



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-

INSPECTOR ART PLUSS
SEGEANT JOSEPH TRUDEAU
CONSTABLE DARREN SIRIE
CONSTABLE WILLIAM FREEMAN
SAULT STE. MARIE POLICE SERVICE

RESPONDENTS

-and-

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR

STATUTORY INTERVENER

DECISION

Panel: David C. Gavsie, Chair
Dave Edwards, Vice Chair

Hearing Date: September 19, 2012

Hearing Location: Toronto, Ontario

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Appearances

Elisabeth Widner, Counsel for the Appellant

Jeffrey Broadbent, Counsel for the Respondent Officers Sgt. Trudeau, Const. Sirie and Const. Freeman

Insp. Art Pluss, Personally

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

Miriam Saksznajder, Counsel for the Statutory Intervener

Introduction

1. On February 28, 2010 at approximately 3:00 a.m. a tragic accident occurred in Sault Ste. Marie when a motorist, Joseph Biocchi, struck and killed a pedestrian, Mathew Howard.
2. The Respondents, Insp. Pluss, Sgt. Trudeau, Const. Freeman and Const. Sirie ("Respondent Officers") investigated or supervised the investigation of this accident. No criminal charges were laid against Mr. Biocchi.
3. At the scene, shortly after the accident occurred, Mr. Biocchi advised Consts. Sirie and Freeman that he had consumed some alcohol that evening. During the hours that followed the accident, neither the Respondent Officers nor the civilian witnesses observed any sign that Mr. Biocchi had consumed alcohol.
4. The Respondent Officers did not make, or cause to be made, an approved screening device ("ASD") demand upon Mr. Biocchi.
5. The Public Complainant (the Appellant herein), is the mother of the deceased pedestrian, Mathew Howard. Pursuant to her complaint, the Office of the Independent Police Director ("OIPRD") undertook an investigation of the conduct of the Respondent Officers during the incident.
6. Following that investigation, by Notices dated December 6, 2010 Insp. Art Pluss and Sgt. Joseph Trudeau were charged

with one count of Neglect of Duty and one count of Discreditable Conduct. As well, Consts. Darren Sirie and William Freeman were each charged by Notices dated December 6, 2010 with one count of Neglect of Duty.

7. The particulars of the charges were that the Respondent Officers failed to administer, or cause to be administered, an ASD demand to the driver.
8. Section 254(2) of the *Criminal Code*, RSC 1985, c.C-46 (the "Criminal Code") reads as follows:

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 the 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.

9. After the date of the accident, but before the commencement of the 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.

10. The disciplinary hearing of the charges against the Respondent Officers began before D/Chief Terrence Kelly (Retired) (the "Hearing Officer") on September 26, 2011. The parties decided to first consider whether Mr. Biocchi's statements at the scene of the accident to Consts. Sirie and Freeman that he had consumed alcohol earlier that evening were legally compelled statements within the Soules principle.
11. On December 21, 2011 the Hearing Officer released his decision on this issue. He concluded that Mr. Biocchi's statements at the scene of the accident to Consts. Sirie and Freeman that he had consumed alcohol earlier that evening were legally compelled statements. Therefore the statements were not available to the Respondent Officers for the purpose of determining whether they had a reasonable suspicion that Mr. Biocchi had alcohol in his body. 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.
12. On January 4, 2011 the Hearing Officer reconvened the hearing and dismissed the charges against the Respondent Officers.
13. Pursuant to s.87(1) of the *Police Services Act* R.S.O c.P.15, as amended ("the Act") the Appellant appeals these findings which resulted in the dismissal of the charges.

Decision

14. For the reasons which follow,
 - a. We find that Mr. Biocchi's statements at the accident scene to Consts. Sirie and Freeman that he had consumed alcohol that evening were not legally compelled statements;
 - b. We confirm the Hearing Officer's decision to dismiss all charges against Insp. Pluss and Sgt. Trudeau;

- c. We revoke the Hearing Officer's decision to dismiss the charges against Consts. Sirie and Freeman, and we remit the matter back to him to continue the hearing.

The Preliminary Motion

15. The OIPRD failed to file its Factum and Brief of Authorities within the time required by the Commission's Rules of Practice (hereinafter "Rule" or "the Rules").
16. After the time for filing its Factum had expired the OIPRD filed a motion requesting an order extending from April 13, 2012 to April 20, 2012, the date by which it was required to file its appeal materials. This motion was made returnable at the opening of oral argument on the appeal.
17. Rule 30.3 requires that, unless otherwise directed by the Commission, the facta and briefs of authorities of the parties and statutory interveners, shall be delivered within 30 days of receipt of the Appellant's factum and brief of authorities.
18. Rule 3.4 provides that the Commission may waive or vary any of the Rules including time limits set out in the Rules.
19. The OIRPD asserted that an extension of the 30 day period was required because it would not be in a position to review the materials filed by all of the parties and file its appeal materials within the prescribed period.
20. Further, the OIRPD's materials stated that "the IPRD's interests in this appeal are different than those of the parties, as the IPRD is not acting in the interests of a client; rather, the IPRD must fulfill his mandate of ensuring that public complaints about police are dealt with in a transparent, effective and fair manner, to both the public and the police".
21. All of the parties consented to the requested order.

22. We granted the motion with reasons to follow. These are those reasons.
23. We do not agree with the OIRPD's submission that in order for it to fulfill its mandate it must review all of the parties' materials before it delivers its factum.
24. The issues before the Commission on an appeal made pursuant to s. 87(1) of the Act are framed by the appellant. It is the appellant who asserts that a hearing officer made certain errors, and it is those errors which form the four corners of a matter before us.
25. Today, it is the issues raised by the Appellant in its Notice of Appeal which are before us.
26. Section 87(7) of the Act provides that the Independent Police Review Director is "entitled to be heard, by counsel or otherwise, on the argument of the appeal of a decision made in respect of a complaint made by a member of the public".
27. Section 25.1(1) of the *Statutory Powers Procedure Act* R.S.O. 1990, c.S.22 as amended empowers the Commission to make rules to govern its proceedings.
28. Rule 26.1 confirms that the OIRPD is entitled to be heard at a disciplinary appeal where a member of the public made the complaint or complaints which were the subject of the disciplinary hearing.
29. Rule 30.3 allows all parties and the statutory interveners 30 days from the date that they receive the appellant's factum and brief of authorities to file their respective facta and briefs of authority.
30. The Act and Rules define the role of a statutory intervener; it is entitled, in certain circumstances, "to be heard" on the argument of a disciplinary appeal. We require that to be heard on an appeal a factum must first be filed in compliance with our Rules.

31. As the appeal is limited to the issues raised by the appellant, and the statutory intervener's role is limited to being heard during argument on the appeal, it is clear to us that the statutory intervener's role is to make submissions on the issues raised by the appellant (that are reflective of its mandate and expertise). It may be that in one appeal a statutory intervener's submissions will align with the position of the respondent; in another they will be consistent with the position of the appellant.
32. Whatever the substance of a statutory intervener's submissions in a given appeal, like the parties, it must comply with our Rules governing disciplinary appeals. Here, the OIPRD's motion for an extension of the time within which to deliver its appeal materials could and should have been brought prior to the expiry of the prescribed time period.
33. The principal reason provided for the requested extension is the OIPRD's mandate, that it is not acting in the interests of a client, but rather seeking to ensure that public complaints about police are dealt with in a transparent, effective and fair manner. In our view, the OIPRD's mandate does not provide a sufficient reason for it not to comply with the Rules which, in part, are intended to establish a fair and open process for the hearing of disciplinary appeals. We would note that the OIPRD's legal argument made on this appeal was in substance identical with that made by the Appellant, and did not relate in any express fashion to its mandate under the Act.
34. We granted the OIPRD's extension motion because this is the first appeal on which the OIPRD has appeared on the argument of an appeal under section 87 (7) of the Act; there was no prejudice (to a party or to the appeal process) as a result of the late filing of the OIPRD's Factum; and the Parties to the appeal consented to the extension requested.
35. However, we expect all parties and statutory interveners to comply with our Rules. Appeal materials filed after the expiry of a prescribed time period are not before an appeal

panel unless or until an order to that effect has been made on a motion brought in accordance with our Rules. In an appropriate case, say, of repeated failure to deliver appeal materials in the time required, the time generally allotted for oral argument as set out in the Commission's Practice Direction applicable to section 87 (1) appeals may be reduced, or the right to make oral argument itself may be jeopardized.

Appellant's Submissions on the Appeal

36. Counsel for the Appellant asks us to set aside the Hearing Officer's ruling that the motorist's statements that he consumed alcohol could not be utilized by the Respondent Officers in determining a reasonable suspicion for the purposes of s.254(2) of the Criminal Code.
37. In the alternative she 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 3 hours.
38. Ms. Widner submitted that the Hearing Officer made two errors of law reviewable on a correctness standard. First, he erred in his application of the law enunciated in Soules and second, there was no evidence to support a finding that the motorist's statements were compelled within the meaning of Soules.
39. She noted that in R. v. Aujla, 2011 ONCJ 10 para. 40 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".

40. She asserted that R. v. Montgomery, 2011 ONSC 5331 confirms that the driver must prove on a balance of probabilities that he had an honest and reasonably held belief that he was required by law to report the accident, and that in the absence of a statement by the driver with respect to his state of mind, there is no evidence upon which to make such finding.
41. Ms. Widner argued that there was no evidence that Mr. Biocchi held such a belief. He testified at the hearing that he had no recollection of the night.
42. She submitted that the Hearing Officer erred in the application of Soules by inferring from Mr. Biocchi's actions what his subjective belief was following the accident.
43. Additionally, Ms. Widner argued that even in the absence of the statements regarding consumption of alcohol, there were objective facts upon which the Respondent Officers could form a reasonable suspicion including:
 - a. the seriousness of the accident;
 - b. the time of the accident; and
 - c. the road conditions were good.
44. In her Factum Ms. Widner requested that the matter be remitted back to a different hearing officer. In oral argument she submitted that in light of the Hearing Officer's statements in his decision of January 4, 2011, there was a reasonable apprehension of bias.

OIRPD's Submissions on the Appeal

45. Counsel for the OIRPD submitted that the Hearing Officer erred in concluding that Soules was applicable for 3 reasons:
 - a. The decision had not been released at the time of the accident and the conduct of the officers could not have been governed by that principle;

- b. The right to exclude a statement must be exercised by the motorist. The officers do not have standing to assert that right; and
 - c. There is an absence of evidence upon which to find a legal compulsion.
46. She argued that the Respondent Officers never raised the issue of compellability with the motorist. They did not make an ASD demand because they saw no signs of impairment.
47. She submitted that Mr. Biocchi's cooperation with the police could have been driven by his feeling of a moral obligation, or it could have been from a legal compulsion. However, there is no evidence upon which one could reach either conclusion.
48. Ms. Saksznajder asserted that with the admission of Mr. Biocchi's statements there is evidence on the record to support a charge of Neglect of Duty against Consts. Sirie and Freeman. She requested that the matter be remitted back for a full hearing on that charge against those officers. She submitted that there is no evidence on the record to support the charges against Insp. Pluss and Sgt. Trudeau.

Sault Ste. Marie Police Service's Submissions on the Appeal

49. Mr. Johnstone, on behalf of the Sault Ste. Marie Police Service (the "Service") adopted the position of the OIPRD with respect to Consts. Sirie and Freeman. He took no position regarding Insp. Pluss and Sgt. Trudeau.
50. He submitted that if we ordered that the matter be heard by a hearing officer other than D/Chief Kelly (retired), that we order that the five days of evidence be admitted as evidence by the new hearing officer in order to reduce the costs of a new hearing.

Respondent Officer's Submissions on the Appeal (other than Insp. Pluss)

51. Mr. Broadbent argued that the finding by the Hearing Officer that Mr. Biocchi subjectively felt compelled to report and answer the officers' questions was a finding of fact and reviewable from a standard of reasonableness.
52. He asserted that the actions of the motorist following the accident which included:
 - a. Stopping his vehicle a short distance after impact;
 - b. Making a U-turn and returning to the immediate area of the accident;
 - c. Calling 9-1-1 and reporting that he believed that he hit a pedestrian; and
 - d. Remaining on the scene and answering all of the questions

provided reasonable grounds upon which the Hearing Officer could conclude that Mr. Biocchi subjectively believed that he was required by law to report the accident and remain at the scene.

53. Mr. Broadbent noted that judges do not make the law; rather they observe the law. Accordingly, although Soules was decided after the date of the accident, its principles governed the parties' conduct on the date of the accident.
54. As the Hearing Officer's decision was reasonable he asserted that the appeal should be dismissed.
55. If the matter is referred back for a hearing he submitted that there was no bias shown by the Hearing Officer and the matter should be remitted back to him with our direction that the statements of Mr. Biocchi were available to the Respondent Officers in their assessment as to whether there

was a reasonable suspicion that Mr. Biocchi had alcohol in his body.

Insp. Pluss' Submissions on the Appeal

56. He asserted that no adverse conclusion should be drawn from the fact that the Respondent Officers had not testified at the hearing.
57. He submitted that the seriousness of the accident is not a factor which the officer should consider in forming a reasonable suspicion for the purposes of s.254(2) of the Criminal Code.
58. He argued that the actions of a motorist can be used to deduce his or her mental state. He noted Mr. Biocchi's questions during his interview at the police station about whether he needed a lawyer demonstrated concern and a feeling of compulsion.
59. He requested that the appeal be dismissed.

Reasons for Decision

60. 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?

61. Turning to the first issue:

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?

62. There is disagreement regarding the appropriate standard of review. The Appellant and the OIRPD assert that this is an error of law, reviewable on a standard of correctness. The Respondent Officers submit that it was a factual finding reviewable from a standard of reasonableness.

63. The Hearing Officer is required to identify and apply the law correctly. Findings of fact are reviewable from a standard of reasonableness, Dunsmuir v. New Brunswick [2008] S.C.J. No. 9.

64. We have been directed by the Courts to not be overly critical of the language used by hearing officers as they are not legally trained, Galassi v. Hamilton Police Service (September 3, 2003, upheld [2005] O.J. No. 2301 (Div. Ct.)

65. On page 25 of the Hearing Officer's Decision of December 21, 2011 he concludes:

By these actions alone it would indicate to this trier-of-fact that Mr. Biocchi subjectively believed he was required by law to report the accident and remain at the scene.

66. In R. v. White [1999] 2 S.C.R. 417 at para. 75 Iacobucci J. held that a driver must establish on a balance of probabilities an "honest and reasonably held belief that he or she was required by law to report the accident, to the person to whom the report was given".

67. Although the Hearing Officer does not utilize the precise language of Iacobucci J. it is clear from his decision that he

applied the correct legal principle in deciding whether Mr. Biocchi's statements were legally compelled statements.

68. As the Hearing Officer applied the correct legal principle, what then is the standard of review for his conclusion that the statements were legally compelled?
69. In R. v. Parol, 2011 ONCJ 292 at para. 15 Duncan, J. concludes:

But I think the crucial point is this: Those cases turned, as does this one, on whether the trial Court was prepared to find on a balance of probabilities that the statements in issue were made pursuant to the compulsion of the provincial statute---i.e that they were accident reports and believed to be so by the defendant at the time he made them. This is a credibility-based finding of fact, made at trial or deferred to on appeal not binding or even particularly helpful in any other case. Once that finding is made, White applies. If the finding is not made, it doesn't.

70. Accordingly, the finding of the Hearing Officer that Mr. Biocchi's statements were legally compelled statements is a finding of fact, reviewable from a standard of reasonableness.
71. The Hearing Officer identified certain actions of Mr. Biocchi immediately following the accident as indicia of his state of mind. Mr. Biocchi stopped his vehicle a short distance after impact; he made a U-turn and returned to the immediate area of the accident; he called 9-1-1 and reported the accident; and he remained at the scene answering all of the officers' questions and followed the directions of those officers.
72. The Hearing Officer inferred a state of mind from these actions.

73. The nub of this issue is whether a trier-of-fact can deduce a mental state from actions for the purpose of asserting the Soules privilege.
74. In R. v. Montgomery, supra, the accused motorist did not report the accident, but he did remain at the scene of the accident and answered the officer's question that he had been driving the car. He also provided his Ontario Driver's Licence when requested. The Court concluded at para. 22:

...the driver must establish on a balance of probabilities an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given. Mr. Montgomery did not testify at the voir dire and I am therefore without evidence to make that finding.
75. Mr. Biocchi has no clear recollection of the evening in question. He is unable to state that his statements were made because of an honest and reasonably held belief that he was compelled by law to do so.
76. During cross-examination Mr. Biocchi answered the hypothetical question as to whether he would feel legally compelled to report to the police and answer their questions if he were involved in another motor vehicle accident. His testimony at best is equivocal. His last answer, found at page 103 of the September 28, 2011 transcript, is "maybe, maybe not depending on the situation I would assume".
77. Police officers who attempt to assert the privilege of a third party at a disciplinary hearing are in a very difficult position. In the absence of statements from Mr. Biocchi to the officers at the time of the accident, Mr. Biocchi is the only person at the hearing who could definitely state what his belief was when he made the statements. Unfortunately, he has no recollection of the night in question.
78. The Superior Court has rejected the argument that licenced drivers know that they have a legal requirement to report an accident and that police officers and the courts must assume

that statements to a police officer with respect to such accidents are given under a legal compulsion. The Courts have required evidence of a specific knowledge that the statement was made under a legal compulsion before they will accept the right of the driver to exercise his or her Charter rights. Effectively, the Court has stated that drivers, who do not know their legal rights, cannot exercise them.

79. In R. v. Parol, supra, Duncan J. states at para. 18:

A minor accident happened and a police officer arrived and inquired of the lone man standing beside the car whether he was driving---an obvious and natural question to which the accused gave a natural response. I don't think that a belief in statutory compulsion had any role in the exchange at all. The defendant's answer was motivated by his belief that he should co-operate with police officers. Respect for, or even fear of police may have contributed to his co-operation, but that is not the same thing as answering questions in order to comply with a known or suspected statutory obligation to report. I have no doubt that had the situation involved not an accident, but say, an illegally parked car and the officer asked "Is this your car?" the defendant would similarly have answered the question. (emphasis added)

80. Absent a statement from the driver at the time of the accident or at trial that he or she made statements to the officers because he or she was compelled by law to do so, the Superior Courts have ruled that the driver has not proved on a balance of probabilities that he or she had an "honest and reasonably held belief that he or she was required by law to report the accident, to the person to whom the report was given", R. v. White, supra.

81. We have no evidence from Mr. Biocchi regarding his mental state of mind at the time that he made the statements to Consts. Sirie and Freeman regarding his consumption of alcohol.

82. Accordingly, the Hearing Officer's finding that Mr. Biocchi "subjectively believed he was required by law to report the accident and remain at the scene" was an unreasonable one, and cannot stand.
83. The first issue is answered in the affirmative. The Hearing Officer did err in finding that Mr. Biocchi's statements at the accident scene 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.
84. We turn to the second issue: Given our finding that Mr. Biocchi's statements at the accident scene to Consts. Sirie and Freeman that he had consumed alcohol that evening were available to the Respondent Officers for their determination of a reasonable suspicion, what is the appropriate remedy?
85. The Appellant requests that a hearing on the merits proceed before a new hearing officer and that the hearing officer be directed that Mr. Biocchi's statements that he had consumed alcohol were available to the Respondent Officers for their determination of a reasonable suspicion. The OIRPD supports that position with respect Consts. Sirie and Freeman. The Service requests that the matter should proceed to a hearing on the merits with our finding regarding Mr. Biocchi's statements, but that the matter could be heard by the Hearing Officer or a new hearing officer.
86. The Respondent Officers resist the position that the matter should be remitted for a further hearing, but if there is such an order, they submit that it should continue before the Hearing Officer.
87. The Service provided no written nor oral argument on the issue as to why the matter should not be remitted to the Hearing Officer.

88. In their respective facta neither the Appellant nor the OIRPD provide any grounds for remitting the matter to a new hearing officer. In response to our questions during oral argument counsel for the Appellant stated that the Hearing Officer's finding that that there was no negligence found at paragraph 3 of the transcript of January 4, 2012 creates an apprehension of bias.

89. It is useful to reproduce the paragraph in question:

Given the comments by the Service Prosecutor and having carefully studied the totality of the evidence placed before me, I did not find any basis, in fact, of any misconduct on the part of these four officers. It is my opinion that no negligence was shown by any of the officers investigating this very tragic accident. The evidence clearly shows that all the officers involved followed all the proper procedures and were not found to have deviated from service protocol. In the circumstances they behaved with courtesy and compassion.

90. We do not agree that the Hearing Officer's finding creates an apprehension of bias.

91. Given the Hearing Officer's ruling that Mr. Biocchi's statements regarding his consumption of alcohol could not be utilized in determining reasonable suspicion, we find that based upon the record the Hearing Officer's finding that there were no grounds for the Respondent Officers to form a reasonable suspicion was a reasonable one.

92. In the absence of a reasonable suspicion the Respondent Officers had no legal right to make or cause to be made an ASD demand. As the particulars for the charges were founded in the failure to make or cause to be made, an ASD demand, there was no Neglect of Duty or Discreditable Conduct.

93. Given the Hearing Officer's finding of the application of Soules to Mr. Biocchi's statements, his decision to dismiss

the charges fell within the range of reasonable outcomes available to him.

94. 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.
95. We find that based upon the record before us that an informed person would not hold a reasonable apprehension that the Hearing Officer is not able to decide this hearing with the required impartiality.
96. We now turn to an issue raised by the OIRPD.
97. The procedural history of this matter has been ably summarized in the Factum of the OIRPD. It began with a public complaint filed by the Appellant with the OIRPD on June 9, 2010. The OIRPD investigation resulted in charges against the Respondent Officers. The testimony of the OIRPD's investigators formed a substantial portion of the proceeding before the Hearing Officer.
98. The OIRPD both in its Factum and in oral argument submits that there is no evidence on the record to support the charges against Insp. Pluss and Sgt. Trudeau.
99. The Appellant requests that the matter be remitted for a hearing on the charges against all of the Respondent Officers. The Service takes no position with respect to Insp. Pluss and Sgt. Trudeau.
100. Most importantly the parties and the statutory intervener are in agreement with respect to certain significant facts.
101. The accident occurred at approximately 3:00 a.m. Const. Sirie arrived on the accident scene at approximately 3:06 a.m. Const. Freeman arrived at approximately 3:10 a.m.

Sgt. Trudeau arrived at the accident scene at 4:20 a.m.
Insp. Pluss arrived at approximately 5:18 a.m.

102. There is uncontradicted evidence that an ASD demand must be made within 15 minutes of the officer forming a reasonable suspicion to satisfy the "forthwith" aspect of section 254(2) of the Criminal Code. It is clear to us from the record that this time period begins with the first police officer's contact with the driver. The time period is not re-set with subsequent contact with the driver by other police officers.
103. The record shows that even if Insp. Pluss or Sgt. Trudeau formed a reasonable suspicion or should have formed a reasonable suspicion, they could not have directed that an ASD demand be made upon the driver as it would have violated the "forthwith" aspect of s.254(2) of the Criminal Code.
104. We find that there is no evidence on the record to support the charges against Insp. Pluss and Sgt. Trudeau. In fact the evidence fully exonerates them from the charges.
105. The powers of the Commission are set forth in section 87(8) of the Act:

After holding a hearing on an appeal, the Commission may,

- a. confirm, vary or revoke the decision being appealed;
- b. substitute its own decision for that of the chief of police...;
- c. in the case of an appeal from a decision of a chief of police, order a new hearing before the chief of police.... or;
- d. in the case of an appeal from a decision of a board, order a new hearing before the board...

106. We believe that this is an appropriate case in which to exercise our power to confirm the decision of the Hearing Officer with respect to the charges against Insp. Pluss and Sgt. Trudeau, but to substitute our reasons which are described above.
107. Accordingly, we confirm the Hearing Officer's Decision to dismiss of all charges against Insp. Pluss and Sgt. Trudeau.
108. 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.
109. Const. Sirie made first contact with Mr. Biocchi and therefore had the opportunity to make an ASD demand within the "forthwith" period.
110. 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.
111. 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.
112. Given our findings, there is no need to deal with the third issue.

Decision

113. In summary:

- a. We find that Mr. Biocchi's statements at the accident scene to Consts. Sirie and Freeman that he had consumed alcohol that evening were not legally compelled statements;

- b. We confirm the Hearing Officer's decision to dismiss all charges against Insp. Pluss and Sgt. Trudeau;
- c. We revoke the Hearing Officer's decision to dismiss the charges against Consts. Sirie and Freeman and remit the matter back to him to continue the hearing.

DATED AT TORONTO THIS 12 DAY OF OCTOBER, 2012

David C. Gavsie
Chair, OCPC

Dave Edwards
Vice-Chair, OCPC