

CITATION:	Wutherich (Re), 2024 ABSRA 1259
DECISION DATE:	June 24, 2024

SAFEROADS ALBERTA

INTRODUCTION

1. At about 1:28 a.m., on May 24, 2024, a peace officer conducted a traffic stop on the Recipient near 18th Avenue and 2nd Street SW in Calgary, Alberta. The peace officer issued a Notice of Administrative Penalty (“NAP”) to the Recipient on the following ground under Section 88.03(1) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6 (“TSA”):
 - a. the Recipient operated a motor vehicle and had a blood alcohol concentration (“BAC”) at the time of driving that is equal to or exceeds 50 milligrams of alcohol in 100 millilitres of blood (“IRS: Warn”).
2. On May 31, 2024, the Recipient applied for an oral review (“Review”) of the NAP under Section 7(1) of the *Provincial Administrative Penalties Act*, S.A. 2020, c. P-30.8 (“PAPA”). My role as an adjudicator under Section 10 of PAPA is to conduct the Review and determine if the Recipient has established all grounds necessary to cancel the NAP on a balance of probabilities. The Recipient bears the burden of proof pursuant to Section 18(1) of PAPA.
3. The grounds on which I may cancel a NAP are set out in Section 4 of the *SafeRoads Alberta Regulation*, Alta Reg. 224/2020 (“Regulation”). This Review raises the following grounds to cancel the NAP on the basis of IRS: Warn under Section 4(d) of the Regulation:
 - a. Section 4(d)(iii): that the Director did not provide complete records to the Recipient as required by Section 12 of PAPA; and
 - b. Section 4(d)(vii): that the officer did not advise the Recipient in writing of the right to a roadside appeal under Section 88.11 of the Act and the Recipient was unaware of that right.
4. The Recipient has also raised fairness allegations. If necessary, I will consider the arguments and evidence pertaining to them under my assessment of the grounds to cancel the NAP and the overarching duty of fairness.
5. I conducted the Review on June 11, 2024. The materials I considered in the Review are set out in **Appendix B**. For the reasons below, I have determined **the NAP is cancelled pursuant to Section 21(1)(b) of PAPA**.

SECTION 4(d)(vii): DID THE OFFICER NOT ADVISE THE RECIPIENT IN WRITING OF THE RIGHT TO A ROADSIDE APPEAL UNDER SECTION 88.11 OF THE TSA AND WAS THE RECIPIENT UNAWARE OF THAT RIGHT?

6. To succeed at this ground, the Recipient must establish on a balance of probabilities that:
 - a. the officer did not advise the Recipient in writing of the right to a roadside appeal under Section 88.11 of the TSA; and
 - b. the Recipient was unaware of the right to a roadside appeal under Section 88.11 of the TSA.
7. Regarding written advice, the question of whether the officer advised the Recipient in writing of their right to a roadside appeal under Section 88.11 of the TSA is a factual assessment in the totality of the circumstances. This requires me to consider, for example: the content of the written advice, when and how it was issued, whether its content was sufficient for the purpose, whether the officer by word or action did anything to obscure or undermine the written advice provided, whether there were any other particular circumstances that raised a duty on the officer to take further steps to ensure that the Recipient received the written advice, and in the latter case, whether the officer satisfied that duty. This is not a closed or mandatory list of factors or relevant circumstances, however.
8. Regarding awareness, the question of whether the Recipient was unaware of the right to a roadside appeal is a factual assessment in the totality of the circumstances. This requires me to consider, for example: when and how the Recipient attained awareness including steps taken by the officer to ensure or verify awareness, what level of demonstrable awareness did the Recipient have, whether the level of the Recipient's awareness was sufficient for the purpose and whether there were any particular circumstances that could have confused the Recipient or otherwise undermined their awareness to a right to a roadside appeal under Section 88.11 of the TSA. Again, this is not a closed or mandatory list of factors or relevant circumstances.
9. Counsel for the Recipient ("Counsel") submits this ground to cancel is made out as the Recipient declined the roadside appeal due to the information regarding a second test being obscured or undermined by the officer. Counsel argues the Recipient was dissuaded from taking the second test. Counsel cited numerous cases in support of the arguments advanced, and the Court's interpretation and commentary on the roadside appeal issue, including *Lawrence v Alberta (Director of SafeRoads)*, 2023 ABCA 271 ("Lawrence"), *Morawetz v Alberta (Director of SafeRoads)*, 2024 ABKB 216 ("Morawetz"), *Curtis v Alberta (Director of SafeRoads)*, 2022 ABKB 632 ("Curtis"), and *Narvan (Re)*, 2024 ABSRA 423.
10. I note in terms of whether the written advice or awareness was sufficient for the "purpose," the purpose of this ground to cancel was articulated by the Alberta Court of Appeal in *Lausen v Alberta (Director of SafeRoads)*, 2023 ABCA 176 (CanLII) ("*Lausen*"). As the Court stated at para 54, "the legislative purpose behind the ground ... (is) to afford voluntary access to meaningful safeguards for ensuring the reliability of the initial road test or evaluation". The Court in *Lausen* set aside the adjudicator's decision because the adjudicator had failed to grapple with the purpose of the provision when they concluded that it was immaterial that the recipient was subjected to a second test with no awareness or written advice as to the nature or context of the second test until after it was conducted,

and there was evidence to show that the recipient thought he was complying with a mandatory breath test.

11. According to the police evidence of Cst. Lebedeff, the issuing officer of the NAP, he was conducting patrols when he observed the Recipient's vehicle with its tire on the curb. The officer therefore conducted a traffic stop and read the Recipient a mandatory alcohol screening ("MAS") demand to provide a breath sample into an approved screening device ("ASD"). After several unsuccessful attempts the Recipient provided a suitable breath sample and the ASD showed "a reading of Caution (over 50mg% alcohol)".
12. Regarding the roadside appeal, the officer says at approximately 1:45 a.m. he "provided [the Recipient] with a copy of his Nap and Seizure notice among with the Roadside appeal tear away. [He] explained to [the Recipient] his right to a second Sample and roadside appeal. [The Recipient] declined to provide a second Sample, and to remain with the first Sample yielding a caution". The Recipient provided an affidavit for the Review, in his affidavit he says after the first ASD test the officer advised him his breath sample was below the "criminal level". He says the officer then "immediately informed me that I could retake the test, but I could face a more severe, even criminal, penalty if the reading was higher. As such, at that moment before any paperwork had been issued, I felt that taking another test would be against my own interests". The Recipient says the officer then only provided him with documents after the roadside appeal had been discussed. The Recipient provided a supporting affidavit from the passenger of his vehicle at the time ("A.C.") of the traffic stop. A.C. corroborates the Recipient's version of events overall and says the Recipient was given paperwork after a discussion about the roadside appeal had already occurred and the Recipient had initially declined. In the present case I note that the officer is clear that he "provided [the Recipient] with a copy of his Nap and Seizure notice among with the Roadside appeal tear away. [He] explained to [the Recipient] his right to a second Sample and roadside appeal" before the Recipient declined. While the Recipient says he only received paperwork after the second test was discussed, I find, given the officer's clear description on this issue, on a balance, I am not convinced the Recipient was given paperwork regarding a roadside appeal only after the discussion. However, that is not the end of the analysis as I must also determine if the Recipient's right to a roadside appeal was somehow obscured or undermined as argued by Counsel.
13. Counsel submits that the Recipient did not proceed with the roadside appeal because of information he was provided by the officer. In particular, Counsel argues "the officer failed to take steps to ensure or verify awareness by misleading the Recipient into believing that the higher of the two breath samples would be taken into account, and also emphasizing to the Recipient that the roadside appeal could lead to more severe consequences, rather than providing the Recipient with a level of demonstrable awareness that the roadside appeal could in fact have a mitigating effect. The level of the Recipient's awareness was not sufficient for the purpose of properly informing the Recipient of the right to a roadside appeal, and the particular circumstances of the officer using specific language to discourage a roadside appeal confused the Recipient and undermined his fully-informed awareness of the right and purpose of a roadside appeal under Section 88.11 of the Act".

Counsel cites the case of *Curtis*, where the court highlighted how the concern of a criminal charge could dissuade a Recipient from providing a roadside appeal. The Court further highlighted the importance of considering the evidence of the Applicant on this particular point. The Recipient's affidavit evidence is that he felt accepting a roadside appeal could only get him into more trouble, and he refused any more tests to maintain the lower IRS: Warn contravention and not risk criminal charges. The Recipient states the officer "immediately informed me that I could retake the test, but I could face a more severe, even criminal, penalty if the reading was higher. As such....I felt that taking another test would be against my own interests".

14. The affidavit of A.C. corroborates the Recipient's version of events. A.C. states that he was present during the time of the issuance of the contravention and that after the Recipient provided a first "FAIL", "the officer then said that the Recipient could retake the test and **warned that if the results of the test are higher, the charges could be more severe or criminal**...while waiting outside of the Recipient's vehicle, the Recipient mentioned to me that he felt discouraged about taking a second test, saying it wasn't worth taking a second test" (emphasis added). While I must take into account that family members and friends may be biased towards a favorable outcome for the Recipient, I find that A.C.'s statement is not wholly inconsistent with police evidence, and I have no reason to disregard his observations completely. I note that Cst. Lebedeff confirms that a passenger was present at the time of the traffic stop. I also note that Cst. Lebedeff's evidence is that he "explained to [the Recipient] his right to a second sample", and there are no details of what the explanation involved. The officer also states "[the Recipient] declined to provide a second Sample, and **to remain with the first Sample yielding a caution**" (emphasis added). Given the Recipient's affidavit evidence before me on this point, with nothing directly contradicting it, along with the corroborating evidence of A.C., on a balance, I accept that the Recipient was told he could retake the test however that there could be more severe or criminal charges.
15. Counsel argues that the information conveyed to the Recipient and the specific facts of the present case therefore amounted to the advice regarding the roadside appeal being obscured and it stopped the Recipient from taking a second test. I find I must look at the totality of the evidence before me, and in light of the court's numerous comments as cited by Counsel in his submissions and with the Recipient and the witnesses detailed affidavit evidence before me on these points, on these particular facts, I agree that the Recipient's understanding and awareness was insufficient for the purpose of the roadside appeal. I must highlight that I find this case is distinguishable in that there is no need for the adjudicator to speculate on what the Recipient might have believed about the roadside appeal at the roadside. In the present case, the Recipient has given clear and cogent evidence directly in affidavit form that he was afraid of more serious consequences occurring based on the officer's comments, and unaware of important aspects of the right to a roadside appeal, and I have accepted his evidence on a balance. I find this information, in addition to the fact the Recipient ultimately did not take the second test, have persuaded me in this highly specific factual scenario that the Recipient's understanding and awareness was insufficient for the purpose of the roadside appeal.

16. Based on the totality of the evidence before me, I find the Recipient has established this ground to cancel. As my finding on this ground is conclusive of the outcome of this Review, further analysis on the remaining grounds is unnecessary.

DECISION

17. The Recipient must establish a ground to cancel every basis of the NAP. In this case, I have found the NAP for IRS: Warn is cancelled pursuant to Section 4(d)(vii) of the Regulation. The Recipient has established a ground necessary to cancel the basis of the NAP. The NAP is cancelled.
18. In accordance with Section 24(2) of the [Provincial Administrative Penalties Act](#), SA 2020, c P-30.8, the Recipient may seek judicial review of this decision no later than 30 days after the date on which the decision or order was received. Please see Appendix C for the full text of Section 24(2).
19. More information about how to seek judicial review may be found at the Alberta Court of King's Bench website here: <https://albertacourts.ca/kb/resources/announcements/filing-procedure-judicial-review-of-saferoads-decisions>. The preferred method of service on the Director for filed documents is via e-mail at jsq.servicehmk@gov.ab.ca. Additional authorized methods of service can be found in Part 11 of the [Alberta Rules of Court](#), Alta Reg 124/2010.

NOTICE TO RECIPIENT

20. Please be advised that you have 60 days from the date of this decision letter to go to any Alberta registry location to receive a no charge duplicate driver's licence. This is provided you have no other suspensions, outstanding reinstatement conditions, or licence restrictions. After this 60-day period has expired, you will be responsible for paying for the duplicate service and the registry agent service fee. Please allow one clear calendar day from the date of this letter before attending an Alberta registry agent location to obtain your duplicate driver's licence to allow time for your driver profile to be updated. If applicable, a "Seized Vehicle Release Authorization" form has been sent directly to the seizure lot on the owner's behalf. The owner may contact the seizure lot directly to obtain the release of the vehicle. The owner will be required to pay seizure costs/storage fees prior to the vehicle being released. The owner may seek reimbursement of seizure costs from the law enforcement agency that issued the seizure notice by contacting the agency directly.

"Original signed by K. Bokhari"

Adjudicator K. Bokhari

Appearances:
J. Goruk, Counsel for the Recipient
J. Wutherich, the Recipient

APPENDIX A

ROLE OF THE ADJUDICATOR

An adjudicator with SafeRoads Alberta is delegated the authority to carry out certain functions of the Director under Section 10 of the *Provincial Administrative Penalties Act*, S.A. 2020, c. P-30.8 (“PAPA”). This includes the power to: 1) cancel the Notice of Administrative Penalty (“NAP”) if satisfied on a balance of probabilities that a ground or grounds prescribed in Section 4 of the *SafeRoads Alberta Regulation*, Alta Reg. 224/2020 (the “Regulation”) is met; and 2) confirm the NAP if not so satisfied. An adjudicator is also authorized under Section 21(2) to confirm the NAP with a substituted administrative penalty if the adjudicator is satisfied that the contravention was committed, but finds that previous contraventions attributed to the Recipient had not in fact been committed.

As set out in Section 18(1) of PAPA, the burden of proof in the review is on the Recipient.

An adjudicator does not have authority beyond the powers delegated under PAPA. In particular, there is no authority to cancel the NAP for a ground or grounds not set out in Section 4 of the Regulation. This includes for reasons of hardship, which are not recognized as a ground to cancel in the Regulation.

An adjudicator is not a court of competent constitutional jurisdiction under Section 11 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3. Accordingly, an adjudicator does not have the power to find *Charter* breaches, nor grant a *Charter* remedy under Section 24 of the *Charter*. Nevertheless, an adjudicator is required to “balance *Charter* interests or values against (the) statutory mandate.”¹

In the context of a roadside sanction scheme for the promotion of traffic and public safety, this means that the duty of fairness requires an adjudicator to consider whether the impugned circumstances or police conduct underlying the claimed *Charter* breaches renders the evidence irrelevant or unreliable, such that it would be unfair to consider it or give it any weight.² An adjudicator may also cancel the NAP because the adjudicator finds that the circumstances of the NAP are so egregiously unfair that they outweigh the public interest in traffic and public safety.³

¹ *Borradaile v British Columbia (Superintendent of Motor Vehicles)*, 2020 BCSC 363 at para 21, citing the Supreme Court of Canada in *Dore v Barreau du Quebec*, 2012 SCC 12 and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12

² *Thomson v Alberta (Transportation Safety Board)*, 2003 ABCA 256 at para 69.

³ *Baker v Alberta (Transportation Safety Board)*, 2004 ABQB 244 at paras 63 and 69.

APPENDIX B

EVIDENCE BEFORE THE ADJUDICATOR

INFORMATION FROM POLICE

- Notice of Administrative Penalty #C00230101A
- Report of Cst. Lebedeff
- Roadside Appeal Tear-away Sheet (System Generated)
- Photo of Recipient's Operator's Licence
- Seizure Notice
- Supporting Documents Declaration Form
- Records pertaining to Approved Screening Device (ASD/FST) #211519

INFORMATION FROM THE RECIPIENT

- Application for Review filed May 31, 2024
- Consent to Representation filed May 31, 2024
- Affidavit of the Recipient filed June 8, 2024
- Affidavit of A.C. filed June 8, 2024
- Supporting Case Law filed June 8, 2024

PAPA SECTION 4 TECHNICAL MATERIALS

The SafeRoads Alberta technical materials library, which may be accessed at:
<https://saferoads.alberta.ca/technical-material>.

APPENDIX C

RIGHT OF JUDICIAL REVIEW

Provincial Administrative Penalties Act, S.A. 2020, c. P-30.8

Judicial review

24(1) Subject to subsection (2), no decision or order of the Director or adjudicator is to be questioned or reviewed in any court by application for judicial review or otherwise, and no order

is to be made, process entered or proceedings taken in any court whether by way of certiorari, injunction, declaratory judgment, prohibition, mandamus, quo warranto, application to quash or set aside or otherwise, to question, review, prohibit or restrain any decision or order of the Director or adjudicator or any of the Director's or adjudicator's proceedings.

(2) A decision or order of the Director or adjudicator may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the application is filed with the Court of Queen's Bench and served on the Director or adjudicator no later than 30 days after the date on which the decision or order was received by the applicant.

(3) On an application for judicial review under subsection (2), the standard of review is reasonableness.