OCPC#14-17

# ONTARIO CIVILIAN POLICE COMMISSION

**IN THE MATTER OF THE *POLICE SERVICES ACT*, R.S.O. 1990, C.P.15, AS AMENDED**

BETWEEN:

PAT NISBETT



APPELLANT

-and-

CONSTABLE DARREN SIRIE
CONSTABLE WILLIAM FREEMAN
SAULT STE. MARIE POLICE SERVICE

RESPONDENTS

-and-

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR

STATUTORY INTERVENER

## DECISION

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| Panel: | Roy Conacher, Vice Chair<br>Zahra Dhanani, Member |
| Hearing Date: | April 4, 2014 |
| Hearing Location: | Toronto, Ontario |

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## Appearances

Julian Roy, Counsel for the Appellant Pat Nisbett

Jeffrey Broadbent and Jonathan Shime, Counsel for the Respondent Officers Const. Sirie and Const. Freeman ("Respondent Officers")

Ian Johnstone, Counsel for the Respondent Sault Ste. Marie Police Service ("the Service")

Miriam Saksznajder, Counsel for the Statutory Intervener the Office of the Independent Police Review Director ("OIPRD")

## Introduction

1. On December 6, 2010, Notices of Hearing were issued against Consts. Darren Sirie and William Freeman who were each charged with one count of Neglect of Duty under S. 2 (1)(c)(i) of the Code of Conduct set out in Ontario Regulation 268/10, (the "Code"), pursuant to section 80(1) of the Police Services Act, R.S.O. 1990, c.P.15 (the "Act"). Two other officers were each charged with one count of Neglect of Duty under S. 2(c)(i) of the Code and one count of Discreditable Conduct under Section 2 (1)(a) of the Code. All of the charges alleged misconduct by the officers arising from the investigation into a fatal vehicle/pedestrian accident that occurred in the early morning hours on February 28, 2010. The essence of the charges were that the Respondents failed in their duty to exercise their discretion under Section 254 (2) of the Criminal Code of Canada ("Criminal Code") in a reasonable manner to demand that the driver of the vehicle submit to an approved screening device ("ASD") sample of his breath.

2. These charges were heard before Hearing Officer, Deputy Chief Terence Kelly, (Ret.) (the "Hearing Officer") in a disciplinary hearing (the "initial hearing"). On December 21, 2011 the Hearing Officer issued his preliminary decision

finding that "there were no grounds to establish mere suspicion, let alone reasonable suspicion" as required before making an ASD demand. On January 4, 2012, the Hearing Officer issued his final decision dismissing the charges against Consts. Sirie and Freeman and the other two officers.

3. After the date of the accident, but before the commencement of the first disciplinary hearing, the Ontario Court of Appeal released R. v. Soules, 2011 ONCA 429 ("Soules") which ruled that statements by a motorist made pursuant to a legal obligation to report a motor vehicle accident under the Ontario Highway Traffic Act R.S.O. 1990, c.H.8, as amended, could not be used to form reasonable grounds to suspect (a "reasonable suspicion") that a person has alcohol in their body for purposes of making an ASD demand under Section 254(2) of the Criminal Code.

4. At the initial hearing of the charges, the Respondent officers raised the issue of whether the statements made to Consts. Sirie and Freeman by the driver of the vehicle at the scene of the accident, that he had consumed one or two beers earlier that evening, were legally compelled statements within the Soules principle and would therefore be inadmissible in determining the issue of reasonable suspicion.

5. In his decision on this issue, the Hearing Officer concluded that the driver's statements made at the scene of the accident to Consts. Sirie and Freeman, were legally compelled statements and therefore not available to support a reasonable suspicion for the purpose of making the demand to submit to an ASD test. Further, he found that in the absence of those statements there was no evidence to support a reasonable suspicion required to

make an ASD demand pursuant to s. 254(2) of the Criminal Code.

6. The decision was appealed to the Ontario Civilian Police Commission ("the Commission") by the Public Complainant, Pat Nisbett (the "Appellant" or "Ms. Nisbett").

7. On October 12, 2012, the Commission released its decision confirming the Hearing Officer's decision to dismiss the charges against the other two officers but also allowing the appeal in part, revoking the decision of the Hearing Officer related to the Respondents herein and remitting the charges against them back to the Hearing Officer for continuation of the hearing. [OCPC #12-15, October 12, 2012]. In its decision the Commission stated:

> Three issues arise on this appeal:
>
> a) Did the Hearing Officer err in finding that Mr. Biocchi's statements at the scene of the accident to Consts. Sirie and Freeman that he had consumed alcohol that evening were legally compelled statements and could not be used in the determination of a reasonable suspicion for the purposes of S.254 (2) of the Criminal Code?
>
> b) If the Hearing Officer did so err, what is the appropriate remedy?
>
> c) If the Hearing Officer did not err in so finding, did he err in finding that, absent Mr. Biocchi's statements, there were no objective grounds upon which the Respondent Officers could form a reasonable suspicion? [para.60]
>
> Our order today overturns the Hearing Officer's decision regarding the application of Soules to Mr. Biocchi's statements at the accident scene to Consts. Sirie and Freeman regarding his

> consumption of alcohol that evening. Those statements now may be considered in the assessment of the Respondent Officers' conduct. It is with this new fact that the Hearing Officer must reconsider the matter. [para.94]
>
> There is some evidence on the record which may place Const. Freeman's contact with Mr. Biocchi outside of the "forthwith" period. However, we believe that determination should be made by the Hearing Officer. [para. 108]
>
> Const. Sirie made first contact with Mr. Biocchi and therefore had the opportunity to make an ASD demand within the "forthwith" period. [para.109]
>
> We order that the Hearing Officer should continue the hearing with respect to Consts. Sirie and Freeman. He should receive such additional evidence as the parties determine relevant and he should consider such issues as may be relevant to the charges. [para. 110]
> Accordingly, we revoke the decision of the Hearing Officer to dismiss the charges against Consts. Freeman and Sirie and remit the matter to the Hearing Officer for a continuation of the hearing. [para.111]
>
> Given our findings, there is no need to deal with the third issue. [para. 112]

8. On May 23rd, 2013 the hearing (the "resumed hearing") into the charge of one count each of Neglect of Duty against both Consts. Sirie and Freeman continued before the Hearing Officer.

9. On August 22, 2013, the Hearing Officer released his decision from this resumed hearing, again dismissing the charges against Consts. Sirie and Freeman.

10. Ms. Nisbett appeals the Hearing Officer's decision.

## Decision

11. For the reasons which follow, we dismiss the appeal.

## Background

12. On February 28, 2010 at approximately 3:00 a.m. a tragic accident occurred in Sault Ste. Marie when a motorist, Joseph Biocchi ("the driver"), struck and killed a pedestrian, Matthew Howard.

13. Consts. Sirie and Freeman investigated and Sergeant Joseph Trudeau and Inspector Art Pluss supervised and monitored the investigation of this accident. Const. Sirie was the first officer on the scene, arriving approximately within five minutes after the accident occurred. Const. Freeman arrived at approximately 3:10 a.m. As a result of the accident investigation, no criminal charges were laid against the driver.

14. At the scene, shortly after the accident occurred, in response to questions from Const. Sirie, the driver initially advised Const. Sirie that he had consumed some alcohol earlier that evening. He repeated that admission to Const. Freeman sometime afterwards. Both Respondents gave statements in an investigation by the OIPRD that because of the apparent circumstances, they were looking for signs that the driver had consumed alcohol.

15. Immediately after the officers' arrival on scene and during the hours that followed the accident, neither of the Respondent Officers nor the civilian witnesses or the other police officers involved in the investigation of this accident

observed any signs that the driver had consumed alcohol. There were no visible physical indications of alcohol consumption emanating from him. There was no slurring of speech, unsteadiness on his feet, redness or watering of the eyes nor any odor of alcohol on his breath.

16. The Respondent Officers did not issue an ASD demand to the driver.

17. The Appellant is the mother of the deceased pedestrian, Matthew Howard. Pursuant to her complaint to the OIPRD, the OIPRD undertook an investigation of the conduct of the Respondent Officers during the incident. Subsequent to that investigation, the above-noted charges were laid against the Respondents and the two supervising officers.

18. The particulars of the charges against the Respondent Officers were that they were negligent in failing to administer or cause to be administered an ASD demand to the driver in accordance with S. 254 (2) of the Criminal Code and the Service's policy on ASD tests.

19. Upon the resumption of the hearing, no further evidence was adduced by the prosecutor or the Respondents. The chronology of the hearing proceedings are as outlined above in the introduction.

*Appellant's Submissions*

20. The Appellant, Ms. Nisbett is the mother of Matthew Howard, who was 19 years old when he was killed in this fatal accident. She brings this appeal because she believes that Consts. Sirie and Freeman failed to administer an ASD demand to Mr. Biocchi when they should have. Ms. Nisbett submitted that this was an improper or incomplete investigation into the cause of the death of her son.

21. The Appellant submits that the Hearing Officer erred in asking himself the "wrong question" in assessing Const.

Sirie's liability and misinterpreted the "forthwith" threshold in section 254 (2) of the Criminal Code of Canada in dismissing the charge against Const. Freeman. He further erred in determining that there was insufficient evidence before Consts. Sirie and Freeman to support an ASD demand. Mr. Roy therefore submitted that these errors were errors of both fact and law and the decision cannot stand.

22. Mr. Roy submitted that the driver had informed the officers that he had consumed alcohol earlier that evening. The road was clear, straight and well lit that night. The weather was good and there were clear site lines. Const. Sirie was informed by Mr. Howard's girlfriend that she and Mr. Howard had been walking eastbound and that the driver had gone off his roadway lane beyond the white line and struck Mr. Howard.

23. Mr. Roy referred to the statement of Const. Sirie to the OIPRD investigators that he had arrived on scene accompanied by Const. Tara Smith and observed Mr. Howard lying in the ditch and, upon being advised that there was no pulse, he presumed Mr. Howard was deceased. Const. Sirie stated that, given the time of night and the seriousness of the accident, he was concerned that alcohol may have been a factor and he spoke to the driver who advised him that he had been at work at the casino and afterwards, had left and gone across the river and had one or two beer earlier that evening. The driver informed him that he struck something but didn't know what it was.

24. Neither of the Respondent Officers testified at the initial or resumed hearing and their evidence was submitted solely through the transcripts of their interviews with the OIPRD which were read into the record. That is significant since their testimony was not subject to cross-examination. It is therefore difficult to ascertain their thought processes at the time.

25. Mr. Roy asserted we have to get this "right" not just put an end to this long proceeding. The Hearing Officer's errors are palpable errors and the decision is fraught with significant problems.

26. Mr. Roy argued that the interpretation of the law regarding ASD demands and breathalyzer demands was where the Hearing Officer made errors. The two investigative tools, ASD and breathalyzer, have two different thresholds for ascertaining applicability.

27. Mr. Roy submitted that the first thing to look at for both of these investigative tools is the level of certainty that the officer has to have in his/her belief about alcohol consumption.

28. The legal test for an appropriate administration of an ASD demand by police officers is a lesser threshold: does the officer have a "reasonable suspicion" that the driver has alcohol in his body and has operated a vehicle within the preceding three hours?

29. The legal test for an appropriate administration of a demand for a breathalyzer sample by a police officer is: does the officer have "reasonable and probable grounds to believe" that the driver has alcohol in his body and has operated a vehicle within the preceding three hours?

30. Mr. Roy asserted that the officer has to have a reasonable suspicion that "the driver has alcohol in his body", not that the driver is impaired, not that the driver has watery eyes or is slurring his speech, not that the alcohol caused the accident.

31. Reasonable suspicion has this lower threshold, just that the driver has alcohol in his body. Once the officer asked: "have you had something to drink?" and the driver answered "yes", that is enough for reasonable suspicion. In addition, in this case, there were ample additional objective factors that should have allowed the Respondents to form a

reasonable subjective belief about the presence of alcohol in the driver's body.

32. While section 254 (2) provides for the exercise of discretion by the officer, the use of the word "may" does not give the officer a blank cheque. The exercise of such discretion must be reasonable and must be based upon a professional assessment of all available factors.

33. Mr. Roy submitted that there have to be objective grounds for reasonable suspicion that there is a presence of alcohol in the body. The Commission has the ability to decipher whether the reasons given by the Respondent Officers in not issuing an ASD were reasonable and rational. "I didn't administer the ASD demand because the driver didn't look drunk, or because I ignored factors of the case," is not a reasonable use of discretion.

34. Mr. Roy argued that the only witness to the accident says that the driver went out of his lane and struck someone. This forms no part of the Hearing Officer's analysis. The reasons reflect that the Hearing Officer does not consider this as relevant to his decision.

35. Mr. Roy stated that in Ontario, officers do not have to be toxicologists to determine the rate of elimination of alcohol from the body. The information before Const. Sirie as stated by the driver was sufficient for a reasonable suspicion. The fact that the driver wasn't consistent in telling how many beers he drank is a serious red flag.

36. Mr. Roy stated that slurring words and teary eyes are not the test. Impairment is not the test, but Const. Sirie was looking for "impairment" not a "reasonable suspicion". This is not the law or the legal test.

37. Mr. Roy submits that the Hearing Officer applied the same inaccurate test. The decision of the Hearing Officer is not as

impeccable, lengthy and detailed as counsel for the Respondents has suggested.

38. Mr. Roy argued that the Hearing Officer engaged in a faulty examination. The examination should not have been about "whose fault is it?" That was not the issue. His ruling reflects that he got the test completely wrong. The Hearing Officer stated that there was no evidence corroborating indicia of alcohol consumption. He didn't analyze the objective circumstances and he made no mention of the "I drank one or two beers" comment by the driver. Mr. Roy further argues that one can't tell what the Hearing Officer was thinking from his ruling.

39. He asserts that apart from the motorist's statements, there were sufficient facts for the Respondent Officers to form a reasonable suspicion that the motorist had alcohol in his body and operated a motor vehicle within three hours. The objective facts upon which the Respondent Officers could have formed a reasonable suspicion included: the seriousness of the accident; the time of the accident; the statement of the girlfriend as to the location of impact and that the road and weather conditions were good. None of these facts were mentioned in the decision.

40. Mr. Roy submitted that, while the Respondent Officers did not have to dig deeper, this evidence was available to them at the time and took the objective factors over the threshold where a reasonable suspicion should have arisen in their minds.

41. Const. Sirie said that it did not occur to him to make a demand because there were no signs of impairment. Counsel submitted that all of the factors considered by both Consts. Sirie and Freeman were directed towards determining signs of impairment and whether that was the cause of the accident. This was the wrong test.

42. Mr. Roy acknowledged Const. Sirie's statement that he spoke to the driver and went back a second time to the driver to be sure regarding the driver's condition, in case he missed something. However, Const. Sirie's and Const. Freeman's considerations were directed towards determining signs of impairment as a cause of the accident. Both Respondents were incorrectly considering the factors under the second test of whether there were reasonable and probable grounds under section 254 (3) of the Criminal Code.

43. Mr. Roy pointed out the inconsistencies in the driver's statements to the Respondent Officers, at first stating he had one or two beers, then nothing to drink before the accident, then later saying he had one beer.

44. This evidence was not stated by either of the Respondent Officers as one of their reasons given in their OIPRD interviews for not issuing an ASD demand nor mentioned by the Hearing Officer in his decision. There was little, if any, analysis of these important objective factors set out in the decisions showing how the Hearing Officer's conclusions were formed.

45. Mr. Roy submitted that the Hearing Officer erred in his interpretation of the application of the term "forthwith" under S. 254 (2) of the Criminal Code in his finding that Const. Freeman was not negligent in his duty since he could not have formed the requisite reasonable suspicion between the time of his arrival on the scene at 3:10 a.m. and his first interaction with the driver at 3:40 a.m.

46. Mr. Roy submitted that the Hearing Officer made an incorrect determination that the required forthwith demand must occur within 15 minutes of the start of the investigation or within 15 minutes of the first investigating officer's contact with the driver. Mr. Roy asserted that the threshold for making an ASD demand relates to the point in time when an officer, who has contact with the driver,

forms a reasonable suspicion and that Const. Freeman could still have made a demand, if he formed a reasonable suspicion, at 3:40 a.m. or within 15 minutes thereafter. He did not do so despite having knowledge of the facts.

47. Counsel submitted that, similar to Const. Sirie, Const. Freeman, also failed to turn his mind to the proper test under s. 254 (2) of the Criminal Code and was therefore guilty of neglect of duty.

48. The Appellant submitted that interviews of the Respondent Officers by the OIPRD after the fact, allowed the officers to "backfill" their responses to the issue of the exercise of their discretion at the time of the accident investigation and, in all of the circumstances of this case, caution should be exercised. Therefore, the weight to be placed on such evidence should be carefully considered.

49. Counsel for the Appellant requested in his Factum that we revoke the Hearing Officer's ruling, and substitute findings of guilt against both Const. Sirie and Const. Freeman. In his oral submissions, Mr. Roy suggested that the matter be remitted back to the Hearing Officer.

*OIPRD's Submissions*

50. Counsel for the OIRPD adopted the Appellant's submissions in whole, adding a few further arguments on behalf of the OIPRD.

51. Ms. Saksznajder submitted that there are two possible criminal charges that could have applied when the officers arrived at the scene of the accident. These were impaired driving and driving with over 80 milligrams of alcohol in 100 milliliters of blood in the body.

52. She submitted that for an impaired driving charge, there has to be reasonable and probable grounds to believe that there is a connection between the impairment and the

driving for a demand for a breath sample to be justified. She submitted that for the offence of over 80 milligrams per 100 millilitres, there also has to be a connection between driving or alternatively, care and control. She submitted that neither the Respondent Officers nor the Hearing Officer were considering the latter possible offence. She further stated that there need not necessarily be any visible indicia of impairment of the person. There are other factors to be investigated in exercising discretion.

53. Ms. Saksznajder asserted that when the Respondent Officers arrived at the scene, they saw a fatality. They asked the driver whether he had been drinking. They were told that the driver had a drink or two some hours earlier that night. They were investigating a death and it could have resulted in a demand under section 253 of the Criminal Code. She stated that the Respondent Officers only looked at the circumstances assuming it might be an impaired driving charge.

54. She submitted that when the Respondent Officers arrived at the scene they didn't know what they had before them; it could have led to either of those two charges. As soon as there was an admission of drinking there should have been an automatic demand for an ASD. The mere admission of alcohol consumption is sufficient to justify a reasonable suspicion to make the demand for an ASD sample.

55. She argued that they should have made the ASD demand because to proceed with a charge of over 80 milligrams per 100 millilitres of blood does not necessarily require indicia of impairment.

56. Ms. Saksznajder asserted that with the admission of alcohol consumption made in Mr. Biocchi's statements to the Respondent Officers and their apparent disregard of those statements, there is evidence on the record to support a charge of Neglect of Duty against Consts. Sirie and Freeman. Further, the admissions of consumption made by

the driver to the Respondent Officers should have caused them to investigate the potential charges of impaired driving or operating a motor vehicle with over 80 milligrams of alcohol in 100 milliliters of blood in Mr. Biocchi's body contrary to section 253 of the Code and their failure to do so also constitutes neglect of duty.

57. Ms. Saksznajder argued that both the Respondent Officers and the Hearing Officer had the same misunderstanding of the law. She stated that the Respondent Officers' decision should have been based on whether they had reasonable grounds to suspect that Mr. Biocchi had operated a motor vehicle with alcohol in his system, not solely on whether there was evidence that his ability to drive was impaired by alcohol.

58. Ms. Saksnajder quoted the Hearing Officer who found that "Police Constable Sirie honestly believed he had no reasonable suspicion that alcohol consumption was responsible for the accident." Ms. Saksnajder submitted that this was not what was being asked of him. The question the Hearing Officer was solely meant to look at is whether or not Const. Sirie believed Mr. Biocchi had alcohol in his system not whether there was a causal link between his consumption of alcohol and the accident.

59. In the case of Const. Freeman, the same considerations related to the officer's flawed exercise of his discretion and the errors of the Hearing Officer apply irrespective of when the "forthwith" requirement started.

60. In her Factum, Ms. Saksnajder requested that the findings of the Hearing Officer be revoked and that the Commission substitute findings of guilty against both Respondent Officers. In her oral submissions, she expressed concerns about remitting the matter back for a further hearing. However, in her Factum, as an alternative, she requested that the matter be remitted back for a full hearing before a different Hearing Officer.

*The Service's Submissions*

61. Mr. Johnstone, on behalf of the Service adopted the positions taken by the Appellant and the OIPRD with respect to Consts. Sirie and Freeman.

62. He requested that the Commission revoke the Hearing Officer's decision and replace it with findings of guilt.

*Respondent Officer's Submissions*

63. Mr. Shime submitted that the Hearing Officer fully and properly understood the issues before him, asked the right question and came to the correct conclusion.

64. He stated that the standard of review for the Commission to apply relating to the facts is reasonableness. The question before the Panel is whether or not the Hearing Officer's conclusion was reasonable. Was it supportable on the facts and the law?: see McCormick v. Greater Sudbury Police Service [2010] ONSC 27 (Ont. Div. Ct.), para 89; Dunsmuir v. New Brunswick [2008] S.C.J. No. 9; and Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board) 2011 SCC 62 (CanLII)

65. Mr. Shime submitted that the Hearing Officer's decision was an eminently reasonable one and should be accorded deference and not be over-scrutinized. The decision should be read as a whole and the reviewing body should not focus on mistakes that do not affect the decision as a whole: see Galassi v. Hamilton Police Service [2005] O.J. No. 2301 (Div. Ct.)

66. The reviewing tribunal must consider that hearing officers are lay persons without legal training and the only thing that invites appellate intervention is a palpable error: see Norris v. Loranger [1998] 2 P.L.R. 493.

67. Mr. Shime stated that this is not an appropriate venue to re-litigate the issues. The Hearing Officer got the issue and that is what is most important. The totality of the decision makes it abundantly clear that he knew what he was doing.

68. The Panel is not being asked to review the evidence again. The question before the Panel is whether the Hearing Officer reviewed the law and the facts before him and whether his conclusions on the facts were reasonable and were correct on the application of the law.

69. Mr. Shime asserted that the Hearing Officer stated the law correctly, outlined the facts, the complainant's position, and the Respondent Officers' position, looked at all of the evidence in its totality, articulated the Criminal Code provision correctly and came to the right conclusions.

70. Under section 254(2) of the Criminal Code an officer must have a reasonable suspicion that the person operating the motor vehicle has alcohol in their body in order to apply the ASD demand. It is well settled that reasonable suspicion is determined based on a number of objective and subjective factors. If an officer does not form a reasonable suspicion, making an ASD demand may constitute a serious violation of the person's Charter rights. The officer must ensure that the threshold of a reasonable suspicion is met otherwise the demand will be deemed unlawful.

71. The provision in the Criminal Code permits an officer to exercise his or her discretion in making a demand. It is not a mandatory provision. It is a judgment call made upon a reasonable belief, honestly held, based upon supportable objective and subjective factors considered in the totality of the factual circumstances. An officer must have regard to the totality of the evidence and not disregard factors that point away from what would be an indicia of reasonable suspicion that the person had alcohol in their body: see R.

v. Martin [2005] O.J. 670 (Ont. Sup. Ct.); R.v Davis [2001] O.J. No. 2984.

72. The Respondent Officers in this case never formed a subjective belief that Mr. Biocchi had alcohol in his body at the time of the accident. There were no indicia of alcohol consumption. The Respondent Officers' subjective belief was that they did not have the necessary grounds to demand an ASD sample.

73. The case law articulates that an officer must look at all the evidence, good and bad, to decide whether to administer the ASD demand. It's a precarious position for the officer to be in, so that is why the officer is given discretion: see R. v. Davis, *supra*.

74. Mr. Shime asserted that six other officers interacted with this driver and all came to the same conclusion that there were no indicia of alcohol in the driver. None formed any reasonable suspicion of alcohol being present in the driver at the time of this accident. Two civilians corroborated the observations that Mr. Biocchi did not exhibit any signs of alcohol consumption. When the driver returned across the Canada-United States border from the casino, the customs officer waved Mr. Biocchi through, not seeing any signs of impairment. When Mr. Biocchi attended at the casino, the video surveillance demonstrated that he looked perfectly fine and showed no visible signs of alcohol consumption. All the evidence before the Hearing Officer objectively and subjectively supported the Respondent Officers' decision not to make an ASD demand.

75. In the case of R. v. Thorburn [2009] O.J. No. 5812 it was held that mere suspicion that a person, at some point, had something to drink is insufficient to justify a demand. There is a difference between saying that a person has been drinking as opposed to saying a person has alcohol in their body. One of the ways that the officer makes a

determination is by looking at the physical condition and symptoms of the driver and the driver's behavior.

76. In the case of R. v. Fetterley [2004] B.C.J. No. 1859 the court held that a disclosure of having had drinks of alcohol earlier in the day is not sufficient to lead to the conclusion that there is still alcohol in the body at the time of the police stop. Mr. Shime argued that in this case Mr. Biocchi had disclosed "dated" evidence of consumption. This does not lead to a reasonable suspicion of still having alcohol in the body.

77. This was confirmed in R. v. Staples [2011] O.J. No. 1329, where the court also held that an admission of consumption alone earlier in the day is not sufficient basis to support a reasonable suspicion. The Court acknowledged that the roadside decision to make an ASD demand is made in a fluid and changing environment that deserves considerable judicial deference: see also R. v. Mowat [2010] B.C.J. No. 2876.

78. Mr. Shime asserted that the Respondent Officers exercised their discretion to the best of their abilities, diligently did their job and exercised their discretion based on objective evidence and their honestly held subjective belief. According to the case law the Respondent Officers' decision was correct and therefore the Hearing Officer's decision was reasonable.

79. Mr. Shime submitted that for there to be a finding of "Neglect of Duty" one has to find that the Respondent Officers acted in bad faith. The officers acted in good faith. There is absolutely no evidence of bad faith. In fact, both of the OIPRD investigators conceded this point in their sworn testimony.

80. Mr. Shime further submitted that Const. Freeman's former fellow partner was killed by a drunk driver, and at the time Const. Freeman attended the accident scene he was

completely alive to the issue of possible drinking and driving by Mr. Biocchi. That was the reason he went to interview the driver to assure himself that nothing was missed, because he is a "professional police officer", being diligent and responsible.

81. Mr. Shime stated that "not every tragedy has a villain". He submitted that while the circumstances are incredibly unfortunate, this case has no villain. The two Respondent Officers are not villains. They did the right thing under extraordinary conditions.

82. The Respondent Officers submit that, absent the admissions of alcohol consumption by Mr. Biocchi hours earlier in the evening, there is not a scintilla of evidence suggesting that Mr. Biocchi had alcohol in his body at the time that would have enabled the Respondents to make an ASD demand. In fact, there is overwhelming and consistent body of evidence proving the contrary, that there was no alcohol in his system and that he was absolutely sober. The Hearing Officer's finding that Const. Sirie did not have grounds to support a reasonable suspicion is correct and, therefore, the finding of not guilty of neglect of duty was a reasonable finding and should not be revoked or varied. The Respondent Officers rely upon Girard v. Delaney (1995) 2 P.L.R. 337 (Board of Inquiry) in support of this position.

83. It was submitted that the actions of Mr. Biocchi immediately following the accident also confirmed the absence of any indicia of alcohol consumption or impairment, including, the uncontradicted and compelling evidence that:

    a) He stopped his vehicle on the shoulder of the roadway after impact;

    b) He made a U-turn and returned to the immediate area of the accident;

c) He called 9-1-1 and reported the accident and that he believed that he hit a pedestrian; and

d) He remained on the scene until police arrived and answered all of their questions. He co-operated fully with the police.

e) He accompanied Const. Freeman to the station to undergo an interview.

84. Mr. Shime argued that because neither Const. Sirie nor Const. Freeman had formed a reasonable suspicion, the question of whether an ASD demand had been made "forthwith" is a moot issue. To get to the "forthwith issue", the officer must have formed a reasonable suspicion that the driver has alcohol in his body at the time and has operated a motor vehicle within the previous three hours. The ASD demand must be made within the forthwith time frame which has been held to be within 15 minutes of forming the reasonable suspicion.

85. Mr. Shime submitted that both the Commission, in its prior decision on October 12, 2012 and the Hearing Officer, who adopted the Commission's position in his decision of August 22, 2013, mischaracterized the law as it relates to the issue of the commencement of the forthwith period under section 254(2) of the Criminal Code. He submitted that the statement by the Commission that the time period begins with the first police officer's contact with the driver and is not reset with subsequent contact with the driver by other police officers, is incorrect. He submitted that there is no such provision in section 254(2) or case law and that each police officer who is in contact with the driver must assess all of the factual circumstances and form a reasonable suspicion in order for the time to start within which that officer must make an ASD demand. In this case, there were no sufficient evidentiary grounds to create a reasonable suspicion in Const. Freeman's mind and therefore, there was no neglect of duty on the part of

Const. Freeman in the exercise of his discretion not to demand an ASD sample.

86. Mr. Shime asserted that the Hearing Officer's decision was reasonable and that the appeal should be dismissed.

*The Issues*

87. As framed in her Notice of Appeal, the Appellant raised the following grounds of appeal:

a) Did the Hearing Officer err in finding that neglect of duty by the Respondents was not proved on clear and convincing evidence?

b) Did the Hearing Officer err in finding that the information known and/or available to the Respondents was not sufficient to constitute reasonable suspicion to support an approved roadside screening device demand?

c) Did the Hearing Officer err in interpreting and applying the "forthwith" requirement in s. 254 of the Criminal Code of Canada?

88. In her Factum and in oral submissions, the Appellant more specifically raised two issues:

i. Did the Hearing Officer ask himself the wrong question in determining whether Const. Sirie used his discretion not to administer an ASD demand in a manner that did not constitute neglect of duty?

ii. Did the Hearing Officer misinterpret the "forthwith" requirement in s. 254 of the Criminal Code in dismissing the charge against Const. Freeman?

*Reasons and Analysis for Decision*

89. The principles to be applied by the Commission on an appellate review of a disciplinary decision are well settled.

90. The standard of review with respect to the Hearing Officer's interpretation and application of the general law is correctness: see Law Society of Upper Canada v. Neinstein (2010), 99 O.R. (3d) 1 (Ont. C.A.) The standard of review for the Commission with respect to the Hearing Officer's factual findings is reasonableness: see Dunsmuir, *supra*, and Newfoundland and Labrador Nurses, *supra*.

91. The Supreme Court of Canada described the standard of reasonableness as being concerned mostly with the existence of justification, transparency and intelligibility in the decision-making process but also whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the law and facts: see Dunsmuir, *supra*.

92. The role of the Commission is not to second-guess the decision of the Hearing Officer but rather to review the decision to determine whether the conclusions reached are reasonable, reflect a correct understanding and application of the law, are based on clear and cogent evidence and are articulated in an intelligible, transparent and logical manner: see Precious and Hamilton Police (2002) 3 O.P.R. 1561, (OCCPS); Whitney v. Ontario (Provincial Police) [2007] O.J. No. 2668 (Div. Ct.); and Dunsmuir, *supra*.

93. In certain limited cases it may be open to us to reach a different conclusion from the one reached by the Hearing Officer. However, we should only intervene if there has been an error in principle, or relevant factors have been ignored: see Williams and Ontario Provincial Police (1995) 20 P.R. 1047 (OCCPS); Favretto and Ontario Provincial Police (February 13, 2002, OCCPS); Karklins and Toronto Police Service (September 25, 2007, OCCPS); Wilson and

Ontario Provincial Police (November 20, 2006, OCCPS); and Quintieri and Toronto Police Service (2002) 3 O.P.R. 1509 (OCCPS).

94. An appeal to this Commission is an appeal on the record. Unlike the trier of fact, we do not have the advantage of hearing and observing the witnesses as they testify. Deference must be accorded to the Hearing Officer's findings unless an examination of the record shows that the Hearing Officer's conclusions cannot reasonably be supported by the evidence: see Blowes-Aybar and Toronto (City) Police Service, 2004 Carswell Ont.1583 (Div. Ct.).

95. The Respondents were charged with neglect of duty by failing to issue an ASD demand to the driver, Mr. Biocchi. Neglect of Duty in the Code is defined as: "without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of a police force". The definition involves willfulness or a degree of neglect which would cross the line from a mere performance issue to a matter of misconduct.

96. In the case before us, the Appellant presented the alleged errors of the Hearing Officer as errors and omissions of fact and also as errors of law entitling the Commission to intervene.

97. In conducting our review of the reasons for decision issued by the Hearing Officer on December 21, 2011 and in his subsequent decision issued on August 22, 2013, we have concluded, albeit for different reasons, that his final decision is justifiable and reasonable bearing in mind all of the factual circumstances surrounding this most tragic accident.

98. We have reviewed the complete record of the disciplinary proceedings including the transcripts of the hearing and the exhibits filed. We find that the Hearing Officer's decision is reasonable and correct notwithstanding that there was

omission of any analysis in his reasons related to other objective factors. After a thorough review of the entire record of the disciplinary proceedings we find that the omission does not affect the outcome of the decision.

99. As an appellate tribunal, it is not normally within our role to second guess the conclusions of the Hearing Officer unless there is a manifest error or an omission to consider relevant factors. In this case, we do have a complete record and in our opinion that record provides sufficient evidence to allow the panel to find that the Respondent Officers did consider the objective facts as referenced by the Appellant and to conclude that the observations of the condition of the driver outweighed such objective facts in the minds of the Respondent Officers at the time: see Bates and Durham Regional Police Service, July 8, 2003, (OCCPS).

100. The Hearing Officer summarized Ms. Nisbett's evidence and submissions. In reviewing the decision against the record, we find that the summation is an accurate review of the Appellant's position and evidence. In his decision, he makes it very clear that he understands the arguments of the complainant:

- Mr. Biocchi had mentioned to Const. Sirie that he had consumed alcohol, one or two beers, about two or three hours ago (p.6),

- Mr. Mathai (counsel for the Complainant) stated that police officers investigations are heightened when dealing with the loss of a member of the public (p. 4),

- It is not clear what information Const. Freeman received from Const. Sirie when he later arrived at the scene of the accident (p.5);

- Counsel further argues that simply relying on the absence of physical signs is not sufficient, neither does the absence of the odor of alcohol prevent the officer from having a reasonable suspicion that the driver has alcohol in his body; that the odor of alcohol is not a necessary pre-condition to the making of a screening demand (p.6); and

- Mr. Mathai submits there was no competent investigation because these officers asked themselves the wrong questions, applied the wrong tests and put undue influence on a factor that they ought not to have.

101. The Hearing Officer also provided an accurate summary of the Respondent Officers' arguments. He stated:

- Mr. Broadbent, spoke to a number of cases that dealt with reasonable suspicion. He then spoke to the use of an approved alcohol screening device (ASD) and its purpose to assist officers conducting an investigation for possible impairment; that the use of this device is at the discretion of the police officer administering it and that the law clearly states that the officer may use the ASD, not shall, which clearly gives the officer discretion in its application. (p. 7)

- Mr. Broadbent stated that there is no evidence before this tribunal with respect to the officers acting in bad faith, or that they deliberately turned away from using the ASD. Further, the contents of the officers' notes show they were exercising good judgment, that their decision was made in good faith in accordance with the law. (p.8)

- The officers' conclusion was [that] the accident was not alcohol-related.

102. It is important to remember that in the case before us, the Hearing Officer had to look only at the information that was available to the officers from the time they arrived at the scene of the accident to a time shortly after, definitely within the first hour of arrival.

103. There are two aspects to what is meant by reasonable suspicion. The first aspect is whether or not a police officer subjectively believes that a person has alcohol in their body. In this case the Respondent Officers asserted that they did not have a subjective reasonable suspicion that Mr. Biocchi had alcohol in his body at that time. The Hearing Officer accepted their statements and found this to be a reasonable conclusion. That finding constitutes a finding of fact: see R. v. Mal [2003] O.J. No. 1050; and R. v. Sheppard [2009] S.C.J. 35.

104. The second aspect is whether the police officer has undertaken a reasonable investigation and considered all of the other possible objective facts available to him or her at the time. In their statements given to the OIPRD investigators, both Respondent Officer's outlined the steps they took to investigate the other objective factors. They interviewed the civilian witnesses including the girlfriend of the victim. They made observations of the weather and road conditions, the lighting and the difficulty in finding any physical evidence of the point of impact. They also obtained information confirming that the driver had stopped his vehicle, turned around and came back to the scene and called 911 and waited until officers arrived. He co-operated throughout.

105. From page 9 to page 11 of his decision, the Hearing Officer focused on the conduct of Const. Freeman from his time of arrival at the scene at 3:10 a.m., noting that Const. Freeman initially spoke to several civilian witnesses and after observing the location of Const. Sirie and his fellow officer, Const. Freeman began ensuring witnesses remained and focused on securing the scene. The Hearing Officer

noted as well that Const. Freeman then later spoke to Const. Sirie to get an update and it was shortly after speaking to Const. Sirie that Const. Freeman went to speak to the driver, Mr. Biocchi, at 3:40 a.m. The Hearing Officer found that Const. Freeman did not have any grounds to form a reasonable suspicion that Mr. Biocchi had alcohol in his body at the time of the accident. The Hearing Officer accepted Const. Freeman' assertions that he did not have a reasonable suspicion and stated at p.11 of the August 22, 2013 decision: "There is no evidence placed before this trier-of-fact to support the charge against Acting Sergeant Freeman." That was a finding of fact.

106. Turning to those issues raised by the Appellant in the Notice of Appeal, as set out in paragraphs 87 and 88 above, in order to answer the first two questions, there has to be an examination of the Hearing Officer's analysis of the evidence upon which he made his findings of fact and law and based his conclusions. He found that, at the time shortly after the accident, there was insufficient evidence available to the Respondent Officers to raise a reasonable suspicion in their minds that there was alcohol in the body of the driver to justify making an ASD demand of the driver.

107. In his decision issued on December 21, 2011, the Hearing Officer outlined in considerable detail, the evidence placed before him. He reviewed the testimony of each of the witnesses who had direct contact with the driver. He also reviewed the evidence of the OIPRD investigators who conducted interviews of many witnesses involved in the subsequent police investigation. Those interviews took place well after the evening of the accident.

108. One consistent factor, throughout the testimony of all of the witnesses, being the civilians and all of the police officers who were present at the scene or who investigated or assisted in the investigation, was that not one of these witnesses, and specifically those who had close contact

with the driver, Mr. Biocchi, observed any signs of alcohol being in Mr. Biocchi's system. None observed any alcohol on his breath, unsteadiness on his feet, slurred speech, redness or watery eyes or any other physical symptom of alcohol consumption throughout the time from the arrival of the first civilian witnesses and police officers on the scene through to the interview of the driver for approximately one hour and eighteen minutes by an officer at the police station. The civilian witnesses at the scene observed that Mr. Biocchi appeared to be in shock, panicked, white-faced and shaking but did not observe any signs of alcohol being in his body at that time.

109. The undisputed evidence of the Respondent Officers was that, when they arrived at the accident scene, because of the time and seriousness of the fatal accident and their knowledge of past incidents of alcohol related driving fatalities, both were very alert to the possibility of the driver having alcohol in his system and were looking specifically for any signs. Const. Sirie spoke to the driver the first time in close physical contact and went back a second time to assure himself that he did not miss any visible signs of the presence of alcohol in the driver. Likewise, after being briefed by Const. Sirie regarding the driver's admission of having alcohol earlier in the evening, Const. Freeman went and spoke to Mr. Biocchi in close contact also to assure himself that nothing was missed in assessing the driver's condition. The statements made by the Respondent Officers were corroborated to an extent by the contents of their notes made shortly after the accident investigation.

110. None of the police officers who had contact with the driver that early morning formed a reasonable suspicion that alcohol was present in his body and none issued an ASD demand.

111. We have reviewed the record, including the transcripts of evidence, which contained portions of the OIPRD interviews

read into evidence, all of the exhibits filed at the hearings and the Hearing Officer's summary of the evidence of the witnesses who had contact with the driver and were present at the scene. We can find no manifest errors in the facts as outlined and the findings made by the Hearing Officer. We are however, aware of the omission of reference to other objective factors in the Hearing Officer's decisions.

112. The question raised by the Appellant is, did the Hearing Officer err by ignoring other objective facts, which ought to have provided grounds to the Respondent Officers for forming a reasonable suspicion that the driver had alcohol in his system at the time of the accident? Such facts were available to both Const. Sirie, the first officer on the scene, and to Const. Freeman, the second officer to arrive, speak to witnesses, survey the scene and who also had direct close contact with the driver.

113. In the Appellant's Factum, Ms. Nisbett submitted that the admission made by the driver to Const. Sirie that he had one or two beers was sufficient on its own to support a reasonable suspicion of the presence of alcohol without further investigation.

114. Const. Sirie had spoken to both the girlfriend of the victim and also to the driver. He had received contradictory statements as to the location of impact. The driver had stated that he believed he was in his lane and that the victim was in the road. The Hearing Officer made no reference to or finding related to this evidence. He did, however, hear testimony from an accident reconstruction expert that it was impossible to determine a point of impact. That was information that was not available to the Respondent Officers but may have been considered by the Hearing Officer but not set out in his decision.

115. The Hearing Officer came to the conclusion that: "When one considers all of the evidence placed before this Tribunal, one can only come to the logical conclusion that

there were obviously no grounds to establish mere suspicion let alone reasonable suspicion". [December 21, 2011, Decision, page 31]. [emphasis added]

116. When we review the record of the disciplinary proceedings in their entirety, and the conclusion reached by the Hearing Officer, we find his conclusion to be reasonable.

117. The applicable statutory provisions dealing with the use of an ASD and a demand are set out in section 254 of the Criminal Code of Canada, R.S.C. 1985, c.C-46.

118. Section 254 (2) of the Criminal Code reads:

> If a peace officer has **reasonable grounds to suspect** that a person has **alcohol or a drug in their body** and that the person has, **within the preceding three hours, operated a motor vehicle**... the peace officer **may**, by demand, require the person to comply with...either or both of paragraphs (a) and (b) in the case of alcohol:
>
> (a) to perform forthwith physical coordination tests.
>
> (b) to provide forthwith a sample of breath that, in the officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the officer for that purpose. (emphasis added)

119. The case law has provided guidance on how to determine whether an officer has or ought to have "reasonable grounds to suspect" or a "reasonable suspicion" that a driver has alcohol in his or her body.

120. Reasonable suspicion has been defined as lying between a mere suspicion and reasonable and probable grounds: see R. v. Kang-Brown [2008]1.S.C.R.456. A police officer

himself cannot dictate what is reasonable and what is not: see R. v. Payette 2010 BCCA 392.

121. There has been considerable debate as to whether an admission of alcohol consumption by a driver is sufficient, in and of itself, to establish a reasonable suspicion to trigger an ASD demand or whether more is required, especially when the driver's answer might be considered to be a qualified one.

122. Some case law suggests that admission of consumption is enough to trigger a demand. This follows from earlier case law on the issue, particularly R. v. Gilroy [1987] A.J. No. 822, and how the courts have interpreted that decision over the years. This line of analysis has been referred to as the **Thomas Dunn** line of reasoning arising from two Alberta cases that held that mere admission of consumption was enough to meet the criteria for reasonable suspicion: see, R. v. Thomas, [2008] A.J. No. 11 and R. v. Kurtis Craig Dunn, [2007] A.J. No. 664, Alberta Provincial Court.

123. The Appellant provided the case of R. v. Aujla, 2011 ONCJ 10 para. 40, wherein the Court held that the statement of a motorist to an officer at 10:23 p.m. that he had one beer at dinner was "an objective fact upon which it was reasonable that the officer could conclude that there was a reasonable suspicion that the defendant had consumed alcohol that was relatively proximate to the time he was driving and therefore that he had the necessary reasonable grounds to make the roadside demand".

124. The other line of reasoning follows what is called the **Hnetka** line based on the decision in R. v. Hnetka [2007] A.J. No. 806, which provides that an admission that the driver has "consumed alcohol sometime in the past" or "a while ago" is not sufficient for an officer to make an ASD demand. There must be a reasonable suspicion that there

is alcohol in the body at the time of the stop: see also, Fetterley, *supra*.

125. In the case of Mowat, *supra*, the Court goes further by holding at para. 19 that:

> there must be one further thing at least that the officer observes beyond the fact that he had a drink at some time prior. It is not sufficient to form the basis for the reasonable suspicion alone, without some other indication, for instance an odour of alcohol on the breath of the person involved...it is not sufficient to meet the objective standard.

126. This is further confirmed in the Staples decision, *supra*, where the court finds that the **Hnetka** line of analysis is preferable to the **Thomas Dunn** line because of the possible Charter violation that can result if an ASD demand is made without sufficient criteria being considered.

127. Finally, in the factually very similar case of Girard v. Delaney (1995) 2 P.L.R. 337 (Board of Inquiry), the Board of Inquiry held that the officer has discretion whether or not to administer the test and must look at all of the factors, not just admission of consumption.

128. The Hearing Officer in this appeal clearly understood that there was a difference in the factors to be considered before making an ASD demand under section 254 (2) of the Criminal Code as opposed to the factors considered before making a demand for a breathalyzer test under section 254 (3) of the Criminal Code. He stated the following at page 30 of his December 21, 2011 decision:

> Forming reasonable suspicion is a precursor to forming reasonable grounds. A suspicion is not an allegation. There is nothing unethical, or illegal about forming suspicions during an investigation for exploratory purposes. A logic-based suspicion, when

investigated properly, can either be disproved, or it may lead to forming reasonable suspicion.

129. And at page 27 of his December 21, 2011 decision and also at page 9 of his August 22, 2013 decision, the Hearing Officer stated:

> Reasonable Suspicion refers to a hunch, or suspicion, for which there is some rational basis to suspect that someone has been consuming alcohol. The odour of an alcoholic beverage on someone's breath is sufficient evidence to form Reasonable Suspicion. (sic)
>
> Reasonable suspicion to suspect need not be based upon the accused's operation of a vehicle; it may be based on a police officer's observance of the accused's condition, or on information supplied by third parties.

130. At page 5 of his August 22, 2013 decision, the Hearing Officer, in acknowledging the submission of Appellant's counsel, stated:

> an officer does not have to note an odour of alcohol on a person's breath to administer an ASD. Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content.

131. In Davis, *supra*, at page 3, the court held:

> ...there is an objective and subjective criteria that must be applied. The officer must have regard to the totality of the circumstances and not disregard factors that point away from what would be indicia, in this case, of reasonable suspicion that the accused had alcohol in his body. [emphasis added]

132. Davis, *supra*, affirmed that "a totality of circumstances as they were known to the officers" must be addressed when assessing whether a demand for an ASD was appropriate or not in the circumstances.

133. There is a further important factor that police officers must consider. Section 8 of the *Charter of Rights and Freedoms* (the "Charter")[1] states that "*Everyone has the right to be secure against unreasonable search or seizure*".

134. Police officers are tasked with balancing the rights set out in s.8 of the Charter and making investigative demands. In cases where an officer infringes these rights, whole investigations and subsequent charges can be jeopardized. Where an ASD demand is made, the person is required by the Criminal Code to comply by providing a sample of their breath into the ASD without first being allowed to contact legal counsel.

135. In the case of Thorburn, *supra*, the accused argued that his section 8 Charter rights were violated by the police, and as a result sought to have all evidence excluded from the trial. In that case the officer could smell a strong odour of alcohol coming from the accused's car. He asked the driver to step out of his vehicle and directed him to exhale into the officer's face so that he could smell the driver's breath. Among other things, the accused argued that the officer did not have reasonable suspicion to make the demand. The driver's application was granted, the evidence was excluded and the charge was dismissed.

136. Based on the statutory provisions of the Criminal Code and the case law submitted to us and balancing all of the rights at stake, we find that, in exercising their discretion as permitted under section 254 (2), police officers must have regard to the totality of the factual circumstances as known to them at the scene in forming reasonable suspicion that a driver has alcohol in his or her body at the time of the

[1] Charter of Rights and Freedoms, Constitution Act, 1982, Part 1

driving occurrence. Failure to take those factors into account may vitiate the exercise of discretion, and breach the person's Charter rights and may constitute neglect of duty.

137. Each case is dependent upon the factual circumstances. In some cases, an admission of earlier consumption of alcohol may not be enough in and of itself to require an ASD demand. In other cases, an admission alone might raise the officer's concern to the level of a reasonable suspicion to make an ASD demand, especially if the admission is of a specific amount consumed and at a specific time proximate to the driving event.

138. At the same time, if the admission alone does not give the officer sufficient cause to form a subjective reasonable suspicion in his or her mind, then other known objective criteria available at the scene need to be addressed. This is where there must be some deference accorded to the police officer who is interviewing the driver. This deference must be tempered by reasonableness and not an expectation that the officer will perform the analysis of a professional toxicologist.

139. One objective fact, considered on its own, may not provide sufficient grounds to support a reasonable suspicion. In this case, the facts that it was a clear winter night, that the road was straight and the view unobstructed when considered in isolation, are not grounds in and of themselves to create an automatic reasonable suspicion that Mr. Biocchi had alcohol in his body.

140. The objective facts that the accident was serious and tragic and resulted in the death of the pedestrian likewise does not in and of themselves necessarily mean that the driver had alcohol in his body giving rise to a reasonable suspicion.

141. Taken together, these objective facts were available and known to or ought to have been known to the Respondent Officers and were required to be considered, in the totality of facts, by them on the scene at the time of this accident.

142. Mr. Biocchi admitted to drinking one or two beers prior to the accident. The Respondent Officers stated that was enough to create a suspicion in their minds. The undisputed evidence before the Hearing Officer was that each of the Respondent Officers went to the scene suspicious of the possibility of alcohol being a factor in this fatal accident given their policing experience, their initial information of the circumstances, the time of the accident and the fatality involved. They then heard the admissions of the driver. They went further to consider other factors that could indicate that Mr. Biocchi still had alcohol in his system. They questioned the driver closely, observed his condition and behavior, spoke to other witnesses and examined the physical evidence at the accident scene.

143. They could not find any indicia on Mr. Biocchi's person that alcohol was still in his body. They got very close to him to smell for any alcohol odour emanating from him or his clothing and found nothing. They spoke to witnesses and heard nothing that would point to alcohol in the body. In fact, none of the civilian witnesses or police officers on the scene that early morning could observe any indications at all that the driver had alcohol in his system at that time. At least one civilian witness spent considerable time with the driver sitting close to him in the confined space of a vehicle, from some time shortly after the accident until he was taken to the police station to be questioned, and could not detect any sign of prior alcohol consumption. When asked specifically, she responded that she believed he was sober.

144. As was stated by the Court in Davis, *supra*, an officer must not disregard factors that point away from what would otherwise be indicia, in this case, giving rise to a

reasonable suspicion that the driver had alcohol in his body.

145. We respectfully disagree with the Appellant's submission that the admission of drinking alcohol at some point earlier in the evening provided sufficient information standing alone in the circumstances of this case to create a reasonable suspicion. We do not believe that in the circumstances, an ASD demand would withstand a Charter review.

146. The Respondents were informed by the driver that he had one or two beers, variously described to them as "earlier in the night", "several hours earlier" and "hours earlier". As a result of receiving these admissions, both Respondent Officers stated, in their OIPRD interviews, that they made a point of approaching the driver specifically to try and ascertain if there were any apparent signs of alcohol consumption emanating from the driver or signs of impairment.

147. In their statements, both Respondent Officers talked in terms of trying to determine whether there were signs of impairment, thus apparently considering whether there were reasonable and probable grounds to make a demand under section 254(3) of the Criminal Code. The Appellant asserts that the Respondents were therefore asking themselves the wrong question and should have been looking at the lesser threshold of reasonable suspicion. She submits that the Hearing Officer asked himself the same wrong question and made the same mistake.

148. With respect, we disagree with the Appellant's position that the Hearing Officer asked himself the wrong question.

149. The transcripts of the interviews of the Respondent Officers with the investigators for the OIPRD disclose that the question was put directly to both as to whether they understood that the reasonable suspicion test was a lesser

or lower level threshold test than reasonable and probable grounds required for a breathalyzer test. Both officers indicated that they understood the difference. The Hearing Officer also understood the difference. While the Appellant references the use of "impairment" in the language of the Respondent Officers and the Hearing Officer, one must be mindful that police officers and hearing officers are not legally trained and it is not accurate to solely focus upon the language used as determinative of the issue: see Galassi, *supra*.

150. In Girard v. Delaney, *supra*, the Board of Inquiry stated:

> In order to decide whether failure to demand a breath sample for an ALERT test amounted to neglect of duty, we should keep in mind the purpose of the legislation. The officer who suspects impaired driving should take steps to determine if reasonable and probable grounds exist to arrest the driver for the purpose of obtaining a breathalyzer analysis of the driver's breath for use as evidence at a criminal prosecution. The ALERT test is one of the possible investigative tools. The Criminal Code does not make the ALERT test a pre-condition to a demand for a breath sample for the purpose of s. 254(3). If reasonable and probable grounds exist under s. 254 (3) because of other evidence of impairment, the ALERT test may be superfluous. On the other hand, if the officer is satisfied that there are no reasonable and probable grounds because there are none of the usual signs of impairment, the ALERT will serve no purpose.
>
> We therefore ask ourselves whether P.C. Delaney had a reasonable suspicion that Ms. Benson had committed an offence under s.254 (3) that needed clarification with an ALERT device. From our earlier findings, it is clear that he no longer had a suspicion at the end of his interrogation to justify a demand under s. 254 (2). P.C. Delaney made a number of

> observations of Ms. Benson to form a belief that she had not committed an offence under s. 254 (3). We found that he took appropriate steps in his investigation from the point of view of a reasonable person in the community. The evidence goes further and establishes that all of the officers at the scene who suspected alcohol arrived at the conclusion that she was not impaired. Under the circumstances, we do not see how the purpose of the legislation could be served by demanding a breath test for an ALERT device. [emphasis added]

151. As in Girard v. Delaney, *supra*, we find that keeping in mind the purposes of the legislation, as they began their investigations, it was not inappropriate that the Respondent Officers asked themselves the ultimate question of whether reasonable and probable grounds existed to arrest the driver for the purpose of obtaining a breathalyzer analysis of his breath for use as evidence at a possible criminal prosecution. In other words, they looked for usual signs of impairment to justify a demand under s. 254(3) of the Criminal Code. From an examination of the statements given by both Respondent Officers to the OIPRD investigators, they were, in fact, asking themselves such question as they undertook their investigations. That was not an improper question for them to be asking. The ASD is one of the investigative tools. If the Respondent Officers were unsure of the condition of the driver and other objective factors raised reasonable suspicion in their minds, then the onus is on them to justify why they exercised their discretion not to make the ASD demand. If, after investigating and weighing all of the objective facts available to them at the time of attending the accident scene, they subjectively believed that they did not have reasonable and probable grounds to make a demand under s. 254(3) then no purpose would be served in making an ASD demand under s. 254 (2).

152. The Respondent Officers were required to comply with the Service's Policy Orders in conducting the investigation of this fatal accident. The Hearing Officer reviewed the provisions of Policy Order No. 15.01 and found that the Respondent Officers had complied with the required duties as the first officers on the scene. That policy specifically requires the officers, firstly, to assess the state of sobriety of involved drivers and, secondly, to initiate the appropriate action in accordance with the Impaired Driving Offences section of the Policy, <u>if impairment by alcohol or drugs is suspected</u>. [Service Policy 15.01 (4)] [emphasis added]

153. The Respondent Officers were therefore required by the Service policy to consider whether the driver was "impaired" and thereafter whether there were reasonable and probable grounds to issue a demand under s. 254 (3). The Hearing Officer found that they complied with the Policy.

154. If the results of their investigation of all of the objective factual circumstances, viewed in totality, including the interrogation of the driver, were not conclusive but the Respondent Officers had subjectively formed a reasonable suspicion that the driver had alcohol in his body at that time, then the Respondent Officers ought to have exercised their discretion to use the investigative tool of an ASD test and made the demand. That was not the case here. The Respondent Officers never had a reasonable suspicion that the driver had alcohol in his body at the time.

155. Both of the Respondent Officers interrogated Mr. Biocchi within a very short time after the accident and made a number of observations of him. They formed the belief that the driver had not committed an offence under section 254 (3) of the Criminal Code. There were no signs of impairment. Their conclusion was corroborated by the civilian witnesses and by other police officers who were in attendance at the scene. Based upon all of the evidence available to them, there was no basis for forming a

reasonable suspicion nor were there reasonable and probable grounds to suspect that the driver had over 80 mgs of alcohol per 100 milliliters of blood in his system.

156. If the admission did not lead to a reasonable suspicion on their part, they could not make the demand as it would potentially lead to a breach of the driver's Charter rights. That is a rationale for granting police officers the discretion under s.254(2).

157. The Respondent Officers had to balance the Charter rights of the driver. This is a very fine line to walk given the apparent absence of any indicia of alcohol in the driver's body or other signs of impairment.

158. While we agree with the Appellant that knowing, with a degree of certainty, whether the driver had alcohol in his body would have supported the investigation into the death of her son and possibly led to charges against the driver of the vehicle, nevertheless, the requirement for an ASD demand must be based on the Respondent Officers' reasonable suspicion, which they, along with the other attending police officers, articulated clearly they did not have.

159. The Hearing Officer found that the Respondent Officers honestly believed that they did not have grounds for reasonable suspicion upon which to base an ASD demand. From their investigation, they concluded that Mr. Biocchi did not have alcohol in his body at that time. The evidence of all the witnesses clearly supports the Respondent Officers' belief as shown throughout the record of the disciplinary proceedings.

160. To paraphrase the principles stated in Davis, *supra*, the Respondent Officers' investigation must have had regard to the totality of the circumstances and not disregard factors that pointed away from what would be an indicia, in this case, of reasonable suspicion that the driver had alcohol in

his body. It is clear from the statements made by Const. Sirie and Const. Freeman that physical signs of alcohol being in the driver's body at that time were not present and this factor outweighed other objective factors in their minds in the exercise of their discretion not to issue an ASD demand.

161. The statements given by the Respondent Officers to the OIPRD confirm that they investigated a number of factors in their interrogation of witnesses and examination of the accident scene, and to them the admission by Mr. Biocchi that he had one or two beers earlier that evening was not enough to create a reasonable suspicion. They believed that there never was the objective or subjective basis upon which to form a reasonable suspicion and therefore exercised their discretion and did not administer an ASD demand.

162. We find that the actions and decisions made by Consts. Sirie and Freeman with respect to the ASD demand that tragic early morning were reasonable given the totality of the circumstances and evidence before them. We therefore find that the Hearing Officer's finding of that fact is reasonable.

163. There was no evidence that the Respondent Officers acted in bad faith in carrying out their duties. The Hearing Officer concluded that the actions of the Respondent Officers that early morning did not cross the line between a performance issue and into one of misconduct. We find that finding is reasonable.

164. Based on our review of the record we find that the Respondent Officers understood and applied the correct test, and based on the case law and the requirement to exercise their discretion in a reasonable manner, their subjective belief and their objective observations, they came to a reasonable conclusion. Having found that the Hearing Officer correctly concluded that the Respondent

Officers were justified in their position that they did not have a reasonable suspicion, we agree with Respondent Officers' counsel that the issue of whether Const. Freeman was negligent in failing to issue an ASD demand within the "forthwith period" is moot.

165. The Hearing Officer accepted the evidence and conclusion of the Respondent Officers, that the condition of the driver outweighed the other objective criteria. The findings of the Hearing Officer are reasonable given the totality of the circumstances, and are entitled to deference.

166. It is clear that on findings of fact, deference is owed to the Hearing Officer, and while he did not perhaps use perfect legal terminology, he applied the correct test, understood the common law precedents and applied the law to the facts before him.

167. While we may not have expressed the reasons in the same manner, that is not our task. The Hearing Officer's ultimate decision is reasonable, justifiable and within the range of possible acceptable outcomes which are defensible in respect of the law and the facts.

**Conclusion**

168. Before concluding we must make a final comment. This case involves the tragic loss of a young life. Ms. Nisbett suffered the worst loss imaginable for a parent. Consts. Sirie and Freeman have been under scrutiny for over four years, in this process to decipher whether they made a reasonable decision. We appreciate that this process, and the ones that have come before, could not have been anything but difficult for all of the parties involved. We acknowledge this and we can only hope that some closure has come from this process for all involved, especially Ms. Nisbett and her family.

169. Finally we find that the Hearing Officer was within his purview to conclude, on the facts presented to him, that Consts. Sirie and Freeman did not have a reasonable suspicion upon which to base a demand for an ASD. We can find no palpable or manifest error.

**Decision**

170. For the reasons as stated above, we would answer the issues outlined in subparagraphs (a) and (b) of para. 87 in the negative. We would also answer the issue re-stated in subparagraph (i) of para. 88 in the negative. The "forthwith" issues set out in paras. 87(c) and 88(ii) are moot.

171. Accordingly, we dismiss this appeal.

DATED AT TORONTO THIS 19TH DAY OF NOVEMBER, 2014

Roy Conacher
Vice-Chair, OCPC

Zahra Dhanani
Member, OCPC