



Spotlight on Court Case of the Month

*L'hirondelle v Alberta (Director of
Saferoads), 2024 ABKB 543*

Characters: Justice McGuire, Def: A. Klassen

Take-Away: While it is the Applicant's burden to show that the grounds to cancel the NAP have been met, the Applicant can rely on the absence of evidence to support their position in discharging that burden.

Highlights: A witness called police to report a vehicle having driven into the ditch and suspected the driver was impaired. The witness was not on scene when police arrived. Police found the applicant in the back of another bystander's vehicle, but no one provided evidence that the applicant had been the driver of the vehicle. The applicant blew a "FAIL" on an ASD and was issued a NAP. At the review, the applicant filed no evidence and argued that there was no evidence the applicant had been driving, so the NAP should be cancelled. The Adjudicator found that there was no evidence the applicant was driving, but the police asserted that he was the driver, so the applicant had to provide evidence that he had not been driving. Justice McGuire found that the adjudicator's decision was unreasonable, noting that, "The burden of proof... does not go so far as to allow confirmation of a NAP in cases where the police documents fail to demonstrate the requisite grounds necessary for its issuance" (at para 7).

Remedy: The decision of the adjudicator was quashed and the NAP was cancelled.

Favourite Five ABSRA Decisions of the Month

Note: Since this is the writer's first newsletter, these are, for the writer, some all-time noteworthy decisions, not just from the past month.

- 1. Dawson (Re), 2023 ABSRA 1923** – Adj. Hetzner – (Incomplete Records pursuant to s.2(h) of the SAR) – Police provided no evidence as to when the collision occurred, so the time of driving was not made out. Counsel argued that a record showing time of driving was required to make out the offence. This case shows the utility of s.2(h), especially before *L'hirondelle, supra*. Def: V. Semenuk
- 2. Disney (Re), 2022 ABSRA 1068** – Adj. Gill – (did not fail to comply) – Officer gave insufficient instructions for the applicant to provide a proper sample. This case gives a good template to follow for this argument (also, the name is fun to cite). Def: T. Foster
- 3. Bango (Re), 2021 ABSRA 139** – Adj. Nowak – (Reasonable Excuse for Refusing) – this case is the first time the test for failing to comply with a demand due to a medical condition is iterated as "the Recipient must establish a) that the Recipient was actively suffering from the symptoms of this condition at the time of the demand, and b) that the symptoms were so severe that they prevented the Recipient from being able to comply with the demand" (my emphasis). This is significant mainly because it took 3 years for this test to be rejected (though mostly just tweaked)



in Justice Sidnell's decision of *JJ v Alberta (Director of SafeRoads)*, 2024 ABKB 343. Def: not listed in CanLII

4. Doornenbal (Re), 2024 ABSRA 946 – Adj. Magnien – Applied and followed **Smith#3**.

Applicant, showing few signs of impairment even though blew fail twice and drove vehicle into a lake, overhauled at station (across the street from her house) for nearly 6 hours without a chance to contact a lawyer. Def: V. Semenuk

5. Wind (Re), 2024 ABSRA 3467 – Adj. Obamonire – (Incomplete records) – The issuing officer established reasonable suspicion that the applicant had been the driver through two separate witness statements, neither of which were provided. The witness statements were seen as necessary to establish the basis for the NAP. Def: B. Thompson (yes, it's my own case; sorry;)

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