

October 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 2, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, Vincent Michaels that you had received full disclosure of the documents before me. Mr. Michaels acknowledged that he received all the documents.

Mr. Michaels argued that that the Immediate Roadside Prohibition ("IRP") legislative regime is unconstitutional because it infringes sections 8, 10, and 11(d) of the *Canadian Charter of Rights and Freedoms*. Mr. Michaels argued that the IRP legislative regime is an unlawful attempt to legislate in the area of criminal law, an area of exclusive Federal jurisdiction.

I have no authority to consider constitutional arguments in this review.

Mr. Michaels made no further submissions. There is no evidence from you, and so I have proceeded with a review of your prohibition on the basis of the evidence before me.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Synopsis, the investigating officer reported that he executed a roadside check after he observed a westbound vehicle with only one tail-light on and smoke coming from the rear tires. The constable identified you as the driver of the vehicle.

In the Report to Superintendent ("RTS"), the constable reported that you were driving or in care or control of a motor vehicle at 04:00 hours, on October 2, 2011.

There is no evidence before me to the contrary. I am satisfied that you were a driver or in care or control of a motor vehicle at 04:00 hours on October 2, 2011.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand was made, and I must determine whether you failed or refused to comply with that demand.

In the Synopsis, the constable reported that he detected the strong odor of liquor in the cab of the vehicle. The constable reported that, at 04:00 hours, he formed a reasonable suspicion that you were driving or in care or control of a vehicle with alcohol in your body.

I find that the symptoms the constable reported led him to reasonably suspect you were driving or in care or control of a vehicle with alcohol in your body, and to make a demand for a sample of your breath for analysis. There is no evidence before me to the contrary. As a result, I find that the constable made a valid demand.

The constable reported that, at 04:01 hours, he read an ASD demand and reported that you understood the demand.

The constable reported you provided three attempts to provide a breath sample. The officer reported that "the driver was not blowing any air, blew through her teeth, and from the side of

her lips.” I am satisfied that these actions constituted your unequivocal failure or refusal to provide an ASD sample.

The constable reported that you failed or refused to comply with a demand at 04:02 hours. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that you failed or refused to provide a sample of your breath when the constable made a demand for one, at 04:02 hours, on October 2, 2011.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to provide a sample. Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to provide a breath sample when the officer made a demand for one.

Decision

I am satisfied that you failed or refused without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device on October 2, 2011. I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1)(b)(ii) of the Act. You may resume driving after the expiration of 90 days, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the owner, or someone authorized by the owner may attend the impound lot and pick up the vehicle. The owner is responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Please be advised that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see the website of the Office of the Superintendent of Motor Vehicles at <http://www.pssg.gov.bc.ca/osmv/>.

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cc. Vincent Michaels
fax: 604.270.3787

NOVEMBER 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 29, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to your lawyer, James Butler, in disclosure. Mr. Butler acknowledged that he had received them on your behalf. I proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?

2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Emmerson indicated that he witnessed you driving on October 29, 2011, at 0157 hours. In your affidavit, you acknowledged that you were driving, as set out in the officer's evidence, and you admitted to failing to come to a complete stop at the stop sign, as the officer noted.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 29, 2011, at 0157 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Synopsis, Constable Emmerson said that when speaking with you, he detected a strong odour of liquor. He said that you would not follow his direction to get back in the vehicle. The officer noted that your eyes were glossy and that you admitted to consuming alcohol a few hours prior. In your affidavit, you said that when stopped by the officer, you had just parked at your destination, so you exited the vehicle. You approached Constable Emmerson, because you thought you should. You admitted to telling the officer that you consumed liquor hours prior.

In the Synopsis, the constable said that he read you the ASD demand, but that you did not attempt to provide a sample. In your affidavit, you said that you were a little confused about the breath sample, because it was your first time doing this. In paragraph seven of your affidavit you said that the officer retrieved the ASD from the police cruiser and formally read you the ASD demand, while you stood outside his vehicle. You said you discussed the repercussions of the ASD, but you were still confused, so you asked to speak with a lawyer. While you may have been confused about the repercussions an ASD test, I infer from your evidence that you understood that the officer was demanding that you provide a breath sample into an ASD. Based on the evidence before me, I am satisfied that a valid demand existed.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. Your immediate response to the ASD demand was to ask for a lawyer. You acknowledged that the officer explained that you were not under arrest and that you did not have the right to speak to a lawyer at that time. Despite this explanation, you said you felt that you were under arrest; the officer's explanation "did not ring true to me." You said that you discussed this point for about five minutes. I find that your explanation of what happened evidences your unwillingness to comply with the demand made by the officer.

In paragraph nine of your affidavit, you said:

“Cst. Emmerson “re-explained to me that I had to provide a sample or I would be charged with a criminal offence. Again I told him that I wanted to speak to a lawyer. Again he did not present the machine to my mouth. This discussion did not take long.”

This is another example of the officer’s attempt to have you comply with the demand, and your unwillingness to do so. Why would he put the ASD to your mouth if you were saying you wanted to speak to a lawyer first? You were refusing to comply with the demand until you spoke with a lawyer.

You also said that the officer did not explain how to provide a sample into the machine that he held in his hand. “All he said to me was ‘blow into the straw until I tell you to stop’ and presented the ASD machine to my mouth area.” That sounds like an explanation to me. In paragraph 12, you said that you took the ASD straw into your mouth and attempted to provide a sample of breath into the straw. You said you had severe bronchitis at that time and you provided as much air as you could into the straw and ran out of breath.

Constable Emmerson’s evidence is consistent with yours, except that he did not say that you told him about your bronchitis. I infer from the evidence before me that you spent most of the time refusing to provide a sample, because you wanted to speak to a lawyer first. You acknowledged that the officer repeatedly demanded that you provide a breath sample and explained that you did not have the right to a lawyer. You acknowledged that he advised you that you could be charged with a criminal offence, if you did not comply with the demand.

Finally, the officer disregarded your request for a lawyer and put the ASD up to your mouth. The officer’s evidence is that “ s.22 did blow but it was very shallow and did not register at all on the ASD.”

Based on all the evidence before me, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 29, 2011, at 0206 hours.

Did you have a reasonable excuse?

From all of the evidence in front of me, it appears that your primary reason for not providing a sample was because you wanted to speak to a lawyer first. As the officer advised, you did not have this right to counsel at the time, so this is not a reasonable excuse for failing or refusing to provide a sample.

You also said that you had severe bronchitis and that your breathing was very laboured. You attached two exhibits to your affidavit in this regard: a prescription for amoxil, and a note from your doctor confirming the bronchitis and saying that your “breathing may have been abnormal for several days.” You included an internet printout explaining what amoxil or amoxicillin is and does. I note that your doctor did not address how your condition may have affected your ability to provide a breath sample into an ASD. Further, in paragraph 15 of your affidavit, you said that you had severe bronchitis, but you were not on any medication at the time. The dates on your doctor’s notes indicate that you contacted him three days after receiving the IRP. I find it odd

that it took three days to seek medical help for “severe bronchitis”. Overall, I do not find your evidence of a medical excuse to be compelling.

You said that you did not intend to refuse to provide a sample, but you admitted to repeatedly asking to speak to a lawyer before you would provide a sample, despite the officer’s explanation that you did not have this right. You did not ask how to provide a sample; you asked about a lawyer and the repercussions of the ASD test. I find that this amounted to delaying the process and refusing to provide a sample. After you were arrested, you asked to provide another sample. A driver does not have the right to provide a sample at a time of his choosing. Section 254(2)(b) of the *Criminal Code* states that “the peace officer may, by demand, require the person . . . to provide forthwith a sample of breath. . . .” [emphasis added]

Your lawyer cited the case of *R. v. Bowman*. I note in paragraph 15 of this case, the court states the following:

...I would, however, add to the foregoing the following caveat. If a person refused to comply with a s.235(1) demand, but immediately thereafter indicated a change of mind and a willingness to take the test then, since the refusal and the subsequent change of heart occurred almost simultaneously, both really comprise the reply to the demand, i.e., form but one transaction, and there would not therefore, in my view, be a refusal in law.”

I do not believe that this applies in your situation. In paragraph 14 of your affidavit, you stated that after the officer arrested you, you protested that you wanted to speak to a lawyer, but that the officer did not respond to that. In his evidence, Constable Emmerson stated that he arrested you, read you your *Charter* rights and official warning and that you requested a lawyer, but you did not know the number. After being arrested and placed in handcuffs, you said you would provide a sample. You said that “only about 5 to 10 seconds had passed since my earlier attempt to provide a sample.” I find it hard to believe that all the events recited in this paragraph occurred within 5 to 10 seconds.

Your lawyer referred to *R. v. Collings* to support the *Bowman* premise that the officer’s charge of refusal and your plea to try again formed one transaction. I find that your scenario is distinguishable from these cases. Further, I note that they are criminal cases entailing a standard of “beyond a reasonable doubt.” In this administrative prohibition, the review is decided on “a balance of probabilities”.

Mr. Butler also referred to *R. v. Pringle*, but only provided the first four pages of the case. This only included the first sentence of the first paragraph of the “Analysis” section, which did not allow me to put the scenario in context. Mr. Butler suggested that the *Pringle* case addressed the issue of a person’s intent to provide a sample, and he said that your failure was due to bronchitis, not a lack of intent to provide a sample. As noted above, I am not convinced that you had a valid medical excuse for failing to provide a breath sample.

Based on the evidence before me, I am satisfied on a balance of probabilities that you did not have a reasonable excuse for failing or refusing to comply with a demand made under the

Criminal Code to provide a sample of breath for analysis by means of an ASD on October 29, 2011, at 0206 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 29, 2011, at 0206 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 29, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also confirmed.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/> .

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Adjudicator

cc. James Butler
604-739-9888

November 15, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 26, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to you. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

The investigating officer noted that you were involved in an accident on Knight Street in Richmond. You confirmed you were driving and that you slid off the road and crashed. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* at 00:18 hours on October 26, 2011, as noted in the report.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

The officer responded to a call regarding the crash. On talking to you, he noticed a strong odour of liquor on your breath, that you had red eyes and a flushed face, and that the crash was clearly due to very bad driving. He read you an ASD demand at 00:40 hours, which you failed to comply with by various actions, those being, sucking rather than blowing, leaving your lips apart, and faking blowing. Despite being warned about what would happen, and understanding same, you pretended to be unable to comply.

I advise that fail and refuse are considered synonymous in this review. Given the evidence, I am satisfied that you were read a valid demand and refused or failed to comply with it.

Did you have a reasonable excuse?

The officer provided no excuse for why you failed to comply with the demand.

You explained that you were knocked unconscious by the crash and that you were in an ambulance when you first encountered the officer. You were confused and in pain, were strapped to a gurney and also in a neck brace. The officer made you take the breath test and you tried to blow into the device several times but you were hampered by the brace, lying on your back (as directed by the ambulance staff), and by your asthma.

Given that you attempted to blow, I find that you did understand the demand. I further find that you were deliberately avoiding providing a suitable breath sample by the actions described by the officer. I note that you do not address his observations, despite you saying that you did your best. You believe that the brace and being strapped to the gurney may have contributed to your asthma and prevented you from providing a suitable sample. I disagree.

Considering the evidence, I am satisfied that you did not have a reasonable excuse because I find that you deliberately avoided providing a suitable breath sample.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* and that you failed or refused to comply with a valid demand without a reasonable excuse at 00:50 hours on October 26, 2011.

I therefore confirm your driving prohibition and monetary penalty as required by section 215.5 of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. I also confirm any vehicle impoundment that resulted from this prohibition.

You should also note that because you are prohibited from driving for a period of 90 days, under section 215.45 of the *Motor Vehicle Act*, you will be required to register in the Ignition Interlock and Responsible Driver programs prior to obtaining a new licence. For further information, you may check the website of Office of Superintendent of Motor Vehicles at <http://www.pssg.gov.bc.ca/osmv/publications/index.htm> "Other Factsheets".

s.15

Adjudicator

cc: Alan Truong
Fax: (604) 568-4597

November 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 16, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing I confirmed with your lawyer, Claire Hatcher, that she received all of the disclosure documents. I proceeded with the hearing based on this information.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Lerhe-Thomas is identified as the investigating officer. Cst. Lerhe-Thomas stated in the RTS the vehicle was located in the parking lot. In the Vehicle Impoundment RTS Cst. Lerhe-Thomas stated that you were sleeping in the driver's seat while the car was running. The date and time of driving or care or control is recorded on the RTS as October 16, 2011, at 01:26 hours.

In your sworn affidavit you stated the following:

- You and your son s.22 were watching the Canucks game on TV. You consumed two (2) beers. Your wife and you started arguing about household matters so you and s.22 decided to go to s.22 to eat.
- s.22 drove the two of you in his car and you did not bring your wallet and did not have your driver's licence on you. You stated that the restaurant is 2-3 minutes away by car.
- You and s.22 arrived at the s.22 at approximately 9:45 p.m. and the two of you ordered food and began visiting with the owner and his staff.
- At 11:00 p.m., just before the restaurant closed you decided to stay and visit with the owner and his staff while they closed the restaurant. At this point you only had had the two (2) beers and were sober.
- s.22 left you the keys to his car and he walked to his house, which was only about 7-10 minutes away by foot. You stated his house is directly across the street from yours.
- After the restaurant closed the owner asked you to have a few drinks with him in the back. You stated you had approximately 2 double rye and waters, and at this point you were too impaired to drive, and as mentioned earlier you did not have your licence on you.
- From approximately 11:45 p.m. to 2:15 a.m. you tried several times to call your son from the restaurant phone to have him come and pick you up but he did not respond. You did not want to call anyone else because it was very late and you were embarrassed.
- You did not want to leave your son's car unattended for the period of time it would take to walk to your son's house and then walk back to the restaurant. This is because it is a very expensive vehicle with very expensive wheels.
- You decided to wait in the car until your son got the phone messages you left and came to pick you up. You stated it was chilly so you turned on the car to have the heater on.
- You stated that the car is an automatic transmission and that at all times the car was in park and in a flat parking stall.
- You stated you had no intention of driving the vehicle. You intended to remain in the car either until your son came to pick you up or until morning.
- You tried to explain to the officer that you had not driven and were not intending to drive because you were impaired.

The sworn affidavit provided by your son s.22 is generally consistent with yours. s.22 stated that he drove the two of you in his car to the s.22 He stated that he has advised you many times that he never leaves the car overnight anywhere but in his garage at home because being a soft top convertible is prone to break-ins. He stated that at 11:00 p.m. he left the restaurant and gave you the car keys because you were sober and he did know that you intended to stay after closing and drink alcohol. He stated that he went home and went

straight to bed and fell asleep, and that he put his phone on silent so that it would not wake him up if it rang. He stated that after he was woken up by the police at 2:00 a.m. he noticed that he had several missed calls from the s.22 Restaurant.

The s.22 restaurant owner, s.22, provided a written submission. Mr. s.22 stated you and he had been consuming alcohol in the back of his restaurant. He stated that he served you a few rye and waters to drink that night, that he is not sure how much he consumed but that you were impaired. He stated that you advised him that you were not going to drive but were going to wait for s.22 to walk back and pick you and the car up. He stated that you used the restaurant phone a few times but s.22 did not answer. Mr. s.22 stated that he offered you a ride home but that you refused even though your home is very nearby. Mr. s.22 also stated that he left his restaurant shortly after midnight.

Your lawyer, Jennifer Currie, referred to and provided the case of *R. v. McLachlan, Kodjabachev, and Gill*, where the driver was found asleep in the driver's seat of the vehicle but was not found in care or control of the vehicle. Ms. Currie stated that there is insufficient evidence that you were a driver within the meaning section 215.41(1) of the Act. She stated that it is clear that you had no intention of driving the vehicle Ms. Currie referred to section 258 of the *Criminal Code* and stated that there is a presumption of care or control of a motor vehicle when the accused is found in the driver's seat but that presumption is rebutted when an accused can establish they were not in the driver's seat for the purpose of setting the vehicle in motion. She submitted that even though this is an IRP review and you have not been charged under the *Criminal Code* that *R. v. McLachlan, Kodjabachev, and Gill* and section 285 of the *Criminal Code* and its principles concerning care or control are the same.

I have reviewed the case of *R. v. McLachlan, Kodjabachev, and Gill* and find it is important to note that this is an administrative review, with a different burden of proof than that applied in criminal cases. *R. v. McLachlan* is a case in which the vehicle was running, and the driver was sitting in the driver's seat of the vehicle when police arrived, yet the driver was found not to be in care or control of the vehicle. I note that in *McLachlan* the Judge had a reasonable doubt that he was in care or control of the vehicle, as he accepted the accused's evidence that he had a designated driver who pulled over and left him at roadside after an argument and that it was his intention to sleep in the vehicle, which distinguishes the case from yours. Here, you are suggesting that your intention was to wait in your vehicle for your son to get the messages or until the morning, not to sleep.

I have considered all of the evidence very carefully and ultimately I find your evidence, including the affidavit from your son s.22 to be confusing and not very convincing that you had no intention to drive after you left the s.22 restaurant, for the following reasons:

- s.22 stated that he never leaves the car unattended overnight and that he has had conversations with you about this. He did not indicate that leaving the vehicle for a short period of time is something that is not allowed or that he ever advised you it would be an issue. You indicated that if you were to walk to your son's house, it would have taken approximately 14 to 20 minutes to get there and back to the car. You did not want to leave the vehicle even for this short period of time. However, I note that Mr. s.22 stated he offered you a ride home but you declined. I would think that given how close you live to the restaurant that it would have been relatively quick for Mr. s.22 to drive you

to your son's house and for you to advise him that he needs to go get his car. Instead you chose to sit in your car.

- I am also curious as to why you both drove to the s.22 in the first place since you live so close.
- s.22 stated in his affidavit that he noticed several missed calls from the s.22 . However, s.22 stated that you called s.22 "a few times". I find this to be inconsistent because "few times" and "several missed calls" are different.
- Mr. s.22 stated that he left his restaurant shortly after midnight, I find that if the owner of the restaurant left shortly after midnight it is reasonable to conclude that the restaurant would be closed and locked up, as a result I am left wondering how you would be using the phone.
- You stated you were calling s.22 from 11:45 p.m. to 2:15 a.m. However, I note that Cst. Lerhe-Thomas stated in the RTS that you were found asleep in the car at 01:26 hours; you do not refute this. I am confused as to how you could have been using the phone and asleep in the car at the same time. I have no evidence before me to indicate that you had a cell phone or that you were sleeping and then waking up and going into the restaurant to use the phone, then going back out the car.

Regardless, under s. 215(1) of the Act, a driver includes a person having the care or control of a motor vehicle, whether or not the motor vehicle is in motion. I find that you were in the driver's seat of the vehicle, and you confirmed that the engine was running. I recognize that in your case you state the engine was running because you were cold and wanted the heater on. However, I note that you chose to remain with the vehicle rather than walk the very short distance to you or your son's house and passed up an offer from Mr. s.22 to drive you home. Further, I note that even though a person may not, at one specific point in time, intend to operate a motor vehicle, if they maintain care or control of that vehicle the risk remains to the public that that person could, at any time, easily decide to drive. Ultimately, I find that putting the vehicle in motion would have taken few steps and little effort, and I am convinced that you posed a significant risk to public safety. In this circumstance, even if you did not intend to drive that night, on a balance of probabilities I find that you did intend to maintain care or control of your vehicle.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 16, 2011, at 01:26 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the RTS, Cst. Lerhe-Thomas stated that there was an odour of liquor from your breath, and that he observed you to have had glossy eyes and that you admitted to consumption of alcohol. Cst. Lerhe-Thomas stated in the RTS that he read you the ASD demand at 01:35 hours and indicated that you understood the demand.

You have not submitted any information indicating an ASD demand was not made upon you.

I am satisfied that a valid demand was made.

In determining whether you failed or refused to comply with a demand, again I turn to the RTS, under the section labeled "Failure or Refusal to Comply with Demand". Here, Cst. Lerhe-Thomas has stated that he explained that you would be charged for refusal if you did not blow into the ASD. Cst. Lerhe-Thomas stated that you stated you were not drunk and refused. Cst. Lerhe-Thomas stated that he explained the infraction and that you continued to refuse.

You stated that you did not intentionally refuse to provide a breath sample or commit any infraction or offence.

If you did comply or attempt to comply with the officer's demand then I would expect to see some evidence from you that you did, or some note in the RTS to support this. Ultimately, I find that your evidence is consistent with that of the constable that you did not provide or attempt to provide, a sample of your breath into an ASD after the officer made an ASD demand.

Based on the evidence before me, I am satisfied that you did fail or refuse to comply with an ASD demand on October 16, 2011, at 01:35 hours.

Did you have a reasonable excuse?

There is no evidence in the RTS that you had a reasonable excuse for refusing to comply with constable's ASD demand.

In your affidavit, you stated that Cst. Lerhe-Thomas never showed you the ASD device or showed you that you should be blowing into it. You stated that you did not understand what the police officer was asking of you, or that you were obligated to blow even if you were not driving. You suggested that the language barrier prevented both you and Cst. Lehre-Thomas from understanding each other, and that your English is poor, and you can only understand if the person is speaking slowly and clearly. You could not understand Cst. Lehre-Thomas's French-Canadian accent and he spoke very quickly.

With regard to the suggestion that there was a language barrier and that you could not understand or that you misunderstood what was happening and what was being asked of you, I note that you have not indicated to me that you did not understand the ASD demand, or that you had trouble comprehending the situation because your first language is Punjabi. Rather, you confirmed that you do know how to speak English. If there were communication issues between you and the officers, I would have expected to see that you advised the officers of this. You have not provided any evidence of this.

While I can appreciate the stressful situation you were in, I am not satisfied that these conditions would have prevented you from providing a breath sample. Additionally, I find the constable's evidence to be that you were given a reasonable opportunity to provide a breath sample.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 16, 2011, at 01:35 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 16, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the registered owner may attend the impound lot and pick up the vehicle. The registered owner is responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges.

You should also note that because you are prohibited from driving for a period of 90 days, under section 215.45 of the Act, you must register in the Ignition Interlock and Responsible Driver

s.15

s.15

Adjudicator

cc: Claire Hatcher
Fax (604) 687-3022

November 8, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 23, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the hearing I listed the disclosure documents which were provided to your lawyer, John Chak. He acknowledged that he received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "IRP Report"), Constable Lee indicated that he witnessed you as the driver of a vehicle when you encountered a roadblock. The constable stated that the date and time of driving or care or control was October 23, 2011, at 01:40 hours.

In your affidavit you acknowledged that you were stopped in a roadblock on October 23, 2011, at around 1:40 a.m.

Although whether or not you fled the scene is not an issue before me in this review, both you and your lawyer have raised the issue; therefore I will address it.

Your evidence is that after being stopped in the roadblock you were instructed to pull over to the side of the road and you gave the officer your driver's licence. You stated that you waited for a long time in your car for someone to attend to you. You were at a banquet earlier and felt you had to urinate at that time and you could not hold it any longer. You stated that at all times you were within close proximity of the officers and your car. You had no intention to flee because you were at a roadblock where there were many officers within close proximity. Moreover, you stated, the officer had your driver's licence with him. You stated that at no time were you arrested or charged with obstruction and you did not receive any promise to appear notice from any member of the RCMP. Mr. Chak submits that the officer had your driver's licence and you had no reason to flee.

The constable's evidence is that you attempted to flee after pulling over and you were caught approximately 50 meters away from the roadblock, hiding in the shadows. The constable stated that you were arrested for obstruction and read the ASD demand. I note that the entire investigation, from start to finish, took 10 minutes according to the IRP Report, so I do not understand how you could determine that you were made to wait in your vehicle for a "long time." As well, according to your own evidence, there were "many officers within close proximity"; therefore, I am left wondering why, if you had to urinate so badly, that you did not mention this to one of those officers instead of leaving the scene without telling anyone. Although you stated that at all times you were close to the officers and to your vehicle, in my view 50 meters is quite a distance away. While the officer may have had your driver's licence, I note that he had not yet read you the ASD demand before you left or fled the scene. Therefore, at that point in time he did not have a sample of your breath, nor did he have evidence to charge you with failing or refusing to provide a sample because he had not yet read you the demand. I think it is far more likely than not that you thought if you could get away from the scene, even if only temporarily, you could avoid a drinking and driving related charge which would be far more severe than an obstruction or "fleeing the scene" charge. Last, although you stated that you were not arrested for obstruction, I am perplexed by why the constable would provide evidence that you were. It just does not make sense to me that the constable would provide this information if there actually was no such charge. I find your action of leaving the scene to be highly suspicious behavior, and I do not find your evidence that you were simply going to urinate to be credible. As such, I question the credibility of the rest of the evidence you provided in your affidavit.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 23, 2011, at 01:40 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report to Superintendent for the Vehicle Impoundment (the VI Report), the constable stated "...obvious signs of impairment..." and "... overpowering odour of liquor from inside vehicle ...". In the IRP Report, the constable stated "Strong smell odour inside vehicle. Glazed over eyes. Slurred speech grinning uncontrollably". The constable indicated that you admitted to consumption at a banquet earlier that night, and he indicated that you "did not say" the time of your last drink. The constable indicated that he read you the ASD demand at 01:49 hours and that you understood the demand.

You have provided no evidence to the contrary in this regard, except that at no time did anyone ever ask you when your last drink was. Regardless of whether or not you were asked when your last drink was, I am satisfied that due to the physical symptoms and odour of liquor in the vehicle noted by the constable, along with your admission of consumption, the constable had sufficient grounds to issue you the ASD demand.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the IRP Report. In section 6, the constable stated "driver given 6 opportunities to blow into ASD. "No Go" reading each time driver visibly was not blowing into device or would stop halfway through blowing." At 01:50 hours, the constable determined that you had failed or refused to comply with the demand.

Your evidence is that you blew into the device; however, for some unknown reason the device was unable to take your breath sample or register a result. You stated that after the first attempt the constable instructed you to blow harder into the device. You stated that at no time did the constable show you how to blow by blowing into the device to make sure it was functioning properly. You stated that you followed his instructions and blew into the device the way he wanted you to. You made about 5 more attempts after you were instructed to blow harder but the device was not taking your samples or registering a result. You stated that there was only one device used by the constable and at no time did he ask you to blow into a different device. You stated that at no time were you pretending to blow or giving inadequate breath samples because the constable was standing next to you and you were afraid of him. You stated that you tried to provide a valid sample every time he asked you to, and you have no idea what else you could have done to make the device function properly.

During the hearing Mr. Chak indicated that there is no evidence that an ASD was used or that it was functioning properly. He stated that there is no information in the IRP Report relating to an ASD being used except in section 6, and there is no information regarding which type, the serial number, or the service and calibration expiry dates. He stated that the constable did not provide you with a demonstration, and he questioned why the constable gave you 6 attempts to provide

a sample. He stated that if you were truly faking, why not charge you after 2 attempts? Mr. Chak provided me with the case of *R. v. Branigan* to support his argument that the ASD was not functioning properly. As well, he provided me with the case of *Spencer v. Superintendent of Motor Vehicles* and referred me to point 4 in paragraph 63 where it states, "if there is insufficient evidence to decide the case, it be resolved in favour of the petitioner, in line with the proper allocation of the burden of proof and the concept of a balance of probabilities."

I have read *Branigan* and note that the circumstances are different than in your case. As well, I note that it is a criminal case whereas this is an administrative review. Administrative proceedings differ from proceedings in the criminal context. In administrative law the standard of proof is based on "a balance of probabilities". In criminal law the standard is "beyond a reasonable doubt".

In considering your evidence that the device was not taking your breath samples or registering a result, I must advise you that a "No Go" reading on an ASD is an actual "result", and is due to an insufficient amount of air being provided into the ASD. While I acknowledge that I do not have the ASD type, the serial number or the calibration and expiry dates for the device used, I do not find that this concerns me. I would not expect to see such evidence from the constable as he did not obtain a proper sample of your breath. Further, the constable referred to the use of an "ASD" in the IRP Report and indicated that it displayed a "No Go" reading each of the 6 times you were given the opportunity to provide a sample, and that you would either not blow or stop halfway. In my view, this is evidence that supports that the device was functioning properly as it registered a reading associated with an insufficient amount of air. Although you indicated that you were not given a demonstration, you stated that you "followed his instructions". You did not indicate that you did not understand those instructions or that you asked for any clarification. I find there is no compelling evidence before me from which I can conclude that an ASD was not used or that it was not functioning properly.

Regarding your statement that only one device was used, I can advise you that in your case, there was no requirement for the constable to use multiple devices to try and obtain a sample of your breath. Last, I do not know why the constable gave you 6 opportunities to provide a sample or why he did not charge you after 2. There is no requirement for officers to provide individuals with a specific number of opportunities.

I find it more likely than not that a properly functioning ASD was used, and that a sample of your breath was not obtained because you did not provide sufficient air into the device.

With respect to *Spencer*, I am satisfied that I have sufficient evidence to decide this case, and that my decision has been made based on a balance of probabilities.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 01:50 hours.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to provide a sample.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on October 23, 2011, at 01:50 hours.

I therefore confirm your driving prohibition, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 23, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at:

<http://v.bc.ca/osmv/>

s.15

s.15

Adjudicator

cc: John Chak
Fax: 604-282-7509

January 10, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 30, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to you. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

The investigating officer noted that he saw you driving on Gorge Road West in Saanich. There is no evidence to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* at approximately 21:30 hours on September 30, 2011, as noted on the notice.

Did you fail or refuse to comply with a demand?

As pointed out by your lawyer, Andrew Tam, you provided a breath sample, so clearly, you did not fail or refuse to comply with a demand.

Decision

I am not satisfied that you failed or refused to comply with a valid demand because I find you did comply. I therefore revoke your driving prohibition and monetary penalty as required by section 215.5 of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia

Your vehicle impoundment is revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle.

The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 11, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

cc: Andrew Tam
Mulligan Tam Pearson
Fax: (250) 480-0004

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 17, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that the approved screening device (ASD) registered a warn or a fail.

I must revoke your driving prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a warn or a fail.

Section 215.5(2) of the Act states that if I determine that you were prohibited from driving for a longer time period than the Act requires, I must substitute the correct prohibition, vary the monetary penalty for which you are liable under section 215.44(1), and vary or revoke any corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review, I listed the documents which were sent to your counsel, Sarah Leamon. She acknowledged that she had received them.

Here, the Notice of Driving Prohibition states that the officer has reasonable and probable grounds to believe that on November 17, 2011, at 0214 hours on Georgia Street you had care or control of a motor vehicle because you failed or refused, without a reasonable excuse, to comply with a demand made under the Criminal Code; yet, the officer's report shows you provided two breath samples into the ASD. Consequently, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act or whether or not you failed an ASD.

Decision

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Drivers Licence.

The vehicle impoundment is also revoked. The owner may go directly to the location where their vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including November 28, 2011. The owner is responsible for any storage costs beyond this date. The owner should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

Sarah E. Leamon [604] 685-8308

October 26, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 9, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, Chris Massey, that he had received full disclosure of the documents before me. Mr. Massey confirmed that he received all the documents.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), the investigating officer reported that you were driving or in care or control of a vehicle at 04:35 hours, on October 9, 2011.

On the RTS, the officer has also given 04:35 hours as the time of his formation of reasonable suspicion for making the demand.

The constable has reported the sequence of other relevant events as follows:

- Approved Screening Device demand read: 04:23 hours;
- Time of first ASD test, for which there is no result shown: 04:25 hours
- Failure or refusal to comply with demand: 04:25 – 04:56 hours.

Given that the constable's evidence indicates that he made his demand before you were driving or in care or control of a vehicle, and before he formed his reasonable suspicion, I am unable to make determinations as to whether you were a driver within the meaning of the Act, or whether a valid demand was made.

Decision

I am not satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, on October 9, 2011.

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5 (4) of the Act.

Please note that the corresponding vehicle impoundment is also revoked. If not already done, the owner or someone authorized by the owner may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 26, 2011. The owner is responsible for any storage costs after that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc. Chris Massey
fax 250.920.0177

November 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 29, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review on November 15, 2011, I listed the disclosure documents which were provided to your lawyer, Ms. Sarah Leamon, on your behalf regarding this matter. She acknowledged that she had received them.

Ms. Leamon stated that you are entitled to refuse to provide a sample as she submitted that this regime is unconstitutional and infringes on your *Charter* rights, specifically section 10b. She has

also referred me to *R. v. Shultz* in support. The *Schultz* decision stated that ASD test results are not to be used as evidence to incriminate, and only as investigative tools. Your lawyer submitted that this decision and principle should be applicable to IRP's as well. As a result, she argues that I should overturn your prohibition. However, as an adjudicator of the Office of the Superintendent of Motor Vehicles, I don't have authority to decide whether the legislation is unconstitutional. In this review, I only have authority to decide issues in section 215.

Ms. Leamon has also referred me to the recent decision of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* and some general principles at paragraph 63. I note that there are some similarities in the two cases, but that the information she is referring me to is general and not binding.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report To Superintendent ("the Report"), Constable Gross identified himself as the investigating officer and indicated that he witnessed you driving. In the Synopsis Report the officer noted that he observed a vehicle conduct a u-turn in the middle of the intersection at 96th Avenue and King George Blvd. The officer stated that he then observed the vehicle driving at speeds of 80 km/hr. and then conducted a traffic stop when the vehicle stopped in an alley. You were identified as the driver. In the Report, the officer has noted the time and date of driving as 03:20 hours, on October 29, 2011.

In your statement, you confirmed that you did a u-turn and that you stopped in an alley and dealt with the officer at about this time. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on October 29, 2011, at 03:20 hours.

Did you fail or refuse to comply with a demand

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the officer has stated that he noted an odour of liquor, and that your speech was slow and deliberate. The officer indicated that you admitted to consumption earlier in the evening prior to driving, and that the time of your last drink was a couple of hours prior to being stopped. He has noted that he read you the ASD demand at 03:30 hours, and that you understood the demand. Based on the evidence before me, I am satisfied that a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, the officer's evidence was that you told the officer you were not going to provide a breath sample "numerous" times, as you believed the ASD could provide an inaccurate reading. The officer determined you were failing or refusing to comply with the demand at 03:32 hours.

You have provided no evidence to dispute or challenge that you failed or refused to provide a sample. In your submission you noted that the officer asked you about how many drinks you had and you stated that you responded truthfully that you had one. After a few minutes you stated that the officer presented you with a small black machine. You stated that you did not understand exactly what was going on.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 03:32 hours, on October 29, 2011.

Did you have a reasonable excuse?

In the police evidence as noted above, your stated excuse for not providing a breath sample is that you believed that the ASD could provide an inaccurate reading. The officer noted that you stated that you "could eat pizza and tomatoes and still fail the test."

In your submission, you noted that you were diagnosed with serious attention deficit and hyperactivity disorder and a very severe learning disability. You also stated that you have had two accidents that have resulted in brain damage. As a result, you stated that you have cognitive issues. More specifically, you claim that you have difficulty expressing yourself and processing information. You have provided a statement from your mother and medical records to support your claims regarding the diagnosis regarding your medical disorders, and your accidents that caused the head injuries.

In your submission, you stated that interacting with the officer was very distressing for you. You stated that you "did not understand exactly what was going on. (you) felt very confused. (you) felt extremely stressed." You noted that you said you "didn't understand", and stated that you could not process what the officer was saying to you. Your lawyer has also noted that your head injuries should constitute a reasonable excuse.

While I acknowledge that your mental disorders and medical conditions may have made interacting with the officer difficult. I find the police evidence of your interaction contradicts your claims. While you state that you have difficulty expressing yourself, and that you did not understand what was going on when you were presented with the ASD, the police evidence in contrast is that you stated numerous times that you would not provide a sample as the ASD could provide an inaccurate reading. I find this expression to be very clear, and note that it implies that you understood what the officer was requesting, and what the ASD was for.

In sum, I find the police officer's version of events to be more likely, and I do not find your medical conditions constitute a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 29, 2011, at 03:32 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 29, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the 30 day impoundment period. Once the vehicle is eligible for release, the owner may attend the impound lot and pick up the vehicle. The owner is responsible for towing and storage charges, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

cc Sarah Leamon
fax: (604) 685 - 8308

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 18, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to you. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

The investigating officer noted that he witnessed you driving on Expo Street in Vancouver. Your lawyer, Patrick McGowan, suggested that there was no evidence that you were the driver. You confirmed you were driving, which is enough evidence for me to be satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* at 23:10 hours on November 18, 2011, as noted in the report.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In his report, the officer noted that there was an odour of liquor in the car and also on your breath, once you had been removed from the vehicle. The officer read you an ASD demand at 23:15 hours, which you failed to comply with by sucking on the straw rather than blowing. Despite the officer demonstrating how to provide a suitable sample, you continued in the same way.

You said the officer did not read from any cards when making the demand, he simply asked you to blow into the device. You stated that he never told you that he could smell alcohol on your breath. Further, you do not believe that he could because you had not had any alcohol for over eight hours. He also did not tell you that the device he was using was approved.

The officer is not required to read the demand from a card. However, he is required to make it clear that you must provide a breath sample into the device. Given that you say you attempted to blow into the device, I find it more likely than not that he did make this requirement clear. Therefore, I am satisfied that he made a demand.

You deny sucking on the straw, stating that you were blowing as forcefully as you could, an action supported by the officer repeating “longer” as you were attempting to provide the sample. There appeared to be no response from the device with no lights illuminating. Exactly, the same occurred on two further occasions, the only difference being that a second officer witnessed your third attempt. Each time, the investigating officer directed you to blow longer and each time the device was unresponsive.

Your wife, s.22 said she saw you blowing into the device. She could tell because your breath was visible in the cold air and your cheeks were puffed up on each of the three occasions. She confirmed that she did not see any response from the device and she noted you blew exactly the way you were shown how to. Your in-laws, as well as your wife, confirmed that you did not consume any alcohol that evening and neither could they smell any liquor on your breath.

Mr. McGowan, believes that the prohibition should be revoked for several reasons: I have already addressed other concerns.

There is no evidence that the device was approved
The officer did not have reasonable grounds to make a demand
You complied with the demand

In response to your lawyer's concerns I note the following.

The officer noted that he read you an approved screening device demand at 23:25 hours on November 18, 2011. Therefore, I find that the device used was approved.

The officer noted an odour of liquor on your breath. Even if he was mistaken as to what the odour was, it is clear he believed there to be an odour of liquor on your breath. Therefore, he more likely than not had reasonable grounds to suspect that you had alcohol in your body, the only requirement that he needs to make an ASD demand.

I advise that fail and refuse are considered synonymous in this review. Clearly, a suitable breath sample was not obtained, whether or not you were blowing into the device or sucking on the mouthpiece. Therefore, while you may have attempted to comply with the demand, it is clear that you failed or refused to do so.

Given the evidence, I am satisfied that you were read a valid demand and refused or failed to comply with it.

Did you have a reasonable excuse?

The officer provided no excuse for why you failed to comply with the demand, explaining that your actions showed deliberate avoidance.

In your affidavit, you stated that, "because of the cold weather, my breath was shorter than it is in warmer conditions." I note that there is no evidence before me to support this comment. I do not accept this to be a valid excuse for failing to comply with the demand.

You offered to provide the officer with a blood sample to show that you were not impaired but the legislation does not allow for that, so I cannot accept that as an excuse.

Finally, you noted that the ASD was unresponsive. No lights lit up and the officer appeared frustrated by the lack of response from the device. There is no evidence before me to show that the device was calibrated or serviced correctly. However, there is sufficient evidence to show why the ASD was unresponsive. The officer noted that you sucked on the straw rather than blow into the device. Although I see no reason for the officer to falsify the information in his report, even if his observations are incorrect, there is the evidence of your wife who observed your breath in the cold air when you were blowing. This shows that the air was not going into the machine; rather it was going to the side. I would not expect the device to illuminate when no air is passing into it.

In my opinion, the evidence provided by the police or that provided by your wife is more convincing than the simple lack of information about the ASD itself. I do not accept that the lack of response from the ASD is evidence that the device was not working and therefore, this does not constitute a reasonable excuse for why you failed to provide a breath sample into the device.

Based on the evidence, I am not satisfied that you had a reasonable excuse for refusing or failing to comply with a valid demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* and that you failed or refused to comply with a valid demand without a reasonable excuse at 23:20 hours on November 18, 2011.

I therefore confirm your driving prohibition and monetary penalty as required by section 215.5 of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on November 18, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. I also confirm any vehicle impoundment that resulted from this prohibition.

You should also note that because you are prohibited from driving for a period of 90 days, under section 215.45 of the *Motor Vehicle Act*, you will be required to register in the Ignition Interlock and Responsible Driver programs prior to obtaining a new licence. For further information, you should visit the website of the Office of Superintendent of Motor Vehicles at ssg.gov.bc.ca/osmv/publications/index.htm "Other Factsheets".

s.15

s.15

Adjudicator

cc: Patrick McGowan
Fax: (604) 684-0799

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 20, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the review, I checked that you had received full disclosure of the documents before me. You acknowledged that you received all the documents.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), the investigating officer reported a vehicle drove up to a roadblock. The officer indicated he witnessed the driver and identified you as that person. The constable reported that you were driving or in care or control of a vehicle at 01:55 hours, on November 20, 2011.

You have not disputed the constable's evidence that you were a driver or in care or control of a vehicle. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act at 01:55 hours, on November 20, 2011.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand was made, and I must determine whether you failed or refused to comply with that demand. A demand must be made forthwith after an officer has formed a reasonable suspicion that a driver has alcohol in their body.

In the constable's evidence, he formed a reasonable suspicion at 02:00 hours that you were driving or in care or control of a vehicle with alcohol in your body. The constable indicated the basis for his reasonable suspicion was the following: the odor of liquor in the car; that you were chewing gum "with masking odour"; that you admitted to consuming one glass of wine 7 hours earlier.

I agree with you that chewing gum by itself is not a sufficient basis for the constable to reasonably suspect that you were driving with alcohol in your body. Further, I am not satisfied that the constable's observations of the odor of liquor in the car and your admission to having consumed one drink seven hours earlier in the evening were sufficient for him to form a reasonable suspicion that you were driving or in care or control of a vehicle with alcohol in your body. As a result, I am not satisfied the constable's demand was valid.

Having made this finding, I do not need to consider any other issues in this review.

Decision

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, the owner may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including November 29, 2011. The owner is responsible for any storage costs beyond that date. If the vehicle is not reclaimed, the impound lot may apply to the Superintendent to dispose of the vehicle.

s.15

Adjudicator

October 13, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 30, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

Preliminary Matters

Records at this office indicate that all of the disclosure documents were faxed to your lawyer, Geoffrey Simair. I have proceeded with the hearing based on this confirmation.

Mr. Simair provided me his written submissions, your affidavit, an opinion letter from alcohol expert, J.T. Audrey Jackus, and the following cases: *R v. West*, *R v. Dearden*, *R v. Sponagle*, *R v. Young*, and *R v. Fantham* for my determination.

As it is determinative of the matter, I will only consider the second issue.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

Mr. Simair submitted that the Superintendent must be satisfied, on a balance of probabilities, that a demand as described in section 215.41(4) was made. Mr. Simair submits that in this particular case this section is completely blank, affording no evidence of compliance with this statutory prescribed requirement. Mr. Simair submits that a demand made under the *Criminal Code* is one made pursuant to section 254(2) which encompasses a requirement of the need for the demand to be made forthwith.

In the Report to Superintendent (Report), Constable Ferguson stated that witnesses observed indicia of impairment such as glassy eyes, slurred, confused speech, and an odor of liquor. Constable Ferguson stated that you denied consumption of alcohol. In section 3 labeled: "Approved Screening Device Demand Read," Constable Ferguson failed to record any information regarding the date, time or whether or not you understood the demand.

The roadside ASD demand is governed by s. 254(2) of the *Criminal Code*. That allows a peace officer to demand that a driver of a motor vehicle provide a sample of breath forthwith as is necessary to obtain a screening of the breath at the roadside.

In my view there is insufficient evidence to conclude that a valid demand was made. Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am not satisfied that you failed or refused to comply with a demand. I therefore revoke your Immediate Roadside Prohibition (IRP) and monetary penalty, as required by section 215.5(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 13, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Geoffrey Simair by fax [250] 385-4506

NOVEMBER 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 28, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure was provided to your lawyer, Mark Cacchioni, on your behalf. I have proceeded with the hearing based on this confirmation.

In his submission, Mr. Cacchioni gave evidence about the service of the Notice of Driving Prohibition (the Notice). The fax cover sheet sent to your lawyer contains the following statement:

"The applicant is responsible for supplying all relevant evidence in support of his/her case. The adjudicators will consider direct evidence from the applicant (oral testimony or written

affidavit preferably) and other evidence supplied by the applicant (such as witness statements or photographs). The adjudicators will not admit information and statements, tendered by the lawyer, as evidence on disputed matters.”

Neither you nor your lawyer provided any direct evidence from you on this matter. The only evidence before me regarding service of the Notice is from the officer. The Certificate of Service states that Constable Montemayor served you with this document on October 28, 2011.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Montemayor indicated that he witnessed you driving on October 28, 2011, at 00:00 hours, which I interpret to mean just as the clock turned from October 27, 2011 to October 28, 2011.

In the Synopsis, Constable Montemayor stated that he observed a vehicle make an illegal u-turn on Vosburg Avenue, travel “south on Manson St then take an abrupt east bound turn on to Ferguson Avenue.” After the officer turned on the emergency equipment, the vehicle reversed toward the police cruiser and pulled away. The vehicle stopped at 34586 Dann Avenue and the driver stepped out of the vehicle.

Constable Montemayor continued in the Synopsis, noting that the lone male occupant of the vehicle had a strong overpowering odour of liquor coming from his body and breath, and that the driver was “very unsteady on his feet.” You were identified as the driver from your BC driver’s licence. You provided no evidence to the contrary.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 28, 2011, at 00:00 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

Constable Montemayor indicated that he placed you in handcuffs for his own safety and then placed you in the back seat of the police cruiser. He said that he read the ASD demand to you repeatedly, and received no answer. The officer then wrote that you became belligerent, “only

stating that [you] wanted [your] lawyer.” Constable Montemayor stated that he repeatedly explained that you were not under arrest under the *Criminal Code*, and that by refusing to respond to the ASD demand, your behaviour would be considered a refusal. In the Synopsis, the officer stated that s.22 continued to refuse to answer. At 00:00 hrs Cst. Montemayor deemed s.22 actions as a refusal.” In section six of the RTS, however, the officer stated that this occurred on October 28, 2011, at 00:17 hours.

Mr. Cacchioni argued that the IRP should not be allowed to stand because of problems in the time line of the officer’s evidence. I acknowledge that it is incongruous for Constable Montemayor to identify “00:00” as the time of driving and the time of the deemed refusal. However, neither you nor your lawyer explained how you were prejudiced by this obvious error. Rather than revoke the IRP because of what I deem to be a clerical error, I find it more appropriate to lower the weight I give to the officer’s evidence in this regard. Further, it appears that the investigation proceeded routinely, with the events being clearly set out in the Synopsis. I infer from the officer’s evidence that upon observing indicia of impairment, he suspected that you had alcohol in your body, and placed you in handcuffs for his own protection. The officer did not detail what you were doing or saying to cause him concern for his safety, but he did describe you as “belligerent” once you were in the police cruiser.

Mr. Cacchioni questions what happened between the time of driving at 00:00 hours and the time of the breath demand at 00:12 hours. First, the officer indicates in the RTS that he formed his reasonable suspicion that you had alcohol in your body at 00:01 hours, almost immediately after the time of driving. But as he indicated in the Synopsis, the officer placed you into handcuffs for reasons of his own safety, and placed you in the back of the police cruiser. It is reasonable to assume that some interaction between the two of you occurred, which led the officer consider this action necessary. Accordingly, I doubt that you were fully amenable to these actions and that they proceeded smoothly. Given this inference, I am not concerned by the eleven minute delay between reasonable suspicion and the breath demand. You provided no evidence to refute that of the officer, so based on the evidence before me, I am satisfied on a balance of probabilities, that the officer made a valid demand.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. All of the evidence that is before me demonstrates that you did not provide a breath sample in compliance with the officer’s demand. Accordingly, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 28, 2011, at 00:17 hours.

Did you have a reasonable excuse?

You did not provide any evidence to explain your failure or refusal to provide a breath sample. The officer’s evidence suggests that you did not want to do anything without first speaking to your lawyer. As the officer explained, however, you did not have the right to consult a lawyer prior to complying with the ASD demand, so this is not a reasonable excuse. Your lawyer points to the officer’s evidence that you: “...continued to state no I don’t understand – I want my lawyer here before I do anything.” You did not comment on the officer’s version of events, so this is all I can rely on to interpret your behaviour. The officer demanded that you provide a breath

sample into an ASD. You varied between remaining silent in response to the demand and asking for a lawyer. The officer repeatedly explained that you were not under arrest and that you did not have a right to a lawyer. I infer that you are fluent in English, so if there was something that you did not understand, then you had ample opportunity to ask the officer for clarification.

Based on the evidence before me, I am satisfied on a balance of probabilities that you did not have a reasonable excuse to refuse to comply with an ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 28, 2011, at 00:17 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 28, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also confirmed.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssq.gov.bc.ca/osmv/> .

s.22

Adjudicator

cc. Mark Cacchioni
604-872-0617 (fax)

October 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 17, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr. I have proceeded with the hearing based on this confirmation.

On September 27, 2011, an Intake Agent advised Mr. Carr by fax that, "The applicant is responsible for supplying all relevant evidence in support of his/her case. The adjudicators will consider direct evidence from the applicant (oral testimony or written affidavit preferably) and other evidence supplied by the applicant (such as witness statements or photographs). The adjudicators will not admit information and statements, tendered by the lawyer, as evidence on disputed matters."

On October 3, 2011, Mr. Carr provided some evidence through his submission, but there was no supporting statement from you to confirm this evidence, or any direct evidence from you. To date, I have not received evidence from you. I will not consider the evidence tendered by your lawyer as there is no evidence that he was witness to the event. I will consider the submissions your lawyer made on the evidence provided by police.

Mr. Carr has made the argument that this is a quasi-criminal administrative matter and that the burden must be strictly enforced against the Crown. He stated that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be “clerical” in nature, can only be resolved in your favour. He also stated that you have no burden or disproof in this hearing and that there is no evidence before me which satisfies the burden of proof. Section 215.49 of the Act says that I must consider evidence supplied by you and the peace officer in making my decision. As previously stated, you have not provided any direct evidence in support of your case.

Mr. Carr has submitted a *Constitutional Questions Act* Notice, indicating that specific sections of the Act are unconstitutional, and that the prohibition should be stayed under section 24(1) of the *Canadian Charter of Rights and Freedoms*. Mr. Carr also argued that you were not advised of your right to counsel. However, under the Act I am not authorized to consider charter and constitutional arguments in this review. The scope of the review is limited to the grounds as defined in section 215.5 of the Act.

Mr. Carr has also submitted that you “did not operate a motor vehicle with a blood alcohol concentration over 80mg/100mL of blood as alleged in the IRP.” However, I must point out that in the Notice, the officer indicated that you were issued this IRP because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of breath.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Synopsis, Constable Kennedy indicated that on September 23, 2011, at 22:30 hours, she observed a Toyota pick-up travelling southbound on the Trans Canada Highway making erratic lane changes and hugging the shoulder of the road. The constable indicated that a traffic stop was conducted and that you were identified as the driver through your driver’s licence.

There is no evidence before me from you or your lawyer contradicting the constable’s evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 23, 2011, at 22:30 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report to Superintendent (the "Report"), the constable indicated that you had shaky hands, bloodshot eyes, an odour of liquor on your breath, and that you were staggering. The constable indicated that you admitted to consumption and the time of your last drink was "2 hours". The constable indicated that she read you the ASD demand at 22:40 hours and that you understood the demand.

Mr. Carr has provided information on your behalf that you did not answer "2 hours", that you consumed one drink with dinner, and that the constable did not inquire about the time of your last drink, and he has referred to the cases *R. v. Hemery* and *R. v. Smith* to support this information. However, as I previously stated, I cannot consider this information from Mr. Carr as he was not witness to the event, and I have no direct evidence from you on this point.

Mr. Carr has argued that in the Report and in the Synopsis, the constable alleges that you were witnessed in care or control of a vehicle and pulled over for a traffic stop at 22:30 hours. Mr. Carr stated that you were then detained for 10 minutes before the constable formed her reasonable suspicion at 22:40 hours, and for 12 minutes before the ASD demand was read at 22:42 hours. He stated that there was no reason given for this delay, and that the *Criminal Code* requires that a demand be made forthwith, and that jurisprudence across Canada has consistently held that an ASD demand that is not made forthwith is invalid. He has referred to the cases *R. v. Woods*, *R. v. McMurray* and *R. v. Cleaver* to support his argument.

I disagree with Mr. Carr's interpretation of when the traffic stop was conducted. It is important to note that in the Synopsis the constable specifically stated that at 22:30 hours she "observed" the vehicle on the highway making erratic lane changes and hugging the shoulder. A traffic stop was then conducted. I find it more likely than not that some minutes passed between the time she first observed you in the vehicle and the time it took her to conduct the stop, approach the vehicle and speak to you, form her reasonable suspicion and read you the ASD demand. I do not find a 10 or 12 minute span to be an unreasonable amount of time for these events to take place. Further, the *Criminal Code* requires the demand to be made forthwith after the reasonable suspicion has been formed, and in your case it appears that the demand was made within 2 minutes; therefore, I find that the demand was made forthwith.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Report. In section 6, the constable stated "Physically capable. Demonstrated that he could blow into mouth piece. When administered on ASD, no effort made by driver." It appears that the constable gave you 10 attempts to provide a sample." At 22:56 hours, the constable determined that you had failed or refused to comply with the demand. In the Report to Superintendent for the Vehicle Impoundment, the constable stated "Driver did not make any effort to blow into the instrument" and "kept placing his tongue on the opening of the mouth piece."

Mr. Carr submits that there is no information from the constable about the ASD type, serial number, calibration or service expiry, or about the time of the alleged tests, or if they had been conducted at all, at any time. He stated that the constable failed to establish that the ASD used was an "approved screening device", and that the calibration and service had not expired, any of which could render an ASD result invalid. Mr. Carr stated that accordingly, there is no evidence that you failed or refused to provide a sample, nor was there adequate justification for the impoundment of your vehicle.

Although Mr. Carr has made these arguments regarding the ASD and the time of the tests, I find them to be irrelevant in your case as there is no evidence before me that you provided a sample of your breath.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 22:56 hours.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to comply with a demand and provide a sample of your breath.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on September 23, 2011, at 22:56 hours.

I therefore confirm your driving prohibition, as required by s. 215.41(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 23, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 25.1 of the Act. For further information, please see our website at:

[.pssg.gov.bc.ca/osmv/](http://pssg.gov.bc.ca/osmv/)

s.15

s.15

Adjudicator

cc: Jeremy Carr
Fax: 250-388-7327

NOVEMBER 24, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records before me indicate that you have received all of the disclosure documents. I have proceeded with the review based on this confirmation.

In your affidavit you argued that you were not given your right to counsel. However, under the Act I am not authorized to consider *Charter* arguments. The scope of the review is limited to the grounds as defined in section 215.5 of the Act.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?

3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent ("Report"), Constable Nassichuk identified himself as the investigating officer and indicated that he stopped your vehicle after you left the scene of an accident. The Report states that the date and time of driving or care or control was November 5, 2011, at 1250 hours.

In his attached Synopsis, Constable Nassichuk stated that Smithers RCMP were enroute to a stolen vehicle /motor vehicle incident in Telkwa BC. Constable Nassichuk stated that while the police were arriving on the scene, a white Ford pickup truck passed police. Constable Nassichuk stated that he left the scene and located the truck on Highway 16, turning onto s.22 . Constable Nassichuk stated that he stopped the truck and found you driving, with your daughter in the passenger seat.

In your affidavit, you stated that just before 12:00 noon on November 5, 2011, you received a call from your daughter, s.22 , asking you to pick her up as she had just been in a car accident. You stated that you went to get her.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on November 5, 2011, at 12:10 p.m.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

The Report indicates that an ASD demand was read to you at 13:10 hours and that you understood the demand.

In your affidavit you stated that the officer came to your window and said that he "smelled booze on your breath" and told you, "you would have to blow into a device". You stated that he was using legal language that you did not understand, you stated that you were not going to do anything until you had a chance to speak to a lawyer. You stated that at no time did the officer ask you if you had anything to drink; nor did you tell him that you were drinking. You stated that he asked you again and you replied, "no." You stated that again he used legal language and asked if you understood; you said "yes", but you actually didn't. You stated that you were shocked by the situation and couldn't think clearly. You stated that the police heard you request for a lawyer, but he didn't respond nor did he tell you that you didn't have that right. You stated that you believed that you had that right because of the car accident, you wanted legal advice. You stated that if the police officer clearly told you in plain language you would have blown into the device. Lastly, you stated that even if you didn't have the right to legal advice the officer had a duty to tell you that.

In considering the evidence before me I find that when conducting an investigation for an IRP an officer has standard questions that he asks. The Report in which the officer records his evidence aids him in answering certain questions such as when you consumed your last drink, and your admission of consumption. In this case the officer stated that you stated that you consumed your last drink ½ hour prior and he stated that you admitted that you consumed alcohol. In my view the very

fact that he recorded this evidence regarding these questions supports on a balance of probabilities that he asked them. In section 3 of the Report is a question. "Did the driver understand the demand?" The officer indicated "yes." He also stated in his Synopsis that he explained the penalty for refusing. I am not convinced that you did not understand this request. The officer stated that you said, "I'm not going to provide you with anything." In addition, the officer stated that after he explained the consequences and you still refused. I find it unlikely that you did not understand what he wanted you to do.

Based on the evidence before me, I am satisfied that there is sufficient evidence to conclude that a demand existed, and that you refused to comply with that demand.

Did you have a reasonable excuse?

You stated that you believed you had a reasonable excuse; because you believe the officer had a duty to tell you that you did not have the right to talk to a lawyer. In an IRP investigation you do not have the right to counsel. In addition, the investigation for the accident is a completely separate matter and I do not have the jurisdiction to consider that matter. Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 5, 2011, at 13:12 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1) of the *Act*. You are prohibited from driving for 90 days. Your prohibition took effect on November 5, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed.

Pursuant to sections 215.45 and 25.1 of the *Act*, you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at:

<http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc: Donald A. Giddings by fax: [250] 877-7752

October 12, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 24, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure had been provided to you. You acknowledged receipt of the police documents. I have proceeded with the hearing based on this information.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable Cacea of the Langley RCMP stated that he witnessed you driving a vehicle at 18:12 hours on September 24, 2011. The constable observed a vehicle in forward motions on 32nd Avenue, with a driver in the driver's seat; the keys were in the ignition while the vehicle was running. In his attached Synopsis, Constable Cacea noted that at 18:12 hours he was conducting a stationary vehicle check in the 26400 block of 32nd Avenue. A vehicle, with BC licence plates s.22 attempted to avoid the check in his lane of travel by driving into oncoming traffic heading westbound. When directed to stop, you pulled over.

In your oral submission, you acknowledged driving a vehicle on September 24, 2011. You challenged the constable's assertion that you attempted to avoid the road check as a misapprehension on constable's part. Your family was in the vehicle with you at the time. You pulled the vehicle over, in between pylons on the road. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on September 24, 2011, at 18:12 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Cacea noted that he formed a reasonable suspicion at 18:13 hours. In his Report, the constable stated that you had an odour of liquor. You admitted to consuming one beer. In his Synopsis, the constable stated that he detected the odour of liquor on your breath. At 18:15 hours Constable Cacea made a breath demand and noted that you understood the demand.

In your submission you affirmed that you consumed one beer earlier in the day. You had not eaten food in two days. The reasonable suspicion requirement for a roadside breath demand is a relatively low standard, consistent with the preventive focus of section 254(2) of the *Criminal Code*: *R v Thompson*, [2001] OJ No 449 (CA). It is suspicion, of alcohol being in the body of the driver, and no more. The constable noted distinct indicia of impairment that you have not challenged. You have not provided persuasive evidence that Constable Cacea did not have an adequate evidentiary basis for an ASD demand. Accordingly, I am satisfied a valid demand was made by Constable Cacea at 18:15 hours, on September 24, 2011.

Police officers must make a demand for an ASD sample directly upon forming a reasonable suspicion of alcohol in the body and they must administer the test immediately upon making that demand for a breath sample. Although there was no evidence with respect to the timing of your last drink, you did not indicate in your evidence any degree of immediacy. Where the particular ASD used has been approved under the statutory scheme, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary. You have not provided any evidence to show that the ASD was not working or functioning properly.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', Constable Cacea stated that you failed to comply with a demand at 18:22 hours on September 24, 2011. You failed to provide a proper sample after three (3) attempts. The constable explained and demonstrated how to provide a breath sample, each time. Three 'NoGo' results registered on the ASD. After the third attempt, that Constable Cacea made the determination that you had failed to provide a breath sample.

You asserted that you were willing to provide a breath sample and attempted to do so. In your submission you stated that you were doing your best to blow into the device, but the ASD did not register a valid result from any of your attempts.

A failure to provide an adequate sample is established when: an adequate sample was not provided after a clear explanation was given as to how to blow into the ASD; a person was given adequate opportunity to blow into an ASD; and the ASD was in working order. You were given an ample opportunity to provide a breath sample for analysis by an ASD. Although Constable Cacea prompted you to provide a sample, you failed to do so, at least three times. The ASD was of an approved type, an Alco-Sensor IV DWF, with valid calibration and service expiry dates, which suggests on a balance of probabilities that it was working properly.

Given the evidence before me, I am satisfied that you failed to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 18:22 hours, on September 24, 2011.

Did you have a reasonable excuse?

A reasonable excuse must involve some circumstance which renders compliance with the demand extremely difficult or likely to involve a substantial risk to the subject's health.

In your submission you indicated that you had ongoing health issues. You have been prescribed Librium as a medication for your sciatica, a condition that engenders back pain. This was compounded by a severe bout of diarrhoea and difficulty controlling your bowels. For the previous two days you had a gastrointestinal infection and were unable to sleep properly: you had to use the bathroom at frequent intervals. At the time of the incident you felt dehydrated and unstable on your feet. Sitting on the curbside may have assisted you to provide a proper sample.

While I can appreciate that you were feeling unwell, suffering abdominal pain and a persistent need to use the bathroom, you have not provided evidence forming the basis of a reasonable justification for your behaviour. Neither of the conditions you have described was so acute as to make compliance with the demand extremely difficult or likely to involve a substantial risk to your health. I also note that the constable did not record any statements from you indicating that your health issues were a possible impediment to providing a breath sample.

Given all of the evidence presented, I find that on a balance of probabilities, you did not have a reasonable excuse for failing to comply with a demand on September 24, 2011, at 18:22 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you failed, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on September 24, 2011, at 18:22 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 24, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. You are responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act; you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

OCTOBER 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 18, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that you have received all of the required disclosure documents. I have proceeded with the review based on this confirmation.

On September 21, 2011, you applied for a written review of your IRP. The Application for Review states that all written material you wish to be considered should be provided in advance of the hearing date. Your hearing was scheduled for September 28, 2011, at 9:30 a.m. As of the date and time of your hearing I have not received a written submission that addressed the grounds on which you applied on.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent regarding your Immediate Roadside Prohibition (Report) and the Notice, Constable Prommer indicates that on September 18, 2011 at 0155 hours, he observed you as the sole occupant, in the driver's seat, on Highway # 97, in Kelowna BC.

You do not challenge this issue.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report under "Reasonable Suspicion for Demand", Constable Prommer indicates that he detected an alcoholic beverage on your breath, and you were unsteady on your feet. Based on these indicia of impairment, at 0158 hours, Constable Prommer formed a reasonable suspicion that you had alcohol in your body and made an ASD demand on you. He indicates that you understood the demand; however, you refused to comply with it. In answer to the question: "How did the driver fail or refuse to provide breath sample?" Constable Prommer recorded that you said several times that you would not blow by stating "no" when the device was lifted to your mouth. In his Report regarding your vehicle impoundment (VI Report), Constable Prommer states that you refused to comply with the ASD.

As there is no tangible evidence before me that diminishes the reliability of Constable Prommer's evidence, I find that on September 18, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

There is no evidence before me that you provided an excuse to Constable Prommer, I do not find that you had a reasonable excuse to fail or refuse to comply with a demand made on you to provide a sample of your breath pursuant to section 254 of the *Criminal Code*.

Decision

I am satisfied that on September 18, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

October 19, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 29, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, John Green that you had received full disclosure of the documents before me. Mr. Green acknowledged that he received all the documents.

Mr. Green made submissions relating to rights to remain silent and to counsel. Insofar as these are constitutional arguments, I have no authority under the Act to consider them. To the extent that they relate to issues I may consider in this review, I address them in the body of this decision.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS") the investigating officer reported that "driver squealed tires into parking lot only occupant was in seat when police pulled behind Driver then got out". The constable identified you as the driver of that vehicle.

On the Notice of Driving Prohibition, the constable reported that you were driving or in care or control of a motor vehicle at 23:00 hours, on September 29, 2011. On the RTS, the constable has indicated making a correction as to the time of driving or care or control, which I find to be unclear. However, in terms of a reasonable chronology of the sequence of events, I rely on the time of 23:00 hours for the time of driving or of care or control of a vehicle, as the constable recorded on the Notice of Driving Prohibition. Your evidence is also consistent with this.

In your statutory declaration, while you disputed the manner in which you pulled into the parking lot of the Avalanche Bar and Grill (the "Avalanche"), you did not dispute that you were driving in relation to the incident as reported by the constable.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act at 23:00 hours, on September 29, 2011.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand was made, and I must determine whether you failed or refused to comply with that demand.

In the RTS, the constable reported the odor of liquor, glassy eyes, and "liquor on breath". The constable reported that, at 23:03 hours, he formed a reasonable suspicion that you were driving or in care or control of a vehicle with alcohol in your body. The constable reported that he made an ASD demand at 23:08 hours. The officer indicated that you understood the demand.

In your statutory declaration, you said you did not drink any alcoholic beverages prior to your arrival at the Avalanche. You said you had not consumed any alcohol or drugs on September 29, 2011. You said you could not have had an odour of alcohol on your breath, nor could there have been an odor of liquor on your person or in your car. You did not dispute the officer's evidence of glassy eyes.

The constable reported that you squealed your tires into the parking lot. The constable's evidence on this point is countered by your evidence that you were driving your car in a "normal

fashion", and pulled into a parking space about 30 feet from the entrance to the Avalanche. In my view, however, the squealing of tires was an event likely to attract the attention of the officer, and one which, in my view, the constable was unlikely to have had any reason to fabricate, and unlikely to have reported inaccurately. Further, I find the constable's description of "squealing tires" is a description that is more precise and less open to interpretation than your description of "normal", and I give greater weight to the constable's description.

While you dispute the officer's observation that you had an odor of liquor on your breath, in view of other findings I make in favor of the officer's evidence in this review, particularly in respect of my finding that he made a demand, which you have denied, I find the overall balance of credibility lies with the officer. This leads me to prefer the officer's evidence that he detected an odor of liquor on your breath. Therefore, this observation, along with the officer's observations of squealing tires and glassy eyes, I find the officer had reasonable suspicion that you were driving with alcohol in your body.

In your statutory declaration, you said that after you had parked your vehicle, you walked to the door of the Avalanche; that the officer walked over to you, asked you for your licence and registration, which you provided. You said that after this, the constable told you to get back in your vehicle, which you said you would not do. You said you would stand where you were, after which the constable grabbed you, put your face against the police car and handcuffed you aggressively.

In his submission, Mr. Green argued this action constituted a de facto arrest, triggering your right to counsel. In your statutory declaration, you said the constable told you that you had a right to remain silent and that you could call a lawyer.

You said you got into the back of the police cruiser, where you were left alone for a few minutes. You said that subsequently the officer returned, opened the back seat door "and started to speak to me." You have not indicated what the officer said when he spoke to you, but you said you did not speak to him. You said the officer asked you why were not speaking to him, and you told him that he had advised you of your right to remain silent and that you wanted to call a lawyer.

You said you were never informed that you had to provide a sample of breath or that you were legally obligated to do so, nor were you given an explanation of the consequences. You said the only discussion of breath samples was in relation to the constable's following statement "If...If I ask you to give me a sample of your breath and you continue not to speak to me is that your way of telling me you are refusing to provide a sample?" Mr. Green submitted that it is plain from the evidence that no demand was read and that no lawful demand under section 254(2) of the *Criminal Code* was made.

Regarding the constable's evidence that he made a demand, Mr. Green argued that although the RTS form is structured such that evidence of a demand is initiated by a single leading statement, "Approved Screening Device Demand Read" followed by spaces for the date and time, and it is unsworn evidence. The lack of detail in this evidence must be weighed against your detailed, sworn evidence, which Mr. Green argued should be preferred. Mr. Green submitted there is no basis upon which I can reject your evidence and accept the officer's

evidence. However, given the noted leading statement in the RTS, I find that it requires a minimal response that the officer met by reporting that the approved screening device demand was read to you at 23:08 hours on September 29, 2011.

Further, I find the Notice of Driving Prohibition contains supporting evidence that the constable made a demand. The constable indicated that he was prohibiting you from driving “because you failed or refused, without a reasonable excuse, to comply with a demand under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device.” As such, when viewed as a whole, I find the constable’s evidence that he read a demand outweighs your sworn statement that no demand was given.

The constable has not said what events occurred in the five minutes between when he formed his reasonable suspicion, at 23:03 hours, and when he read the ASD demand, at 23:08 hours. Mr. Green submitted that in the absence of a reasonable explanation for the delay, the five minute delay between the officer’s formation of reasonable suspicion and the demand means the demand was not given forthwith. I am, however, satisfied that a five minute delay is accounted for by routine police administration that does not require explicit explanation.

In summary, I find that the constable had a reasonable basis for making the demand, and that he made a valid demand for a sample of your breath. I find further that your exercise of your “right to silence” constituted an unequivocal refusal to comply with a demand for a sample of your breath. Further, there is no evidence before me that a result of a breath sample was obtained. Given all the evidence, I find it more likely than not that a demand was read and that you failed or refused to comply with it.

Based on the evidence before me I am satisfied that you failed or refused to provide a sample of your breath when the constable made a demand for one, at 23:08 hours, September 29, 2011.

Did you have a reasonable excuse?

Mr. Green argued that the officer’s conduct, as described by you, was unlawful and unfair and that it was therefore reasonable for you to refuse to comply with the demand. Mr. Green provided criminal cases to support this, which I find are distinguishable on their facts: *R. v. Drda* involved the officer applying a choke hold; *R. v. Cummings* involved the accused’s request to have the breath test administered by other officers after hearing an abusive remark; *R. v. Cristoff* involved police telling the accused to strip and touch his toes. In my view the police behavior in your case, which I accept involved handcuffing you and which you described as aggressive, does not equate to the behaviors that occurred in these cases to justify your refusal to provide a breath sample. In *R. v. Miller*, the court said there must be credible evidence of malice. In my view, credible evidence of malice is not before me in your case.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to provide a breath sample when the officer made a demand for one.

Decision

I am satisfied that you failed or refused without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device on September 29, 2011. I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act. You may resume driving after the expiration of 90 days, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up the vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Please be advised that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see the website of the Office of the Superintendent of Motor Vehicles at <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc. John Green
fax: 250.361.9181

November 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 27, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (the “ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were provided to you. During the oral hearing you acknowledged that you had received disclosure. I have proceeded with the review based on this confirmation.

Our office received the pictures, medical document and taxi receipt that you couriered. However, as discussed during the hearing, I have no authority to address your allegations of physical abuse by the police officer. Further, the taxi receipt has no relevance to the issues in this review.

Issues

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent regarding your Immediate Roadside Prohibition (the "Report"), Constable Rodney indicates that on October 27, 2011 at 0800 hours, witnesses observed you drive up to a construction road block and had you pull over to wait for police to arrive.

In the attached Synopsis, Constable Rodney indicates that on October 27th at 0811 hours, s.22 advised Mission RCMP of an intoxicated female sitting in her car at the BC Hydro Station. When Constable Rodney arrived, he identified you as the driver of the vehicle.

During the oral hearing you provided the following evidence:

- On October 27, 2011, you were in Vancouver attending a business meeting.
- You left Vancouver between 1:30 a.m. and 2:00 a.m to drive to White Rock.
- You got lost, took the wrong turnoff and ended up in Mission.
- You drove for hours and were unable to find your way back to White Rock.
- You decided to pull over and sleep in the back seat of your car.
- Between 7:30 a.m. and 8:00 a.m., two construction workers knocked on your window and woke you up.
- One of the workers drove your car to a compound. You had no idea where it was.
- You were sitting inside the building of the compound, drinking a cup of coffee, when police arrived.
- The construction worker that drove your car, had your car keys.
- You asked Constable Rodney to speak to the construction worker who drove your car and he refused.
- Constable Rodney has provided no statements from the construction workers, to confirm that you were driving.

While I have considered your evidence, I have some concern with the credibility of your statements. I find it unlikely that if you were lost in the Lower Mainland, you would drive for hours without pulling into a service station or a convenience store and ask for directions. I also find it unlikely that you would let a complete stranger drive your vehicle to an unknown location and that you would stay at this unknown location and allow a stranger to maintain possession of your car keys, rather than leave to drive home.

I prefer the police evidence that witnesses observed you drive up to a construction road block and kept you there until police arrived.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report, Constable Rodney indicates that you smelled of liquor and had slurred, incoherent speech. Constable Rodney also indicates that you appeared confused and tired. Based on these indicia of impairment, Constable Rodney formed a reasonable suspicion that you had alcohol in your body and made an ASD demand on you at 0803 hours. He indicates that you understood the demand; however, you refused to comply with it. In answer to the question: "How did the driver fail or refuse to provide breath sample?" Constable Rodney indicates that you were told that a sample of your breath was required and that if you refused, you could be arrested. However, you refused multiple times and resisted arrest.

During the oral hearing you acknowledged that you refused to provide a breath sample.

Based on the evidence before me, I find that on October 27, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

During the oral hearing you stated that you had not been drinking and you refused to comply with the ASD demand because you are aware that it is against the law for a police officer to request a breath sample when a driver has not been drinking.

While I have considered your submissions, it was not unlawful for Constable Rodney to make an ASD demand on you. Consequently, I do not find that you had a reasonable excuse to refuse to comply with the demand.

Decision

I am satisfied that on October 27, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, you can make arrangements to have the vehicle released. You are responsible for all towing and storage charges, including the day the vehicle is eligible for release. You should know that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the *Act*. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

NOVEMBER 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 31, 2011, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to your lawyer, Sarah Leamon, in disclosure. Ms. Leamon acknowledged that she had received them on your behalf. I have proceeded with the hearing based on this confirmation.

In her submission, Ms. Leamon argued that the IRP should be revoked, because you were denied constitutional rights under the *Canadian Charter of Rights and Freedoms*, including the right to contact a lawyer. Ms. Leamon included the *Schultz* case to support this argument. I respectfully disagree with Ms. Leamon's conclusions in this regard, since the *Schultz* case is distinguishable from your situation. First, Ms. Schultz was prohibited from driving under a

different section of the Act. Further, the IRP legislation was not in place at the time of the *Schultz* case, and I am not aware of any court decisions declaring it unconstitutional. Also, as an adjudicator of the Office of the Superintendent of Motor Vehicles, I don't have authority to decide whether the legislation is unconstitutional. I only have authority to decide issues in s. 215.5.

Ms. Leamon also cited *Spencer v. British Columbia (Superintendent of Motor Vehicles)* on your behalf. In particular, she noted the court's direction in paragraph 63 of the case. I have taken Ms. Leamon's arguments into consideration while rendering a decision in this review. I also note the case of *Roberson v. British Columbia (Superintendent of Motor Vehicles)* (September 8, 2011), Kamloops 45551 (BCSC). This is a judicial review of an adjudicator's decision dated February 23, 2011, which upheld the notice of driving prohibition served on Mr. Roberson. The driver was prohibited from driving for failing or refusing without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a breath sample for analysis by an ASD. The investigating officer's Report to the Superintendent of Motor Vehicles was somewhat confusing and ambiguous regarding the time of the demand, which is similar to your situation. I will comment further on the relevance of the cases throughout this decision letter.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Notice, Constable Wagner stated that on October 31, 2011, at 2335 hours, he had reasonable grounds to believe that you had care or control of a motor vehicle on a highway or industrial road. I note that the officer initially wrote "2355" for the time on the Notice, but he corrected it to read "2335" hours. In the Report to Superintendent (RTS), Constable Wagner wrote "2355" as the time of driving, which corresponds to his initial entry on the Notice. He also gave this as the time he read the ASD demand to you. These and other incongruous time entries cause me concern, and as a result, I have reduced the weight that I give to the officer's evidence. However, I only have the officer's evidence before me; I have no direct evidence from you setting out another version of events. In the *Spencer* case, the adjudicator had evidence from the applicant to rebut that of the officer. This led to Mr. Justice McEwan's directions in paragraph 63 on how the re-hearing should be conducted in that case.

I also note that Constable Wagner's investigation appeared to proceed routinely, so it is reasonable to infer that events happened in chronological order. Based on the evidence before me, I am satisfied on a balance of probabilities that you were a driver within the meaning of section 215.41(1) of the Act on October 31, 2011, at 2335 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Occurrence Report (OR), Constable Wagner noted having observed the vehicle being driven erratically before pulling it over and finding you to be the driver. When you exited the vehicle, the officer observed you to be "heavily intoxicated by liquor by smell, red eyes, slurred speech." He took you to the police vehicle for an ASD test. In the RTS, the officer stated having read you the ASD demand on October 31, 2011, at 2355 hours and that you understood the demand. He later stated that you refused the demand at "2340 hours", so the time of the demand is not in proper chronological order. In considering the totality of the evidence, I find that the demand occurred between 2335 and 2340 hours, after the officer formed a reasonable suspicion that you had alcohol in your body. There is no compelling evidence before me to the contrary.

Further, in your application for review, you checked the box indicating that you had a reasonable excuse for failing to comply with the peace officer's demand to provide a breath sample, which indicates your acknowledgement of having failed or refused to provide a breath sample. This interpretation is supported by the court in the *Roberson* case. At paragraph 21, the court noted that Mr. Roberson applied for a review of the prohibition on the basis that he had a reasonable excuse for failing to comply with the officer's demand to provide a breath sample. "In other words, he did not question the propriety of the demand."

In addition, the court in *Roberson* says the following in paragraph 25:

"... The finding as to whether a lawful demand was made, of course, does not depend upon what was on the card, but on the totality of the evidence. It was not unreasonable for the adjudicator to conclude a proper demand was made where the officer says it was made and understood, and where Mr. Roberson was asked to blow into an approved screening device. That is, as I have indicated, a reasonable interpretation of the evidence before the adjudicator." [emphasis added]

Based on the totality of the evidence before me, I am satisfied on a balance of probabilities that a valid demand existed.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. The officer wrote on the RTS that you "refused to provide sample." In part six of the RTS, he stated:

"-would not blow on 3 chances. Would not explain why would not blow. Understood consequences. attempted to suck instead of blow. Understood the difference between blowing and sucking."

The officer noted that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 31, 2011, at 2340 hours. You did not dispute this evidence.

Based on the evidence before me, I am satisfied that you failed or refused to comply with an ASD demand on October 31, 2011, at 2340 hours.

Did you have a reasonable excuse?

Your lawyer pointed to the officer's failure to complete the information required in part four of the RTS. She argued that we cannot be sure that you were asked to blow into an approved and/or properly calibrated and serviced instrument. The officer is not required to provide this information unless he alleges that your breath sample registered on the device. The evidence before me is that you did not provide a suitable sample for analysis on an ASD, despite having had ample opportunity to do so.

There is no evidence before me explaining why you did not provide a breath sample, so I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with an ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 31, 2011, at 2340 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 31, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also confirmed.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc. Sarah Leamon
604-685-8308 (fax)

October 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 2, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s report.

Preliminary Matters

At the beginning of the oral hearing, I confirmed with your lawyer, Sarah Leamon, that she had received full disclosure. Based on this confirmation, I will proceed with the review.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "IRP Report"), the investigating officer checked the box to indicate that he observed you as the driver. He recorded the date and time of driving/care or control as October 2, 2011, at 0049 hours. He stated that when he stopped you, you were operating the vehicle from the driver's seat.

There is no evidence before me to contradict the officer's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 2, 2011, at 0049 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the IRP Report, the officer stated that there was a strong odour of liquor, you were swaying when standing, and you "admitted to consuming some drinks after playing hockey". He recorded the time of your last drink as 2352 hours. He indicated that he formed his reasonable suspicion at 0052 hours and made the ASD demand at 0054 hours. He checked the box to indicate that you understood the demand. At the bottom of the IRP Report, the officer indicated that you failed or refused to comply with the demand on October 2, 2011, at 0054 hours. He stated, "The process was explained to the driver twice. The ASD demand was read to the driver. The driver stated "I refuse to provide a sample."

You provided two versions of your affidavit, one affirmed prior to ("Version 1") and one affirmed after ("Version 2") Ms. Leamon received a copy of your wife's October 7, 2011 letter to the Superintendent of Motor Vehicles. In Version 1, you stated that the officer asked how much you had to drink, and you replied, "I had one beer in the last hour or so". You said "in the last hour or so" because you knew you were not impaired by alcohol and you did not want to arouse suspicion. You believed that your answer was accurate, for the most part, as you were honest about the type and amount of alcohol you had consumed. I take it that you have qualified the accuracy of your response because you did not tell the officer that you had consumed the beer 20 minutes prior to the vehicle stop. The officer then asked you to step out of your vehicle. You were confused by what was going on, but you complied with his request. The officer then presented you with a small machine and began reading some things off a card, after which he asked if you understood. You answered "no". The officer then read the same thing off the card, and again asked if you understood. You again answered "no", as you were confused, your head was swimming, you had no idea what was going on, and much of what the officer was saying sounded like "jargon". The officer then told you to blow into the machine. You replied that you would not do anything until you understood what was happening. The officer said "fine" and asked you to go and sit in your vehicle. You were still confused. You called your wife, and she came to get you. After she arrived, the officer handed you some papers, and told you that you were prohibited for 90 days and the vehicle would be impounded for 30 days. You were shocked, and you still did not know what was happening. You then put your belongings, including a large hockey bag and two dogs, in your wife's vehicle. You had no difficulty doing that, and at no point during your interaction with the officer were you swaying while standing. You also denied telling the officer that you were refusing.

In Version 2, you added information about your citizenship and residency. You also added evidence regarding what you said to the officer about your drinking pattern. You elaborated on what you were thinking when you told the officer that you would not do anything until you understood what was happening. You explained that you just wanted an explanation. You noted that you told your wife that you were confused. You stated that you asked the officer about jail and court, and you were very confused by what was happening. You denied that the officer told you anything about criminal charges. You also denied that you told your wife that you decided not to take any chances.

In her October 7, 2011 letter, your wife explained that you had a glass of wine with dinner, and you agreed not to have a second glass of wine because you would be driving later. She stated that the officer told you that if you blew there would be a criminal charge, but if you did not blow, there would not be a criminal charge. You were worried about your ability to visit Canada and about your job, so you decided not to take any chances even though you would most likely have passed. When the officer asked how many drinks you had consumed, you replied, "2". Your wife then explained what happened after you called her, and she suggested that the officer apologized because he knew he had made a mistake. Your wife also provided some email correspondence regarding the incident.

I also have before me evidence from s.22 and s.22 supporting your claim that you only consumed one beer after the hockey game.

Finally, Mr. s.22 provided evidence that based on one beer your blood alcohol level at the time the officer formed his reasonable suspicion would have been between 13 and 19 milligrams of alcohol in one hundred milliliters of blood.

Ms. Leamon provided me with a copy of the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)*. She referenced paragraphs 58 and 63. I have read and considered *Spencer*, including the noted paragraphs, in making this decision.

Ms. Leamon argued that you never refused to comply with the ASD demand. She noted that the wording on the police caution card does not explain to the driver why the demand is being made. She suggested that you were not impaired, and that under the circumstances it was reasonable for you to require an explanation from the officer before providing a breath sample.

It is curious to me that in Version 1 the officer asked you to step out of your vehicle after you told him about the beer, but in Version 2 the officer asked you twice how much you had had to drink, and you told him about the glass of wine you had consumed earlier. I understand that you added this after reading your wife's letter, but I am left to wonder if you forgot about this evidence or if there is some other reason why you did not mention it in Version 1. In any event, you admitted to recent alcohol consumption, the officer twice read the ASD demand from a card, and he also told you to blow into the device. As such, I find that the officer made a valid ASD demand.

I now turn to the matter of whether you failed or refused to comply with that demand. Even if I were to accept that you were not swaying, you did not tell the officer you had consumed “some” drinks after hockey, you did not tell the officer that you were refusing, and you told the officer that you did not understand, I would still find that you refused to comply with the ASD demand. As noted, I find that the officer made a valid demand. He twice read that demand off a card, and Ms. Leamon provided me with a copy of a card that presumably contains the wording, or similar wording, of the ASD demand. While the demand is not in plain language, it makes it clear that the individual is required to provide a breath sample. Additionally, the officer told you in plain language to blow into the machine. As a result, I cannot accept that you did not know what was required of you. In that regard, there is no suggestion that you have any difficulty with English, or that you suffer from a cognitive impairment or other medical condition that would make it difficult for you to understand that you were required to provide a sample of your breath. Further, the officer had just finished asking you about your drinking pattern, and according to Version 2, the officer had asked you twice about the specifics of your drinking. While the officer may not have explained why he was demanding a sample of your breath, it follows that the demand was related, at least in part, to your admission of alcohol consumption. Further still, while you are not a s.22 , you spend a considerable portion of the year here, and you hold a driver’s licence from s.22 , a state in the United States that presumably also has laws around drinking and driving. Although you may not be aware of the details of the IRP legislation, I find it inconceivable that you were not aware that the officer wanted to obtain a sample of your breath to determine the amount of alcohol in your bloodstream. I also find it inconceivable that you did not realize that you were required to comply with the officer’s demand. Finally, you did not deny your wife’s evidence that you agreed to only have one glass of wine prior to driving her vehicle. That evidence, and her evidence that you strongly believe in not drinking and driving, demonstrates that you were well-aware that alcohol consumption prior to driving can be problematic.

In short, based on your evidence, you consumed alcohol 20 minutes prior to the vehicle stop, you admitted to recent consumption, the officer clarified your consumption pattern and then asked you to step out of the vehicle, presented you with a small machine, made two formal demands, and informally told you to blow into the machine. Based on this sequence of events, I cannot accept that you did not understand what was going on, even if you were not impaired. As such, I find that by telling the officer you would not do anything until you understood what was happening, you constructively refused to comply with the ASD demand.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand on October 2, 2011, at 0054 hours.

Did you have a reasonable excuse?

Based on the evidence before me, I do not find that you had a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 2, 2011, at 0054 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 2, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our www.pssg.gov.bc.ca/osmv/.

s.15

s.15

Adjudicator

cc: Sarah Leamon
Fax: 604-685-8308

October 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 1, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing I listed the disclosure documents that were sent to your lawyer, Sandy Bartlett. He acknowledged that he received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), Constable Mooney indicated that she witnessed you as the driver of a vehicle stopped in a roadblock. The constable stated that the date and time of driving or care or control was September 30, 2011, at 23:53 hours.

In your affidavit you acknowledged that you were stopped in a roadblock on September 30, 2011.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 30, 2011, at 23:53 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the constable indicated that she formed her reasonable suspicion for the demand due to an odour of liquor on your breath, and that you admitted to consumption. The constable stated that she read you the ASD demand at 23:53 hours.

Your evidence is that after being stopped in a roadblock the constable asked "if we had anything to drink that evening." You advised the constable that you were on your way home and that you had not been drinking. When the constable asked why she could smell the odour of alcohol in the vehicle, your husband responded that he had been drinking. The constable asked you to pull over to the side of the road and asked again if you had had anything to drink. You responded that you just had a drink. In s.22 affidavit, he confirmed your evidence. Mr. Bartlett indicated that the odour of liquor was likely coming from your husband; however, he acknowledged that you initially denied consumption and then admitted to having one drink.

I note that the constable's evidence in the Report is that she detected the odour of alcohol on your breath, she did not state it was from the vehicle. As well, you admitted to having one drink.

During the hearing Mr. Bartlett stated that in the Report, the constable did not check the box to indicate whether or not you understood the demand. However, you provided the following evidence:

- In an affidavit from s.22 whom you telephoned while at the scene, she stated s.22 conveyed that she had been pulled over by the police and was being asked to take a breathalyzer test" and "... s.22 came back to speak to me and told me she needed to talk to Sandy first before she takes the breathalyzer."
- In an affidavit from Mr. Bartlett whom you telephoned while at the scene, he stated s.22 was upset and told me that she had been stopped by the police who demanded that she provide a breath sample."
- In your affidavit you stated "She (the constable) then told me that I would have to provide a breath sample" and "I then told the RCMP officer that I would like to speak with my lawyer first."

While I acknowledge that the constable did not tick the box to indicate that you understood the demand, based on the above noted evidence you provided, I am satisfied that you understood the demand to provide a sample of your breath.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to provide a breath sample, I turn again to the Report. In section 6, the constable stated "ASD demand read driver asked what would happen if she didn't provide a sample consequences explained, she said I'm not going to provide a sample". At 23:55 hours, the constable determined that you had failed or refused to comply with the demand.

There is no evidence before me that you provided a sample of your breath.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 23:55 hours.

Did you have a reasonable excuse?

In your affidavit you indicated that you told the constable that you wanted to speak to your lawyer before providing a sample. The constable told you that you were a grown woman and that you would have to make a decision on your own. You asked to speak to your husband and were denied. You again stated that you wanted to speak with your lawyer, and you were told that your only options were to provide a breath sample. You asked what would happen if you refused, and were told that it would be the same as a fail reading, and that your car would be impounded for 30 days and your licence would be suspended for 90 days. You told the constable that you still refused. You felt her explanation of denial to counsel was not accurate, and until you spoke with a lawyer you were not comfortable doing anything further.

You stated that the constable advised you that she was going to prepare your paperwork and began walking away towards the police car, and in a raised voice said "refusal". You then used your cell phone to call Mr. Bartlett and when the constable asked what you were doing, you told her that you were speaking to your lawyer. Mr. Bartlett attended the scene about 4 – 5 minutes later. The constable then handed you the prohibition paperwork. Mr. Bartlett indicated in his affidavit that when he had spoken to you on the telephone he was going to give advice to you; however, you advised him that you had told the police you would not give a breath sample. He stated that he told you there was no need for advice as you had refused to provide a breath sample. However, during the oral hearing Mr. Bartlett stated that his advice to you was to provide a sample. He stated that had you been given the opportunity to contact counsel about one and a half minutes earlier, you would have provided a sample.

In your affidavit you indicated that the constable's statement in section 6 of the Report that "consequences explained" is false. You stated that the constable did not disclose that you would have to take a Responsible Driver Program (RDP) and register for the Ignition Interlock Program (IIP). You stated that the constable also omitted your multiple requests to speak with your lawyer, and your immediate action of calling your lawyer as the constable was walking to the patrol car.

While I do not know for certain how many requests you made to contact your lawyer, or what the constable advised you in that regard, I must inform you that when an officer gives you an ASD demand you are required to provide a sample. You do not have the right to contact or obtain counsel. There is no provision under section 215 of the Act which directs officers to provide drivers the right to speak to counsel, or anyone else, during an impaired driving investigation. Further, I can advise you that officers are not required to advise individuals of the RDP or the IIP. Information relating to these additional consequences is available on the back of the Notice which was served to you. I do not understand your point of your "immediate action" of calling your lawyer as the constable was walking to the patrol car. At this point in her investigation, it appears to me that the constable had already deemed that you had refused her demand. In any case, there is no compelling evidence before me that you agreed to provide a sample after consulting with Mr. Bartlett.

After careful review of all of the evidence before me, I am satisfied that you understood a sample of your breath had been requested and that you refused to provide a sample, despite being advised of the consequences, because you were denied access to counsel.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on September 30, 2011, at 23:55 hours.

I therefore confirm your driving prohibition, as required by s. 215.41(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 1, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections

d 25.1 of the Act. For further information, please see our website at:

[.pssg.gov.bc.ca/osmv/](http://pssg.gov.bc.ca/osmv/)

s.15

s.15

Adjudicator

cc: Sandy Bartlett
Fax: 250-741-0008

November 30, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 20, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that the approved screening device (ASD) registered a warn or a fail.

I must revoke your driving prohibition, cancel the monetary penalty, and revoke any vehicle impoundment if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a warn or a fail.

Section 215.5(2) of the Act states that if I determine that you were prohibited from driving for a longer time period than the Act requires, I must substitute the correct prohibition, vary the monetary penalty for which you are liable under section 215.44(1), and vary or revoke any corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to you. I have proceeded with the hearing based on this confirmation.

Issues

There are two issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. Did the ASD register a warn or a fail?

Facts, Evidence and Analysis

In reviewing the evidence before me, I note the Notice of Driving Prohibition states that you are prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a Criminal Code demand for a sample of your breath on an ASD. There is no evidence before me that you failed or refused such a demand. Consequently, I cannot uphold this prohibition.

Decision

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.41(1) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Drivers Licence.

The vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including November 30, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

November 22, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 2, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1) or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing, I confirmed with your lawyer, Laura Allen, that she had received full disclosure.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (IRP Report), Constable Foster indicated that he identified you as the driver of the vehicle when you were stopped by police. He recorded the date and time of driving/care or control as November 2, 2011, at 20:35 hours.

You have not challenged this issue.

Based on the evidence before me, I am satisfied that you were the driver within the meaning of section 215.41(1) of the Act on November 2, 2011, at 20:35 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

Constable Foster noted that you had a strong odor of liquor on your breath, your eyes were watery and glassy, your balance was poor and you admitted to consuming 1 drink earlier in the evening. Constable Foster indicated that he read you an ASD demand at 20:38 hours and stated that he explained it 4 times in simple terms.

Based on the evidence before me I am satisfied that a lawful demand was made to you.

With regard to the refusal, Constable Foster stated in the IRP Report that you advised him that you would not provide a sample, you knew your rights and you did not have to give one. In the Report to Superintendent for the Vehicle Impoundment Constable Foster stated that you wished to give a sample after the paperwork was filled out. He noted that on three separate attempts you blew in and then sucked, providing invalid samples. He further noted that on each occasion you were advised how to properly provide a sample and indicated that you understood 100%.

In your affidavit you stated that after you were pulled over by Constable Foster he told you that he was going to have you blow into a roadside device. You indicated that you questioned him as to whether or not you were legally obligated to provide a sample because you did not think there were grounds for him to require you to do that. You noted that a second officer at the scene discussed the legal requirements with you and then you told that officer you would provide a sample. You stated that Constable Foster brought the device to you and asked you to

blow into it. You stated that at no point did you observe Constable Foster, or any other officer, blow into the device. You indicated that you blew into the same device two times and that both times you made sure your lips were sealed around the mouthpiece and that you blew directly into the device as long and as hard as you could. You stated that after you blew into the device the first time, the officer told you that the device did not capture a reading. You stated that Constable Foster told you that you would have one more chance to blow or else you would be given an IRP for failing to provide a sample. You stated that after you blew into the device the second time Constable Foster again told you that the device did not capture a reading and he told you he was giving you an IRP for failing to provide a sample. You stated that the device was in your sight the entire time and you did not observe Constable Foster push any buttons. You indicated that you told Constable Foster that you were not refusing and that you wanted to provide a sample. You asked him if there was anything you could do, such as blow into another machine. However, Constable Foster told you that you had your chance. You stated that you did not intend to fail to provide a breath sample and that you tried as hard as you could to provide one.

Ms. Allen argued that the onus is on the officer to establish that the device was in good working order. She noted that there is no evidence before me that the officer tested the device himself to prove it was working or that it had been used that evening. She noted that there is no evidence that the device was even turned on. Ms. Allen provided me with a copy of the Alco-Sensor IV DWF Screener and noted that the device would display certain symbols to prove it was working. She noted that there is no evidence of displays or lack of displays. Ms. Allen noted that your initial refusal was more of a discussion of whether you were legally obligated to provide a sample. She noted that when you were told you were required to provide a sample, you complied. Ms. Allen noted that you blew into the device twice and that you blew as hard as you could. She submitted that your prohibition should be revoked based on the fact that the officer did not justify the prohibition by providing evidence that the device was in working order. Ms. provided me with a copy of the recent decision of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* and *R. v. Sobolik* in support of her submission. Ms. Allen also directed me to section 4 and 5 on the IRP Report where the officer recorded the time of the test as 20:40 and the time of the refusal as 20:38. She argued that it is not possible to refuse a test prior to taking one and suggested that this calls into question the officer's credibility.

I have read and considered the cases and the manual Ms. Allen provided in making my decision. With regard to the time of the test and the time of the refusal, I note the time of the ASD demand was at 20:38. It follows then that 20:38 was the time you initially refused, and your final refusal was after the test time of 20:40 hours.

In your affidavit you portrayed yourself as a cooperative individual. That portrayal is very different from how the constable described you. I note that you did not dispute the officer's evidence that you advised you would not provide a sample, you know your rights and you do not have to give one. It is noteworthy that while you stated you were given two opportunities to provide a sample, the officer indicated in the IRP Report, the Synopsis, and the Vehicle Impoundment Report that you were given three opportunities to provide a sample. I accept the officer's evidence that you were given three opportunities and that you did not provide a suitable

sample. Further, in my view, I find your statements and the constable's description that you blew in and then sucked consistent with someone being uncooperative.

With respect to Ms. Allen's suggestion that the onus is on the officer to provide evidence that the device was in good working order, I note that the officer indicated that the device was an Alco-Sensor IV DWF, serial no. 031922, with a calibration expiry date of 2011/11/29 and a service expiry date as 2012/10/01, which indicates that the device was correctly calibrated and serviced. I do not require any further information.

Based on the evidence before me, I find that you deliberately avoided providing a sample. I also find it more likely than not that you refused to comply with the officer's demand.

Did you have a reasonable excuse?

You did not provide any submissions on this issue.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for refusing to provide a breath sample at the time.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 2, 2011.

I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5 of the Act. You are prohibited from driving for 90 days, which came into effect on November 2, 2011. When your prohibition ends you may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle will remain in the impound lot for the remainder of the impoundment period. It will be eligible for release thirty days from the date IRP came into effect.

s.15

a separate letter requiring you to register in and attend remedial programs
ons of sections 215.45 and 25.1 of the Act. For further information, please see
[tp://www.pssg.gov.bc.ca/osmv/](http://www.pssg.gov.bc.ca/osmv/) .

s.15

Adjudicator

cc: Laura Allen
250-753-5368

October 14, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 3, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were faxed to you on October 6, 2011, and additional disclosure documents were faxed to you on October 11, 2011. I have proceeded with the hearing based on this confirmation.

In your affidavit you stated that your legal name is s.22 You do not know any s.22 or s.22 who the police officer kept referring to in the documents. I note that on October 4, 2011, Constable Meleady faxed a "Police Supplemental to File Report" to our office, which was faxed to you on October 11, 2011. In his fax the constable indicated that he "mis-spelled the name of the driver and did not use her complete name." In this document he referred to the driver as s.22, which is how your name is currently reflected in the ICBC database. If this is incorrect you should contact ICBC and advise them so that they can

make a correction. That aside, you applied for this review and have submitted evidence in support of it. Therefore, I am satisfied that the IRP was issued to you.

You stated that it is very important that you get your licence back as

s.22

s.22 You also stated that you have never received a traffic ticket and you have no criminal record. However, under the Act I am not authorized to consider hardship, personal circumstances, or transportation needs in this review. The scope of the review is limited to the grounds as defined in the Act. In addition, I do not have the authority to consider a person's driving or criminal record in the context of this review.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), Constable Meleady indicated that an individual phoned the RCMP to inform them of a possible impaired driver. When police arrived, they found you asleep in the driver's seat of the vehicle, the keys were in the ignition and the engine was running. The constable stated that the date and time of driving or care or control was October 3, 2011, at 22:10 hours.

In your affidavit you stated that you returned home from having dinner with a friend on the evening of October 3, 2011, and you were unable to open the security gate with your remote control. You indicated that you were looking down in your lap while trying to fix the remote control, but that you were not asleep.

Although your evidence regarding the state in which the constable found you differs from his, the issue before me is whether or not you were a driver, and you admitted to driving the vehicle prior to your encounter with police.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 3, 2011, at 22:10 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the constable indicated that he formed his reasonable suspicion for the demand due to an odour of liquor on your breath, that you were asleep behind the wheel with the keys in the ignition and the engine running, and that you admitted to consuming alcohol. The constable stated that he read you the ASD demand at 22:18 hours, and he ticked the box to indicate that you understood the demand.

As I previously acknowledged, you deny that you were sleeping in the vehicle. Further, you stated that English is your second language and you could not understand all of the things the constable was asking or telling you. However, regardless of whether or not you were sleeping in the vehicle, the constable stated that he smelled alcohol on your breath and you admitted to consuming alcohol. As well, you stated that when the officer told you to blow into the little machine, you tried as hard as you could to do so. Therefore, I am satisfied that you understood the constable's demand to provide a sample of your breath.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to provide a breath sample, I turn to the Report. In section 6, the constable stated "s.22 was given at least 6 – 8 chances to provide sample, would not blow hard enough into ASD despite being warned on at least 3 occasions". At 22:20 hours, the constable determined that you had failed or refused to comply with the demand.

There is no evidence before me that you provided a sample of your breath.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 22:20 hours.

Did you have a reasonable excuse?

You stated that you are of very slight build and weigh less than 100 pounds, and you are not a strong person in any way. You stated that if you did not blow hard enough for the machine to work, it was because you could not do so, not because you refused. You stated that you tried as hard as you could to blow into the machine, that you kept trying each time the officer asked you to, and in no way did you ever refuse to provide a sample. As well, as I previously noted, you indicated that English is your second language and you did not understand everything the constable was asking or telling you. You stated that you were never offered the assistance of an interpreter.

First, I am puzzled by your statements regarding your weight, build and strength. I am uncertain how these physical traits could affect your ability to provide a sample, nor did you provide me with sufficient evidence to convince me that they would prohibit you from doing so.

Next, while English may be your second language, the constable's evidence does not indicate that there were any communication problems, or that you requested any clarification during his investigation. It appears to me that you understood the constable's ASD demand as you made some attempts to provide a sample. It is unclear to me what, specifically, you did not understand, as you did not provide me with that information in your affidavit. Although you stated you were not offered an interpreter, you did not indicate that you asked for one. If you needed an interpreter, then I would expect that you would have requested one. Further, if you did not understand what the constable was asking or telling you, it seems more likely than not to me that this would have been evident to him; however, there is no compelling evidence before me to indicate that this was the case.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on October 3, 2011, at 22:20 hours.

I therefore confirm your driving prohibition, as required by s. 215.41(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 3, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at:

<http://.bc.ca/osmv/>

s.15

s.15

Adjudicator

cc: Craig Sicotte
Fax: 604-585-8964

October 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 26, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to your lawyer, Joseph Gordon. I have proceeded with the hearing based on this confirmation.

Mr. Gordon submitted that the legislative scheme under which your driving prohibition was issued is unconstitutional. I have no authority under the Act to consider this submission.

Mr. Gordon also argued that the Report to Superintendent (RTS) is not a "report, in the form established by the Superintendent" as required by section 215.47(d) of the Act, and therefore I cannot consider it in this review. Mr. Gordon argued that there is no evidence that the legislature or the Superintendent approved the RTS.

I note that under section 215.41(6) a notice of driving prohibition must be in the “prescribed form”, while s. 215.47(d) requires “a report, in the form established by the superintendent.”

Mr. Gordon argued that the terms “establish” and “prescribe” are synonyms under section 1 of the *Interpretation Act*, and a properly established RTS involves the same requirements as a form that is “prescribed”.

Mr. Gordon provided a copy of a letter from the Superintendent, dated September 22, 2011 (the “Superintendent’s letter”), in which the Superintendent said, “Reports to Superintendent have been in use for a number of years for various administrative sanctions. These reports, which are not prescribed by regulations, are developed by the Superintendent’s office in consultation with the police.”

In my view, the words “prescribe” and “establish” are not synonyms under the Act and must have been intended under the Act to convey different meanings. The words “to prescribe” or a variation thereof do not appear under s. 215.47(d), and I am satisfied that the RTS was not required to be prescribed. I am also satisfied that the words in the Superintendent’s letter, “developed by the Superintendent’s office” indicate that the RTS is “established by the Superintendent.” As a result, I am satisfied that I may consider the RTS as having been properly established by the Superintendent, and that it is evidence I may consider in this review.

If I am wrong in this analysis, I proceed with this review on the basis of s. 215.49(1)(d) and that the RTS is “other relevant documents and information”.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent Vehicle Impoundment and in the RTS, the investigating officer indicated that a witness had reported “a vehicle all over the road, nearly hitting other vehicles.” The constable indicated that “vehicle was stopped” and the “driver was in driver’s seat, vehicle was operational, keys in ignition.” The constable has not specifically reported the time you were driving or in care or control of a vehicle. However, in view of the likelihood that the constable responded to the witness’ report of a “vehicle all over the road”, I am satisfied that you were driving or in care or control within three hours of the constable’s formation of reasonable suspicion, which he reported to occur at 20:35 hours, and his demand for a sample of your breath, which he reported to occur at 20:37 hours, on September 26, 2011, as required by section 254(2) of the *Criminal Code*.

You have not disputed the constable’s evidence on this point. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on

September 26, 2011 within three hours of the constable's formation of reasonable suspicion and his demand for a sample of your breath.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand. A demand must be made forthwith after an officer has formed reasonable suspicion that a driver has alcohol in their body.

In the constable's evidence, he formed a reasonable suspicion at 20:35 hours that you were driving or in care or control of a vehicle with alcohol in your body. The constable indicated the basis for his reasonable suspicion was the following: you admitted to "consuming a drink in Vancouver" and he detected the "odor of mouthwash on breath". The constable read an ASD demand at 20:37 hours.

There is no evidence before me to the contrary. I am satisfied that the constable made a valid demand for a sample of breath for analysis by means of an ASD.

The constable reported that you failed or refused to comply with a demand at 20:40 hours. On the RTS, the constable reported that "driver stated he would not provide a breath sample after he first agreed to." On the Report to Superintendent Vehicle Impoundment, the officer reported "...driver agreed to provide breath sample. The driver then said he would not provide a breath sample."

There is no evidence before me to the contrary. I am satisfied that you unequivocally failed or refused to comply with the constable's demand.

Mr. Gordon argued that the RTS fails to identify the ASD type, the serial number, the calibration or service expiry "in consequence whereof the adjudicator cannot determine whether a demand was on the Applicant to supply a sample of his breath under section 254 of the Criminal Code (pursuant to section 94.1(b) of the MVA) which requires employment of an approved screening device."

In my view, paragraph 3 of the RTS, which states "Approved Screening Device Demand Read" and which is followed by the constable's report of a date and time, fulfils any requirement that the demand be for a breath sample by means of an approved screening device. As such, in my view, the constable was not required to report the details of the ASD, as Mr. Gordon submitted.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to comply with the constable's demand. As a result, I find that you did not have a reasonable excuse to refuse to comply with the constable's demand for an ASD test.

Decision

I am satisfied that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on September 26, 2011, at 20:40 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5 (1) of the Act. Your prohibition took effect on September 26, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by the owner may attend the impound lot and pick up your vehicle. The owner is responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see the Office of the Superintendent of Motor Vehicles' website at <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc. Joseph Gordon
fax: 250.860.9937

October 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 19, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to your lawyer, Jennifer Currie. I have proceeded with the hearing based on this confirmation.

In her written submissions, Ms. Currie made arguments on constitutional grounds. I have no authority under the Act to consider these arguments.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), the investigating officer reported that:

“Driver had keys to vehicle in her right pocket. Witness puts Driver in care and control of the vehicle several times trying to start the vehicle before police arrived.”

The constable also reported that you stated, “I don’t understand, I was just trying to move my car.”

In the Report to Superintendent Vehicle Impoundment, the constable reported that:

“A witness called 911 to report the accident. Witt advised police that he observed the vehicle on the sidewalk with obvious damage from hitting the metal lamp post. Police arrived on scene and spoke with driver/RO...”

I accept the constable’s evidence that an accident occurred, as you have not disputed this. Nor have you disputed that you told the constable you were trying to move your vehicle. Ms. Currie has made submissions in relation to the time of those events, however.

Ms. Currie submitted that the officer failed to provide evidence of the time or date you were driving or in care or control of the vehicle; that without a time and date of driving or care or control of a vehicle, I cannot be satisfied that the ASD demand was made within three hours of the time of driving or care or control of a vehicle as required under s. 254 (2)(b) of the *Criminal Code*, and therefore I cannot be satisfied that the ASD demand was lawful. Ms. Currie submitted that the constable did not witness you driving or in care or control of a vehicle, and there is no indication as to what time the unidentified alleged witness saw you trying to start your vehicle; nor is there evidence to indicate that the witness saw the accident occur or how much time passed between the time of the accident and when the witness called 911.

I find it is reasonable to infer that the time of driving or care and control was within three hours of the constable’s formation of reasonable suspicion and the demand. First, I refer to the constable’s report that a witness said you were “trying to start vehicle before the police arrived.” In my view, the constable’s use of the word “before”, in the context of a motor vehicle accident and the likelihood that police were dispatched to the scene promptly after receiving the accident report, implies that your alleged action of attempting to start your vehicle occurred more or less immediately, or within a few minutes, before the police arrived.

Secondly, I find your reported statement that you were “just trying to move” your car, further indicates the action occurred more or less immediately before police arrived. Again, in the context of the accident and the likelihood that the police responded promptly to the accident report, in my view, the evidence indicates it is unlikely you were attempting to start or move your vehicle more than three hours before police arrived. I find it unlikely you would have told the police that you were “just trying to move” your car if the last time you attempted to do so was over three hours before.

I am satisfied your statement that you were trying to move your car constitutes an admission of driving or care or control of the vehicle at the relevant time, and that this is corroborated by the constable's report of what the witness stated. You have not disputed that you made this statement, and I am satisfied that you did. In turn, I am satisfied that you were driving or in care or control of a vehicle within three hours of the constable's demand, which the constable reportedly made at 0740 hours on September 19, 2011.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 19, 2011, less than three hours before the officer made a breath demand.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand. A demand must be made forthwith after an officer has formed reasonable suspicion that a driver has alcohol in their body.

In the constable's evidence, she formed a reasonable suspicion at 0741 that you were driving with alcohol in your body, based on her observations that you had a strong odor of liquor emanating from your breath, you were unsteady on your feet and had glassy eyes. The constable reported that she read an ASD demand at 0740 hours.

Ms. Currie referred to case law in submitting that the *Criminal Code* requires that an officer form the requisite subjective suspicion of alcohol in the body prior to reading an ASD demand. Ms. Currie submitted that the constable made her demand at 0740 hours and formed her suspicion that you had alcohol in your body one minute later, at 0741 hours. Ms. Currie argued that the constable, having formed her reasonable suspicion after making her demand, means the demand is unlawful.

I agree that the law requires the officer to form her reasonable suspicion prior to making her demand. However, in your case, it is my view that the recorded times, being so close at 0740 and 0741 hours, simply indicate that the constable erred in how she recorded the sequence of events. In my view, the constable either wrote the information onto the RTS sequentially as events were happening, or she wrote the information on the RTS after some or all the events had occurred. If she wrote the report sequentially as events occurred, it is my view that the physical structure of the report is evidence in itself that the constable turned her mind to the evidence of consumption before she read the demand. That is to say, she recorded the evidence of consumption before she recorded that she read a demand, meaning she must have formed her reasonable suspicion before she made the demand, and the times she recorded were errors and did not reflect the actual sequence of events. On the other hand, if the constable wrote the report after the conclusion of some or all the relevant events, in my view it is reasonable to conclude that the constable was estimating the times for the events, and simply erred in recording the times such that they were out of sequence from their actual occurrence. Either way, I find it is reasonable to conclude that the officer did in fact form her reasonable suspicion prior to when she read the demand.

Also, in light of the nearness in the constable's record of the times, I find the demand was made forthwith despite the constable's error in recording their sequence. As a result, I am satisfied that the constable made a valid demand for a sample of your breath for analysis by means of an ASD.

The officer indicated that after she read the ASD demand, you stated, "I don't understand, I was trying to move my car." The constable reported that she asked you a second time for a breath sample, and you stated, "No, I won't." The officer reported that she explained the outcome of a refusal. The constable said you replied with, "I won't do it," and reported that you failed or refused to comply with a demand at 0742 hours, on September 19, 2011. You have not disputed that you said these words, and I am satisfied that they reflect your unequivocal refusal to comply with the constable's demand for an ASD test.

Did you have a reasonable excuse?

Ms. Currie presented no evidence or submissions that you had a reasonable excuse to refuse to comply with the constable's demand for an ASD test. There is nothing in the officer's evidence that indicates you had a reasonable excuse. As a result, I find that you did not have a reasonable excuse to refuse to comply with the constable's demand for an ASD test.

Decision

I am satisfied that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on September 19, 2011, at 0742 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5 (1) of the Act. Your prohibition took effect on September 19, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up your vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Please be advised you may also receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see the Office of the Superintendent of Motor Vehicles' website at <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc. Jennifer Currie; fax: 604.590.5626

November 9, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 22, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing I confirmed with your lawyer, John Green, that he received all twelve (12) pages of disclosure documents. I have proceeded with the review based on this confirmation.

Mr. Green stated that the IRP Scheme is unconstitutional. In response, I note that the scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (RTS) Constable Kerr identified himself as the investigating officer in this matter. Cst. Kerr stated that you stopped at a police road check, and that you were the driver of the vehicle.

Neither you nor Mr. Green has provided any evidence that contradicts that of Cst. Kerr.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on October 22, 2011, at 01:03 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Occurrence Report, Cst. Kerr stated that he placed his face into the driver's side window and detected the odour of cigarette smoke and liquor. Cst. Kerr stated that he noted you were speaking with a slight slur. Cst. Kerr stated in the RTS that he read you the ASD demand at 01:08 hours and indicated that you understood the demand.

During the oral hearing, Mr. Green pointed out that in the Report on page 1 Cst. Kerr stated in the 4th paragraph:

“Cst. Kerr believed that s.22 ability to operate a motor vehicle was impaired by alcohol given the odor detected on his breath, his slow slurred speech and his bloodshot/watery eyes.”

Mr. Green stated that is a lawful 254(2) *Criminal Code* ASD demand when the officer has a reasonable suspicion and requires a sample of breath to elevate that suspicion to a belief. However, if the officer has already formed the belief that a driver's ability is impaired by alcohol prior to issuing the 254(2) ASD demand then it is not a lawful demand. He referred me to the cases of: *R v Diruggiero*; *R v Minielly*, and *R. v. Carty*.

I have reviewed the Report and Mr. Green's submission, and I concede that the word “belief” used by Cst. Kerr in the above excerpt from the Report, on its own merits could be questionable. However, when I look at the above excerpt segregated out by Mr. Green in conjunction with the rest of the evidence and the sequence of events contained in the Report I note the following:

- You pulled up to a road check and Cst. Kerr approached your vehicle and you rolled down the window. Cst. Kerr immediately made the observations that you were smoking a cigarette, and that your eyes were glossy and bloodshot.
- Cst. Kerr stated that he placed his face into the driver's side window and detected the odour of cigarette smoke and liquor. Cst. Kerr stated that he noted you were speaking with a slight slur.
- Cst. Kerr told you that he suspected you had consumed liquor.
- Cst. Kerr believe your ability to drive was impaired by alcohol, he instructed you to put your cigarette out.

- Cst. Foreman stayed with you while Cst. Kerr retrieved an ASD. Cst. Kerr returned with the ASD and requested you to exit your vehicle.
- Cst. Kerr smelled a strong odor of liquor which was coming from you.
- Cst. Kerr read you the ASD demand from the official ASD card at 01:08 hours.

I find that by looking at the totality of the evidence and the sequence of events it is reasonable to conclude for the purposes of this IRP administrative review that Cst. Kerr had a reasonable suspicion that your ability to drive was impaired by alcohol and therefore issued you a 254(2) *Criminal Code* ASD demand.

On a balance of probabilities I am satisfied that the ASD demand made on you was a lawful demand.

In determining whether you failed or refused to comply with a demand, I turn to the RTS, under the section labeled "Failure or Refusal to Comply with Demand". Here, the officer has stated that you said you would not provide a sample of your breath. Cst. Kerr stated in the Report that you said to him "No" and "I am not doing it". Cst. Kerr stated that he explained the consequences and that you stated you would not provide a sample. Cst. Kerr has recorded the time of refusal on the RTS as being 01:08 hours.

I have not been provided with any evidence from you or Mr. Green on this issue. As such, I find that there is no evidence before me to contradict that of the officer.

Based on the evidence before me, I am satisfied that you did fail or refuse to comply with an ASD demand on October 22, 2011, at 01:08 hours.

Did you have a reasonable excuse?

Cst. Kerr stated in the Report that you told him that he did not have the reasonable and probable grounds to give the demand.

Mr. Green suggested that the ASD demand issued by Cst. Kerr was outside the ambit of section 254(2), and need not have been legally complied with.

I acknowledge Mr. Green's submission; however, since I have already determined above that the ASD demand issued on you by Cst. Kerr was a lawful demand, I find that this is not a reasonable excuse for refusing to comply with Cst. Kerr's demand.

Neither you nor your lawyer has provided any further evidence that would indicate to me that you had a reasonable excuse at the time for refusing to comply with Cst. Kerr's ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 22, 2011, at 01:08 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 22, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up your vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>.

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Adjudicator

cc: John Green
Fax (250) 361-9181

November 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 22, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

As it is determinative to the outcome, I will only address the second issue.

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

First, I must determine whether a demand existed.

When considering the evidence before me, I find that you were not given a demand forthwith or as soon as practicable. Consequently, I find the demand was invalid.

Decision

I therefore revoke your driving prohibition, the monetary and other penalties you received, and the vehicle impoundment as required by s. 215.5 of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Drivers Licence, you must make an appointment to reapply for the Enhanced Drivers Licence.

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will costs up to and including November 10, 2011. You are responsible for and that date. You should know that if the vehicle is not reclaimed, the o the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

cc: Cory Armour
250-762-3163

October 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 8, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review on October 20, 2011, I listed the disclosure documents which were provided to your lawyer, Ron Lamperson, on your behalf regarding this matter. He acknowledged that you had received them.

In your written statement, you noted that
s.22 requires you to be able to drive. You will not be able to work if you are

prohibited from driving. I acknowledge and appreciate the impact a driving prohibition can have on your personal and professional circumstances. However, under the Act, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. In addition, the Act does not grant me any discretion to alter the terms of a driving prohibition unless that prohibition is lengthier than the Act requires.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report To Superintendent ("the Report"), Constable Martin identified himself as the investigating officer and indicated that he witnessed you driving. In the Report, the officer stated that "driver was seated in driver's seat, as the vehicle approached Cst. Martin at a checkstop engine was running, keys in ignition." In the Occurrence Report, he further noted that you were stopped at a checkstop on Memorial Avenue in Qualicum Beach, and you were identified as the driver and lone occupant. In the Report, the officer has noted the time and date of driving/care or control as 21:45 hours on October 8, 2011.

You have provided no evidence to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with a demand

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the officer stated that you had an odour of liquor on your breath. The officer has indicated that you denied consumption of alcohol. He has noted that he read you the ASD demand at 21:47 hours, and that you understood the demand. Based on the evidence before me, I am satisfied that a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, the officer's evidence was that you were "simulating" blowing into the ASD. In the Occurrence Report, the officer has further stated that he demonstrated how to provide a proper sample and on your first opportunity the device was still flashing "TEST" which indicated there was no airflow through the instrument. On your third attempt, the officer noted you began to blow into the device with barely enough force to register but stopped blowing before the device accepted the sample. The Constable stated that he demonstrated again how to provide a proper sample, and then he stated that you "simulated" blowing on the next two attempts. The officer stated that on the next attempt you exhaled, and then sucked the air back. He warned you not to do this, and stated

that you did the same thing on your next opportunity. The officer determined you were failing or refusing to comply with the demand at approximately 21:50 hours.

In your submission, you stated that while according to the officer you did not provide a suitable sample of your breath, you “did not do so willfully”. You stated that you were trying your best to provide a sample, but just breathing regularly was causing you difficulties at the time.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 21:50 hours, on October 8, 2011.

Did you have a reasonable excuse?

In your statement, you note that you have a life-long history of respiratory problems. You stated that you have respiratory restrictions due to your asthma, permanent lung damage due to having pneumonia several times, and you have residual cough and shortness of breath from a recent case of bronchitis.

On the night in question, you said it was cold and rainy which aggravated your shortness of breath, and you were having trouble breathing, never mind breathing deeply and exhaling forcefully for an extended period of time. You maintain that while you tried your best to provide a proper sample, your medical condition prevented you producing the volume of air necessary for the ASD to register a reading. You have provided a letter from your doctor confirming that you recently had significant bronchitis and you are being treated for a residual cough and shortness of breath. Your doctor also noted that while she is not an expert on ASD's, that asthma can reduce expiratory flow and this may have been a factor in your inability to provide a proper sample.

Your lawyer also stated that there is no evidence that you were not blowing properly, and that your respiratory problems constitute a reasonable excuse.

After considering all the evidence, I note the following:

- I find it odd that if you were physically unable to provide a proper sample that you did not inform the officer of your medical issues,
- Similarly, I find it odd that that if you had trouble just breathing as you maintain, that the officer did not observe your condition and make note of this in his Report.
- I also note that despite your claims in your statement, the officer was convinced that you were simulating breathing, and purposefully not blowing properly into the ASD,
- I find it odd that you make no mention of alcohol consumption, admission or denial, on the evening in question in your statement, and while you denied consumption to the officer, you apparently had no issue with having to provide a breath sample.

While I acknowledge that your medical conditions may have made providing a proper sample difficult, I am not convinced that you were physically unable to provide a sample. In sum, I find that I cannot be sure you were trying to provide a proper sample, and I do not find your medical conditions constitute a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 8, 2011, at 21:50 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 8, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the 30 day impoundment period. Once the vehicle is eligible for release, someone authorized by you may attend the impound lot and pick up the vehicle. You, as the owner, are responsible for towing and storage charges, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

cc Ron Lamperson
fax: (250) 752 - 2055

October 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 18, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1) or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the outset of your oral hearing you confirmed that you received full disclosure.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Jodoin stated that you were seated in the driver's seat with the engine in operation and the key in the ignition. He recorded the date and time of driving/care or control as September 18, 2011, at 00:14 hours.

You have not challenged this issue.

Based on the evidence before me, I am satisfied that you were the driver within the meaning of section 215.41(1) of the Act on September 18, 2011, at 00:14 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the RTS, Constable Jodoin stated that you had a strong odor of liquor on your breath and person. He noted that you were read an ASD demand at 00:16 hours and that you understood the demand.

Based on the evidence before me I am satisfied that a lawful demand was made to you.

With regard to the refusal, the RTS indicates that you failed or refused to comply with a demand at 00:23 hours on September 18, 2011. Constable Jodoin noted that you stated "no" when you were asked if you were going to supply a sample. He further noted that you argued that you were doing the right thing by being the designated driver and you wondered why you were being punished for it.

You have not provided any evidence to rebut that of the constable. Based on the evidence before me, I find that it is more likely than not that you refused to comply with the officer's demand.

Did you have a reasonable excuse?

You stated that you did not understand the consequences of not providing a sample. You also stated that you are not up to date on the new drinking and driving laws. You explained that you were scared, confused, upset and nervous. You further explained that you thought that the ASD would read the alcohol in your breath from the night before. Additionally, you stated that the officer led you to believe you were going to fail. You provided written statements from three of your friends.

I have considered yours and your friends' statements. However, I am not convinced nor am I satisfied that at the time you had a reasonable excuse to refuse a breath demand. I can appreciate that you may have been scared, confused, upset and nervous. I can also appreciate that you may not have understood the new laws. However, these are not sufficient reasons for being unable or unwilling to provide a proper breath sample in response to a valid demand.

In my consideration of the evidence, I find that you had no excuse for failing or refusing to comply with the breath demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 18, 2011, at 00:23 hours.

I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5 of the Act. You are prohibited from driving for 90 days, which came into effect on September 18, 2011. When your prohibition ends you may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle will remain in the impound lot for the remainder of the impoundment period. It will be eligible for release thirty days from the date IRP came into effect.

s.15

separate letter requiring you to register in and attend remedial programs
ns of sections 215.45 and 25.1 of the Act. For further information, please see
[p://www.pssg.gov.bc.ca/osmv/](http://www.pssg.gov.bc.ca/osmv/) .

s.15

Adjudicator

November 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 29, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing I checked that your lawyer, John Cheevers, had received full disclosure of the documents before me. He acknowledged that he had received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Occurrence Report (the "Report"), Constable Gallant indicated that at 00:20 hours on October 29, 2011, he initiated a traffic stop after he observed a vehicle failing to stop at two consecutive stop signs. Your identity was confirmed by your driver's licence.

There is no evidence before me which contradicts the constable's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 29, 2011, at 00:20 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report to Superintendent (the "RTS"), the constable indicated that you admitted to consumption, your eyes were bloodshot, your speech was very slurred, you fumbled for your documents, and there was an odour of liquor on your breath. The constable indicated that he read you the ASD demand at 00:25 hours and that you understood the demand.

There is no evidence before me which contradicts the constable's evidence. Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Report where the constable provided the following evidence:

- It was explained in detail how to provide a proper breath sample. You stated that you understood.
- The constable used the Alco-Sensor IV DWF ASD with the serial number of 100821.
- The constable is a certified member to operate this device.
- On your initial attempt to blow, you placed your lips around the mouthpiece but did not blow air into the ASD, which registered a "NOGO".
- Instructions on how to properly blow were given to you again, and the penalties for refusing to blow were explained to you. You stated that you understood.
- On your second attempt, you blew for approximately 1 second and then stopped. You stated that was all you could blow.
- It was again explained to you that you needed to blow until instructed to stop.
- On your third attempt you blew for approximately 1 second and then stopped. You again stated that you could not blow any longer.
- It was evident that you were purposely failing to follow directions and would not provide a proper sample.
- It was noted that you had no issues speaking, your breathing seemed fine, and no reason was observed as to why you could not blow into the device properly.

In the RTS the constable indicated that you had failed or refused to comply with the demand at 00:25 hours.

Mr. Cheevers provided and referred to the RCMP Memorandum on ASDs (the "Memorandum") during the hearing. The Memorandum indicates that the subject has 1 minute to provide a sample and if a suitable sample is not provided in this time frame, the ASD will display a "VOID" reading.

Further, the Memorandum states that during each 1 minute test sequence window, a subject has a maximum of 3 attempts to provide a suitable sample. During the first 2 attempts, if the subject provides a sample of breath but it does not meet the minimum sample acceptance parameters, the device will display a "NOGO" reading. If a third attempt is unsuccessful, the device will display "VOID" and the operator must eject the mouthpiece. To start a new test, a mouthpiece must be inserted.

In summary, Mr. Cheevers has argued that based on the Memorandum it would be impossible for the constable to get the ASD results as he said they were. Mr. Cheevers referenced the Report and stated that if you provided no breath into the ASD on the first test, there would not be a "NOGO" reading. He stated that the second time you blew there were no results indicated, and on your third attempt there was a "NOGO" reading. He stated that the constable did not know how to operate the ASD, and that he did not operate it in a proper manner. He also pointed out that the constable's evidence is that both the failure and refusal of the demand and the reading of the demand were at 00:25 hours. He stated that the time is impossible, that it would have taken 4 – 5 minutes to have done everything he stated that he did.

Last, Mr. Cheevers referenced the Memorandum where it states "It is imperative that all ASD operators are able to adequately articulate how the device functions and the correct sequence of messages displayed by the device, when called upon to give testimony in court. Mr. Cheevers stated that "this is a type of court." However, I am mindful that this is an administrative process and as such, issues are weighed on a balance of probabilities, not beyond a reasonable doubt as they are in the criminal courts.

First, I will address the issue Mr. Cheevers raised regarding the reading of the demand and the failure or refusal to provide a sample both occurring at 00:25 hours. While he stated that this would have been impossible and it would have taken 4 – 5 minutes, I find it important to note that Mr. Cheevers was not a witness to the event so he cannot attest to how long it took the constable to perform his tasks. Further, the constable's evidence is all that I have before me on this issue. I have no direct evidence from you to the contrary. However, even if these events did occur over a longer period of time, such as 4 – 5 minutes as Mr. Cheevers suggested, I do not find this to be an unreasonable amount of time for the constable to provide you with instructions multiple times, to explain the consequences of not providing a sample, and to administer 3 ASD tests.

I acknowledge Mr. Cheevers submissions regarding the test results noted by the constable. However, as evidenced in the Memorandum, if a subject provides a sample of breath that does not meet the minimum requirements the ASD will register a "NOGO". Therefore, I find it more likely than not that you provided some air into the ASD during your first test, hence the "NOGO" reading; however, it may have been so miniscule that the constable's interpretation was that there was no breath at all. I do not know why the constable did not indicate a result for the second test; however, I do not find that to be a fatal flaw. As the constable stated that you blew for approximately 1 second during the second test, it seems likely to me that the ASD registered a "NOGO". I also acknowledge that, based on the Memorandum, after 1 minute or 3 unsuccessful attempts the device will register a "VOID". It follows then, that if I am satisfied that the ASD used in your case registered a "NOGO" in each of your three attempts, I must also be satisfied that the constable ejected and then inserted the mouthpiece after your first or second attempt, as three readings of this nature would not have been possible had he not done so. I do not require this specific evidence from the constable in order to be satisfied that this is what occurred. It just makes sense to me that if all 3 tests resulted in "NOGO" readings, the constable would have had to eject and then insert the mouthpiece in order to obtain these results.

As I previously stated, the constable indicated that he was certified to operate the ASD he was using. Based on that information, as well as my findings above, I find there is no compelling evidence before me that the constable did not know how to operate the device, or that he did not operate it in the proper manner.

Last, I find it important to note the absence of any direct evidence from you with regard to the constable's statements that you did not blow air into the ASD or that you would blow for approximately 1 second and stop, and you advised the constable you could not blow any longer. Based on the evidence before me, you understood the instructions on how to provide a proper sample which you were given multiple times, and you understood the consequences of not providing a sample. It was also noted that you had no speaking or breathing issues, and no reason was observed as to why you could not blow into the ASD properly. If this was not the case, then I would expect that you would have provided evidence vigorously opposing the constable's account of what transpired; however, there is no such evidence before me.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 00:25 hours.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to provide a sample.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on October 29, 2011, at 00:25 hours.

I therefore confirm your driving prohibition, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 29, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: pssg.gov.bc.ca/osmv/

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Adjudicator

cc: John Cheevers
Fax: 604-685-8308

October 06, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 16, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (“Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (“ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s reports.

Preliminary Matters

Records at this office indicate that disclosure was provided to you. I have proceeded with the hearing based on this confirmation.

In your written submission, you indicated that you asked the officer why you had been pulled over and Constable Malcolm said that an anonymous call had been received from Pollard Street stating you had been drinking. You indicated in your submission that you had not been drinking and that the anonymous phone call was placed by your friends disgruntled landlord. I infer from your submission that you take issue with the reason that the police stopped you. However, the reason for the stop is not an issue in this review.

You indicated, in your written submission that you are not being charged criminally. However, whether or not the police charge you criminally is not an issue in this administrative review.

In your affidavit, you indicated that the officer spelled your name incorrectly on one of the forms. You opined that, as the officer had your driver's licence, these mistakes should not have been made. You stated "This officer had the correct information in front of him and he still made glaring mistakes, I wonder if his investigation isn't as riddled with mistakes?" While I acknowledge that the officer misspelled your middle name as "Michael" on the Vehicle Impoundment Notice of Impoundment form, I do not find it to be compelling evidence that the officer's investigation is riddled with mistakes. Consequently, I find that I can rely on the officer's evidence.

You further indicated that you contacted a lawyer who informed you that the IRP legislation was being challenged in the Courts and that you could challenge the events there. You stated that have no money to pay the fines associated with this prohibition, or proceed with action in the Courts. I take this to mean that this prohibition will cause you financial hardship. I acknowledge and appreciate your situation. However, under the *Act* I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review.

You indicated that your driver's licence has stipulations regarding your driving. However, I am unable to consider any stipulations your driver's licence may have for the purposes of this review. The scope of the review is limited to the grounds defined in the *Act*. The issues I can consider are limited to the issues as listed below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the IRP Report to Superintendent ("IRP Report"), Peace Officer Malcolm is identified as the investigating officer. The investigating officer checked the box to indicate that he witnessed you as the driver of the vehicle. The officer stated that you were located driving on Front Street and that you turned left onto Carson Avenue where a vehicle stop was performed. The officer stated that the date and time of driving or care or control was September 16, 2011, at 19:48 hours.

In your affidavit, you acknowledged that you were driving and that you were pulled over by several police vehicles on September 16, 2011.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* on September 16, 2011, at 19:48 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

The officer indicated that while you were answering questions, he smelled a strong odor of liquor on your breath. He also noted that your speech was slow and that you were swaying while standing. The officer further indicated that he read an ASD demand to you on September 16, 2011, at 19:48 hours, and that you understood the demand.

You indicated in your submission that you did not have anything to drink on the night in question. You stated that a friend had spilled a beer on a counter in her home and some beer had landed on your hooded sweatshirt. You indicated that two different police officer's informed you that they could smell alcohol.

While you have reasoned that your hooded sweatshirt smelled of liquor as a result of the spilled beer at your friend's house, I note that the officer specifically stated that he smelled a strong odor of liquor on your breath, not your sweatshirt. I also note that you have been silent about the officer's evidence regarding your "slow speech" and "swaying while standing". Nonetheless, I find that the officer's observations were sufficient to provide him with a reasonable suspicion that you had alcohol in your body.

Considering the evidence before me, I find that the officer had a reasonable suspicion to make the demand and that a valid demand for a sample of your breath into an ASD was made.

In the IRP Report the officer stated that you said you understood the demand and that refusing carried the same penalty as an impaired charge. He also stated that you said you would not blow into anything. In the IRP Report, the officer noted the date and time of failure or refusal to comply with the demand was September 16, 2011, at 19:50 hours.

You stated that a screening device was placed on the hood of a police vehicle, and you stated "I wouldn't blow into it", and then repeated this statement again. This implies to me that you understood that you were required to provide a sample of your breath into an ASD and that you made it clear to the police that you were not going to blow into it.

There is no indication, in the police evidence, that you made any attempt to provide a sample of your breath into an ASD. Additionally, it is clear in your submission that you informed the officer that you would not provide a sample of your breath.

Based on the evidence before me in its entirety, I am satisfied that a demand existed, and that you failed or refused to comply with that demand.

Did you have a reasonable excuse?

The officer indicated in the IRP Report that you said you understood that it was a demand and that refusing carried the same penalty as an impaired charge. Furthermore, you said that you were not blowing into anything.

In your submission, you stated that if you had known the full legal ramifications of not blowing into a screening device you would have blown immediately. Since you have never been pulled over, you were unclear on how the law worked regarding a roadside screening device.

I find here that your evidence contradicts that of the officer. In order for me to accept your version of events, I would have to conclude that the officer falsified his evidence. Officers are trained to observe, collect and document evidence as part of their regular duties. Additionally, an officer has no motive to falsify evidence, whereas you are facing a driving prohibition and associated penalties. The officer clearly indicated in the IRP Report that you understood the consequences of not providing a sample, and that you said that you were not blowing into anything. This is consistent with your own submission in which you stated "I stated "I wouldn't blow into it" then I repeated this statement again." I find no reason not to rely on the officer's evidence. I find it hard to believe that the officer would not have informed you of the consequences. Furthermore there is no evidence before me that this was your excuse or reason at the time. Regardless, I do not find whether or not you knew the full legal ramifications to be a reasonable excuse for refusing to provide a breath sample.

Based on the evidence before me in its entirety, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 16, 2011, at 19:50 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1) of the *Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 16, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up the vehicle. You are responsible for towing and storage charges that have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

separate letter requiring you to register in and attend remedial programs of sections 215.45 and 25.1 of the *Act*. For further information, please <http://www.pssg.gov.bc.ca/osmv>.

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Adjudicator

November 10, 2011

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REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 21, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (the "ASD"), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Jeremy Carr. I have proceeded with the hearing based on this confirmation.

Mr. Carr submits that your right to legal counsel was violated. He asserts that when Constable Versteeg asked if you wanted to speak to legal counsel, your response was blatantly ambiguous, which was not an indication in any way of a waiver of that right and Constable Versteeg failed to give you the supplementary Prosper warning.

While I have considered Mr. Carr's submission, I have no authority under the *Act* to revoke a driving prohibition on this basis.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the report to Superintendent regarding your Immediate Roadside Prohibition (the "Report") and attached Narrative, Constable Versteeg indicates that on October 21, 2011 at 00:46 hours, you drove your vehicle onto a gravel pile near the 7500 block of Pemberton Meadows Road in Pemberton.

In your written submission you acknowledge driving.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In her Report, Constable Versteeg indicates that you had a strong odour of liquor on your breath, blood shot eyes, and you swayed as you stood and staggered when you walked. You also admitted to consuming a few beers and had your last drink two to three hours earlier. Based on these indicia of impairment, at 00:55 hours, Constable Versteeg formed a reasonable suspicion that you had alcohol in your body and made an ASD demand on you at 01:20 hours. She indicates that you understood the demand; however, you refused to comply with it.

In her Occurrence Report, Constable Versteeg fully explained the procedure for providing a suitable sample and you advised her that you had provided samples in the past. Constable Versteeg told you to take a deep breath, create a tight seal with your lips around the mouthpiece and to blow as hard as you could until she told you to stop.

At 01:24 hours, you failed to provide a suitable sample by stopping your breath mid-sample. Constable Versteeg had you provide a second breath sample; however, it was also unsuccessful. This time Constable Versteeg could hear air escaping from around the mouthpiece and again, you stopped blowing mid-sample.

Constable Versteeg put a new mouthpiece into the ASD and had you provide a third breath sample. However, you blocked the airway with your tongue half way through the sample. Your cheeks were puffed out and again, air could be heard escaping around the mouthpiece.

Constable Versteeg put a new mouthpiece into the ASD and had you provide another breath sample. She again heard air escaping from around the mouthpiece and no air was running through the ASD as you again, blocked the mouthpiece with your tongue.

A fifth and sixth attempt were done with a second ASD. A fresh mouthpiece was utilized; however, you again blocked the mouthpiece with your tongue and air was escaping from around the mouthpiece. Constable Versteeg provided you with a seventh opportunity to provide a suitable breath sample; however, you again blocked the mouthpiece with your tongue and air escaped from around the mouthpiece.

After each attempt, Constable Versteeg provided you with direction on how to provide a proper sample. She also warned you that failure to provide a suitable sample would result in a charge of refusal.

You told her that you understood and repeatedly plead with Constable Versteeg for another chance; however, after providing you with seven opportunities to provide a suitable breath sample without success, Constable Versteeg charged you with refusal.

You have provided a hand-written submission dated October 21, 2011, in which you state the following:

- After sliding into the ditch with your Ford F350 on October 21, 2011, the closest resident called the RCMP and an officer came and gave you a roadside test. You blew into it 5 times as hard as you could, but the officer kept telling you that you were not blowing hard enough.
- You told the officer that you could not blow any harder and she said that you were refusing.
- You told her numerous times that you were not refusing.
- You were taken to the detachment where no more tests were administered.

Mr. Carr has provided a copy of your written declaration in which you declare the following:

- At no time on October 21, 2011, by words or conduct, did you refuse to comply with the ASD demand made by Constable Versteeg. You explicitly repeated several times that you were not refusing to comply with the ASD demand.
- You attempted to provide a sample of breath into an ASD five times. You were trying very hard to provide a sample and were not in any way trying to thwart the results.
- At no time did Constable Versteeg search your vehicle or remove anything from inside of it. A second police officer arrived at the scene for this purpose, whereas Constable Versteeg remained with you at all times.
- At no time did Constable Versteeg demand that you provide additional breath samples to determine the concentration of alcohol in your blood.

Mr. Carr made the following written submissions:

- A demand made pursuant to s. 254(2) of the *Criminal Code* requires that the ASD demand be made “forthwith”.
- Because Constable Versteeg did not issue the ASD demand in a “forthwith” manner, the demand is invalid.
- Jurisprudence across Canada has consistently held that an ASD demand that is not made “forthwith” is invalid and it has been held that as little as a four-minute delay may render the demand invalid.
- The BC Supreme Court has recently reminded us that the delegate must not assume “from the existence of a demand that the demand was properly founded”.
- In the Report to Superintendent, Constable Versteeg indicates that she formed reasonable and probable grounds at 00:46 hours; however, the ASD demand was not issued until 01:20 hours. Therefore, 34 minutes elapsed between the time that reasonable suspicion was formed and the time of the demand.
- In the court decision, *Spencer v. the Superintendent of Motor Vehicles* [2011] BCSC 1311, the judge confirmed that the police are not deemed to have a credibility advantage, but that the case be determined impartially on the evidence.
- In response to the question in paragraph 3 of the Report to Superintendent, “Explain any delays if sample is not taken forthwith after demand”, Constable Versteeg states that her priority was with searching the vehicle and “clearing firearms prior to tow truck arriving so they could deal with vehicle safely”.
- The evidence in your statutory declaration contradicts this statement as you submit that at no time did Constable Versteeg search the vehicle or remove the firearms. Rather, a second officer arrived at the scene and dealt with this matter, with Constable Versteeg remaining with you at all times.
- The evidence shows that the delay occurred because Constable Versteeg was confused about the proper procedure. According to Constable Versteeg’s Narrative, she arrested you for impaired driving at 00:50 hours based on your indicia of impairment. At 01:05 hours, Constable Versteeg again arrested you, Chartered and warned you from the card and then contacted two different police officers, Constables Rudiak and Kennedy, for instructions about how to deal with the issue. It is only after these calls that she issues you the ASD demand.
- Because the demand was delayed, it is invalid and your driving prohibition should be revoked.

While I have considered your evidence and Mr. Carr’s submissions, I have the following concerns:

First, I note that Mr. Carr has made an error in his submissions regarding the time Constable Versteeg formed her reasonable suspicion. Mr. Carr states that the time was 00:46 hours, when it was actually 00:55 hours. Therefore, there were 25 minutes between the time she formed a reasonable suspicion and the time she made the ASD demand, not 34 minutes as Mr. Carr indicates.

Further, although you state in your declaration that a second officer arrived on scene and it was this officer that searched your vehicle for firearms, I do not find your evidence compelling. In your hand-written submission you state, "the officer came and gave me a roadside test." You make no mention of a second officer. Also, I find it highly improbable that Constable Versteeg would indicate throughout her Narrative that she was the only officer conducting the investigation if there was another officer assisting her. There would be no reason for Constable Versteeg to do this. In addition, if a second officer was on scene, I find it unlikely that Constable Versteeg would have contacted Constable Rudiak as she could have simply consulted with the second officer at the scene. Moreover, if she was with you the entire time as you contend, it seems unlikely that she would simply stay with you for 25 minutes without taking any police action, such as making the ASD demand. Based on these concerns, I prefer Constable Versteeg's evidence that she searched your vehicle.

I also do not find that there was an unreasonable delay in making the ASD demand. Mr. Carr submits that section 254(2) of the *Criminal Code* requires that the ASD demand be made as soon as the peace officer has reasonable grounds to suspect that a driver has alcohol in their body. In support of his submission, Mr. Carr has referred to a number of court decisions, including, *R. v. Woods*; a criminal case heard in the Supreme Court of Canada in 2005. In that decision, Justice McLachlin held that in order for section 254(2) of the *Criminal Code* to be constitutionally valid, it has both implicit and explicit requirements of immediacy and this immediacy requirement is implicit with respect to the demand for a breath sample.

While I acknowledge this court decision and Mr. Carr's submissions, the wording of section 254(2) of the *Criminal Code* has been amended since 2005 and the *Woods* decision was written with respect to the previous wording of section 254(2).

The new wording of section 254(2) reads in part:

If a peace officer has reasonable grounds to suspect that a person has alcohol ...in their body and that person has, within the preceding three hours, operated a motor vehiclethe peace officer may, by demand, require the person to ...provide forthwith a sample of breath ... by means of an approved screening device

In reading this section literally, it states that once a peace officer makes an ASD demand, the driver must provide a sample forthwith. Further, with respect to determining the meaning or intent of amended section 254(2), it is important to note that in section 254(3), which addresses the Breath demand, the word "forthwith" has been removed and only "as soon as practicable" remains. As the word "forthwith" has been removed from section 254(3), I find it reasonable to infer that the amended section 254(2) no longer has the implicit meaning Justice McLaughlin determined in the *Woods* decision in 2005.

However, even if the ASD demand is required to be made "forthwith", the *Criminal Code* does not provide that it must be made immediately or within a certain number of minutes after a peace officer encounters an individual, as each case varies in circumstances. Consequently, whether a demand is made "forthwith" would be assessed on a case by case basis.

With respect to the previous definition of section 254(2), there are several court decisions that have held this, including, *Smithson v. the Superintendent of Motor Vehicles* [2005] BCSC 411, in which the court determined that an ASD demand made one hour and 15 minutes after police encountered the driver was not an unreasonable delay in the circumstances.

In that decision, Mr. Justice Edwards noted that the literal meaning of the previous section 254(2) was that a breath sample must be provided forthwith; however, he acknowledged that the section had been judicially interpreted to mean that the test must be administered “forthwith” after the subject is encountered by police so there is no detention to engage the *Charter* right to counsel. He referred to former case law and at para. 17 noted that in *R. v. Bernshaw* [1995] 1 S.C.R. 254, the Supreme Court of Canada held “forthwith” did not mean “immediately” and that section 254(2) must be interpreted to mean the ASD test may be administered within the time required to take a proper test, bearing in mind the two hour limit imposed for a BAC test under section 254(3).

At para. 19 Mr. Justice Edwards noted that in *R. V. Higgins* [1994] M.J. No. 44, the court held that the determinant factor is not the length of the delay but the reasons for it.

In the *Smithson* case, at para. 22, Mr. Justice Edwards held that the delay in making the demand did not compromise the petitioner’s *Charter* rights to be free from unreasonable search and seizure or to contact counsel when detained. He stated, “It was not therefore an unreasonable delay and according to the “flexible” approach to balancing *Charter* rights with the public interest in combating drunk driving, the petitioner had no reasonable excuse to refuse the ASD test.”

While I agree that in your case the evidence indicates that there were 25 minutes between the time of driving and the time the ASD demand was made on you, there is a reasonable explanation for this time lapse. Constable Versteeg’s initial investigation began with a report of an impaired driver. When she arrived at the scene, you were not in the vicinity of your vehicle and Constable Versteeg observed various types of ammunition scattered in the centre console of your truck, as well as a fully loaded magazine. You then arrived at the vehicle and after observing your indicia of impairment, Constable Versteeg arrested, chartered and warned you for impaired driving. Constable Versteeg asked if you had firearms in the vehicle and you stated that there were two rifles. Constable Versteeg then conducted a search of the vehicle in order to ensure the safety of any officers and tow truck drivers who may be handling the vehicle. She located two rifles on the floor of the back seat and confirmed that both were unrestricted and unloaded. She also noted that the magazine was for one of the rifles. She also observed that there were open beer cans on the floor of the front passenger seat and on the floor of the back seat and that the vehicle smelled strongly of liquor.

At 01:05 hours, she returned to the police vehicle in which you were sitting and arrested, chartered and warned you from a police issued card. You stated that you understood 10(a) and (b) and refused to answer whether or not you wanted to talk to a lawyer by repeatedly deflecting the question and playing games by trying to make Constable Versteeg write down gibberish and repetitive phrases. You advised her that you understood the police caution and also told her that your last drink was around 2 to 3 hours ago.

Based on this evidence, I find that it was appropriate for Constable Versteeg to conduct an investigation regarding the firearms in your vehicle, prior to dealing with the issue of impaired driving. It is also clear from the evidence that your *Charter Rights* had been read to you twice and you were given the opportunity to speak to legal counsel. In addition, based on Constable Versteeg's description of your behaviour when she arrested, chartered and warned you the second time, your actions were causing a delay in the process. I note that you do not address this in your evidence.

While I acknowledge that Constable Versteeg contacted Constable Rudiak and Constable Kennedy to discuss the course of her investigation, I do not find that this caused an unlawful delay in the process. It is not inappropriate for an officer to consult with colleagues or superiors during the course of an investigation. Further, you had already been advised of your *Charter Rights*; specifically section 10(a) and 10(b). Section 10(a) explains the reason you are being arrested and/or detained. Section 10(b) advises you that you have the right to retain and instruct legal counsel in private, without delay and that you may call any lawyer you want.

Mr. Carr also made the following submissions:

- Any errors which the Superintendent may classify as "clerical" in nature, can only be resolved in your favour.
- Constable Versteeg has the burden of proof.
- You have no burden to disprove the evidence.
- You take issue with the truthfulness and accuracy of Constable Versteeg's evidence.
- You believe that the minimal evidence provided by Constable Versteeg is a significant exaggeration and distortion of the facts alleged.
- Constable Versteeg failed to provide any sworn or solemnly affirmed evidence; consequently, it should be given little weight.

I have considered Mr. Carr's submissions and will address them, in turn:

- Mr. Carr does not identify what, if any, clerical errors, he is referring to.
- I agree that Constable Versteeg has the burden of proof.
- I agree that you have no burden to disprove Constable Versteeg's evidence.
- You do not specify how Constable Versteeg's evidence is untruthful or inaccurate.
- You do not specify how Constable Versteeg's evidence is exaggerated and distorted.
- There is no requirement under the *Act* that Constable Versteeg's evidence be sworn or solemnly affirmed.

Mr. Carr also submits that because Constable Versteeg has provided no evidence to confirm the ASD type or when the ASD was calibrated and serviced or the time of the alleged tests, there is no evidence that it was reliable. Because an unreliable instrument cannot be used as evidence that a test result was not registered on the device, there is no reliable evidence that you failed or refused to comply with a demand for a breath sample.

While I have considered Mr.Carr's submissions, there is no requirement under the *Act* that Constable Versteeg provide this information to you or in his Report. This information is required in the Report only when suitable breath samples are provided.

Further, simply because this information is not provided in the Report, does not mean that it is likely the ASD was not operating properly. Police officers are well-trained in the use of the ASD and are aware of the indicators that an ASD is not working properly. One of these indicators is when the officer observes that the driver is clearly blowing properly into the ASD; however, it does not provide a result.

In your case, your evidence is that you gave your best effort to provide a sample and told Constable Versteeg numerous times that you were not refusing. Constable Versteeg is very detailed in her description of your attempts to provide a breath sample, describing you as continually blocking the mouthpiece with your tongue and allowing air to escape from around the mouthpiece. I find it noteworthy that you do not address this evidence in your declaration or written statement. Moreover, even though you deny that you refused to provide a breath sample, you acknowledge that you did not provide a sample suitable for analysis.

Based on the evidence, I am satisfied that on October 21, 2011, a demand was made on you to provide a sample of your breath pursuant to section 254(2) of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

In your written declaration you state the following:

- You have been a smoker for the past fifteen years.
- You work for s.22 and you are frequently exposed to chemicals, paint and dust.
- You believe that your smoking and your work have negatively impacted your respiratory health.

While I have considered your evidence, without medical evidence corroborating your assertion that you suffer from respiratory distress to the degree that you are unable to provide breath samples suitable for analysis into an ASD, I do not find that you had a reasonable excuse to fail or refuse to comply with the demand.

Decision

I am satisfied that on October 21, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, the vehicle owner can make arrangements to have the vehicle released. The owner is responsible for all towing and storage charges, including the day the vehicle is eligible for release. The owner should also be made aware that if the vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You should also be aware that because you are prohibited from driving for a period of 90 days, under section 215.45 of the *Act* you must register for the Responsible Driver and Ignition Interlock programs. Our office will be sending you a letter explaining the process.

s.15

Adjudicator

pc: Jeremy Carr
Fax: (250) 388-7327

November 8, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 19, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure had been provided to you. You acknowledged receipt of the police documents. I have proceeded with the hearing based on this information.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable Robichaud of the Mission RCMP stated a witness at a McDonald's restaurant observed you drive a vehicle past the 'drive thru' window at 22:24 hours on October 19, 2011. You were alone in the vehicle. The witness requested that you park the vehicle. The police were called immediately. When Constable Robichaud attended the scene, he observed the vehicle was still running and you were behind the wheel. The constable provided further context to the incident in his Occurrence Report. The constable noted that he received a call for service at 22:22 hours regarding a possible impaired driver in the McDonald's located at 7230 Park Street. The complainant reported that the driver of a red Ford Ranger was possibly impaired. The constable attended to the call within seconds since he was right by the restaurant when he got called. The constable activated his emergency lights and went to the vehicle passenger window and asked you to roll down the window.

In your oral submission, you acknowledged driving a vehicle on October 19, 2011. You went to the McDonald's 'drive thru' and after placing your order you parked the vehicle. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on October 19, 2011, at 22:24 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Robichaud noted that he formed a reasonable suspicion at 22:30 hours. In his Report, the constable stated that you had an odour of liquor on your breath and watery eyes. In his Occurrence Report, the constable stated that you were able to walk in a straight direction. At 22:32 hours Constable Robichaud made a breath demand and noted that you understood the demand.

The reasonable suspicion requirement for a roadside breath demand is a relatively low standard, consistent with the preventive focus of section 254(2) of the *Criminal Code: R v Thompson*, [2001] OJ No 449 (CA). It is suspicion, of alcohol being in the body of the driver, and no more. The constable noted distinct indicia of impairment that you have implicitly challenged. In your submission you denied drinking; you stated that you had used toothpaste, deodorant, cologne and aftershave two hours previously. In itself, this does not constitute persuasive evidence that Constable Robichaud did not have an adequate evidentiary basis for an ASD demand, given that constable stated the smell of alcohol emanated from your breath. Accordingly, I am satisfied a valid demand was made by Constable Robichaud at 22:32 hours on October 19, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', Constable Robichaud stated that you refused to comply with a demand at 22:33 hours on October 19, 2011. When asked if you were prepared to provide a breath sample the constable noted that you were not 'going to blow into

the machine.’ You asserted that you were willing to provide a breath sample at the police detachment into a breathalyser, but declined to provide a sample into an ASD because you do not trust the roadside devices. You had a bad experience once when providing five roadside breath samples in Abbotsford.

A refusal to provide an adequate sample is established when a person declines to blow into an ASD following a valid demand. Although Constable Robichaud prompted you to provide a sample, you refused to do so at 22:33 hours. The constable stated: s.22 [sic] refused to provide a sample of his breath.”

Given the evidence before me, I am satisfied that you refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 22:33 hours, on October 19, 2011.

Did you have a reasonable excuse?

A reasonable medical excuse must involve some circumstance which renders compliance with the demand extremely difficult or likely to involve a substantial risk to the subject’s health: *R v Nadeau* [1974] NBJ No 7 (CA).

In your submission you indicated that you had an ongoing health issue. You suffer from migraine attacks, a common type of headache that may occur with symptoms such as nausea, vomiting, or sensitivity to light. It can cause a throbbing pain that is felt only on one side of the head. You have been prescribed Almotriptan, and other drugs as medication for your migraine. At the time of the incident you felt a mild migraine. You assert that the stress engendered by the police investigation triggered a major attack. In your submission, you stated that you informed Constable Robichaud of your medical condition, but he left this out of his Report. Two days later you had a medical appointment with Dr F Tanha, a neurologist practicing in Abbotsford.

While I can appreciate that you were feeling unwell, suffering from a migraine attack, you have not provided persuasive evidence justifying for your behaviour. The condition you have described was not so acute and debilitating as to make compliance with the demand extremely difficult or likely to involve a substantial risk to your health.

Given all of the evidence presented, I find that on a balance of probabilities, you did not have a reasonable excuse for failing to comply with a demand on October 19, 2011, at 22:33 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 19, 2011, at 22:33 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. You are responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act; you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

s.15

s.15

Adjudicator

NOVEMBER 28, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On November 11, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure was provided to your lawyer, Brian Juriloff, on your behalf. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?

3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Chahal indicated that he witnessed you driving or in care or control of the vehicle on November 11, 2011, at 2340 hours. The officer's evidence that you were in care or control is as follows: "Driver in driver seat. Vehicle keys sitting on passenger seat. Lone occupant of vehicle."

In the last page of his letter, Mr. Juriloff argued that we cannot rely on the *Criminal Code* presumption that care or control applies, based on your position in the vehicle, since you received an administrative prohibition, not a criminal charge. The analysis that follows illustrates that this argument is not relevant to this review.

Mr. Juriloff noted part of the definition of "driver" from section 215.41(1), but I will quote the entire passage, as it is relevant to your situation:

"215.41 (1) In this section, "**driver**" includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion."

Your lawyer recited portions of the *Criminal Code* in his argument, and cited the case of *R. v. McLachlan*. He noted paragraph 46 of *McLachlan*, which quotes from the Supreme Court of Canada's decision in *R. v. Toews*, 1985 CanLII 46 (SCC). I find a more pertinent case that also cites the same clause in *Toews*, is *Gray v. the Superintendent of Motor Vehicles*, 2007 BCSC 655. In *Gray*, the Honourable Mr. Justice Metzger analyses the decision of an adjudicator of the Officer of the Superintendent of Motor Vehicles. *Gray* addresses the issue of care or control in an administrative prohibition such as yours, unlike *McLachlan*, which deals with a criminal offence.

The adjudicator in *Gray* found that the driver had care or control based on the following factors:

- Police attended the location after a report of a male slouched over the wheel;
- Peace officer witnessed applicant in the driver's seat;
- Keys were beside the applicant;
- Applicant denied intending to drive, saying he planned to sleep in the vehicle and then call a cab;
- Nothing indicated that the vehicle was inoperable.

The adjudicator found contradictions in the applicant's evidence, asking "if you were going to sleep in your vehicle and then call a cab to take you home, I question why you would not lie down rather than sit in the driver's seat slumped over the wheel. I also find it odd that you would sleep and then call a cab."

In your case, the police reported the following evidence:

- Attended gas station after receiving a call about an impaired driver (part 2 of RTS);
- You, the lone occupant, were found in the driver's seat;
- The keys were found beside you on the passenger seat;

In addition:

- There is no evidence before me of your intention;
- There is no evidence before me indicating that the vehicle was inoperable.

I find that there is stronger evidence of care or control in your case than there was in Gray's. It is reasonable to conclude that there was a risk that you would drive the vehicle away from the gas station, thereby putting the public at risk. There is no evidence before me to contradict this conclusion.

In *Gray*, the court stated:

"[16] In my view, the adjudicator's conclusion that the petitioner had care or control of the vehicle is rationally supported by the evidence. The two contradictions stated above as well as the fact that the car keys were beside the petitioner provided the adjudicator with the evidentiary basis for her essential finding. In the context of a regulatory scheme that is directed at the prevention of future harm and increasing the safety of highway driving, the adjudicator rightly considered the public safety risk of the petitioner waking up and deciding to drive. The adjudicator's decision was not "clearly irrational" or "evidently not in accordance with reason"."

Your lawyer argued that section 241.41 of the Act "requires that a driver must be a person who is driving or in care or control of a motor vehicle, not a person whom the officer suspects has been driving or in care or control." I agree. When the officer found you, you were in care or control of the vehicle. Based on the evidence before me, and the opinion of the Honourable Mr. Justice Metzger in *Gray*, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on November 11, 2011, at 2340 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the RTS, Constable Chahal stated that he suspected you had alcohol in your body based on the smell of liquor, your admission to having consumed alcohol, the report of an impaired driver, and your slow, deliberate movements. He read you a demand to provide a sample of breath into an ASD at 2340 hours and indicated that you understood the demand. You did not dispute this evidence.

Based on the evidence before me, I am satisfied that a valid demand existed.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. In part six of the RTS, Constable Chahal stated that on November 11 2011, at 2341 hours, you failed or refused to comply with the demand. He stated:

“ASD presented to s.22 and he said ‘No, I will not.’ Refusal explained to s.22 & advised that it is a criminal offence. s.22 again verbally refused & shook his head side to side.”

As there is no evidence before me to the contrary, I am satisfied that you failed or refused to comply with the demand.

Did you have a reasonable excuse?

There is no evidence before me explaining why you refused to comply with the demand, so I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 2011, at 2341 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 11, 2011, at 2341 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on November 11, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/> .

s.15

Adjudicator

cc. Brian Juriloff
604-504-5880 (fax)

OCTOBER 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 1, 2011, a peace officer served you with a Notice of Driving Prohibition. (the "Notice") You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review, your lawyer, Ajeet Kang confirmed that she received the documents I received from the police. I proceeded with the hearing on that basis.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent regarding your Immediate Roadside Prohibition (the "Report") and the Notice, Corporal Fedirchuk indicates that on October 1, 2011, at 0245 hours, he stopped your vehicle during a check stop at 84th Avenue and 140th Street in Surrey, British Columbia. Corporal Fedirchuk stated that you initially drove past even though you were indicated to stop and yelled at three times. Corporal Fedirchuk stated that Constable Morgan was able to stop you after yelling twice. Corporal Fedirchuk stated that he observed you stumble slightly when you exited your vehicle.

In your written submissions you acknowledge driving and being stopped by Corporal Fedirchuk on October 1, 2011.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report under "Reasonable Suspicion for Demand", Corporal Fedirchuk states that he observed a slight odour, and some stumbling. In addition you admitted you consumed 1 beer 2 hours prior. Based on these indicia of impairment, at 2047 hours, Corporal Fedirchuk formed a reasonable suspicion that you had alcohol in your body.

Corporal Fedirchuk stated that he read you the ASD demand at "2047" hours and the time of refusal was at "2050" hours.

In his Report, Corporal Fedirchuk indicates that you understood the demand; however, you refused to comply with it. In answer to the question: "How did the driver fail or refuse to provide breath sample?" Corporal Fedirchuk stated that you were presented with the ASD 4 times and each attempt you did not blow through the device at all. Corporal Fedirchuk stated that you were warned of the consequences, but you only put lips around the tube and pretended to blow each time. In the attached Synopsis Corporal Fedirchuk stated that no air passed through the tube.

In your affidavit you stated that you are taking

s.22 You stated that you use inhalers on a daily basis and you are not able to provide long or continuous breaths. You stated that you tried your best to provide a sample as required, you stated that you advised the officer that you suffer from s.22 .
You stated that you completely disagree with the officer's characterization of your attempts as "pretending to blow."

Your physician, M.J. Robbertse confirmed that you suffer from asthma that you have a significant reduction in your forced expiratory due to your lung condition.

Ms. Kang submitted that you did not explicitly refuse you actually attempted to provide a sample. Ms. Kang further submitted that the officer made an inaccurate assumption with respect to his statement that you were pretending to blow rather than recognizing your inability to blow, in support of a person's reasonable excuse Ms. Kang cited *R v. Henderson* for my consideration. Lastly, Ms. Kang submitted that when you advised the officer of your medical condition the officer could have offered a blood test.

Based on the evidence, I find that on October 1, 2011, a demand was made on you at 2047 hours pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

In your written affidavit you provided the following evidence:

- You made earnest attempts by trying your best to provide a sample.
- You explained to the officer that you suffer from asthma and just had heart bypass surgery six months ago.
- The officer did not believe that you had medical conditions.
- You stated that at no time did you pretend to blow.
- Your family doctor confirms that you suffer from a legitimate, relevant and real medical condition.

In considering your evidence, I note the following:

- The officer's evidence is that you initially drove past the check stop and had to be yelled at 5 times and you stumbled slightly when you exited the vehicle; your behavior is suspect given your claim that you consumed one beer two hours earlier.
- Your evidence is that you deny that you were pretending to blow, yet the officer's evidence is that, "no air passed through the tube", and, "you did not blow into the device at all."

Having considered the evidence before me, I find that I prefer the constable's version of events. I acknowledge that you suffer from a medical condition, however, the officer's evidence is not consistent with someone who is attempting to provide a sample, with or without a medical condition. While I agree that the inability to provide a sample is a reasonable excuse, however, based on the evidence I do not accept that your asthma was the reason you did not provide a suitable sample. Consequently, I do not find that you had a reasonable excuse to fail or refuse to comply with a demand made on you to provide a sample of your breath pursuant to section 254 of the *Criminal Code*.

In addition, contrary to your assertion, there is nothing in the *Act* that compels a police officer to take a driver to the hospital for a blood sample. Once Constable Fedirchuk deemed that you had refused to comply with the ASD demand, he had no further obligation to permit you to provide blood for an analysis.

Decision

I am satisfied that on October 1, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, you can make arrangements to have the vehicle released. You are responsible for all towing and storage charges, including the day the vehicle is eligible for release. You should be aware that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

Ajeet Kang *Kang & Company* by fax: [604] 572-6127

October 24, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 8, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review on October 19, 2011, I listed the disclosure documents which were provided to you regarding this matter. You acknowledged that you had received them.

You stated that the argument that you had with the officer on the night in question was 70% your fault. You said you were having a bad day and said some inappropriate things to the officer, and that you should have treated the officer with more respect. I acknowledge your partial apology, but note that only the issues outlined below can be considered in this review.

You stated that you are in the transportation business, and that you need your licence for work. You stated that if you do not get your licence back soon, you are not sure if your business will survive. I acknowledge and appreciate the impact a driving prohibition can have on your personal and professional circumstances. However, under the Act, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. In addition, the Act does not grant me any discretion to alter the terms of a driving prohibition unless that prohibition is lengthier than the Act requires.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report To Superintendent ("the Report"), Constable Adams identified herself as the investigating officer and indicated that she witnessed you driving. In the Report, the officer stated that "driver was observed driving, keys in ignition & vehicle was in motion". In the Synopsis Report, she further noted that you were stopped on 24th Avenue and that you sped up to the traffic stop point and slammed on your brakes. In the Report, the officer has noted that the time and date of driving/care or control as 02:15 hours on October 8, 2011.

You have provided no evidence to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with a demand

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the officer stated that you had a smell of liquor and poor motor skills. She has stated that you originally denied that you had consumed alcohol, but later admitted consuming one beer prior to driving, after being served with the Notice. The officer has indicated that she read you the ASD demand at 02:16 hours, and that you understood the demand. Based on the evidence before me, I am satisfied that a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, the officer's Report indicated that she thought you were pretending to blow. She stated that you would not seal your lips and that you would bite the mouthpiece. She also noted that you were arguing about blowing with the police officers. In the Synopsis Report, the officer has further stated that the officers could see that you were not wrapping your lips around the instrument and could hear that you were not blowing. The officer determined you were failing or refusing to comply with the demand at approximately 02:25 hours.

In your hearing, you stated that you were trying to provide a sample and are not sure why it did not work. Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 02:25 hours, on October 8, 2011.

Did you have a reasonable excuse?

There is no mention in the police evidence of you providing any reason for why you did not provide a sample, and I find that you have not provided me with any reasons as to why you failed or refused the demand to provide a sample. I cannot find that you had a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 8, 2011, at 02:25 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 8, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the 30 day impoundment period. Once the vehicle is eligible for release, the owner may attend the impound lot and pick up the vehicle. The owner is responsible for towing and storage charges, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 8, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “*Act*”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (the “ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Kevin Filkow. During the oral hearing, Mr. Filkow acknowledged that he had received disclosure. I have proceeded with the review based on this confirmation.

Mr. Filkow submits that your driving prohibition should be revoked because the IRP regime set out in section 215 of the *Act* is unconstitutional. While I appreciate Mr. Filkow’s submissions, I have no authority under the *Act* to consider whether or not being issued an IRP, is a contravention of the *Constitution Act* or your *Charter Rights*.

I have been delegated authority by the Superintendent to conduct this review under section 117 of the *Act*. The extent of my authority is outlined in the Introduction of this decision. I have proceeded with the review accordingly.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In his Report to Superintendent regarding your Immediate Roadside Prohibition (the “Report”), Constable Gray indicates that on November 8, 2011 at 1500 hours, he observed you sitting in the driver’s seat of your vehicle with the engine running.

Mr. Filkow did not make a submission on this issue.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report under “Reasonable Suspicion for Demand”, Constable Gray indicates that he observed food on your clothing and smelled liquor on your breath and in your vehicle. You also admitted to consuming alcohol. Constable Gray formed a reasonable suspicion that you had alcohol in your body at 1500 hours and made the ASD demand on you at 1518 hours.

In explaining the delay in making the ASD demand, Constable Gray indicates that he explained the reason you were being detained and was waiting for a second ASD, as well as backup from another police officer.

Mr. Filkow submits that Constable Gray did not make the ASD demand, forthwith or as soon as practicable, pursuant to section 254 of the *Criminal Code* and the reason for the delay was not valid. Consequently, your driving prohibition is revoked.

I concur.

Having made this finding, there is no need to address the third issue.

Decision

Based on the evidence before me, I am not satisfied that you failed or refused to comply with an ASD demand, without a reasonable excuse, on November 8, 2011 at 1524 hours. I therefore revoke your driving prohibition and monetary penalty as required by s. 215.5(4) of the *Act*. As a result, the prohibition has been removed from your driving record and you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also revoked. The owner may go directly to the place that her vehicle was impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including November 29, 2011. The owner is responsible for any storage costs beyond that date. The owner should know that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

s.15

Adjudicator

cc Kevin Filkow
Fax: (604) 270-3787

October 24, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 16, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure has been provided to your lawyer, Jennifer Currie. I have proceeded with the hearing based on this information.

I note that the charge indicated on the Notice was for failing to comply with a demand to provide a sample of breath for analysis by an ASD. The Report to Superintendent (Report), submitted by Constable Brookes, indicates in Section 4, however, that you complied with the demand and provided a breath sample at 00:25 hours, and again at 00:30 hours, on October 16, 2011. The officer submitted no evidence of a failure or refusal to comply with a demand. Section 6 of the Report, 'Failure or Refusal to Comply with Demand', was left blank. I find that the officer erred in his charge. Accordingly, I do not find that you failed to comply with a demand.

Decision

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 24, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

cc: Jennifer Currie
Fax: (604 590 5626)

November 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 28, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (the “ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Michael Mulligan. I have proceeded with the review based on this confirmation.

I acknowledge that losing your driver’s licence will adversely impact you; however, I have no authority under the *Act* to consider the hardship you will experience, personal circumstances, employment, or transportation needs, in the course of this review.

Mr. Mulligan submits that because you were not provided the opportunity to speak to legal counsel when you were stopped at the roadblock, your *Charter Rights* were violated. Consequently, your driving prohibition should be revoked. Mr. Mulligan cites the court decisions, *R v. Conway* and *R. v. Orbanski*, in support of his submission.

While I appreciate Mr. Mulligan's submission, when conducting a review under s.215.49 of the *Act*, the Superintendent does not decide questions of law and is not a court of competent jurisdiction. Therefore, the *Conway* and *Orbanski* decisions do not apply to this review and the Superintendent does not have the authority to grant *Charter* remedies.

Please note that I will only be addressing evidence that is relevant to the issues in this review.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the report to Superintendent regarding your IRP (the "Report") and attached Occurrence Report, Constable Prill indicates that on October 28, 2011 at 2300 hours, you drove up to a roadblock in the area of Cordova Bay Road and Ash Road in Saanich.

In your affirmed affidavit you acknowledge driving.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made to you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report under "Reasonable Suspicion for Demand" and in his Occurrence Report, Constable Prill indicates that he detected an overwhelming smell of liquor on your breath and you had glossy, bloodshot eyes. Based on these indicia of impairment, Constable Prill formed a reasonable suspicion that you had alcohol in your body at 2301 hours and made an ASD demand on you at 2305 hours.

Mr. Mulligan submits that section 215.41 of the *Act* requires that you were a driver at the time the ASD demand was made; however, I disagree with his interpretation of the legislation. The result of this interpretation would be that to issue a valid prohibition under this section, a police officer would have to allow a driver to remain in care or control of the vehicle until a demand was made. It would mean an officer could not ask an impaired driver to step out of a vehicle

before making a demand, despite the danger this would pose. It would also mean that if an officer did not notice signs of impairment until after removing a driver from a vehicle, it would be too late to make a demand. It would not make sense for me to conclude that the legislature intended results like these when it brought this section of the Act into force.

Mr. Mulligan contends that there was an undue delay in making the ASD demand because there were 4 minutes between the time Constable Prill formed his reasonable suspicion that you had alcohol in your body and the time he made the ASD demand. In your affidavit, you depose that you stood at the back of Constable Prill's police vehicle for approximately 5 minutes before he read you the demand.

While I have considered Mr. Mulligan's submissions and your evidence, the *Criminal Code* does not require that an ASD demand be made as soon as a police officer encounters an individual. Each case varies in circumstances and the time it takes police officers to investigate a matter is dependent upon the situation. There are several court decisions that have held this, including, *Smithson v. the Superintendent of Motor Vehicles* [2005] BCSC 411, in which the court determined that a demand made one hour and 15 minutes after police encountered the driver was not an unreasonable delay in the circumstances.

In your case, Constable Prill indicates that he directed you to park your vehicle, exit your vehicle, move to the back of his vehicle and provide your driver's licence to him. He then spent some time talking to you and making observations in the course of his investigation. He also indicates in his Report that there was "No delay". It is reasonable to infer that these activities would have taken at least 4 minutes. Consequently, I do not find that there was an unreasonable delay in making the ASD demand to you.

Based on the evidence, I am satisfied that a demand was made to you pursuant to section 254 of the *Criminal Code*.

In determining whether the evidence establishes that you failed or refused to comply with the demand, I have considered the following:

In his Occurrence Report, Constable Prill indicates that you understood the demand; however, you refused to comply with it. He describes you as argumentative and indicates that you continued to ask questions about being taken back to the Police Detachment for a breath or blood sample because you believed that it was your right.

Constable Prill provided a very detailed account in his Occurrence Report, indicating that he gave you a number of opportunities to provide a breath sample into the ASD; however, you did not. Constable Prill explained the demand in plain language and the procedure on how to provide a suitable sample.

Although you told Constable Prill that you would provide a breath sample, each time he gave you the opportunity, he describes you as putting your mouth around the mouthpiece and making facial expressions to suggest that you were providing a sample, but you clearly were not.

You did not address whether or not you failed or refused to comply with the ASD demand, in your affidavit.

Based on the evidence, I find that on October 28, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with an ASD demand, I must look at the excuse you gave to the police officer at the time of the refusal.

In your affidavit you depose the following:

- You had consumed a single can of beer only a few minutes prior to driving through the roadblock.
- A few weeks prior, an ICBC clerk told you that the ASD result can be inaccurate if you have recently consumed alcohol.
- When Constable Prill read you the ASD demand, you were concerned that it would improperly conclude that you were impaired due to your recent alcohol consumption.
- The ICBC clerk also told you that if a police officer asked you for a breath test, you had the right to request a blood test instead.
- You asked Constable Prill for a blood test; however, he refused to give you the opportunity.
- After receiving your driving prohibition, you immediately attended the hospital and requested that blood samples be taken in order to demonstrate that you were not impaired by alcohol.
- The police refused to attend the hospital to witness the blood sample being taken.
- You have provided a copy of the blood test result which indicates that your blood alcohol concentration ("BAC") was less than 20 milligrams of alcohol in 100 millilitres of blood.
- At no time after you were detained by the police, were you informed of your right to contact legal counsel.
- If you were provided an opportunity to contact a lawyer, you would have done so in order to ascertain your rights and obligations.

While I have considered your evidence, I do not find you had a reasonable excuse to refuse to comply with the ASD demand. I base this on the following:

There is nothing in Constable Prill's evidence or your evidence to indicate that you told Constable Prill that you were refusing to provide a breath sample because you had recently consumed alcohol. However, even if you had, this is not a reason to refuse to comply with the ASD demand. Constable Prill would have simply waited at least 15 minutes from the time you told him that you had consumed your beer, before having you provide a breath sample.

With respect to your submission that you were not given the opportunity to speak to a lawyer prior to providing a breath sample, this does not constitute a reasonable excuse for refusing to provide a breath sample for the purposes of this administrative review.

Regarding your submission that you refused to provide a breath sample because it was your right to provide a blood sample instead, this is incorrect and was explained to you by Constable Prill. It was your prerogative to choose to believe the ICBC clerk over Constable Prill; however, this does not constitute a reasonable excuse. Constable Prill clearly explained the demand to you and the consequences of refusing.

Although you have provided a copy of a blood test result indicating that your BAC was less than 20 mg% at the time your blood was drawn, the issue before me is not whether or not you were impaired, or what your BAC was at the time of driving. The issue is whether or not you had a reasonable excuse to fail or refuse to comply with the ASD demand. I find you did not.

Decision

I am satisfied that on October 28, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, you can make arrangements to have the vehicle released. You are responsible for all towing and storage charges, including the day the vehicle is eligible for release. You should know that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the *Act*. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

pc: Michael Mulligan
Fax: (250) 480-0004

October 31, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 13, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to you. I have proceeded with the hearing based on this confirmation.

In your submission, you said you are a community health worker. You indicated that you are not able to do your work without your driver's licence, and you said you worry about your clients who are missing out on care. You said you apologize and regret not providing a sample. You said you were nervous at the time and not thinking straight. You said you have lost a lot already. You said you realize how serious these matters are, and have learned just to obey the law.

I acknowledge your submission, and recognize that a prohibition of this kind can have far-reaching consequences. However, I must advise that I have no authority under the Act to consider in this review your employment transportation needs, hardship, or remorse. The factors I may consider are set out in the Act and are outlined in the paragraphs that follow.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Vehicle Impoundment Report to Superintendent, the investigating officer indicated that a report was received of a female in a vehicle in a parking lot with two cans of beer. In the Report to Superintendent (RTS), the officer indicated he located a person in the driver's seat with keys in the ignition. The constable identified you as that person. The constable reported that you were driving or in care or control of a vehicle at 16:35 hours, on October 13, 2011.

In your submission, you stated you were in the parking lot waiting for your food, when officers came and took your keys. You have not disputed the constable's evidence that you were in care or control of a vehicle, and you made no submissions regarding your intention to drive. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act at 16:35 hours, on October 13, 2011.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand was made, and I must determine whether you failed or refused to comply with that demand. A demand must be made forthwith after an officer has formed reasonable suspicion that a driver has alcohol in their body.

In the constable's evidence, he formed a reasonable suspicion at 16:35 hours that you were driving or in care or control of a vehicle with alcohol in your body. The constable indicated the basis for his reasonable suspicion was the following: the odor or liquor in the vehicle and on your breath; open beer cans in the vehicle. The officer reported that you admitted to having consumed two beers, and the officer reported that the "time of last drink" was 16:30 hours.

In your submission, you said there were two beer cans in the coffee holder of the vehicle, left there from the day before. I understand your submission is that you did not consume anything from these cans on the afternoon in question and that the constable should not have used the observation of the cans in forming his reasonable suspicion for a demand. You said you had missed taking the cans out of your vehicle when you got home the night before. In your submission, you indicated that you "had couple beer night before".

I acknowledge your evidence on this point. However, I am satisfied that the constable's observations of the odor of liquor on your breath and open cans of beer in your vehicle, even if they were there from the day before, were sufficient for him to form a reasonable suspicion that you were in care or control of a vehicle with alcohol in your body. As a result, I am satisfied that the constable made a valid demand for a sample of breath for analysis by means of an ASD.

The constable read an ASD demand at 16:50 hours. He reported that you failed or refused to comply with a demand at 16:51 hours. On the RTS, the constable reported that "driver stated "I choose to refuse". Police asked "Are you sure", driver stated, "Yes, I refuse." The constable reported this in similar fashion in the Vehicle Impoundment Report to Superintendent.

You have not disputed the constable's evidence that you refused, and you acknowledged that you did not blow. I am satisfied that you unequivocally failed or refused to comply with the constable's demand for an ASD test.

Did you have a reasonable excuse?

In your submission, you said that you were nervous and scared and you were "afraid that even a little alcohol would put you over." You said you were not thinking straight. While I acknowledge your nervousness and that it may have caused you not to think clearly in the circumstances, I am not satisfied that this is reasonable excuse to refuse to comply with the constable's demand for an ASD test.

Decision

I am satisfied that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 13, 2011, at 16:51 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5 (1) of the Act. Your prohibition took effect on October 13, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, you may authorize someone to attend the impound lot and pick up your vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see the Office of the Superintendent of Motor Vehicles' website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

s.15

Adjudicator

October 31, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 10, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure had been provided to your lawyer, Chris Massey. He acknowledged receipt of the police documents. I have proceeded with the hearing based on this information.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable Gilbert stated that he witnessed a vehicle being driven south bound on Douglas Street at 02:05 hours on October 10, 2011. The vehicle approached the constable's colleague, Constable Henly; the driver's window was rolled down, and the vehicle was running with the keys in the ignition. In the Synopsis report, Constable Gilbert noted the time of driving was approximately 02:05 hours. The police constables were attending to a motor vehicle accident and waiting for a damaged vehicle to be towed from near the corner of Douglas Street and Belleville Street. A black SUV, licence plate s.22, came speeding up the middle of the road with no lights on and almost hit Constable Henly. You were identified later as the driver.

Your lawyer has not challenged this issue and you have not provided any evidence to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on October 10, 2011, at 02:05 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Gilbert noted that he formed a reasonable suspicion at 02:03 hours. The constable stated in his Report that you had slurred speech and bloodshot eyes. You admitted to consuming one glass of wine. The constable noted that you changed lanes and passed a police vehicle with its emergency lights on. In the Synopsis, the constable also observed that the police detected an odour of liquor in the vehicle. At 02:05 hours Constable Gilbert made a breath demand and noted that you understood the demand.

The reasonable suspicion requirement for a roadside breath demand is a relatively low standard, consistent with the preventive focus of section 254(2) of the *Criminal Code: R v Thompson*, [2001] OJ No 449 (CA). It is suspicion, of alcohol being in the body of the driver, and no more. The constable noted distinct indicia of impairment, and an admission of prior consumption, that have not been challenged.

Your lawyer disputed the validity of the demand on two grounds: 1) the time that Constable Gilbert ostensibly formed a suspicion at 02:03 hours occurred before the time of driving was established at 02:05 hours; and, 2) since the constable did not specifically record that there was an ASD available, or that one had been presented to you, there is no evidence that a proper breath analysis could be made pursuant to Section 254 of the *Criminal Code*.

Mr Massey argued that in order for a valid demand the constable must have formed a reasonable suspicion that you had alcohol in your body and operated a vehicle within the preceding three hours. He pointed out that the time of driving, stated as 02:05 hours in the Report and Notice actually preceded, by two minutes, the time a suspicion was formed. On its

face this seemingly creates an absurdity. However, the constable's Synopsis provides context to the Report and is written in a logical and chronological manner. The constable states, in the first line of the Synopsis that the time was approximately 02:05 hours. There is some inexactitude in the precise moment when the vehicle you were driving was observed speeding up the middle of the road and almost hitting Constable Henly. In the third paragraph of the Synopsis, the constable notes the grounds upon which he based a reasonable suspicion. It is a reasonable inference that the vehicle had stopped at this point and the constable initiated his investigation. You were then given a formal ASD demand.

Based on the evidence before me, and with no contradictory evidence from you, I find that Constable Gilbert formed a reasonable suspicion shortly after the time of driving on October 10, 2011.

Your lawyer submitted that there is no police evidence to show that an ASD was available, or presented to you, when the demand was made. Mr Massey argued that there must be an ASD, as approved under the Act, for the demand to be valid. A person may lawfully refuse to provide a breath sample if there is no confidence that an ASD was available. He noted that there is no description of the type of device under Sections 4 or 5 of the Report, Approved Screening Device – Test Result and Second Test. Your lawyer maintained that it would have been a simple proposition for the constable to fill out the ASD information.

Your lawyer referred me to the case of *R v Skwara* (2005) MBPC. In that case, the investigating officer did not have an ASD in his possession, 'nor any plan about how one could be assuredly and promptly obtained.' Your lawyer contended that prior to making a demand a peace officer must know, or believe on reasonable grounds, that he will have the means to take the requested sample forthwith.

For a valid ASD demand, the demand must be made with the ASD accessible forthwith. A demand made, but not capable of such fulfillment is not a proper demand, following *R v Grant*, [1991] 3 S.C.R. 139. The BC Court of Appeal held in *R v Wilson* (1999) BCCA 0110, however, that *Grant* did not add to the ingredients of the offence under Section 254. There is no requirement that the Crown prove in every case that an ASD was in the possession of the police or immediately available.

"In most circumstances, including those in this case, the police officer will mean what he says, effectively, please provide a breath sample now. Unless there is something in the evidence that makes more than purely speculative the possibility that the police officer did not mean what he said, there is no need for the Crown to prove the availability of an ASD. In *Grant*, it was not the absence of an ASD that was fundamental to the acquittal, but a 30 minute delay."

Similar reasoning can be applied to the *Skwara* case: The police officer delayed 14 or 19 minutes and had no reasonable belief that an ASD would be available forthwith. The simple absence of evidence that an ASD was not available or presented to you is not enough to raise any doubt about the validity of the demand itself.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', Constable Gilbert stated that you failed or refused to comply with a demand at 02:05 hours on October 10, 2011. In his Synopsis the constable stated that you refused twice to provide a sample. While waiting, as instructed, for the paperwork, you fled from the scene.

The essential elements of the offence described under section 254 of the *Criminal Code* consist of a proper demand and a refusal or failure to comply with that demand. Where a refusal is alleged, as is your case, the proof required flows from the statements or acts of the accused. You declined to blow into an ASD and then fled the scene.

Given the evidence before me, I am satisfied that you refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 02:05 hours, on October 10, 2011.

Did you have a reasonable excuse?

A reasonable excuse must involve some matter that is extraneous to the existence of the essential elements of the prohibition that justifies or excuses actions that would otherwise constitute the offence. Neither you, nor your lawyer, have provided evidence forming the basis of a reasonable justification for your behaviour. I am satisfied that you did not have a reasonable excuse for refusing to comply with a demand.

I find that on a balance of probabilities, you did not have a reasonable excuse for refusing to comply with a demand on October 10, 2011, at 02:05 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 10, 2011, at 02:05 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 10, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. You are responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act, you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

s.15

s.15

Adjudicator

cc: Chris Massey
Fax: (250 920 0177)

November 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 16, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure was provided to you. You confirmed receipt of the police evidence and I proceeded with the hearing based on this information.

In your submission you noted that you drive for work purposes and have suffered significant detriment to your employment. I can appreciate that a driving prohibition may have serious implications for you. However, under the Act I am not authorised to consider economic or compassionate issues. The scope of the review is limited to the grounds as defined in section 215.5 of the Act.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable MacQueen, of the Whistler RCMP, stated that he identified you as the driver of a vehicle at 02:20 hours on October 16, 2011. You were observed by the constable driving the wrong way on a street. He initiated a traffic stop. Upon his approach, the constable observed the driver in the driver's seat, while the keys were in the ignition and the engine was running. In the Vehicle Impoundment Report, Constable MacQueen stated that you drove the wrong way on a one way street, and then turned down the wrong way into oncoming traffic on a divided road.

In your submission you acknowledged being the driver of a vehicle and taking a wrong turn. You had been to a club in Whistler with some friends and decided to drive. You were pulled over by the police. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on October 16, 2011, at 02:20 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable MacQueen noted that you had a strong odour of liquor on your breath when you spoke to the officer. He observed that you had glossy eyes and were unable to focus. You had slurred speech. You were operating a vehicle into the path of oncoming traffic on two streets. The constable noted that you admitted to consuming alcohol earlier. The constable formed a suspicion that you had alcohol in your body. At 02:25 hours the constable made a demand for you to provide a sample of breath pursuant to the *Criminal Code*. The constable noted that you understood the demand.

You have not challenged this issue or provided evidence to the contrary. In your submission you acknowledged stating to the constable that you a 'shot' shortly before driving. You stated that you would have had an odour of liquor on your breath. I find there is sufficient evidence to support the constable's subjective belief that you had alcohol in your body. Accordingly, I am satisfied a valid demand was made by Constable MacQueen at 02:25 hours, on October 16, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', the constable stated that he gave you an explanation and a demonstration. You pursed your lips on the mouthpiece and your cheeks filled with air, but no air came out. The ASD displayed 'NoGo'. This was repeated six times, each time you were cautioned and given an explanation. In section 3 of the Vehicle Impoundment Report the constable stated that he explained how to blow into the device. You blocked the mouthpiece six times and each time the ASD read 'NoGo.'

The essential elements of the offence described under section 254 of the *Criminal Code* consist of a proper demand and a refusal or failure to comply with that demand. Where a failure is alleged, as is your case, the proof required flows from the inference that a person intends the natural consequences of his acts.

You argued that you did not fail to provide a sample of breath. You asserted that you were willing to provide a breath sample and attempted to do so, at least three times. In your submission you stated that you tried to follow the officer's instructions, particularly after the first attempt. The constable instructed you to cover the mouthpiece, take a deep breath, and blow hard into the device. You did this "a few times." You acknowledged being given an explanation of how to blow into an ASD, if not a demonstration. You implied that you sincerely tried to provide a suitable breath sample.

A failure to provide an adequate sample is established when the inference can be drawn that a person intended the natural consequences of his acts: an adequate sample was not provided after a clear explanation was given as to how to blow into the ASD; an adequate opportunity was given to blow into an ASD; and the ASD was in working order. It is clear from the evidence that the ASD was properly calibrated and serviced. You did not blow adequately into the device; it registered 'NoGo' each time. You were given an ample opportunity to provide a breath sample for analysis. Although Constable MacQueen cautioned you, and prompted you to provide a sample, you failed to do so, at least three times, if not six.

Given the evidence before me, I am satisfied that you failed to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 02:30 hours, on October 16, 2011.

Did you have a reasonable excuse?

You have not provided persuasive evidence forming the basis of a reasonable justification for your behaviour. I am satisfied that you did not have a reasonable excuse for failing to comply with a demand.

I find that on a balance of probabilities, you did not have a reasonable excuse for refusing to comply with a demand on October 16, 2011, at 02:30 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 16, 2011, at 02:30 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 16, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. The owner is responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act; you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

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Adjudicator

NOVEMBER 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On November 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me,

Preliminary Matters

Records at this office confirm that disclosure was provided to your lawyer, Ron Buddenhagen prior to your scheduled written hearing. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Notice of Driving Prohibition (Notice), Corporal Erichsen indicated that on November 5, 2011, you had care or control of a motor vehicle on 2nd Avenue in Fernie. In his Occurrence Report (OR), Corporal Erichsen stated that at 02:15 hours on that date, he was sitting in his police car, parked on 2nd Avenue in Fernie monitoring patrons leaving the Northern Bar and Stage. He observed a male and a female who appeared to be leaning on each other, walking across the street towards a Toyota Venza parked two vehicles in front of his vehicle. Once the couple reached the vehicle the female opened the driver's side door and got into the vehicle and the male walked around to the passenger side and took a seat in the front passenger's seat. Corporal Erichsen walked up to the Toyota to speak with the person in the driver's seat and determine their intentions. As he approached the vehicle, the vehicle was started up and the head and tail lights came on. He got the attention of the driver who rolled down the window.

Corporal Erichsen asked the driver how much she had to drink and the driver replied "nothing". He asked where they were going and said the driver replied "We're going home." You were identified as the driver of the vehicle and your identity was confirmed by your Alberta driver's licence.

In your affidavit you stated that on the night in question, you were not driving when approached by Corporal Erichsen. You said that you left your two dogs in the car with the windows open and your intention was to take them out of the car and walk home with them as you lived only about 8 blocks from the pub. You said that while you agree that you were in the driver's seat and the motor was running, you needed to start the car to roll up the windows as they are activated by a power button. You added that you cannot start the vehicle unless seated in the driver's seat as you also need to put your foot on the brake. The head and taillights come on when the engine is started. When Corporal Erichsen asked you where you were going you replied "home". You added "I did not say and I don't think my companion said that "we're going home."

Mr. Buddenhagen submitted that a person can be found to be a driver if that person has care or control of a vehicle. However, in order to find an individual in care or control, the person must have intention to take control of the vehicle. He stated that your unchallenged evidence is that you entered the vehicle to roll up the windows so you could take your dogs out and walk home. Mr. Buddenhagen submitted the case of *R v. Toews* in support of his position.

First, I have read the *Toews* case but I find it to be a markedly different fact pattern than your case. Further, *Toews* is a criminal case requiring a standard of proof beyond a reasonable doubt whereas this is an administrative procedure with a standard of proof on a balance of probabilities.

IRP Review Decision
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In considering this issue, I note that:

- Corporal Erichsen stated that he observed both you and your male passenger enter and sit in the vehicle. If your intention was only to roll up the windows of the vehicle, retrieve your dogs and walk home, I find it odd that your companion would also enter and sit in your vehicle.
- Corporal Erichsen reported that after he issued you the demand, he asked you four times if you were going to provide a breath sample to which you replied that you would not. It was only after he told you that he found you in care or control of the vehicle that you turned off the ignition and told him "I'm just going to take my dogs and walk home." If it was your intention all along to retrieve your dogs and walk home, I find it odd that you did not inform the officer of that immediately upon being approached, and continue to roll up your windows and get your dogs out of the vehicle.

For these reasons, I do not find your claim that you were going to walk home to be very credible. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* on November 5, 2011, at 02:15 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue: first, I must determine whether or not a proper demand was issued to you and, if so, I must then determine whether or not you failed or refused to comply with the demand.

In his OR, Corporal Erichsen stated that he detected a strong smell of liquor coming from your breath and your speech was slurred. Although you denied consuming any alcohol, Corporal Erichsen formed the reasonable and probable grounds to believe that you may be operating a motor vehicle with alcohol in your body. He stated that he told you that in accordance with the *Criminal Code*, he demanded that you provide a sample of your breath, forthwith, using an approved screening device. When you replied "Excuse me?" he stated "I have reasonable grounds to believe that you have alcohol in your body and I am demanding that you provide a sample of your breath into an approved screening device."

Mr. Buddenhagen submitted that "if...the demand falls short of the requirements provided by Judge McGivern, the accused, or in this case the motorist, has no requirement to comply." He submitted a copy of the case of *R v. Grant* in support of this submission.

However, in considering this, I do not agree with Mr. Buddenhagen. Based on Corporal Erichsen's OR, I am satisfied that a proper demand was issued to you that morning, for a sample of your breath for analysis by an ASD. Having made this finding, I must now determine whether or not you failed or refused to comply with the demand.

In his Report to Superintendent (RTS), Corporal Erichsen left section 4 and 5, the areas used by officers to record the results of breath tests, completely blank. In section 6 of his report, he

noted that on November 5, 2011, at 02:22 hours, you failed or refused to comply with the demand. In his OR, Corporal Erichsen stated that after he issued you the demand, you rolled up your window, consulted with your passenger then you rolled your window down and stated "No, I don't think I want to do that." He then told you that you would be charged with refusing and explained the consequences to you but you stated "I don't think I should have to." He asked you if you would provide a breath sample and you answered "no". When he asked you if you are refusing to provide a breath sample, he said that you told him "I don't think I should have to. I wasn't even driving." He explained that he found you in care or control of the vehicle and that you had been drinking and asked you again if you would provide a breath sample but stated that you then turned the ignition off and said "I'm just going to take my dogs and walk home."

Corporal Erichsen then stated that he told you that you had been given a demand and asked you again if you were going to provide a breath sample but you said that you were not. When he told you he was charging you with refusing, you told him "No, I'm going to take my dogs and go home." When he told you that you needed to wait a few minutes for him to complete some paperwork, you told him that you were not waiting for anything. After a similar exchange, Corporal Erichsen advised you that you were being arrested for obstruction and he escorted you to have a seat in his patrol car.

Mr. Buddenhagen submitted that it can be inferred that the officer arrested you because you did not want to wait for him to complete his paperwork; however, I do not agree because, as noted in his report, the corporal stated that he arrested you for obstruction.

Based on the evidence before me, I am satisfied that you did fail or refuse to comply with a demand on November 5, 2011, at 02:22 hours.

Did you have a reasonable excuse?

Corporal Erichsen reported that you told him that you were refusing to comply with the demand because you were not driving that night. In your affidavit you confirmed that you saw no reason why you should provide a breath sample because you were not driving. You also stated that "I was fearful. It was 2 o'clock in the morning. There was no one around. My companion was intoxicated and I was very apprehensive about getting into the back of a police car operated by an armed policeman who was yelling at me."

I have read through the corporal's report and there is no evidence in his report that you appeared fearful or that you told him that you were afraid of him that night. Rather, it appears to me that you were not being very cooperative with the officer, refusing to comply with the demand then trying to take your dogs and leave the area, resulting in your being arrested for obstruction. Based on the evidence, I do not find your claim that you were fearful of the officer to have much merit.

With respect to your excuse that you did not believe that you should have to provide a breath sample as you were not driving, Constable Erichsen acknowledged that but he explained that he found you in care or control of the vehicle. Therefore, I do not find that to be a reasonable excuse for failing or refusing to comply with the demand. Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on November 5, 2011.

I therefore confirm your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(1)(b)(ii) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on November 5, 2011. You may resume driving 90 days after that date, after you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle will remain in the impound lot for the remainder of the impoundment period. It will be eligible for release thirty days from the date the IRP came into effect.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the *Motor Vehicle Act*. For further information, please check our website: <http://www.pssg.gov.bc.ca/osmv>.

OCTOBER 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of your oral hearing, I listed the documents I received from the police which were sent to you. You acknowledged that you had received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and AnalysisDid you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue: first, I must determine whether or not a proper demand was issued to you and, if so, I must then determine whether or not you failed or refused to comply with the demand.

In his Report to Superintendent (RTS), Constable Hanna stated that “a witness reported driver was impaired.” He said that the vehicle crossed over the centre line and hit the curb prior to him conducting a traffic stop. The constable noted that you had a high odor of liquor on your breath, your eyes were watery and your speech was slurred. Although you initially denied consuming any alcohol that night, Constable Hanna formed the opinion that you may be operating a motor vehicle with alcohol in your body. He indicated that at 23:22 hours he read you the ASD demand.

In section 3 of the RTS, Constable Hanna stated “Driver refused to provide a sample.” Below that, in section 6, the constable stated that he determined that you failed or refused to comply with the demand at 23:24 hours, or 2 minutes after he read you the demand. He stated “Driver verbally advised Cst. Hanna 3 separate times that he would not provide a sample. Driver refused to exit the vehicle for sample and stated he shouldn’t have to provide one.” In his Report to Superintendent for the Vehicle Impoundment (VI Report), the officer notes that a report was made to the police about a possible impaired driver, he located the vehicle and conducted a traffic stop, you exhibited signs of impairment and an ASD demand was read to you. He added “ s.22 refused to provide a sample X 3. 90 day immediate roadside prohibition issued.” He did not say anything further in the RTS or the VI Report.

During your hearing, you stated that on the day in question, you had been to the pub and on the way home you were pulled over because the officer believed that you had been drinking. You said that you require your driver’s licence for employment purposes, so you panicked and refused to get out of your vehicle. You acknowledged that when the officer asked you if you were going to provide a breath sample, you initially refused. You acknowledged that the constable asked you 2 more times if you were going to provide a breath sample but you refused again. You said that you refused because you were panicking and upset because you were afraid that you were going to lose your job as you need a driver’s licence for work purposes. When you did get out of your vehicle, the officer handcuffed you and put you in his police car.

You said that once you were in the constable’s vehicle you began to calm down. You said that once you started thinking clearly, you asked the officer if you could do the test but he said no and when you asked why, he said “it’s too late.” You stated that you did not understand why he said it was too late as you changed your mind very quickly and he was still completing his paperwork. You said that you asked the officer what the penalties were and stated “he told me it was all in the paperwork he would be giving me, but I could not see it.”

When I asked you why you changed your mind, you told me that when you calmed down you started thinking about it and thought that you would likely blow a “warn” anyway which would probably not be so bad. When I asked you why you, you told me that you have friends who

have taken the "Serve it Right" course who told you that you could have 1 drink per hour and still be under the legal limit to drive. You said that regardless, you thought it was better to take the test and find out as it probably couldn't get any worse. You said that you did everything wrong "but when I tried to correct it, whatever I said he wasn't going to do the test."

In considering this issue, I note that nowhere in the officer's evidence is there any mention that he informed you of the consequences of refusing to comply with the demand. Further, your evidence supports that the constable did not inform you of the consequences.

In paragraph 16 of the case of *Johnson v. Superintendent of Motor Vehicles*, Justice Nielson opined that the evidence of a demand is sufficient, if the information before an adjudicator is that the ASD demand was read and the consequences of refusal were explained. I am not satisfied that this was done in your case. Therefore, I find that you were not issued a valid demand that night and, since the demand was not valid, it follows that there could be no refusal.

Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a demand on October 5, 2011 at 23:24 hours.

Having made this finding, I do not have to consider anything further.

Decision

I am satisfied that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 5, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving 90 days after that date, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

October 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 2, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were faxed to your lawyer, Adam Alteen, on October 5, 2011. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

After careful consideration of the evidence before me, I am not satisfied that the approved screening devices were functioning properly.

Based on the evidence before me, I am not satisfied that you failed or refused to comply with a demand.

Having made this finding, I do not have to consider anything further.

Decision

I am satisfied that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 2, 2011 at 05:45 hours.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(4)(c)(ii) of the Act. If you have not already done so, you may go directly to the location where your vehicle is impounded, for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 20, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

cc: Adam Alteen
Fax: 604-684-9690

October 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 1, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure had been provided to your lawyer, Sarah Leamon. She acknowledged receipt of the police documents. I have proceeded with the hearing based on this information.

Your hearing was scheduled for October 19, 2011, at 10:00 am. As of that date and time, I had not received a statutory declaration for a lost driver's licence, and an adjournment was granted until 2:00 pm, so that you could fulfill the requirements under section 215.48 of the Act. As a result of this delay, a witness was no longer able to testify on your behalf as to whether you were a driver within the meaning of the Act. I do not make any negative inference as a result of the absence of a supporting statement from the 'driver'.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable Gillis stated that he witnessed you in care or control of a vehicle at 08:11 hours on October 1, 2011. You were located sitting in the driver's seat slouched over onto the passenger seat. While the vehicle was parked in a parking lot, the engine was running, with the keys in the ignition. The constable noted that the vehicle was operable since it was running. In his attached Prime Report, Constable Gillis stated he was conducting a traffic stop, when a man ran up to him and asked for help. He pointed to a yellow vehicle across the street, at North Road and Austin Avenue in Burnaby, and stated there was a woman slumped over the seats not moving. At 08:11 hours the constable attended the scene. He observed the passenger side door of the vehicle wide open and the window half way down. The constable stated that he observed a woman sitting in the driver's seat; she was slumped over onto the passenger seat face down. The keys were in the ignition and the vehicle was running. Your feet were down by the pedals while you were passed out. Later in the prime report, Constable Gillis noted that when his colleague Constable Kaminsky attended, you grabbed the keys from the ignition and turned the vehicle off. You put the keys between your legs asserting that Constable Gillis had put the keys in the ignition. The constable stated that you made the assertion that Constable Gillis was lying. The constable noted that you then changed your account; the keys had not been in the ignition at all.

In the prime report the constable described identifying himself as a police officer and asked if you needed medical attention. The constable stated that after declining assistance you became confrontational. You moved from the driver's seat over to the passenger side of the vehicle and sat in the front passenger seat.

In her submission your lawyer argued that you consistently denied being a driver; you occupied the passenger seat and were not in care or control of a vehicle on October 1, 2011. You stated in your oral testimony that earlier the prior evening, you had not driven the vehicle. A friend, s.22, operated the vehicle. Due to the lateness of the hour, you decided to take a nap. You sat in the front passenger seat and the keys were on the driver's seat. You denied sitting in the driver's seat. You were defensive in response to the manner in which the police officer questioned you.

In conducting this review I am mindful of the fact that under s. 215(1) of the Act, a driver includes a person having the care or control of a motor vehicle, whether or not the motor vehicle

is in motion. Part of the test for whether a person has care or control of a vehicle requires some use of the vehicle or its equipment that involves a risk of putting the vehicle into motion so that it could become dangerous. You were asleep in the front of the vehicle when the peace officer came upon the vehicle. There is a presumption, stemming from section 258(1) of the *Criminal Code*, of care or control if a person occupies the driver's seat. The broad purpose of the presumption section was set out by the Supreme Court of Canada in *R v White*, (1988) 42 CCC (3d) 97 in the following language:

Parliament wished to discourage intoxicated people from even placing themselves in a position where they could set a vehicle in motion while at the same time providing a way for a person to avoid liability when there was a reason for entering the vehicle other than to set it in motion.

In your submission, you stated you had no intentions of driving. You were asleep, on the passenger side of the vehicle. You had decided to take a nap and the keys were on the driver's seat. The constable indicated in his Report that you were partly clothed, and that the engine was still running at 08:11 hours. You were in the driver's seat slumped over, face down on the passenger seat. The passenger door was open.

Since your account of events contradicts the evidence provided by the investigating officer, I must make a finding of credibility. The Supreme Court in *Giesbrecht v Superintendent of Motor Vehicles* 2011 BCSC 506 has found that an adjudicator conducting a review under section 215.49 of the Act has the power to make findings of fact, including who to believe if there is conflicting evidence and to draw inferences.

The constable has provided a detailed description of the incident in his Report, Vehicle Impoundment Report and Prime Report. He explained the circumstances that led to his investigation, prompted by the intervention of an independent witness. The previous 'driver' of the vehicle, a friend s.22 had left some earlier unspecified time. I note the passenger door was open when Constable Gillis attended.

A woman passed out, partly clothed, and slumped face forward in a vehicle with an engine running, may cause a passerby to believe there was a serious incident such as a medical emergency or a risk that the vehicle could be put into motion. The independent witness regarded the situation and felt it warranted summoning the police. He ran up to constable Gillis and asked for help, indicating a sense of urgency. Constable Gillis attended the scene in two minutes. Since you were asleep and unaware of these preconditions, they have not been challenged. According to your testimony, you were tired and decided to take a nap on October 1, 2011, in the passenger seat.

The constable's account is detailed, follows a clear narrative structure, and chronological order. He maintains that on first contact he identified himself as a police officer and asked three times if you needed medical attention. Only on the fourth time did you slowly get up. Again, this is uncontradicted evidence, and indicates behaviour consistent with you having passed out into a deep sleep rather than taking a 'nap' simply because you were tired. If a person were just taking a nap or having some sleep, it would be very unusual for them in that situation to be

semi-clothed, wearing only blue jeans and sandals; there would be a need for warmth or protection from the elements. There are also social considerations in a highly populated, urban environment.

In his Report the constable noted a moderate odour of liquor coming from your breath. He noted that you admitted to a few drinks the night before. You have disputed neither statement. You maintain that at all times you were sitting in the passenger seat. Constable Gillis observed a pink zip up sweater in the passenger seat when he first attended the scene, with you slumped over sitting in the driver's seat. According to the constable, only once you were awake did you move to the passenger seat. After interacting with the constable for at least seven (7) minutes, insisting that you were not a driver, you grabbed the keys from the ignition. Continuing in his prime report, Constable Gillis stated you turned the vehicle off. You put the keys between your legs asserting that the constable had put the keys in the ignition. You accused the constable of lying. The constable noted that your behaviour was 'belligerent'; you yelled at the officer, used profanities, flailed your hands and arms, hit and kicked the front dash of the vehicle and acted erratically. You lunged at both Constable Gillis and Constable Kaminsky.

Taking these factors together, and all of the evidence that the constable has submitted, in my view the suggestion that you were not a driver or in care or control of the vehicle is one that cannot be sustained. I find that you were seated in the driver's seat when Constable Gillis attended at 08:11 hours. You were asleep, with the keys in the ignition and the engine running. There is no compelling evidence before me to show that a sequence of very deliberate acts would have been required before the vehicle could have been put into motion; you did not take steps such as removing your shoes, moving to the passenger seat or retiring to the rear of your vehicle, that are indicative of preparing for sleep. I find, based on a balance of probabilities, that your actions constituted a potential risk of putting the vehicle in motion and thereby placing the public at risk.

Given the evidence, I find that, on a balance of probabilities, you were a driver within the meaning of section 215.41 of the Act on October 1, 2011 at 08:11 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Gillis noted that he formed a reasonable suspicion at 08:20 hours. The constable stated that you had a moderate odour of liquor on your breath and glossy eyes. You were slow with your initial responses when roused from sleep. The constable stated that you admitted to having a couple of drinks the previous night. At 08:20 hours Constable Gillis made a breath demand and noted that you understood the demand.

The reasonable suspicion requirement for a roadside breath demand is a relatively low standard, consistent with the preventive focus of section 254(2) of the *Criminal Code: R v Thompson*, [2001] OJ No 449 (CA). It is suspicion, of alcohol being in the body of the driver,

and no more. The constable noted distinct indicia of impairment, and an admission of prior consumption, that have not been challenged. Your lawyer has not provided persuasive evidence that Constable Gillis did not have an adequate evidentiary basis for an ASD demand. Accordingly, I am satisfied a valid demand was made by Constable Gillis at 08:20 hours, on October 1, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', Constable Gillis stated that you refused to comply with a demand at 08:20 hours on October 1, 2011. In his Report the constable recorded your statements: "No, I didn't drive." "I'm not driving the car. I'm a passenger, not driver." The constable asked you repeatedly to provide a breath sample and explained the consequences of a refusal. At least ten (10) times you were given an opportunity to blow, but you continued to argue until 08:56 hours. For example, in the Prime Report, the constable noted that at 08:41 hours you stated: "Refuse to provide a breath sample because I was a passenger."

The essential elements of the offence described under section 254 of the *Criminal Code* consist of a proper demand and a refusal or failure to comply with that demand. Where a refusal is alleged, as is your case, the proof required flows from the statements or acts of the accused. You declined to blow into an ASD. You refused to provide a breath sample and made no attempt to do so. Although Constable Gillis cautioned you, and prompted you to provide a sample, you refused to do so, at least 10 times.

Given the evidence before me, I am satisfied that you refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 08:20 hours, on October 1, 2011.

Did you have a reasonable excuse?

A reasonable excuse must involve some matter that is extraneous to the existence of the essential elements of the prohibition that justifies or excuses actions that would otherwise constitute the offence. Neither you, nor your lawyer, have provided evidence forming the basis of a reasonable justification for your behaviour. The fact that you consistently denied driving or having or control of the vehicle does not provide a reasonable excuse for failing to comply with a breath demand. Reasonable excuse, under s 254, refers to matters which stand outside of the requirements which must be met. I am satisfied that you did not have a reasonable excuse for refusing to comply with a demand.

Given all of the evidence presented, I find that on a balance of probabilities, you did not have a reasonable excuse for refusing to comply with a demand on October 1, 2011, at 08:20 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 1, 2011, at 08:20 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 1, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. The owner is responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act, you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

s.15

s.15

Adjudicator

cc: Sara Leamon
Fax: (604 685 8308)

October 6, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 21, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing, your lawyer, Mark P. Bussanich listed the disclosure documents that he had received prior to the hearing. I confirmed that we both had the same documents.

Mr. Bussanich has submitted a copy of a decision made by one of my colleagues in support of his submissions in this review. While I acknowledge this decision, it is important to note that Adjudicators are independent decision makers and are not bound by other Adjudicators' decisions. Further, I find sections 4 and 5 of the Report are relevant to a "test result" rather than a "failure or refusal to comply with a demand". I have proceeded with the review on this basis.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), Constable Dheri stated that he witnessed you driving at 2130 hours on September 21, 2011. In his attached Synopsis, Constable Dheri stated that he and Constable Gardner were conducting routine patrols in the Pitt River road area of Port Coquitlam. Constable Dheri stated that they observed a grey CR-V bearing BCL s.22 with two occupants exit the Cat and Fiddle parking lot. Constable Dheri stated that both constables observed the vehicle weave back and forth within its own lane. Constable Dheri stated that he spoke with the driver, s.22, who was identified by a valid photo BC driver's licence.

In your affidavit you admit that you were the driver. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on September 21, 2011, at 2130 hours.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report under "Reasonable Suspicion for Demand", Constable Dheri indicates that he detected an odour of liquor on your breath while standing outside of the vehicle. In his Synopsis he stated that initially you denied alcohol consumption and when asked again you admitted that you consumed one "Jagger Bomb." Based on these indicia of impairment, at 2138 hours, Constable Dheri formed a reasonable suspicion that you had alcohol in your body and made an ASD demand on you. He indicates that you understood the demand; however, you refused to comply with it. In answer to the question: "How did the driver fail or refuse to provide breath sample?" Constable Dheri states: "failed to provide valid breath samples" "5 NoGos and one void reading given after demonstration on how to provide breath samples."

Mr. Bussanich made the following submissions regarding this issue:

- There is evidence of a medical condition. He provided two statements from two different physicians that confirm you have asthma.
- In Dr. Todorovic statement he states that it is possible that during an episode you may experience difficulty in providing a breath sample.

- Mr. Bussanich submitted that you never stated at anytime that you would not provide a sample. You didn't say "no" or "I don't want to."
- There is no evidence of "puffing out cheeks, of taking short puffs, or sticking your tongue in the tube."
- By the constable's own evidence he stated that you made several attempts.

In your affidavit you stated that you were not taking any medication on September 21, 2011. You stated that you were at the pub for a birthday party, you were the designated driver, you had one drink that was bought for you and you believed after the drink you were having an asthma attack. You stated that you decided to leave and when you approached your house, you were stopped by the police. You tried to blow into the ASD and you told the officer you had asthma and was not able to get air into your lungs, the officer showed you how to blow into the machine. During each attempt you stated you were wheezing and on some occasions you were coughing when you inhaled. Lastly, you stated that you did not refuse to provide a sample.

There is sufficient evidence to conclude that a valid demand made under section 254 of the Criminal Code was made. I have evidence of 5 "NoGos" and one "void". I find that on September 21, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

In your affidavit you state that you told the officer that you suffer from asthma and you were wheezing and coughing at the time.

I acknowledge that you have asthma. However, I do not accept that you were suffering with asthma at the time you were attempting to provide samples for the following reasons. I am aware that officers are trained to observe breath test subjects prior to and during an ASD test. If you advised the constable that you had asthma, and you were coughing while attempting to provide a sample, it makes sense to me that the constable would have observed that you were having difficulties, particularly if it happened six times, and that he would have proceeded accordingly. In addition, I would not expect the constable to demonstrate to you on how to use the instrument if you were having an asthmatic attack. Last, I am convinced that if you were in your driveway experiencing an asthma attack the constable or you would have likely suggested that you get your medication.

Decision

I am satisfied that on September 21, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

I also confirm any vehicle impoundment that resulted from this prohibition.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc: Mark Bussanich by fax: [604] 681-0652

October 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 17, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

As it is determinative to the outcome, I will only address the second issue.

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

First, I must determine whether a demand existed.

When considering the evidence before me, I find that the officer did not have reasonable and probable grounds to issue you a demand for an approved screening device. Consequently, I find the demand was invalid.

Decision

I therefore revoke your driving prohibition, the monetary and other penalties you received, and the vehicle impoundment as required by s. 215.5 of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will p costs up to and including October 3, 2011. You are responsible for any
st at date. You should know that if the vehicle is not reclaimed, the
in o the Superintendent of Motor Vehicles to dispose of the vehicle.

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Adjudicator

October 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 13, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1) or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing, I confirmed with your lawyer, Danny Markovitz, that he had received full disclosure.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Abbott stated that you were followed by a witness and then stopped by police. He recorded the date and time of driving/care or control as September 13, 2011, at 20:10 hours.

You have not challenged this issue.

Based on the evidence before me, I am satisfied that you were the driver within the meaning of section 215.41(1) of the Act on September 13, 2011, at 20:10 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Synopsis, Constable Abbott noted that you were not listening to the police directions, you were unstable when walking, your eyes were glassy, and you had a strong odor of liquor on your breath. In the RTS, the officer indicated that he read you an ASD demand at 20:14 hours and that you understood the demand.

Based on the evidence before me I am satisfied that a lawful demand was made to you.

With regard to the refusal, the RTS indicates that you failed or refused to comply with a demand at 20:19 hours on September 13, 2011. Constable Abbott stated "continued to give small breaths and inhale while providing a sample. Police demonstrated numerous times and driver only continued to do same thing".

In your affidavit you stated that you did your best to provide a sample and that you did not refuse to obey any demands by the police. You explained that you were advised that the machine was not registering any sample. You indicated that you told the officer that you would be prepared to provide a blood sample, but the police officer refused.

Mr. Markovitz stated that there is no indication that the device was in working order. He noted that although the officer stated that “police demonstrated numerous times” there is no evidence to indicate whether the officer demonstrated on a different device of the one presented to you.

While you stated that you did not refuse to obey any demands by the police, the evidence before me indicates that you were given numerous opportunities to provide a sample. In my view of the evidence, I find that you were being uncooperative and that you did not make every effort to provide a suitable breath sample. With respect to your request to provide a blood sample, there is no requirement under the legislation for an officer to provide you with an opportunity to provide a blood sample.

In response to Mr. Markovitz’s statement that there is no indication that the ASD was in working order or that the police demonstrated on a different device, in considering Mr. Justice Wong’s decision in *Johnson v. Superintendent of Motor Vehicles*, “it is not sufficient for the petitioner to make ‘suggestions’ about what might have happened .. An administrative review is not a situation where a ‘suggestion’ which is put forth in an effort to raise a reasonable doubt will suffice. The petitioner must put forth something other than suggestions, or hypotheticals, which would move an Adjudicator to be satisfied in his favour” (para 35). It has merely been suggested that there is no indication that the ASD was in working order or that the police demonstrated on a different device. There is no evidence to support this statement.

Based on the evidence before me, I find that it is more likely than not that you refused to comply with the officer’s demand.

Did you have a reasonable excuse?

You did not provide any submissions on this issue.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for refusing to provide a breath sample at the time.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 13, 2011, at 20:19 hours.

I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5 of the Act. You are prohibited from driving for 90 days, which came into effect on September 13, 2011. When your prohibition ends you may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle will remain in the impound lot for the remainder of the impoundment period. It will be eligible for release thirty days from the date IRP came into effect.

You may receive a separate letter requiring you to register in and attend remedial programs under the [215.45 and 25.1 of the Act](#). For further information, please see our web [.gov.bc.ca/osmv/](http://gov.bc.ca/osmv/) .

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Adjudicator

cc: Danny Markovitz
778-297-3131

October 27, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 17, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (“Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (“ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s reports.

Preliminary Matters

Records at this office indicate that disclosure was provided to you. I have proceeded with the hearing based on this confirmation.

In your written submission, you requested that your vehicle be released from impoundment as it impedes your ability to work in order to support your wife and two children. You indicated that you need to take your children to school and extra-curricular activities which is impossible without a vehicle. You requested, if I am unable to rescind your driving prohibition, that at the very least the vehicle be released so you can hire someone to drive you to and from job sites and carry your tools. You stated that you work in construction which requires a truck for your tools. You also stated that public transit is not feasible with your tools. I also take this to mean that this prohibition will cause you hardship.

I acknowledge and appreciate your situation. However, under the *Act* I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. There is a separate review process for the review of your vehicle impoundment. The instructions for that process are listed at the bottom of the Vehicle Impoundment Notice. The scope of this review is limited to the grounds defined in the *Act*. The issues I can consider are limited to the issues as listed below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the IRP Report to Superintendent ("IRP Report"), Peace Officer Stolarchuk is identified as the investigating officer. In the IRP Report, the investigating officer checked the box to indicate that he witnessed you as the driver of the vehicle. The officer indicated that the vehicle was being driven by you in the 900 block of SE Marine Drive. The vehicle was stopped in the 700 block of SE Marine Drive where you produced the keys to the vehicle and your driver's licence. The officer stated that you were the driver and that you were seated in the driver's seat of the vehicle. In the IRP Report, the officer stated that the date and time of driving or care or control was October 17, 2011, at 21:22 hours. The officer provided a detailed occurrence report which is consistent with the evidence in the IRP Report.

In your written submission, you acknowledged that you were served this IRP on October 17, 2011. In your submission, you have not refuted the issue of being a driver.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* on October 17, 2011, at 21:22 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the occurrence report, the officer indicated that a witness had called 911 to report a vehicle, BC licence plate s.22, that was driving all over the road, travelling westbound on Hwy 91 toward No. 6 Road in Richmond. The officer indicated that he located your vehicle, which matched the same licence plate and description as reported, and conducted a traffic stop. The officer stated that he detected an odour of alcohol emitting from you, additionally, there was an independent witness that had called police about your erratic driving. The officer indicated that you stated that you had worked all day and were taking Tylenol 1 and 3s. He also indicated that you told him that you had not consumed any alcohol and you were going to purchase a case of beer from the store where the traffic stop had been initiated. In the occurrence report, the

officer stated that he requested another police unit attend the location with an ASD. Then at 21:24 hours, the officer requested that you provide a sample into the ASD to which you refused. In the IRP report, the officer stated that he read an ASD demand to you on October 17, 2011, at 21:24 hours, and that you understood the demand.

In your written submission, you have not refuted the validity of the demand. Considering the evidence before me, I find that the officer had a reasonable suspicion to make the demand and that a valid demand for a sample of your breath into an ASD was made.

In the IRP Report the officer indicated that you understood the demand and that you refused the demand. The officer also indicated that you were informed of the consequences of refusing, yet you still refused the demand. The officer's occurrence report supports the evidence in the IRP Report. In the IRP Report, the officer noted the date and time of failure or refusal to comply with the demand was October 17, 2011, at 21:24 hours.

In your written submission, you acknowledged that you did not make any attempt to provide a sample of your breath into the ASD. There is no indication, in the evidence before me, that you made any attempt to provide a sample of your breath into an ASD. Consequently, based on the evidence before me in its entirety, I am satisfied that a demand existed, and that you failed or refused to comply with that demand.

Did you have a reasonable excuse?

In the IRP Report, the officer indicated that you understood the demand and that you refused the demand. In section six of the IRP Report, the officer stated the following:

"Driver said that he would not provide breath sample. Driver advised of suspension and impound should he not provide sample. Driver said that he understood but still would not provide sample. ASD presented, driver said he would not blow."

In the occurrence report, the officer indicated that he requested for you to provide a breath sample into the ASD, which you refused. The officer indicated that he requested, a second time, for you to provide a breath sample and advised you that should you refuse that you may have your licence suspended and your vehicle impounded. The officer stated that you refused again. Additionally, in the occurrence report, the officer indicated that he requested a s.22 sample and s.22, assist with translating the police demand for a breath sample and s.22 replied that you were not going to provide a sample.

In your written submission, you stated that you have limited English and misunderstood the officer's request to blow into the roadside screening device. You indicated, in your submission, that you advised the officer that you wanted to blow into a blood alcohol breathalyser unit, which would provide an accurate measurement of any impairment. I take this to mean that you are referring to a Datamaster machine that is used in measuring blood alcohol concentrations. You stated that the officer took this to mean that you were refusing to blow into the roadside screening device and subsequently issued this prohibition, without advising you of the implications of your request. You indicated that, had you been aware that your request for the more accurate measurement would be construed as a refusal to blow and result in this IRP, you would have agreed to blow into the roadside screening device.

Your submission is not consistent with the officer's reports on the events that occurred. Regarding your limited English excuse, the officer clearly indicated in his occurrence report that he requested a security guard assist with translating the police demand for a breath sample, and you refused. I note that you have been silent about the security guard that translated the demand for the officer. Additionally, the officer indicated in the IRP Report that he "presented" the ASD to you. I take this to mean that the officer held or "presented" the ASD device up to you when he demanded a breath sample. I find this physical act to be a clear physical indication from the officer that he wanted you to blow into the ASD to provide a breath sample. The officer's evidence clearly indicates that the officer; made the demand, you refused, he then explained the result of a refusal, you understood the demand, he made the demand again, and you still refused. As such, I find it more likely than not that you understood the demand, and I do not find your limited English excuse reasonable. Regarding your request for a breath test into the Datamaster machine, there is no requirement in the *Act* that police must use a Datamaster for the purposes of an IRP. Consequently, I do not find that this is a reasonable excuse.

Based on the evidence before me in its entirety, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 17, 2011, at 21:24 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1) of the *Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 17, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up the vehicle. You are responsible for towing and storage charges that have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

separate letter requiring you to register in and attend remedial programs
ns of sections 215.45 and 25.1 of the *Act*. For further information, please
<http://www.pssg.gov.bc.ca/osmv>.

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Adjudicator

November 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 28, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

In your written submission you provided context to the incident on October 28, 2011, and a narrative of events. You asserted that Constable Ramirez checked your driving record and then decided to demand a breath sample. You refused to comply, not appreciating the consequences of refusing. After the officer started to fill out the Notice, he informed you of the consequences of refusing. At that point you requested the opportunity to provide a sample, but the officer denied your entreaties, three or four times.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report) and the attached Synopsis, Constable Ramirez, the investigating officer, stated that you were observed driving on the 800 block of Granville Street on October 28, 2011. The constable followed the vehicle as it turned west bound onto Davie Street and then onto the west lane of the 1200 block of Granville Street. The constable activated the emergency equipment of the marked police vehicle. You were identified by reference to your BC driver's licence.

In your submission you admitted to driving a vehicle on Granville Street and heading towards the bridge at approximately 2:20 am. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act at approximately 02:20 hours on October 28, 2011.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Ramirez stated that he formed a reasonable suspicion at 02:25 hours. In the Synopsis the constable noted a smell of alcohol on your breath during conversation. You denied the consumption of alcohol. An ASD demand was made at 02:30 hours. In your written submission you denied drinking at all on October 28, 2011 or the preceding evening.

For a valid demand the investigating officer must have reasonable grounds to suspect that a person has alcohol in their body. Although you made no admission of drinking, the smell of liquor of itself is sufficient evidence upon which an officer could form a 'reasonable suspicion.' This follows the reasoning in *R v Lindsay* [1999] OJ No 870 and *R v Danielson* [1979] MJ No 365 that: "a slight odour of alcohol on the breath of a person is sufficient to support a reasonable suspicion in the mind of a peace officer that the person had alcohol in his body." There are several other cases to the same effect. Accordingly, I am satisfied a valid demand was made by Constable Ramirez at 02:30 hours, on October 28, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', the constable stated that: 'He refused to provide a breath sample. In his Synopsis, the constable noted that you immediately refused to provide a breath sample after the demand.'

You argued that you did flat out refuse to provide a sample of breath. You felt angry and insulted. You alleged that you did not know what the consequences of a refusal would bring. A 'refusal' is not necessarily absolute and irrevocable at the time it is made. A person may change their mind and agree to provide a sample. You contended that when the constable started to fill out the Notice, he told you the consequences of refusing. At that point you asked three or four times for the opportunity to take the ASD test, but the constable insisted it was too late. You inferred that in the circumstances, your initial refusal was followed within a short duration, by an alleged acceptance and should be treated as part of a sequence of continuous discourse forming a single transaction. You contended there was never an unequivocal refusal in your mind. In your submission you imply you did not appreciate the consequences of a refusal.

A refusal to provide an adequate sample is established when a driver declines to blow into an ASD. What constitutes a refusal depends on all the circumstances of an individual incident. As you suggested, an interaction with the police may be extended and an entire conversation should be treated as a continuous sequence of events forming a single transaction. It may contain pauses or breaks. Even after an apparently unambiguous refusal, it is possible for later willingness to be considered as part of the whole 'transaction.' In this incident there appeared to be a gap or break in the events. Once the constable started writing up the prohibition you then made the request to blow. I find that there was effectively a break in the sequence of events preceding your plea to blow. You noted the constable insisted it was too late. You do not have a choice as to the time and conditions of an ASD test before agreeing to comply with the demand. The 'change of mind' came after the refusal was complete. While you assert you did not appreciate the consequences of a refusal, you admit to being prohibited from driving for a year and starting the 'Responsible Driver Program.'

The Responsible Driver Program is required for drivers who have received an Immediate Roadside Prohibition for blowing a fail, having been convicted of an alcohol related driving offence or who have multiple alcohol related driving events on their driving record. The program may also be required because the Superintendent of Motor Vehicles has evidence that the driver has an alcohol abuse or misuse problem. I do not accept your assertion you were unaware of the potential consequences of refusing to provide a breath sample. You were given an adequate opportunity to provide a breath sample for analysis by an ASD and you refused.

Given the evidence before me, I am satisfied that you refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 02:30 hours, on October 28, 2011.

Did you have a reasonable excuse?

A reasonable excuse must involve some matter that is extraneous to the existence of the essential elements of the prohibition that justifies or excuses actions that would otherwise constitute the offence. You have not provided persuasive evidence forming the basis of a reasonable justification for your behaviour.

I find that on a balance of probabilities, you did not have a reasonable excuse for failing to comply with a demand on October 28, 2011, at 02:30 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 28, 2011, at 02:30 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 28, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. You are responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act, you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

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Adjudicator

November 2, 2011

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REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 12, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s report.

Preliminary Matters

You applied for a review of this IRP on October 17, 2011. In your application you requested a written review and indicated that s.22 would be acting as your representative. The Office of the Superintendent of Motor Vehicles faxed disclosure documents to s.22 on October 18, 2011. I have before me a fax communication result report confirming successful transmission of those documents.

Both your application and the fax sheet attached to the disclosure documents state that your written review was scheduled for October 25, 2011, at 9:30 am. To date, I have not received any submissions on your behalf. I will proceed with this review on the evidence before me.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "IRP Report"), the investigating officer checked the box to indicate that he observed you as the driver. He recorded the date and time of driving/care or control as October 12, 2011, at 0131 hours. He stated that he observed you drive southbound on 124th Street before turning right on 92nd Avenue.

There is no evidence before me to contradict the officer's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 12, 2011, at 0131 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the IRP Report, the officer stated that there was a strong odour of liquor on your breath, and your eyes were glassy. He indicated that he formed his reasonable suspicion at 0133 hours and made the ASD demand at 0134 hours. He checked the box to indicate that you understood the demand. At the bottom of the IRP Report, the officer indicated that you failed or refused to comply with the demand on October 12, 2011, at 0135 hours. He stated that you refused to provide a sample because you were concerned that the ASD might register a fail result. The officer explained the consequences, but you still refused.

There is no evidence before me to contradict the officer's evidence. Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand on October 12, 2011, at 0135 hours.

Did you have a reasonable excuse?

Based on the evidence before me, I do not find that you had a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 12, 2011, at 0135 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

You may receive a separate letter requiring you to register in and attend remedial programs
u of sections 215.45 and 25.1 of the Act. For further information, please see
o www.pssg.gov.bc.ca/osmv/.

s.15

s.15

Adjudicator

cc:

s.22

OCTOBER 19, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 30, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of your oral hearing, I listed the documents I received from the police which were sent to your lawyer, Melissa Kaniuk. Ms. Kaniuk acknowledged that she had received them.

Ms. Kaniuk submitted that your driving prohibition should be set aside "pending the outcome of the *Charter* challenge." However, as an Adjudicator with the Office of the Superintendent of Motor Vehicles, I am not authorized to set aside a driving prohibition for that reason. In this review, I am only authorized by the *Motor Vehicle Act* to consider and make decisions on the issues noted below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue: first, I must determine whether or not a proper demand was issued to you and, if so, I must then determine whether or not you failed or refused to comply with the demand.

In his Occurrence Report (OR), Constable Funk stated that after you were located, you were taken into custody and handcuffed. He immediately smelled the odor of liquor coming from you, even though you were lying face down on the ground. Constable Funk stated that you were arrested, *Chartered* for hit and run and impaired driving, given the secondary warning and read the breath demand. You were searched and your wallet was located in your pocket. Your identity was confirmed and a small search of the area was conducted for your keys and cell phone but they were not located. Constable Funk then stated that "At 0615 hrs was read the ASD demand".

In his Report to Superintendent (RTS), he noted that he formed the reasonable suspicion at 05:15 hours, and stated "Demand read by police. s.22 shown demand on card."

Ms. Kaniuk submitted that the demand was not read as soon as practicable after the officer formed his reasonable suspicion. In considering this, I find that I agree with Ms. Kaniuk. Consequently, I am not satisfied that a proper demand was issued to you that morning.

Having made this finding, I do not have to consider anything further.

Decision

I am not satisfied that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on September 30, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(4)(c)(i) of the *Motor Vehicle Act*. You may resume driving 90 days after that date, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.22

IRP Review Decision

Page 3

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 18, 2011, the date you were informed that your vehicle was eligible for release. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Melissa Kaniuk
(604) 637-1617

November 23, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review, I listed the documents I received from the police which were sent to your lawyer, Jordan Allingham. He acknowledged that he had received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative, Constable Hodgetts stated that on November 4, 2011, at approximately 0125 hours, she observed a grey Chevrolet Silverado quad cab pull out from the area of the McDonalds's drive thru and onto Main Street and make a right turn southbound. She stated that the vehicle crossed three lanes of traffic in one motion, failed to signal lane changes and caused vehicles in the through lanes to brake to avoid collision. The vehicle then made a left turn onto Industrial from Main Street contrary to the posted movement prohibition sign. The constable stated that she conducted a traffic stop and you were identified as the driver from you BC driver's licence.

There is no evidence before me contradicting the constable's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on November 4, 2011, at 0125 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Narrative, the constable stated a moderate odour of alcohol was present in the vehicle and that you had red, bloodshot, watery eyes with pupils dilated beyond the range that would be expected given the lighting. The constable stated that she asked you when your last drink was and you stated "I haven't had anything to drink". The constable stated that she examined your eyes and noted that there was a lack of smooth pursuits in both eyes and that given your driving, the odour of liquor and the appearance of your eyes, she asked you to exit the vehicle. She stated that once outside the vehicle, the odour of liquor persisted and you were advised of the reason you were asked to exit the vehicle. The constable stated that you said you were taking medication to which she asked, "anti depressants?" and you replied, "no antibiotics". The constable stated "0130 hours ASD demand issued from memory and s.22 stated refusal". He stated that the penalties associated with refusal were explained to you but you stated you did not care and that it was a set up.

You did not dispute the constable's evidence. Mr. Allingham submitted *R. v. McIvor*, *R. v. Khunkhun*, and *R. v. Hardy* in support of your case and argued that the demand was not in compliance with the *Criminal Code* because the officer did not have enough evidence to form a reasonable suspicion that there was alcohol in your body. He also stated that the constable did not provide the wording she used for the demand nor did she indicate that you understood it.

I have read *R. v. McIvor*, *R. v. Khunkhun*, and *R. v. Hardy* but I find these cases to be a markedly different from your case. Further, they are criminal case requiring a standard of proof beyond a reasonable doubt whereas this is an administrative process with a standard of proof on a balance of probabilities.

With regard to Mr. Allingham's argument that the constable did not have enough evidence to form a reasonable suspicion for the demand, I disagree. The constable's evidence is that you

had red, bloodshot, watery eyes with pupils dilated beyond the range that would be expected given the lighting and that the odour of liquor that was present in the vehicle persisted when you exited the vehicle. It seems logical to me that a person will smell of liquor for one of two reasons: an alcohol based drink has been spilled on him/her or he/she has consumed alcohol. As a result, it seems reasonable to me that when a police officer smells liquor on a person, the logical conclusion for the officer to draw is that the person has been drinking and has alcohol in his/her body. Regardless of whether or not the constable stated she believed you had alcohol in your body, I am satisfied that due to the red, bloodshot, watery eyes and dilated pupils as well as the odour of liquor that persisted after you exited the vehicle, the constable had sufficient grounds to issue you the ASD demand.

With respect to the wording of the demand, I do not require the actual wording used by the constable to determine that a demand was made. The constable's evidence is "0130 hours ASD demand issued from memory and s.22 stated refusal", and that she explained the penalties associated with a refusal and you stated you did not care and that it was a set up. As previously stated, you did not dispute the officer's evidence that she made a demand for a sample of your breath and that you refused to provide one. In my view, it does not seem reasonable to conclude that you would refuse a demand for a sample of your breath if the demand did not exist and you did not understand it. Further, there is no compelling evidence before me from which I could conclude that your refusal was in response to anything other than a demand for a sample for you breathe.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand and you failed or refused to comply with that demand.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to comply with the ASD demand. Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on November 5, 2011, at 0130 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on November 5, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Drivers Licence.

The vehicle impoundment is also confirmed. The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the owner may attend the impound lot and pick up the vehicle. The owner is responsible for towing

and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

s.15

Adjudicator

cc: Jordan Allingham
Fax: 604-688-8350

NOVEMBER 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On November 6, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to your lawyer, Danny Markovitz, in disclosure. He acknowledged receiving them on your behalf. I have proceeded with the hearing based on this confirmation.

In the hearing, Mr. Markovitz argued that the investigating officer did not explain why they pulled you over. The reason for the traffic stop is not relevant to the issues that I can consider in this

review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent, Immediate Roadside Prohibition (RTS), Constable Perrey indicated that you were witnessed driving or in care or control of the vehicle on November 6, 2011, at 0000 hours. I take this time notation to mean that the clock had just turned from November 5, 2011 to November 6, 2011. The officer noted that you were the only occupant of the vehicle and that you were sitting in the driver's seat.

In the Report to Superintendent, Vehicle Impoundment, Constable Jarvis stated the following:

"PC observed the vehicle which matched an earlier broadcast for an impaired driver. The vehicle travelled south on Granville at a high rate of speed. Traffic stop conducted, PC could smell liquor on the driver's breath. PC read the breath demand the driver refused to provide a sample and kept saying that he was not driving. The driver was the only occupant and members did not lose continuity of the vehicle."

Your lawyer said he was confused by the police evidence. He noted that there were two different reports from two different officers. I agree that there is evidence before me from Constables Perrey and Jarvis, but section 215.49(d) the Act requires me to consider the evidence of both officers:

"215.49 (1) In a review of a driving prohibition under section 215.48, the superintendent must consider

(d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer, "

I find from Constable Jarvis's evidence noted above, that the officers observed you driving south on Granville at a high rate of speed at some point before they conducted a traffic stop. Mr. Markovitz pointed to Constable Perrey's evidence in the RTS, in which the officer said that the keys were found behind the passenger seat on the floor. In the oral hearing I said that it was possible that you removed the keys from the ignition and threw them behind the passenger

seat. This is just speculation, but I also noted Constable Perrey's statement that "VEH observed being driven." Again, Constable Jarvis stated that a traffic stop was conducted. Accordingly, there is consistent evidence before me from both officers that you were observed driving, and not just in care or control of the vehicle. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on November 6, 2011, at 0000 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

Constable Perrey stated in the RTS that he read you a demand to provide a sample of breath into an ASD on November 6, 2011, at 0011 hours. He noted that you understood the demand. You did not dispute this evidence, so I am satisfied that the officer made a valid demand.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. Constable Perrey stated in the RTS that you used an expletive to indicate that you did not intend to provide a breath sample. He noted in part six of the RTS that he explained the implications of not complying with the demand, and that you gave him the same, negative response. You did not refute the officer's evidence.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 6, 2011, at 0011 hours.

Did you have a reasonable excuse?

Neither you nor the officer provided any evidence explaining why you refused to comply with the demand, so I am satisfied that you did not have a reasonable excuse for failing or refusing to provide a sample of breath into an ASD.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 6, 2011, at 0011 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on November 6, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Driver's Licence.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/> .

s.15

Adjudicator

cc. Danny Markovitz
778-297-3131 (fax)

November 8, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 26, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing I listed the disclosure documents before me. Your lawyer, Melissa Kaniuk, acknowledged that she had received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act??

After careful consideration of the evidence before me, I am not satisfied on a balance of probabilities that you were a driver.

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 26, 2011, at 12:48 hours.

Having made this finding, I do not need to consider anything further.

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 26, 2011, at 12:48 hours.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215(4)(c)(ii) of the Motor Vehicle Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Drivers Licence.

If you have not already done so, you may go directly to the location where your vehicle is impounded, for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including November 8, 2011. You are responsible for the costs beyond that date. You should know that if the vehicle is not reclaimed, they may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

cc: Melissa Kaniuk
Fax: 604-637-1617

OCTOBER 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 18, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to your lawyer, Kevin Filkow, in disclosure. Mr. Filkow acknowledged that he had received them on your behalf. I have proceeded with the hearing based on this confirmation.

Mr. Filkow argued that I should revoke the prohibition because the legislation is unconstitutional. As I explained in the oral hearing, I am not aware of any court decisions declaring the legislation unconstitutional. He further argued that the IRP regime infringes your rights under the *Canadian Charter of Rights and Freedoms* regarding the presumption of innocence, unlawful search and seizure, and the right to counsel. You did not provide any

evidence indicating that your rights in this regard were infringed. Further, as an adjudicator of the Office of the Superintendent of Motor Vehicles, I do not have authority to decide whether the legislation is unconstitutional. I only have authority to decide issues in section 215.5.

Mr. Filkow also argued that an ASD is supposed to be tool used by the police to help them do their jobs, but it is not intended to produce a determinative result. While that may be the case in other sections of the Act, administrative sanctions were imposed on you under section 215.41(3), which states:

“**215.41** (3) If, at any time or place on a highway or industrial road,

(a) a peace officer makes a demand to a driver under the *Criminal Code* to provide a sample of breath for analysis by means of an **approved screening device** and the approved screening device registers a warn or a fail, and

(b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, **must**,

(c) if the driver holds a valid licence or permit issued under this Act, or a document issued in another jurisdiction that allows the driver to operate a motor vehicle, take possession of the driver's licence, permit or document if the driver has it in his or her possession, and

(d) serve on the driver a notice of driving prohibition.”

(4) If a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device, the peace officer, or another peace officer, **must** take those actions described in subsection (3) (c) and (d).”

[emphasis added]

The IRP portion of the Act requires the police to use the ASD for determinative purposes.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Shipper checked a box indicating that you admitted to driving. He stated that the date and time of driving was September 18, 2011, at 0400 hours.

In the Occurrence Report (OR), Constable Shipper notes that the police received a complaint of a single vehicle accident at Slocan/Kingsway. The officer stated in the OR that he attended the location and found the vehicle with the front, left end crushed. He said that you approached him and admitted to having driven the vehicle into the pole.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 18, 2011, at 0400 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the OR, Constable Shipper said, "Fire was on scene upon the PC's arrival and had checked and cleared NG." I take this to mean that you were not injured in the accident. The officer stated in the RTS that:

- you smelled of stale liquor,
- you had driven your car into a pole,
- you were unsteady on your feet, and
- you admitted to drinking.

The officer stated that he read the ASD demand to you at 0406 hours, which you did not dispute. Based on the evidence before me, I am satisfied that a valid demand existed. I now turn to the issue of whether you failed or refused to comply with the ASD demand.

In the OR, the officer stated that you repeatedly blew weakly into the ASD, refusing to blow fully into it. He also noted having shown you how to provide a sample "on multiple occasions. After 5 failed attempts to even remotely try a decent blow into the ASD..., PC SHIPPER took this as a refusal." You did not provide any evidence to the contrary.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 18, 2011, at 0420 hours.

Did you have a reasonable excuse?

The only evidence before me suggesting a reason for your failure or refusal was the Officer's statement: "...in which he kept saying he wasn't perpendicular [*sic*] as a reason for his lack of blowing power...." I do not understand what this means. Your lawyer addressed the matter, but

he did not provide any direct evidence from you explaining what it meant. I find that you did not have a reasonable excuse for failing or refusing to comply with the demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 18, 2011, at 0420 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 18, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/> .

s.15

Adjudicator

cc. Kevin Filkow
604-270-3787 (fax)

October 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 15, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to you. I have proceeded with the review based on this confirmation.

In your written submissions you asked that I consider your driving record, your health, and your family's reliance on you driving. You have requested I consider a lesser penalty.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, or transportation needs in this review. The scope of the review is limited to the grounds as defined in the Act. In addition, I cannot alter the terms and conditions of a prohibition.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable Petkov of the Vancouver Police indicated that he attached a Prime Report (Occurrence Report) for evidence of an incident that took place on October 15, 2011, at 2120 hours. In the Occurrence Report, Constable Petkov stated that Acting Sergeant Gibson witnessed you driving too slow and weaving. Constable Petkov stated that when Sergeant Gibson attempted to conduct a traffic stop you continued driving for 11 blocks southbound from E 12th Avenue /Clark Drive to the 3900 block of Knight Street. When Sergeant Gibson pulled you over he noticed a very strong odour of liquor on your breath, and requested a cover unit to attend the scene. Constable Petkov attended the scene.

You do not challenge this issue. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on October 15, 2011, at 2120 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Petkov stated that he read an ASD demand at 2120 hours. He stated that you understood.

The reasonable suspicion requirement for a roadside breath demand is a relatively low standard, consistent with the preventive focus of section 254(2) of the *Criminal Code: R v Thompson*, [2001] OJ No 449 (CA). It is suspicion, of alcohol being in the body of the driver. The constable noted distinct indicia of impairment; accordingly, I am satisfied a valid demand was made by Constable Petkov 2120 hours, on October 15, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', Constable Petkov stated that you would not provide a sample of your breath and comply with the demand. In the Occurrence Report, Constable Petkov stated that you would not provide a sample, because you did not think you were drunk. Constable Petkov stated that the consequences of refusing were explained to you. Constable Petkov stated that you were unsteady on your feet and when a tow

truck was requested you made a request to provide a sample. Constable Petkov stated that you made three attempts but were unsuccessful due to your level of intoxication.

You asserted that you were willing to provide a breath sample and attempted to do so. In your submission you stated that you took a deep breath and blew. You stated that the instrument did not register a “warn” or a “fail.”

A failure to provide an adequate sample is established when: an adequate sample was not provided, a person was given adequate opportunity to blow into an ASD; and the ASD was in working order. You were given an ample opportunity to provide a breath sample for analysis by an ASD.

Given the evidence before me, I am satisfied that you failed to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 2120 hours, on October 15, 2011.

Did you have a reasonable excuse?

A reasonable excuse must involve some circumstance which renders compliance with the demand extremely difficult or likely to involve a substantial risk to the subject's health.

In your submission you indicated that you have ongoing health issues with colon cancer. While I can appreciate that you are not well; this condition would not have prevented you from complying with the demand.

Given the evidence presented, I find that on a balance of probabilities, you did not have a reasonable excuse for failing to comply with a demand on October 15, 2011, at 2120 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you failed, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 15, 2011, at 2120 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 15, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. You are responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act; you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

November 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 30, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to you. I have proceeded with the hearing based on this confirmation.

In your affidavit, you stated that you do not have criminal record in Canada or abroad and you have a clean driving record.

I acknowledge your statements; however, I do not have the authority to consider your driving record or your lack of a criminal record in this review. The scope of this review is limited to the grounds as defined in the Act.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative, Constable Hansen stated that on October 30, 2011, at approximately 20:45 hours, he observed a grey Kia Sephia driving eastbound on Hastings Street. He stated that the vehicle had a flat tire at the rear on the passenger side. He conducted a traffic stop and you were identified as the driver by your driver's licence.

In your affidavit, you confirmed that you were stopped by Constable Hansen on October 30, 2011, at approximately 8:45 pm.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 30, 2011, at 20:45 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Narrative, the constable stated that you were slightly unsteady on your feet, and when asked if you had consumed alcohol that night, you initially stated no, but then stated "three beers". He stated that you said your last drink was at 18:00 hours, but he could detect a strong odour of liquor on your breath. The constable stated that he read you the ASD demand at 21:02 hours and you replied "no problem".

In your affidavit, you stated that you understood and complied with the constable's request for your driver's licence, and when he verbally and physically directed you to exit your vehicle, you understood and complied with his direction to stand at a certain spot at the rear of your vehicle. You stated that the constable told you that you would need to take a test because he felt that you had consumed more alcohol than what you had told him. You stated that you did not understand what the test entailed, but you did not want to cause a problem so you said, "okay, no problem". You also stated that you were not unsteady on your feet; you have a robust, muscular body build which causes you to walk in a heavy, left to right manner. You stated that you never denied drinking and you did not tell the constable that you drank at a friend's house. You stated that when the constable first asked you if you had anything to drink that evening, you replied "a couple of beer" and you told him you drank with a friend at a restaurant. You also stated that given the small quantity of alcohol you consumed, you do not see how it was possible for the constable to detect a strong odour of liquor on your breath. You stated that due to your ethnic diet, you emit a strong odour when you breathe out.

While I acknowledge that you stated you walk in a heavy left to right manner, that you did not initially deny drinking, and that you did not tell the officer you were drinking at a friend's house, I am satisfied that due to the strong odour of liquor on your breath, along with your admission of consumption, the constable had sufficient grounds to make the ASD demand.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Narrative. The constable stated that you were provided with clear instruction on how to provide a sample into the ASD but you would only place your lips on the mouth piece, suck air from the mouthpiece as if drinking from a straw then remove your lips and exhale. He stated that you were repeatedly provided with clear instructions including a mock demonstration, yet you continuously engaged in the previously mentioned behavior. The constable stated that he warned you that he believed you were attempting to defeat the ASD by your actions. He stated that you repeatedly claimed that you understood his instructions and were complying with his instructions, but after 10 attempts to provide a sample, you were told that your actions were considered to be a failure to provide a sample.

In your affidavit you stated prior to your first attempt to blow into the ASD, the constable did not provide you with any physical direction. You stated that on your first attempt, you pursed your lips around the ASD, sucked air in through the device and blew into it for several seconds. You stated that the constable told you "no", then physically demonstrated how to provide the sample. You stated that he showed you that you should take in a deep breath of air then blow it straight through into the ASD. You stated that prior to your second attempt, you observed the constable change the mouthpiece. You stated that on your second attempt, you did exactly as the constable demonstrated but he told you "not correct" and "do it again" and you stated "I want to do it. I don't know how to do it". You stated that the constable became visibly agitated with you and he said "you're playing with me" and you replied "I don't want to. I want to do my best". You tried again to provide a sample, but were unsuccessful and the constable told you "No good, that's not enough". You stated that you asked for another chance but the constable stated, "No more chances".

The constable's evidence is that you did not provide a suitable sample, and you acknowledged that you did not. Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your affidavit, you stated that your significant language barrier provides a reasonable excuse for your inability to understand the constable's instructions with respect to the breath sample procedure you were directed to follow. You stated that you are working hard to learn how to read, write, and speak English but have not yet gained proficiency in the language so you asked s.22, a law student, to assist you with your written submission. s.22 provided an affidavit in which he stated the following:

- He has known you since the fall of 2009

- He converses with you several times a week
- He can attest to your limited capacity to communicate in English
- It's necessary to speak slowly and use physical gestures to communicate with you
- That you had no understanding of what had transpired on October 30, 2011, and what the documentation you received related to
- That he spent 3 hours assisting you with your written submission

Further, you stated that the constable could hear that you have little command of the English language, but he did not speak to you in a slow, clear, manner to enable you to thoroughly understand his instruction. You stated that you are deeply troubled by the fact that the constable did not make any notation of the language barrier that was evident during the incident. You also stated that you are aware that "pursuant to the samples I did provide, Cst. Hansen could have chosen to activate the manual switch on the ASD, which would have established my low level of intoxication; I do not believe that he did this".

With regard to your assertion that the constable could hear that you have little command of the English language, you did not provide any compelling evidence from which I could conclude that he held any such belief. The constable's evidence is that you were repeatedly provided with clear instruction and a mock demonstration on how to provide a sample into the ASD but you would only place your lips on the mouth piece, suck air from the mouthpiece as if drinking from a straw then removed your lips and exhale. He also stated that you repeatedly claimed that you understood his instructions and were complying with his instructions. Your own words confirm:

- You understood and complied with the constable's request for your driver's licence
- You understood the constable when he asked if you had been drinking
- You understood when he verbally and physically directed you to exit the vehicle

Most convincingly, you stated that he "physically demonstrated how to provide a sample; he showed me that I should take in a deep breath of air and then blow it straight through the ASD". In my view, the fact that you are able to describe the process of providing a sample tells me that you clearly understood what the constable required you to do in order to provide a valid breath sample, but you did not do it. Ultimately, I am not convinced of your contention that a language barrier prevented you from providing a breath sample.

You stated that the constable could have used the manual switch to establish your low level of intoxication but you did not state why he would do this and I know of no requirement for him to do so. There is no medical evidence before me from which I could conclude that you were physically incapable of providing a sample, so I can see no reason for him to use the manual switch. As previously stated, the constable's evidence is that you were sucking air from the mouthpiece, not blowing into the ASD and I do not find this behavior to be consistent with a sincere attempt to provide a breath sample.

Last, the constable provided the details of the ASD used in your case. I have compared these details to the information contained in the Superintendent's Report on ASDs and find that the ASD used in your case reflects current police practices and I am satisfied that it was operating

properly. There is no other evidence before me from which I can conclude that you had a reasonable excuse for failing or refusing to provide a sample of your breath on an ASD.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 30, 2011, at 21:02.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 30, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up your vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

s.15

Adjudicator

NOVEMBER 14, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 29, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to you in disclosure. You acknowledged that you had received them. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Macdonald stated that he witnessed you in care or control of the vehicle on October 29, 2011, at 0515 hours. The officer indicated that the vehicle was parked in a public parking lot and that you were sleeping in the driver's seat with the keys on the passenger seat.

In the oral hearing, you told me that you were sleeping in the vehicle because of an argument you had with your girlfriend s.22 . You said that s.22 and that you usually stay with her on weekends. You always use the underground parking and leave the vehicle parked for the weekend. You provided a letter from s.22 , a copy of her tenancy agreement, her hydro bill, and a copy of her passport. You also faxed a copy of the parking receipt evidencing your payment of \$19.50 for 24 hours at the s.22 lot from 7:57 pm October 28 to 7:57 pm October 29, 2011.

You gave details of going out in the evening of October 28, 2011 for Halloween celebrations at a club, but you said you did not use the vehicle. "The truck doesn't move on weekends." You left s.22 apartment at approximately 9 pm to attend a party, where you stayed for a few hours. When you went back to s.22 place, you had a discussion, which made you feel "uncomfortable, so you went to the truck to cool down." You told me that you threw the keys on the passenger seat and never intended to drive. You said you would never drive even if just a little intoxicated.

You said that you fell asleep at 0130 hours and that a security guard must have seen you and called the police. You said that you are a heavy sleeper and at around 0520 hours, you heard the police knocking, and you were really disoriented. You said you were still upset from the discussion with your girlfriend.

Evidence in the officer's Occurrence Report corroborates your explanation of sleeping in the vehicle because of an argument with s.22 . Given the specific scenario that you described to me and all of your supporting evidence, I am satisfied on a balance of probabilities that you were not in the vehicle for the purpose of driving and that it is unlikely that you would have changed your mind and decided to drive.

Based on the evidence before me, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on October 29, 2011, at 0515 hours. Given this finding, I do not need to consider other issues.

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 29, 2011, at 0515 hours. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including November 14, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

October 26, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 8, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to you. I have proceeded with the hearing based on this confirmation.

In your written submission, you stated that the three reasons you selected on your application are valid reasons for having this IRP dismissed. I note that given that the police evidence is that you did not provide a suitable sample, the grounds of, an approved screening device did not register a WARN, and an approved screening device did not register a FAIL, are not applicable to your circumstances. The third reason you selected, "I did not fail or refuse to comply with the peace officer's demand to provide a breath sample", is applicable and will be considered.

You also stated that you are disputing this IRP because you were not impaired. Whether you were impaired or not is not the issue in this review. The three issues for consideration are noted below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report To Superintendent ("the Report"), Constable Sardari identified himself as the investigating officer and indicated that he witnessed you driving. In the Report, the officer stated that "Driver in driver's seat, vehicle on, keys in ignition, seat belt fastened + no one else in vehicle when in motion." The officer has reported the time and date of driving/care or control as 03:58 hours on October 8, 2011.

In your written statement, you confirmed that you were driving and stopped by the police on the date in question. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with a demand

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the officer stated that you had a strong odour of liquor, glossy eyes, and evasive driving behavior. He has stated that you informed him that you consumed 2 drinks, and the time of your last drink was at 02:30 hours. The officer has indicated that he read you the ASD demand at 04:00 hours, and that you understood the demand. Based on the evidence before me, I am satisfied that a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, the officer's Report stated that he explained how to provide a sample three times. He stated that you would put your tongue on the tip of mouthpiece and not blow. He stated that the ASD read "NO GO" three times. The officer has also noted that he explained the consequences of not providing a sample. The officer determined you were failing or refusing to comply with the demand at 04:05 hours.

In your submission, you stated that "at no point did (you) refuse an ASD test", and you deny that you were putting your tongue on the mouthpiece. However, I note that you do acknowledge that the officer informed you the device did not register on your three attempts. Therefore, while you did not explicitly refuse, you do not deny that you failed to provide a proper breath sample.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 04:05 hours, on October 8, 2011.

Did you have a reasonable excuse?

In your statement, you note that you were cooperative in providing three samples. While you maintain that you were not intentionally trying not to provide a valid sample, you have provided no reason as to why you were unable to provide a proper sample. I cannot find that you had a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 8, 2011, at 04:05 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 8, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the 30 day impoundment period. Once the vehicle is eligible for release, someone authorized by the owner may attend the impound lot and pick up the vehicle. You, as the owner, are responsible for towing and storage charges, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>.

s.15

Adjudicator

October 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 16, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (*Act*) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Cory Armour. I have proceeded with the hearing based on this confirmation.

I acknowledge that losing your driver's licence will adversely impact you; however, I have no authority under the *Act* to consider the hardship you will experience, personal circumstances, employment, or transportation needs, in the course of this review.

On September 28, 2011, Mr. Armour faxed our Office, requesting an adjournment of the hearing scheduled for September 29, 2011. He stated that you had retained him as counsel on September 27, 2011 and he needed time to prepare your defence, including obtaining witness statements, a police video and bloodwork results.

Based on this request, I adjourned the hearing and Mr. Amour was advised that he had until 4:30 p.m. on October 3, 2011, to provide your evidence.

On October 3, 2011, we received a fax from Mr. Stan Tessmer, requesting another adjournment because his law firm had not received disclosure from the police, including the police officers' notes and the Report to Crown Counsel. Mr. Tessmer's fax also included Mr. Armour's submissions, your written evidence, and written statements from s.22 and s.22

s.22

In considering Mr. Tessmer's request, I note that you applied for a review six days after the date of the incident. As noted on the application form, if you are to be represented in the review, you are responsible for ensuring that your representative is available for that date and time. Further, the application indicates that all written information you wish to be considered should be provided to the Superintendent in advance of the review. The application also notes that reviews will not be rescheduled, except in extraordinary circumstances.

In your case, you waited several days before you applied for a review. You also changed lawyers between the date of your application and the time of the scheduled review. While it is your prerogative to do so, your actions do not support a further adjournment. Request for a second adjournment is denied. I have proceeded with the review based on the evidence before me.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent regarding your Immediate Roadside Prohibition (Report) and attached Synopsis, Constable Sears indicates that on September 15, 2011 at 22:28 hours, a complainant reported that a white SUV with Alberta licence plate s.22 had backed into his van parked outside his residence at s.22. The witness identified the driver as a blonde female. He also observed a dark male get out of the vehicle and then get back into it. The SUV then travelled northbound on Lindahl Street.

Constable Sears indicates that a police report went out to be on the lookout for the suspect vehicle. You were later identified as the driver of the vehicle.

In his Synopsis, Constable Gauthier indicates that on September 15, 2011 at 23:19 hours, a complainant reported that an unknown female was yelling "let me out" from a White Lincoln

Navigator in the alleyway near Richter Street and Patterson Avenue in Kelowna. The vehicle was located by police, abandoned.

A second complainant called shortly thereafter to report that a naked female had just ran through his house located at s.22 and into his bathroom. The complainant's roommate stated that the female was drunk or high and was not making sense. Constable Gauthier attended the location and found the female in the kitchen, heavily intoxicated. Constable Gauthier asked if she knew who lived there. She replied that she just drove there. Constable Gauthier asked the female to clarify which vehicle and the female acknowledged the Lincoln Navigator. You were identified as the woman.

Mr. Armour has provided a copy of your written statement in which you provide the following evidence:

You are an interior designer and had a work trip planned to s.22 in Castlegar, on the morning of September 16, 2011. The developer of this project is your biggest client and has many condo developments throughout BC. It is standard that you use his 2002 white Lincoln Navigator for work relating to his projects.

On September 15, 2011 at 6:00 p.m., you had dinner at your home with your husband and children. During dinner you consumed two drinks consisting of vodka and orange juice. At 7:30 p.m., you put your 2 youngest children to bed and read them a bedtime story. You then told your husband and your 14-year-old daughter that you were going to switch vehicles at s.22 and would be back within the hour.

After picking up the Lincoln Navigator you drove towards home via East Kelowna Road. While driving, a phone call came in and you realized that you did not have your 'hands free' with you, so you ignored the call until pulling into the parking lot of s.22. The caller did not leave a message so you decided to call the home number of s.22, as she works for you and was going to Castlegar with you in the morning. She was not home, but you spoke to her husband, s.22, for about 15 minutes.

While talking to s.22, you noticed a man and a woman sharing a cigarette on the grass about 40 feet away from you. You ended the call with s.22 and saw the man from the field approach you. You stood beside the open driver's door, sipping on your vitamin water. The man politely asked if you could give him and his girlfriend a ride to the downtown area. You apologized and said that you had to get home to your kids and were going in the other direction. He asked if you had a lighter, as the blonde woman walked up beside him. You noticed that she had bare feet. Feeling a bit uncomfortable, you asked where her shoes were. She replied that she did not have any. You told her that you had an extra pair of flip flops in your vehicle and asked her if she wanted them. She accepted happily.

You set your open vitamin water carefully on the driver's leather seat and did not close the driver door because the man was leaning on it. You walked around to the back of the Navigator with the blonde woman beside you. The trunk hatch was still open so you knelt up on the back

bumper and crawled in to find the flip flops. You handed them to the woman, she thanked you profusely and you closed the trunk hatch in preparation to drive home.

As you walked to the driver side of the Navigator, the man handed you the opened vitamin water and said, "Caught it before it spilled on the seat." You smiled and thanked him. You drank the last half inch of water and jumped into the driver's seat. Seconds later you started to feel dizzy. The man was still leaning against the inside of the opened driver door. You did not want to be rude but you just wanted to leave because suddenly you were not feeling well. You told the man and woman that you hoped that they had a great night, but that you had to get home to your kids. You put the key in the ignition and the man asked if you knew anyone who was hiring. He gave you a good 3 or 4 minute sob story about him and the woman and the rough time they were having. You replied that you did not know anyone in particular, but suggested he go into the corner store across the street, as the owners might know if any farmers or fruit growers were looking for help in that area.

You remember feeling sick to your stomach and really dizzy. The man started talking about some apple picking he had done last summer and then you felt like you were going to throw up.

You do not recall any conversation from that moment, or the events that took place in the next 3 – 4 hours. It is as though the hours between 8:30 p.m. and midnight did not exist for you. You have several very foggy/dream-like moments that play in your mind nearing the end of the incident.

The first is running as fast as you could from the Navigator in the dark and then a female inside a house with her arms around your shoulders asking you, "Are you okay? What happened to you?" You remember being able to hear her, but you could not get words out.

The second is a male officer asking you how you got there. In the Report it states that you said, "I drove here" and pointed to the Navigator. The Navigator is how you "got" there. You pointed to the Navigator as the vehicle you just escaped from, not the vehicle you "drove". If the officer believed that you were admitting to being the driver, he was mistaken.

The third is just pure panic from being locked in the back of a second vehicle that night. This time, with handcuffs on and a female police officer repeating in a loud voice, "Who is the man you were with? Where did the dark-haired man go?" It felt like you were in a dream watching yourself.

Finally, you found yourself in a jail cell, shivering, with boxers and a T-shirt on that you did not recognize. You had no shoes and your feet were cut and bleeding. The water in your cell was turned off. You threw up and threw up until your stomach cramped painfully. Your whole body hurt. You had huge bruises on your wrists, ankles, knees and elbows.

When Constable Sears came to your cell to give you a ticket for leaving the scene of an accident, you started to cry and said, "I don't remember anything ... did anyone get hurt in the accident?" You were so confused and still dizzy. The time was 4:30 a.m. You then threw up for the next four hours.

At 8:30 a.m., a male officer walked you over to a locker area and asked where your clothes and shoes were. You started sobbing again and said, "I don't know". He had a female officer look around for you, but all they had was your purse. The female officer found you a pair of runners to wear. You went to a waiting room and called your husband, your sister and your mother, but could not reach anyone. You finally called s.22 and told him where you were. He said he would pick you up. You were let out of the waiting room and sat on the grass waiting. You felt like you were losing your mind.

You called Constable Sears three times, once leaving a message. You did not know if you were being charged criminally and wanted an explanation of what happened. You also wanted to see a copy of the police report; however, Constable Sears did not return your call.

After speaking to your doctor about the symptoms: nausea, dizziness, memory loss, total blackout, shivering cold, dream-like state, etc., she strongly suggested that you were drugged with GHB (date rape drug). She said it most commonly comes in a liquid form and looks like water. You now realize that leaving your open vitamin water bottle on the front seat unattended with strangers around, was clearly a lapse in good judgment.

Realizing the severity of the events from that evening, you spoke to a lawyer who advised you to apply for a review. Upon doing this, you were horrified to read the reports of the 3 people who called the police that evening. Each incident is clear confirmation to you that you were not in care or control of the vehicle:

A "blonde girl" and "dark" man back into a parked van in front of an old tiny house with plywood nailed onto all windows. You assert that this is the couple who asked you for a ride earlier in the night. You went to the address of the "accident" to see if you could recognize anything. The house looked like a refuge for drug addicts and you had absolutely no recall of being there. You submit that all of your cash was taken from your wallet (\$220 for your trip the next morning).

A man called police after hearing you screaming "LET ME OUT" from the Navigator parked in his alleyway. It seems highly unlikely to you that you would scream for help if you were in care or control of the vehicle.

The police found the Navigator "abandoned" and suggest that you "fled from the Navigator and into a stranger's house, naked." You agree that you probably fled from the vehicle. Considering that you were naked and screaming for help in your own vehicle, your guess is that you ran like hell, which would explain your cut up and bleeding feet. You thank God that you ran and that someone left their front door open.

There is no doubt in your mind that you were drugged. Your vehicle was stolen, your cash was stolen, and the bruises all over your body and the general pain of all your muscles, tell you that you fought with everything you had. You believe that you fought for your life and got away. You know in your heart that you were not driving.

Because you were naked and so badly bruised, your doctor has taken blood tests to check you for sexually transmitted diseases. You have yet to get the results back. Your doctor also referred you to a counselor because you cannot sleep or eat and you keep crying.

Each day since the incident, you and your husband have driven around the area of South East Kelowna s.22 and the address where the “accident” occurred, hoping to find the man and his girlfriend. You have talked to people at the corner store and at s.22, asking if anyone recalls this “couple”. You have also put a request s.22, asking anyone who was around the baseball field that night, who may have seen you talking to these people, to please call you.

Mr. Armour has provided a copy of a statement from s.22 dated September 29, 2011. Mr. s.22 states that he spoke to you around 8:15 p.m. on September 15, 2011 and you talked for about 15 minutes. You were arranging to pick up his wife for work the following morning at 8:00 a.m. You told Mr. s.22 that you were driving home after your call.

Mr. Armour has provided a copy of a statement from s.22 dated September 29, 2011, in which she corroborates Mr. s.22 statement.

Mr. Armour made the following submissions:

- The witness statements provided by the police are entirely inconsistent with the inference that you were the driver of the Lincoln Navigator.
- Mr. Armour questions why you would scream “Let me out!” of your own vehicle if you were the one driving. This statement suggests that you were being held inside the vehicle against your will.
- Similarly, why would you flee the vehicle and run naked into a stranger’s home if you were actually the driver and had control over the situation. The more likely explanation for this is that you were being forced to remain in the vehicle against your will until you could escape the male’s custody.
- The fact that an hour earlier another witness saw your client’s vehicle with a male occupant with brown hair, also suggests that your statement is true and that you were not the driver.
- When the police arrived on scene, no male was seen. Instead, all the police could locate was another impartial witness who said he saw you run from the vehicle (and not from the driver’s seat) towards a stranger’s home, fully naked, screaming, “Let me go!”
- Had you known the male in the vehicle, then surely you would have had no reason to flee his presence and he would have still been around at the time the police arrived.
- Regarding your ‘admission’ of driving, it is clear that your emotional state was all over the map. Constable Gauthier described you as “heavily intoxicated” (albeit, he did not specify whether that was by alcohol or drug) and a witness described you as “high and not making sense”.
- You told Mr. Armour that your memories prior to arriving at the house are missing, but you do recall the officer asking you about where you came from. Constable Gauthier said he asked you how you got to the home and you replied that you “just drove here” and acknowledged that it was in the Lincoln Navigator.

- However, you assert that you were asked how you got there and you said, “in the Lincoln Navigator”, referring to the fact that you had just fled the vehicle. Thus, it was not an admission that you were the driver, but rather an admission that you had been inside the vehicle as an unwilling passenger.
- Moreover, even if Constable Gauthier did in fact attempt to specify that you were the driver, it is clear that your emotional state was so messed up at that point that you likely misunderstood his questions. In your mind you were only telling the officer that you arrived in that vehicle; not that you drove it.
- The circumstances themselves do not add up. You have provided numerous statements from witnesses confirming that you had a road-trip planned for the next morning at 8:00 a.m. Consequently, why would you go out drinking and partying on a Thursday night knowing that you had a long trip planned for the next morning and a husband waiting for you at home? The suggestion that you were in control of your actions does not add up.
- The evidence supports that you were not the driver; consequently, your prohibition should be revoked.

While I have considered the evidence in your written statement, I have concern with the credibility of the events as you describe them. If you had been drugged, kidnapped, possibly raped, and had to flee for your life, naked, with bruises all over your body and badly cut feet, I find it puzzling that the police would not have determined that you were a victim, rather than arrest you for drinking and driving.

I also find it noteworthy that you have not provided a statement from your husband and/or your daughter, corroborating your evidence. If you left your home just after 7:30 p.m. and told your husband and 14-year-old daughter that you would be home in about an hour, it is reasonable to infer that when you did not return home that evening, your husband and daughter would have been very worried about you and taken some action to find out where you were. According to your evidence, you were gone from your residence for over 12 hours without your family knowing your whereabouts, yet you have provided no evidence from them to indicate that they were concerned or attempted to contact you.

Although the statements from s.22 corroborate your evidence that you spoke to s.22 on the evening in question and that you were travelling to Castlegar the next morning, they do not confirm that you were not the driver that witnesses later saw driving the Lincoln Navigator.

Further, while you submit that you saw your doctor after the incident and she “strongly suggested” that you were drugged with GHB, you have not provided written evidence from your doctor to support this. In addition, all of your symptoms described in both your evidence and the police evidence, are also symptoms of alcohol intoxication.

You state that each day since the incident, you and your husband have driven around the area of South East Kelowna s.22 and the address where the “accident” occurred, hoping to find the man with the dark hair and his girlfriend. You submit that you have also talked to

people at the corner store and at couple.

s.22

and have asked if anyone recalls this

However, again you have provided no evidence from your husband to corroborate this. Moreover, it strikes me as odd that you would attempt to find the two people that you allege drugged, kidnapped, and possibly raped you, and from whom, you ran for your life. What did you plan to do if you found them? If your evidence is factual, rather than conducting your own search, I question why you did not speak to police about your experience, describe these two individuals to them and ask them to conduct an investigation into what you allege happened to you.

I also find it noteworthy that you did not attempt to contact any of the witnesses who allege that you were driving, as well as the woman in the house that you ran into, that you state, wrapped her arms around your shoulders and asked if you were okay. It seems more probable that obtaining more details from the witnesses would be more helpful to you than spending time trying to find the couple you allege kidnapped you. Clearly, even if you found them, they would not admit to kidnapping you and driving the Lincoln Navigator.

Further, although both you and Mr. Armour submit that one of the witnesses described the man in the Navigator as having "dark hair", the witness actually described him as a "dark male". From this I can infer that he was dark-skinned, which is not the description you provided of the man that you allege approached your vehicle at the baseball park. In addition, contrary to your evidence, none of the witnesses described the driver as a "blonde girl", which would imply that she was very young. The driver was actually described as a "blonde female".

With respect to Mr. Armour's submissions, he is simply speculating on the police evidence and providing his opinion on how I should analyze it. Further, I disagree with his statement that you would not try to get away from a man that you knew. It is not uncommon for people who know each other to have altercations.

While I have considered your evidence, I find there are too many statements that do not make sense, to find your evidence credible. I also find that you appear to have selective memory. While you contend that you have no memory of what took place in the 3 to 4 hours after you met the couple at the ball park, you state that you recall that you told Constable Gauthier that you arrived there in the Navigator, not that you had driven it. I find it unlikely that you would remember such a specific conversation, when you allege that you were drugged and Constable Gauthier described you as "highly intoxicated".

In considering all of the evidence before me, I am satisfied that on the evening in question, Constables Sears and Gauthier conducted an investigation and after questioning the witnesses and you, accurately determined that you were the driver of the Lincoln Navigator.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* at 23:19 hours.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In her Report under “Reasonable Suspicion for Demand”, Constable Sears indicates that you had a smell of liquor on your breath and bloodshot eyes. Constable Sears also indicates that you said that you were drunk. In Constable Gauthier’s Synopsis, he indicates that after attending the residence you had entered, he found you in the kitchen, heavily intoxicated.

Based on these indicia of impairment, Constable Sears formed a reasonable suspicion that you had alcohol in your body and read you the ASD demand. She indicates that you understood the demand; however, you refused to comply with it. In answer to the question: “How did the driver fail or refuse to provide breath sample?” Constable Sears indicates that you said that you were not taking any test without your friend present. Constable Sears explained the consequences of refusing and you stated, “Tomorrow’s another day.” Constable Sears said, “So you are refusing to provide a sample of your breath?” and you said “Yes”.

In her Synopsis, Constable Sears states: “ s.22 had odour of liquor on breath, bloodshot eyes and was quite uncooperative. ... s.22 arres for Fail to Remain and ASD demand read. s.22 refused to give a sample of her breath. Cst. Sears explained that a refusal carried the same consequence as a FAIL, which was a driving prohibition for 90 days. s.22 was asked if she understood and would provide a sample but she still refused.”

As there is no tangible evidence before me that diminishes the reliability of Constable Sears’ evidence, I find that on September 15, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

In your evidence you stated that you have no recollection of being asked to provide a breath sample or being told the consequences of refusing.

In Constable Sears’ evidence, she states that you said you would not provide a breath sample without your friend present. You did not make a submission on this evidence.

Mr. Armour submits that you had the right to refuse the demand because it was unlawful, based on the following:

- Constable Sears did not put the time of driving in her Report.
- Your *Charter Rights* were violated because you were not given the opportunity to speak to legal counsel.
- Because the officers believed that you were heavily intoxicated, they already had reasonable and probable grounds to believe that you had committed an offence under section 253 of the *Criminal Code*. Consequently, rather than make an ASD demand, they should have made a Breath demand.

With respect to Mr. Armour's submissions, it is not fatal in the evidence that Constable Sears did not put the time of driving in the Report. Further, I have no authority under the *Act* to revoke your prohibition because you were not given the opportunity to speak to legal counsel. With respect to Mr. Armour's third submission, there is nothing in the *Motor Vehicle Act* or the *Criminal Code* that precludes a police officer from making an ASD demand, rather than a Breath demand.

As I have found from the evidence that the ASD demand was valid and that you were in care or control of a motor vehicle at the time in question, I do not find that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

I am satisfied that on September 15, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, the owner can make arrangements to have the vehicle released. The owner is responsible for all towing and storage charges, including the day the vehicle is eligible for release. The owner should be made aware that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssq.gov.bc.ca/osmv/>

s.22

Adjudicator

pc: Cory Armour
Fax: (250) 762-3163

November 24 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On November 7, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to your lawyer, Mr. Michael Kennedy, on your behalf. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report To Superintendent ("the Report"), Constable Laplante identified himself as the investigating officer and indicated that he witnessed you driving. In the Report, the officer noted that you were in the driver's seat of a running vehicle. In the Synopsis Report, the officer stated that he observed a vehicle parked in a pub parking lot with the engine running. He noted that you were found hiding from view by lying on the bench seat in the cab of the vehicle. You were identified as the driver. In the Report, the officer has noted the time and date of driving as 23:30 hours, on November 7, 2011.

You have provided no direct evidence on this point, but your lawyer suggested that you were not in care or control of your vehicle. He submits that there is no evidence in the Report that you ever moved the vehicle, or made any effort to move the vehicle. Mr. Kennedy also suggested that there is no indication that you had any intention to move the vehicle. He noted that you tried to walk away when you were read the breath demand, and suggested that this indicated you never formed the mental intent to move the vehicle, and therefore you were not in care or control. While I agree that there is no indication in the Report regarding you moving the vehicle or trying to move the vehicle while the officer was on the scene, I find I have no evidence to indicate your intention. I disagree with your lawyer's speculations regarding your intent based upon your actions after the breath demand, and I note that you have provided no statement regarding your intentions. In sum, I find that it is more likely than not that you were intending to drive, but even if you were not intending to drive, you were behind the wheel of an operable vehicle with the keys in the ignition and the engine running. In my view, that is sufficient to place you in care or control.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on November 7, 2011, at 23:30 hours.

Did you fail or refuse to comply with a demand

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the officer has stated that he noted an odour of liquor on your breath. The officer indicated that you admitted to having a "few" drinks in the pub, but that you would not elaborate as to how many or provide the time of your last drink. The constable has also stated that your gross motor skills were impaired as he observed you stumbling when trying to walk. He has noted that he read you the ASD demand at 23:37 hours, and that you understood the demand.

Mr. Kennedy noted that the demand for a breath sample is to be made pursuant to the *Criminal Code*, but that officer did not specifically mention that he had a suspicion regarding you having alcohol in your body when he made his demand. I note that in the section of the Report regarding reasonable suspicion for demand, the officer has noted he detected the odour of liquor on your breath and that you admitted to consumption of a "few" drinks. I find this to be sufficient for the officer to form his reasonable suspicion and the basis for the demand. Based on the evidence before me, I am satisfied that a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, the officer's evidence was that you tried to walk away when he read you the breath demand. The officer noted that he arrested you for obstruction, and that you still refused to provide a sample even after being warned about the penalties for refusing or failing to provide a sample. The officer determined you were failing or refusing to comply with the demand at 23:42 hours.

You have provided no evidence to dispute or challenge that you failed or refused to provide a sample. Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 23:42 hours, on November 7, 2011.

Did you have a reasonable excuse?

You have provided no statement regarding your reason for not providing a sample, and I note that there is no mention of you informing the officer regarding the reason for your refusal in the police evidence either. I find that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on November 7, 2011, at 23:42 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on November 7, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the 30 day impoundment period. Once the vehicle is eligible for release, the owner may attend the impound lot and pick up the vehicle. The owner is responsible for towing and storage charges, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

cc Michael Kennedy
fax: (250) 769 - 5495

OCTOBER 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 25, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Jennifer Currie, prior to your scheduled written hearing. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

In the Notice of Driving Prohibition, Constable Wheeler indicated that you had care or control of a motor vehicle on 13th Street in Courtenay and that you failed or refused to comply with a demand to provide a sample of your breath on September 25, 2011. However, upon reading the Report to Superintendent (RTS) that Constable Wheeler submitted, there is no evidence to support that charge.

Therefore, based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a demand on September 25, 2011.

Having made this finding, I do not have to consider anything further.

Decision

I am satisfied that you did not fail or refuse without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on September 25, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 4, 2011, the date you were informed that your vehicle was eligible for release. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 17, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the review I checked that you had received full disclosure of the documents before me. You acknowledged that you had received them.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Synopsis, Constable Baker indicated that he observed a vehicle exit a driveway at a high rate of speed while turning, causing the rear wheels to slide. He stated that the vehicle then went into oversteer shortly before regaining control. The constable stated that he conducted a traffic stop and identified you as the driver. In the Report to Superintendent for the IRP (the "IRP Report"), the constable stated that the date and time of driving or care or control was September 17, 2011, at 22:40 hours.

You stated that it was drizzling that night and the weather was not good. You indicated that you are unsure about the constable's comments regarding your driving, and you think the police were already there. However, I must advise you that the reason for the stop and where the constable was located prior to the stop are not issues before me. Further, you admitted that you were driving the vehicle.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 17, 2011, at 22:40 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand existed, and I must determine whether you failed or refused to comply with that demand.

In the IRP Report, the constable stated "strong odour of liquor on breath." The constable also stated that you admitted to consuming alcohol and that the time of your last drink was 21:42 hours. The constable indicated that he read you the ASD demand at 22:43 hours, and that you understood the demand.

During the hearing you stated that in one document the constable indicated that you had a strong odour of liquor on your breath, and in another document he stated that there was an odour of liquor on your breath. Regardless of whether the odour of liquor was strong or not, the constable indicated that he detected it on your breath, and you admitted to consuming alcohol about an hour prior to the stop.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the IRP Report. In section 6, the constable stated "4 – Nogo samples despite repeated direction. s.22 states "go ahead and arrest me then." directions were understood by s.22 ". At 22:48 hours, the constable determined that you had failed or refused to comply with the demand.

There is no evidence before me from you that you provided a sample of your breath.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 22:48 hours.

Did you have a reasonable excuse?

As previously noted, in the IRP Report the constable stated "4 – Nogo samples despite repeated direction. s.22 states "go ahead and arrest me then." directions were understood by s.22 .

Your written evidence is that you were asked approximately four times to take the test. You were asked to take a deep breath and blow air into a machine. You believe you coughed each time a test was taken because of your sore throat and because you were asked to take a deep breath. You asked the officer to take you to the station and take a blood sample so he could get an accurate reading. You fully cooperated with the police officer's demands and you followed the officer's directions. You told the officer about your sore throat and that you had a cold and cough. You are diabetic and take insulin, and you are on medication for high blood pressure.

During the oral hearing you indicated that the first couple of times you tried to blow you coughed, and thought you would do okay for the next ones, but you did not. You told the constable that you would blow again but he said no. You asked if you could get a blood test but were told no. The constable did not show you any reading.

I can advise you that under the Act, officers are not required to obtain blood samples, nor are they required to show an individual the reading on an ASD.

I do not find your evidence credible for the following reasons. I am aware that officers are trained to observe breath test subjects prior to and during an ASD test. If you advised the constable that you had a sore throat, cold and cough, and you were coughing while attempting to provide a sample, it makes sense to me that the constable would have observed that you were having difficulties, particularly if it happened four times, and that he would have proceeded accordingly.

I note that there is no evidence from the constable that you asked to blow again and were refused. However, even if you did make that request, I am satisfied that the constable provided you with four opportunities to provide a sample, which appears to be a sufficient number of opportunities. Further, I am left wondering why you stated to the constable "go ahead and arrest me then." You did not address this in your submissions, nor did you deny that you made the statement. It appears to be an odd statement to make if you were fully cooperating and following directions.

I am uncertain why you advised me that you are diabetic and have high blood pressure. However, if you made these statements to suggest that these ailments somehow affected your ability to provide a proper breath sample, I must advise you that it is not sufficient to simply imply this without providing supporting evidence as to how it impacted your ability.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on September 17, 2011, at 22:48 hours.

I therefore confirm your driving prohibition, as required by s. 215.41(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 17, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at:

<http://v.bc.ca/osmv/>

s.15

s.15

Adjudicator

November 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 23, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review, I listed the documents I received from the police which were sent to you. Your lawyer, Sarah Leamon, acknowledged that she had received them.

In the hearing, Ms. Leamon submitted *Spencer v. British Columbia (Superintendent of Motor Vehicles)* in support of your case and read paragraph 63. I am familiar with the *Spencer* decision and I acknowledge her submission. My decision in this matter will be decided on a balance of probabilities and based on my consideration of all the evidence before me. I am also mindful of the principles of administrative fairness and natural justice as they relate to this process.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Vehicle Impoundment Report to Superintendent (the "VI Report"), the constable stated that you were observed driving erratically by police and stopped. In the Report to Superintendent (the "RTS"), the constable stated that you were observed to be in care and control of the vehicle and noted the date and time as October 23, 2011, at 02:45 hours.

In your affidavit, you stated that on October 22, 2011, you went to a friend's home to watch a movie. You stated that you arrived there at approximately 7:30 pm and at 2:30 am, you decided to go home. You stated that after approximately 15 minutes of driving, you saw the police lights in your rear view mirror and you pulled over onto a side street. You did not deny being the driver.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 23, 2011, at 02:45 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the VI Report, the constable stated that erratic driving was observed by police and that you exhibited signs of impairment by alcohol. In the RTS, the constable stated that your speech was slurred, your eyes were glassy and bloodshot, you were unsteady on your feet, and there was a smell of alcohol on your breath. The constable also stated that you initially admitted to consuming alcohol but then later denied it. He stated that he read you the ASD demand at 02:49 hours and indicated that you understood the demand.

You stated that you were not driving erratically and that while you could not be sure of your exact speed, you know you were driving very close to the speed limit. You also stated that you told the constable that you had consumed some beer earlier in the evening, and that the constable presented you with a small, black device and asked you to blow into it.

While I acknowledge that you deny driving erratically, you did not refute the constable's evidence that your speech was slurred, your eyes were glassy and bloodshot, you were unsteady on your feet, and there was a smell of alcohol on your breath. I am satisfied that due to the physical symptoms and odour of liquor on your breath, along with your admission of consumption, the constable had sufficient grounds to issue you the ASD demand.

Your statement that you were presented with a black device and asked to blow into it demonstrates your awareness that the constable made a demand for a sample of your breath and you understood it. Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In the RTS, the constable recorded the type, serial number, calibration and expiry dates of the ASD used in your case. In section 6 of the RTS, the constable wrote, "Multiple attempts. No adequate sample provided. Stated he was trying. Cst. Frizzel tested device and it functioned properly". He recorded the time of refusal as 02:51 hours. In the VI Report, the constable stated "Driver given several (6) chances to provide a suitable breath sample. Driver did not provide suitable sample. Dri given 90 day IRP for refusal".

The constable's evidence is that you did not provide a suitable sample, and you acknowledged that you did not. Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your affidavit, you stated that you blew into the device a total of six times. You stated that on each attempt you were truly trying to provide a breath sample, but the constable told you that you were not trying and you told him that you were. You stated that on each attempt, you blew long, deep breaths into the device, but the samples did not work and you could see that the constable was "growing irritated" with you. You stated that you knew you were not impaired, you were determined to provide a valid breath sample, but after your sixth attempt, the constable stated "okay that's enough, you aren't trying". You also stated that while you were sitting in the back of the police vehicle you did not speak to the constable while he completed his paperwork because you were confused and frustrated about why you were unable to register a breath sample, in spite of your best efforts.

Ms. Leamon argued that while the constable stated that Constable Frizzel tested the device to ensure it was functioning, we do not know when that was and we cannot be certain that the device was functioning properly. She stated that the constable did not provide any evidence of what the ASD readings were so we do not know if it was registering "+" or "NOGO". She provided a copy of an RCMP memo regarding refusals and drew my attention to the paragraph which states that if the operator of the ASD feels that the person is making an earnest attempt to provide a sample, they have the option to use the "manual" key to obtain a sample. She also stated that you were cooperative and vocal about trying to provide a sample.

With respect to Ms. Leamon's argument that we do not know when Constable Frizzel tested the device, I accept the constable evidence that the ASD was tested and functioning properly and with no evidence to the contrary, I accept that he tested the device on or around the time you were attempting to provide a sample. If Ms. Leamon was concerned with when the device was tested, I am confused as to why she did not ask you for this information, as you were present at the time and you did not dispute the constable's evidence. As well, as noted above, the constable provided the details of the ASD used in your case. I have compared these details to the information contain in the Superintendent's Report on ASDs and find that the ASD used in your case reflects current police practices and I am satisfied that it was operating properly.

Last, while I acknowledge that the RCMP memo states an operator can use the manual button to obtain a sample of breath if the operator feels the subject is making an earnest attempt, there is no compelling evidence before me to suggest that the constable held such a belief. Your evidence is the constable told you that you were not trying and he was growing irritated with you. In my view, this is consistent with him issuing you this prohibition. There is no other evidence before me from which I can conclude that you had a reasonable excuse for failing or refusing to provide a sample of your breath on an ASD.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 23, 2011, at 02:51 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 23, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up your vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

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s.15

Adjudicator

cc: Sarah Leamon, Acumen Law
Fax: 604-685-8308

October 27, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 7, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure had been provided to your lawyer, John Chak. He acknowledged receipt of the police documents. I have proceeded with the hearing based on this information.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Carmichael noted that he formed a reasonable suspicion at 00:51 hours. In his Report, the constable stated that you had glassy eyes, the smell of liquor on your breath, slurred words and a 'sleepy' face. He stated that you admitted to consuming drinks at the bar earlier that night. The time of your last drink was given as 00:30 hours. At 00:52 hours Constable Carmichael made a breath demand and noted that you understood the demand.

In your affidavit you affirmed that you consumed your last drink at around 12:30 am. When asked if you had anything to drink that evening, you said 'I had some drinks.' The reasonable suspicion requirement for a roadside breath demand is a relatively low standard, consistent with the preventive focus of section 254(2) of the *Criminal Code: R v Thompson*, [2001] OJ No 449 (CA). It is suspicion, of alcohol being in the body of the driver, and no more. The constable noted distinct indicia of impairment that your lawyer has not challenged. You have not provided persuasive evidence that Constable Carmichael did not have an adequate evidentiary basis for an ASD demand. Accordingly, I am satisfied a valid demand was made by Constable Carmichael at 00:52 hours, on October 7, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', the constable stated that approximately 12 tests were administered. You were blowing in and out and were purposely not giving a sufficient sample. The constable provided a demonstration, but you refused to comply.

Your lawyer disputed that you failed to provide an adequate breath sample on the grounds that: 1) the constable did not state that the ASD was working properly; and, 2) for some reason the ASD was unable to register a result despite your repeated attempts to blow into the device after following the constable's instructions.

Your lawyer contended that Constable Carmichael failed to provide information with respect to the ASD used. He went on to argue that your evidence was that you blew into an ASD. You tried several times to provide a valid sample but the ASD was not taking a breath sample, for some reason. You denied pretending to blow or blowing in and out of the ASD. You followed the instructions of Constable Carmichael and blew in the way you were instructed to. You made 6 or 8 attempts to blow harder.

Your affidavit was clear and persuasive. You addressed the constable's observations and given the evidence, I find that on a balance of probabilities, you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(c)(ii) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 27, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

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s.15

Adjudicator

cc John C Chak
(fax: 604 282 7509)

November 16, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 30, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (“Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (“ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s reports.

Preliminary Matters

Records at this office indicate that disclosure was provided to you. I have proceeded with the hearing based on this confirmation.

In your written submission you opined that the officer detained you for an unreasonable amount of time and suggested that this detention was contrary to the *Canadian Charter of Rights and Freedoms*. You referenced a case *R. v. Cleaver*. I note that you have not provided this case for my consideration. Nonetheless, as an adjudicator, I have no authority under the *Act* to consider *Charter* arguments and grant *Charter* remedies. My role and authority in this review is outlined in the introduction of this letter. I will proceed with this review, and I will consider the issues that I am required to consider under the *Act*.

In your written submission, you indicated that you are a single unemployed mother and that you require your driver's licence and vehicle to survive. You stated that you were recently offered employment and require both your licence and vehicle to fill the position. You provided a letter from a potential employer that indicates you are being considered for a full time position. I take this to mean that this prohibition will cause you hardship. You further indicated in your submission that you have never had any type of driving infraction that involves alcohol or drugs and that you have a clean driving record. You provided a copy of your current driver's abstract and insurance to support this.

I acknowledge and appreciate your situation. However, under the *Act* I am not authorized to consider a person's driving record, hardship, personal circumstances, employment or transportation needs in this review. The scope of this review is limited to the grounds defined in the *Act* as listed below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the IRP Report to Superintendent ("IRP Report"), Peace Officer Noel is identified as the investigating officer. In the IRP Report, the investigating officer checked the box to indicate that he witnessed you as the driver of the vehicle. In the IRP Report, the officer indicated that you pulled up to a check stop and that you were seated in the driver's seat with the vehicle's key in the ignition while the vehicle was in motion. In the IRP Report, the officer stated that the date and time of driving or care or control was October 29, 2011, at 23:51 hours. The officer provided a synopsis report which is consistent with the evidence in the IRP Report.

In your written submission, you acknowledged that you were a driver.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* on October 29, 2011, at 23:51 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the IRP Report, the officer indicated that he asked you to blow on his face and stated that he detected an odour of liquor on your breath and clothing. The officer indicated in the IRP Report that you admitted to consuming one glass of wine one hour prior. Now turning to the officer's synopsis report, the officer stated that he detected the odour of liquor on your breath and person despite being initially informed that you had not consumed any alcohol earlier. The officer then

read verbatim the standard field sobriety test (SFST) demand and had you perform certain tests roadside. The officer then described his observations of the SFST in his synopsis report and indicated that once the SFST was completed he read verbatim the ASD demand to you several times and explained what it meant. In the officer's synopsis report, he indicated that it was not until he was in the process of serving the driving prohibition on you that you admitted to having a glass of wine, mixing it with PRISTIQ (antidepressant), 2 tablets of Ketorolac (NSAID analgesic), Tramadol (analgesic), and Dirlofenac (analgesic).

Upon review of the evidence from the officer, I take note of the following. The officer stated in the IRP Report that he formed his reasonable suspicion for the ASD demand at 23:52 hours, which was one minute after the time of driving. The officer further stated that he read the ASD demand to you at 00:10 hours, which was eighteen minutes after the time that he formed his reasonable suspicion. It was during the eighteen minutes that the officer had you perform the SFST.

While the officer has accounted for the eighteen minute delay between the time he formed his reasonable suspicion and the time of the ASD demand, he has not provided any reason for him to have you conduct the SFST prior to the ASD demand. I am not aware of any requirement for an officer to demand an SFST once the officer has already formed his reasonable suspicion for an ASD demand. As such, I do not find the eighteen minute delay reasonable and I find that the ASD demand was not made forthwith. Consequently, based on the evidence before me in its entirety, I find that the demand for a sample of your breath was not valid, as per section 254(2) of the *Criminal Code*.

Having made this finding, I do not need to consider any further issues.

Decision

I am not satisfied that the demand for a sample of your breath was valid, as per section 254(2) of the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 30, 2011, at 00:10 hours. I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the *Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Drivers Licence. The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 16, 2011. You are responsible for any storage costs beyond that date. If the vehicle is not reclaimed, the impound lot may apply to the Motor Vehicles to dispose of the vehicle.

s.15

s.15

Adjudicator

November 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 16, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (the "ASD"), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Scott Wright. During the oral hearing, Mr. Wright confirmed that he had received disclosure. I have proceeded with the review based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the report to Superintendent regarding your IRP (the "Report") and the attached Synopsis, Constable Hilditch indicates that on October 16, 2011 at 00:47 hours, he observed you drive through a road check on Valley Drive, south of Guildford Drive, in Squamish. Constable Hilditch indicates that he was standing just left of his vehicle headlights, with five red lights blinking on traffic cones sitting on the centre line of the road, spaced at a distance of approximately 30 feet. Constable Hilditch was wearing a full, high visibility vest and holding a flashlight, which was directed towards your oncoming vehicle. Constable Hilditch states that you drove past him without slowing or stopping and he yelled at you to stop. You continued to drive until arriving at Guildford Drive and Westway Avenue, where you were stopped by Constable Hilditch, with lights and sirens going. Your vehicle drifted forward until Constable Carter moved his vehicle in front of yours, to block it from moving any further. You were identified as the driver from your BC driver's licence.

In your sworn affidavit you acknowledge driving.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In his Report under "Reasonable Suspicion for Demand", Constable Hilditch indicates that he detected an odour of liquor on your breath and you stumbled towards the police vehicle. Based on these indicia of impairment, at 00:48 hours, Constable Hilditch formed a reasonable suspicion that you had alcohol in your body and made an ASD demand on you.

Based on this evidence, I am satisfied that a demand was made on you pursuant to section 254 of the *Criminal Code*.

In determining whether the evidence establishes that you failed or refused to comply with the demand, I have considered the following:

In his Report, Constable Hilditch indicates that you understood the demand; however, you refused to comply with it. In answer to the question: "How did the driver fail or refuse to provide breath sample?" Constable Hilditch indicates that you put your lips/mouth, around the mouthpiece, but did not provide any air into the ASD. Several attempts were made, but you did not provide a sample.

In his Synopsis, Constable Hilditch indicates that you failed to provide a sample of your breath, although how to provide a suitable sample had been explained to you several times. Constable Hilditch states that you did not blow and after being shown how to provide a suitable sample, you blew a demonstration blow without the ASD, which was consistent with a suitable blow. However, when asked to blow into the ASD again, Constable Hilditch observed that your cheeks were indented, indicating that you were sucking, instead of blowing. At 0052 hours, you were charged with refusing to provide a suitable sample of your breath. You were read your Charter Rights and arrested for "Flight from Police".

Mr. Wright has provided a copy of your sworn affidavit in which you depose the following:

After leaving a social gathering on October 16, 2011 at approximately 12:30 a.m., you were driving on Valley Drive with a white car directly in front of you, when you noticed a single marked police car on the side of the road. The police car's lights were activated. There was another vehicle stopped in front of the police vehicle. It appeared to you as though the police car had pulled the other vehicle over.

You slowed down and drove past the police vehicle, with the white car in front of you doing the same. You proceeded a short distance and stopped at the stop sign at Clarke Drive as did the car in front of you. When it was safe to do so, you proceeded through the intersection. Shortly after beginning to move forward, you looked in your rearview mirror and saw the police car behind you with its lights flashing. You pulled over to the side of the road, as did the white car in front of you.

An officer approached your vehicle and you rolled the window down to speak with him. The officer loudly told you to put your hands in the air. He opened your vehicle door and instructed you to step out of your vehicle. You were unsure why this request was being made. At this point the white car in front of you proceeded and turned left on Westway Avenue. You asked why the white car was allowed to proceed, as your vehicle had been driven in the same manner. You were still unsure as to why you had been stopped. The officer did not respond to your question.

At that time, a second police car arrived and parked directly in front of your vehicle. The officer directed you to the back of his car and asked if you had had anything to drink. You told him that you had not consumed any alcohol that evening.

The officer then demanded that you provide a sample of your breath. You stated that you would absolutely be willing to provide a sample, as you had not consumed any alcohol. The officer explained how to provide a sample and then put the device to your mouth. You followed the instructions that you were given and gave your best effort to provide a sample. The officer told you that the device had not been able to get a sample; that you were not doing it properly and asked you to try again.

On the second try, you again followed the instructions you were given and gave your best effort to provide a sample. After you had attempted to provide a sample, the officer turned you around and asked you to put your hands behind your back. The other officer forcefully pushed

your forehead into the back window of the vehicle, as the original officer put handcuffs on you. You indicated that you were trying your best and were still willing to provide a sample. The officer put you into the back of the police car. While waiting in the police car, you asked what you were being charged with and the officer replied, "Flight from Police". The officer continued to complete paperwork. You then told the officer that you were concerned about your purse, which was still on the front passenger seat of your vehicle. After the tow truck had taken your vehicle, the officer drove you home. After arriving at your home, the officer served you with the Notice.

At no point did you fail or refuse to comply with a demand to provide a sample of your breath. At all times, you were attempting to follow the instructions you had been given and gave the best possible sample of breath that you could.

Mr. Wright made the following oral submissions:

- Based on the evidence, I cannot be satisfied that you refused to provide a breath sample.
- Constable Hilditch only gave you four minutes to provide a breath sample and does not specify how many attempts you made.
- Your evidence cannot be rejected simply because it is self-serving.
- You provide more evidence than Constable Hilditch provided and there is no principle basis to reject your evidence.
- I cannot presume that the police officer's evidence is accurate.
- You said that you were trying your best and you were not trying to refuse.
- It cannot be proven on a balance of probabilities that you were refusing.
- There are two versions of events before me, which makes this an issue of credibility.
- I cannot prefer one version over the other because each version is equally probably; consequently, I must find in your favour and revoke your prohibition.
- Your evidence is logical and sworn under oath; consequently, you should be believed, as to reject your evidence is to say that you are lying.

Mr. Wright has provided a copy of the court decision, *Spencer v. the Superintendent of Motor Vehicles* [2011] BCSC 1311, which he referred to in support of his submissions. I have considered this decision in the course of this review.

Mr. Wright is correct in that based on your affidavit evidence, in making a determination in this review, I must consider the credibility of your evidence versus that of Constable Hilditch's. In reviewing the evidence, I have the following concerns:

Constable Hilditch describes the road check as highly visible. He indicates that there were five blinking lights on traffic cones sitting on the centre line of the road for a length of 30 feet. He also indicates that the headlights of his vehicle were on and he was wearing a full, highly visible vest. He indicates only one vehicle approached the road check, which was later identified as your BMW. He also indicates that although he used his flashlight to motion you to pull over, you drove right past him without slowing or stopping.

Your evidence indicates that neither you, nor the driver of the white car you say was in front of you, realized that you were driving through what is described as a highly visible road check. In addition, neither one of you noticed that Constable Hilditch was motioning you to pull over and yelled at you to stop, as you drove past him. Further, after being chased by police because you failed to stop, only you were charged with "Flight from Police".

First, I find it highly unlikely that any driver could drive through a highly visible road check and not notice that they were being motioned to pull over. Second, if there truly was a vehicle in front of you, I find it highly unlikely that Constable Hilditch would not charge that driver with "Flight from Police", as well. Particularly when you contend that it was the first vehicle to drive through the road check. As both officers were at the location where Constable Hilditch stopped your vehicle, one of them could have dealt with the other driver. Based on the evidence as a whole, I find it more likely than not that there was no vehicle in front of you when you drove through the road check.

I also find it noteworthy that although you state in your affidavit that you told Constable Hilditch that you had not consumed any alcohol that evening, nowhere in your affidavit to you actually state that you did not consume any alcohol. I find this of interest, particularly when you state that you attended a social gathering with friends that evening for five hours. At social events, it is more common than not for the participants to consume alcohol. Consequently, based on your failure to directly state in your affidavit that you did not consume alcohol and Constable Hilditch's evidence that you had an odour of liquor on your breath, which you do not address, I find it more probable than not that you did consume alcohol that evening. If so, this would support a lack of cooperation in providing a breath sample suitable for analysis.

I also find it interesting that when Constable Hilditch told you that you were being charged with "Flight from Police", you did not deny this or protest the charge by explaining to Constable Hilditch that you did not deliberately fail to stop at the road check. In your affidavit you indicate that after Constable Hilditch told you what you were being charged with, you told him that you were concerned about your purse being left in your vehicle. You provide no evidence to indicate that you were shocked or upset that you were being charged with "Flight from Police", which supports Constable Hill's evidence that you deliberately failed to stop when motioned to do so.

With respect to the evidence regarding whether you failed or refused to provide a breath sample, you state that you gave your best effort to provide a sample. Constable Hilditch states that although you put your mouth around the mouthpiece, you did not provide any air into the ASD. Constable Hilditch describes you as sucking in air, rather than blowing air because your cheeks were indented. You do not address this evidence in your affidavit. Moreover, even though you deny that you refused to provide a breath sample, you acknowledge that you did not provide a sample suitable for analysis.

With respect to Mr. Wright's submission that you were given only 4 minutes to provide a suitable breath sample, there is no requirement under the *Criminal Code* or the *Act*, that a police officer provide a specific length of time or a minimum number of opportunities, for a driver to provide a

suitable breath sample. Constable Hilditch indicates that you were provided with “several” opportunities to provide a breath sample; however, you did not.

Based on the evidence, I find that on October 16, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

In your affidavit, you state that at all times you were attempting to follow the instructions you had been given and gave the best possible sample of breath that you could. After you were charged with refusal, you assert that you told Constable Hilditch that you were trying your best and you were still willing to provide a breath sample.

Mr. Wright submits that because Constable Hilditch has provided no evidence to confirm that the ASD was an approved screening device or when it was calibrated, there is no evidence that it was operational. He asserts that based on this, you had a reasonable excuse to refuse to comply with the demand.

While I have considered Mr. Wright’s submissions, there is no requirement under the *Act* that Constable Hilditch provide this information to you or in his Report. Further, simply because this information is missing in the Report, does not mean that it is likely the ASD was not operating properly or that it was not an approved device. It is highly improbable that any police detachment in British Columbia would use screening devices that are not approved under the *Act*. Further, police officers are well-trained in the use of the ASD and are aware of the indicators that an ASD is not working properly. One of these indicators is when the officer observes that the driver is clearly blowing properly into the ASD; however, it does not provide a result. In your case, Constable Hilditch is very detailed in his description of your attempts to provide a breath sample, describing you as not providing any air into the ASD and sucking air in. Your evidence is that you were blowing to the best of your ability.

In summarizing the evidence, Constable Hilditch indicates that you did not stop at the road check and he had to chase you with his vehicle, with sirens and lights on. This resulted in a charge of “Flight from Police”, which you did not protest at the scene. Further, I find it highly improbable that you drove through the road check without being aware that Constable Hilditch was motioning you to pull over. Constable Hilditch indicates that you refused to put your hands in the air when requested to do so, which you have not denied. The evidence also indicates that you did not provide a breath sample suitable for analysis. The evidence as a whole, suggests that you were uncooperative with police.

Although you state that you followed the instructions you were given and gave your best effort to provide a sample, I find you have provided no compelling evidence to indicate that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

I am satisfied that on October 16, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, you can make arrangements to have the vehicle released. You are responsible for all towing and storage charges, including the day the vehicle is eligible for release. You should know that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

Adjudicator

pc: Scott Wright
Fax: (604) 681-0652

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On November 8, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to you. I have proceeded with the hearing based on this confirmation.

In your written submission, you asked me to take mercy on you, as you need your licence and vehicle on a daily basis and you cannot take public transit. I acknowledge and appreciate the impact a driving prohibition can have on your personal and professional circumstances. However, under the Act, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report To Superintendent ("the Report"), Constable Fortier identified himself as the investigating officer and indicated that he witnessed you driving. In the Synopsis Report, the officer noted that he observed a vehicle weaving within its lane and he conducted a traffic stop on 100th Avenue in Surrey. You were identified as the driver. In the Report, the officer has noted the time and date of driving as 20:40 hours, on November 8, 2011.

In your written submission, you stated that the reason you weaved was because you were adjusting your jacket that was stuck under your seatbelt, however, you did confirm that you were driving and stopped by the officer at about this time.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on November 8, 2011, at 20:40 hours.

Did you fail or refuse to comply with a demand

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the officer has stated that he noted an odour of liquor on your breath. The officer indicated that you admitted to having a glass of wine prior to driving, and he has noted that you informed him the time of your last drink was at 1300 hours. The constable has noted that he read you the ASD demand at 20:44 hours, and that you understood the demand.

You have provided no evidence to the contrary. Based on the evidence before me, I am satisfied that a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, the officer's evidence is that you tried to give a sample of your breath 15 times, and while the officer could detect air coming out of the ASD, you did not provide a valid sample. The officer determined you were failing or refusing to comply with the demand at 21:02 hours.

In your statement, you confirmed that you made numerous attempts to provide a sample, and then the officer informed you that he was going to charge you with refusal. Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 21:02 hours, on November 8, 2011.

Did you have a reasonable excuse?

In your written statement, you stated that after trying to provide a breath sample a couple times, you explained to the officer that you have COPD and that you could not breathe. You stated that you told the officer several times that you have COPD and that you cannot walk any further than 100 metres.

I note that you have provided no evidence to confirm that you have COPD as you have stated in your submission. Further, even if I accept that you have this medical condition, I find you have not provided me any evidence to confirm that this condition made you unable to provide a valid breath sample. In addition, I note that there is no mention in the police evidence of you telling the officer about your medical condition.

After considering all the evidence, I find that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on November 8, 2011, at 21:02 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on November 8, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the 30 day impoundment period. Once the vehicle is eligible for release, you may authorize someone to attend the impound lot and pick up the vehicle. You, as the owner, are responsible for towing and storage charges, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On November 10, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing your lawyer, Jack Harris, confirmed that he had received full disclosure of the documents before me.

During the hearing Mr. Harris made comments regarding the constable's failure to complete section 6 of the Report to Superintendent (the "Report"), how the constable failed to indicate the number of pages he included when he attached his prime report, and how the constable is "going to tell me what happens in his own report." I acknowledge his submissions; however, the constable submitted a one page Narrative in addition to the Report, and section 215.49 of the Act directs me to consider this evidence.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), Constable Chassie indicated that he witnessed you as the lone occupant of a vehicle leaving a pub parking lot and driving south on 148 Street. The constable stated that the date and time of driving or care or control was November 10, 2011, at 20:49 hours.

There is no evidence before me which contradicts the constable's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on November 10, 2011, at 20:49 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the constable indicated that there was an odour of liquor on your breath, that you admitted to 2 glasses of wine "but not vodka", and that your last drink was at 20:04 hours. The constable indicated that he read you the ASD demand at 20:50 hours and that you understood the demand. In the Narrative, the constable stated "Identity satisfied 20:50 Reasonable suspicion. ASD demand made." Also in the Narrative, after your second attempt to provide a breath sample, the constable stated "20:53 hours ASD demand from card and refusal explained."

During the hearing you did not provide any direct evidence with respect to whether or not the constable read you the ASD demand. However, you did state that you were trying to provide a sample. You also stated that it was the constable who brought up the vodka, not you. You stated that he said he could smell vodka on your breath, but you told him you had not drank any vodka.

Mr. Harris submits that although the constable indicated in his Report that the ASD demand was read, we cannot be sure that it was read. He stated that in the Report the constable states the time this was done was at 20:50 hours, but in the Narrative he states it was done at 20:53 hours, after attempts were made to obtain a sample of your breath. As well, Mr. Harris submits that the constable accused you of drinking vodka and he, Mr. Harris, was just pointing out "snipits" that were taken out of context.

While I do not know why the constable indicated in his Narrative that he made the ASD demand at 20:53 hours, he also indicated it was done at 20:50 hours, at the same time he formed his reasonable suspicion, and as previously indicated, he stated in the Report that he made it at

20:50 hours, and that you understood the demand. You provided evidence that you were trying to provide a sample; therefore, if a demand was not given to you, I must question how you knew you were required to blow into an ASD and provide a breath sample. Further, regardless of the constable's reference to "but not vodka" and why he made that statement, he noted that there was an odour of alcohol on your breath and you admitted to consuming 2 glasses of wine, with your last drink being 45 minutes prior to the stop.

Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Narrative where the constable provided the following evidence:

- First attempt s.22 blow light and 1 cross lit then suck back "NOGO".
- s.22 cautioned and breath sample explained again.
- Second attempt s.22 repeats same as first attempt and "NOGO".
- 20:53 ASD demand from card and refusal explained. Mouth piece replaced.
- Breath sample explained and demonstrated. Cautioned again.
- Mouth piece presented but had not seated properly. withdrawn.
- Third attempt s.22 now chokes up on mouth piece and blows hard and sucks back as hard "NOGO".
- Final attempt presented and first cross lit just in time for suck back and "NOGO".
- s.22 advised of Refusal and 90 day IRP and VI.

In the Report, the constable indicated that you failed or refused to comply with the demand at 20:53 hours. In the Narrative, the constable indicated that after you were advised of the refusal, you were loud, unsteady on your feet, and almost confrontational. You were adamant that you were keeping your vehicle despite being advised to the contrary. You kept asking to see the reading. You were controlled by your granddaughter after you threatened to slap the constable.

Mr. Harris submits that the constable's evidence in the Narrative is jargon and that he just told you the reading was a "NOGO", he did not explain to you what a "NOGO" meant. Mr. Harris questioned how the constable cautioned you, and stated that "blow light and 1 cross lit and suck back", as well as the "NOGO", means nothing to you. He stated that the constable did not tell you what you should do when you ended your breath, when to take your next breath, and that it should not be while the mouthpiece was in your mouth. Mr. Harris submits that the explanation from the constable is inadequate.

During the hearing Mr. Harris asked you if the constable told you that the readings were a "NOGO" and you said yes. He asked you if that made sense to you and you stated that the constable told you that it meant that there was not enough air. You stated that you told the constable that you are a smoker and that you were trying to provide a sample. You also stated that you were not sucking on the mouthpiece, and that you were just taking another breath. You stated that you did not know whether you should take the mouthpiece out of your mouth when you took that breath. You stated that the constable was very aggressive and very annoyed with you, and said "you have to do this." You denied that you threatened to slap the constable.

In my view, it is highly unlikely that the constable said the words "blow light and 1 cross lit and suck back" to you after attempting to obtain a sample of your breath. Nor did you state that he

said those words to you. In fact, you stated that he explained that a “NOGO” reading meant that you were not providing enough air. Based on the constable’s evidence, it appears that he explained to you how to provide a sample before each of the first three tests, and that he demonstrated how to provide a sample before the third test. There is no compelling evidence before me that you did not understand his instructions. Further, I do not accept your evidence that you were just taking another breath and not sucking on the mouthpiece. I am aware that officers are trained in the proper operation of an ASD, which leads me to believe that the constable would know whether you were sucking on the mouthpiece or taking another breath, particularly when it appears that you exhibited this behavior in each of the four test attempts. Further, because of his training, it seems more likely than not to me that the constable would have advised you to blow into the device until he told you to stop.

With respect to how the constable cautioned you, I note by his evidence that he did so twice, as well as explaining a refusal to you. I do not require the exact wording he used at the time in order to infer that he advised you of the consequences should you fail or refuse to provide a sample.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 20:53 hours.

Did you have a reasonable excuse?

You stated that the constable was very aggressive and annoyed with you, and that you are a smoker. However, you did not provide me with any details or supporting evidence in which you described how any of this prevented you from providing a sample.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on November 10, 2011, at 20:53 hours.

I therefore confirm your driving prohibition, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on November 10, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also confirmed.

s.15 te that you may receive a separate letter requiring you to register in and attend programs under the provisions of sections 215.45 and 25.1 of the Act. For further n, please see our website at: <http://www.pssg.gov.bc.ca/osmv/>

s.15
Adjudicator

cc: Jack Harris, Fax: 604-859-1375

NOVEMBER 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 29, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to you in disclosure. You acknowledged that you had received them. I proceeded with the hearing based on this confirmation.

In the oral hearing, you told me that after receiving the IRP, the officer asked you if you had a ride. You said you did, but you were being picked up at a spot about half a kilometer away from where you were stopped. You asked if the officer could give you a ride to that spot, but he said he had to wait for the tow truck to arrive to remove the vehicle. You told me that the officer did not let you wait until after he was done with the tow truck to get a ride with him. You said you

found it odd that the officer would let someone he considered impaired walk half a kilometer along a dark highway at night.

While I understand that dealing with the police can be unsettling, I am not authorized to consider the means by which the officer administered the investigation in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Constable Woodall indicated that he witnessed you driving on October 29, 2011, at 0131 hours when he stopped you for speeding. You did not dispute this evidence.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 29, 2011, at 0131 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

The officer stated in the RTS that he noticed the smell of liquor on your breath, that you had a dry, raspy voice, blood shot, watery eyes and that you admitted to having consumed alcohol earlier. He noted that your balance was unsteady while standing outside the vehicle.

In the oral hearing, you told me that you were up at 5 in the morning on October 28, 2011, and that you stayed up until early in the morning on October 29, 2011. You said that it is not surprising that you looked and sounded the way the officer described, because you were very tired after such a long day. You told me that you were driving 3 – 4 friends home, all of whom had been drinking, which is why the vehicle smelled of liquor, but you do not understand why the officer would smell it on your breath. You were also surprised to read the officer's evidence stating that you admitted to having consumed liquor hours earlier. You might have said that you had not consumed liquor since the previous week, but you were adamant that you had not consumed any alcohol before driving on October 29, 2011.

In the RTS, the officer said that he read you an ASD demand on October 29, 2011, at 0134 hours and that you understood the demand. You did not dispute this evidence; I am satisfied that a valid demand existed.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. You said you have never had to provide an ASD sample before, and that you blew into the device five times trying to provide a suitable sample, but the ASD never registered a result. You told me that the officer said you were not blowing hard enough, so on the last two tries you blew as hard as you could. Unfortunately, the ASD still did not register a result. You said that the officer did not ask you to do any other sobriety tests or take you to the station for a different test. The officer is not required by the Act to give you any other "sobriety tests" or take you to the police station for a breathalyzer test.

In part six of the RTS, Constable Woodall's evidence mirrors yours. He noted that you repeatedly failed to provide proper breath samples, despite his giving you instructions three times. The difference between your evidence and his is that the officer said "no air was being blown through the instrument when [you were] instructed to blow into the instrument."

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 29, 2011, at 0143 hours.

Did you have a reasonable excuse?

You told me that despite your efforts to blow as hard as you could, the ASD did not register a result on any of your attempts. You did not give me an excuse for this, and there is nothing in the officer's evidence explaining why you did not provide a sample, either.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to provide an ASD sample.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 29, 2011, at 0143 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 29, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also confirmed.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssg.gov.bc.ca/osmv/> .

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Adjudicator

November 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 24, 2011, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to you. I have proceeded with the hearing based on this confirmation.

In your submission you requested that the prohibition be lifted and your vehicle returned so that you may provide a home for your child. You stated that you have never had any sort of conviction or even a stop prior to this. I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. The scope of the review is limited to the grounds as defined in the Act. As well, I do not have the authority to consider a person's conviction or driving record in this review.

You also stated that you did not run a stop sign and you provided some details with respect to what led up to your encounter with the police; however, I must advise you that the reason you were stopped is not an issue before me in this review.

In your second submission received in our office on November 2, 2011, you stated that it had come to your attention that you were allowed to check more than one reason for review. You indicated that you wish to add the second and third lines for your reasons, namely, that you did not receive a “warn” or a “fail” reading on the ASD. However, I must advise you that as you did not provide a sample of breath into the ASD, these grounds are not applicable in your case; however, I will proceed with the review with the other grounds available to you, in mind.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Occurrence Report, Constable Arnold-Smith indicated that after initiating a traffic stop, he found you to be the driver of a 2001 Ford. Your identity was confirmed by your driver's licence. In the Report to Superintendent (the “Report”), the constable stated that the date and time of driving or care or control was October 24, 2011, at 23:45 hours.

In your submission you acknowledged that you were the driver.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 24, 2011, at 23:45 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a valid demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, the constable indicated that there was an overwhelming odour of liquor on your breath, your speech was slurred, your eyes were bloodshot, and your balance was unsteady. The constable stated that you admitted to consuming 3 glasses of wine before driving, and that your last drink was 2 hours prior. Additionally, in the Occurrence Report, the constable stated that your eyes were extremely watery, that you had difficulty complying with his requests in a timely manner, and that your movements appeared slow and deliberate. The constable indicated that he read you the ASD demand at 23:48 hours and that you understood the demand.

There is no evidence before me which contradicts the constable's evidence. Based on the evidence before me, I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Occurrence Report where the constable provided the following evidence:

- He explained to you how to provide a proper breath sample and you stated that you understood.
- At 23:50 hours he administered the ASD and you would blow air out of the side of your mouth and then stop blowing. The ASD showed a “NOGO” reading.
- He explained again that you must not blow air out of the side of your mouth and not to suck on the mouthpiece.
- At 23:53 hours he administered the ASD, and again you blew air out of the side of your mouth and then sucked on the mouthpiece. The ASD read “NOGO”. He knew you were intentionally not providing a breath sample.
- He again explained and demonstrated to you how to provide a proper breath sample. You stated that you understood.
- He advised you that if you did not provide a breath sample that you could be charged criminally. You stated that you understood.
- He explained that it was lawful to drive with a certain amount of liquor in the blood, and that it was possible that you could be under the legal limit for alcohol, but by refusing the ASD demand there were severe penalties.
- At 23:58 hours he administered the ASD and you did not blow and sucked on the mouthpiece. The ASD showed a “NOGO” reading.
- At this point it was clear that you were intentionally not providing a breath sample.

At 23:59 hours, the constable determined that you had failed or refused to comply with the demand.

The constable stated that he successfully completed the ASD course in New Westminster BC at the Justice Institute of BC Police Academy on the Alco-Sensor IV DWF, and that he has since been a qualified operator. He indicated that he used the Alco-Sensor IV DWF with the serial number of 101879.

Your evidence is that you did not refuse to provide a breath sample. You stated that each of the three times you attempted, you just started to blow into the tube when the officer would pull it out of your mouth, ask if you were refusing and threaten you with arrest. Each time you stated that you were not refusing and that you were trying to provide a sample. You stated that at no time was a full breath allowed into the machine before it was removed. You stated that you did the procedure as they explained it and you do not know why a breath sample was not obtained, or why the machine could not read your breath.

I do not find your evidence credible that the constable would pull the mouthpiece out of your mouth each time you would just start to blow, and that a full breath was never allowed. I must advise you that a “NOGO” reading on an ASD is an actual result, and is due to an insufficient amount of air being provided into the ASD. Once a “NOGO” reading has registered, that particular test is over and the mouthpiece must be removed from the driver’s mouth. The constable stated that each of the 3 times he administered the ASD it registered a “NOGO”, and that you were either blowing out of the side of your mouth and then would stop blowing, or that you would suck on the mouthpiece. You did not deny this behavior. You stated that you were trying to provide a sample and that you did the procedure as they explained it to you; however,

blowing out of the side of your mouth or sucking on the mouthpiece is, in my view, behavior that is consistent with someone who is trying to defeat the ASD and not provide a proper sample, and is also consistent with a “NOGO” reading. The constable’s evidence is that multiple explanations and demonstrations on how to provide a proper sample were given to you and that you understood, and that he explained that you must not blow air out of the side of your mouth or suck on the mouthpiece. There is no evidence before me which contradicts this evidence. As a trained and qualified ASD operator, it seems more likely than not to me that the constable would have provided you with proper instruction, and that he had the necessary training and qualifications to determine that you were intentionally not trying to provide a breath sample.

In your submission you stated “I honestly did not think I was unable to drive and I am grateful the officer’s stopped me & sent me home in a taxi...”. This statement, combined with the constable’s evidence of the overwhelming odour of alcohol on your breath, slurred speech, unsteady balance, extremely bloodshot and watery eyes, slow and deliberate movements, and difficulty complying with his requests in a timely manner, all of which you did not dispute, suggests to me that you were likely driving with a considerable amount of alcohol in your body, and you knew it. It further suggests to me that because you knew this, you intentionally did not provide a sample of your breath.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand at 23:59 hours.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse for failing or refusing to provide a sample.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on October 24, 2011, at 23:59 hours.

I therefore confirm your driving prohibition, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 24, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that you may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections and 25.1 of the Act. For further information, please see our website at:

www.pssg.gov.bc.ca/osmv/

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Adjudicator

November 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1) or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral hearing, I confirmed with your lawyer, Scott Wright, that he had received full disclosure.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (IRP Report), Constable Arnold-Smith noted that he identified you as the driver of the vehicle when you approached a road block. He recorded the date and time of driving/care or control as November 5, 2011, at 05:02 hours.

You have not challenged this issue.

Based on the evidence before me, I am satisfied that you were the driver within the meaning of section 215.41(1) of the Act on November 5, 2011, at 05:02 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Occurrence Report, Constable Arnold-Smith noted that you had an overwhelming odor of liquor on your breath, your eyes were watery and bloodshot, you had difficulty complying with his requests in a timely manner, your speech was slurred, your movements appeared slow and deliberate, and you initially denied consuming alcohol, but you later admitted to consuming wine before driving. Constable Arnold-Smith noted that he had sufficient grounds to read you the ASD demand and that he read it to you at 05:06 hours and you stated that you understood.

Mr. Wright submitted that the demand made to you was unlawful. Mr. Wright argued that the threshold for an ASD demand is simply a suspicion of alcohol in the body and that in your case the officer's evidence suggests that he had more than just a suspicion. He directed me to *R. v. Minielly* in support of his submission.

I have read and considered the decision of *R. v. Minielly*. However, I note that case involved a criminal charge. In this administrative review, the issue before me is whether the officer had a reasonable suspicion that you had alcohol in your body. Based on the officer's noted observations, I am satisfied that he had a reasonable suspicion. As such, I am satisfied that a lawful demand was made to you.

With regard to the refusal, Constable Arnold-Smith indicated that he explained to you how to provide a sample. He noted that on your first attempt you did not blow air into the device rather you sucked on the mouthpiece and the ASD showed a "NOGO" reading. Constable Arnold-Smith again explained that you must blow air out of your mouth and must not suck on the mouthpiece. Constable Arnold-Smith noted that on your second attempt you again did not blow air into the device, you sucked on the mouthpiece and the ASD read another "NOGO" reading. Constable Arnold-Smith stated that he knew you were intentionally not providing a breath sample. He noted on your third attempt that you again did not blow air into the device, you sucked on the mouthpiece and the ASD read another "NOGO". Constable Arnold-Smith once again explained and demonstrated how to provide a proper breath sample. He advised you if you did not provide a breath sample that you could be charged criminally. He noted that he explained to you that you were able to provide a sample as you were in good health. Constable Arnold-Smith noted that on your last attempt you again did not blow into the device, you sucked on the mouthpiece and the ASD showed a "NOGO" reading. He stated that at this point it was clear that you were intentionally not providing a breath sample. He noted the time of your failure/refusal to comply with the demand as 05:17 hours.

In your affidavit you stated that you spent the evening of November 4, 2011, at your friend's house in Burnaby. You went to sleep at approximately midnight and woke up around 4:00 am and you left to return to Surrey. You explained that you were quite tired when you drove and your eyes get watery and bloodshot when you are tired. You stated that you did not consume any alcohol on November 5, 2011. You had last consumed alcohol when you had one glass of wine at approximately 6:00 pm on November 4, 2011. You explained that when Constable Arnold-Smith asked you if you had anything to drink that night you answered that you had not given that it had been almost 11 hours since you had a glass of wine. You indicated that the officer told you that he believed you had had something to drink as your eyes were watery and he could smell liquor on your breath. You stated that you told the officer that you had not had anything to drink since the glass of wine at approximately 6:00 pm on November 4, 2011. You explained that you did not have an odour of liquor on your breath, you were not unsteady on your feet and you had no problems with your balance. You explained that you followed the officer's instructions and gave your best effort to provide a sample. You stated that the officer told you that you were sucking rather than blowing. However, you told him that was not true and that you were blowing to the best of your ability. You explained that after the fourth attempt the officer told you that you were under arrest. You explained that you offered to try again and you also offered to attend with him to the station and provide a sample on the breathalyzer or perform any roadside sobriety tests that he wished to do. You explained that at no point did you fail or refuse to comply with a demand to provide a sample of your breath and that at all times you were attempting to follow the instructions that you had been given.

Mr. Wright indicated that you were doing your best to provide a sample and that you were always willing to provide a sample. He noted that you were deemed to have refused because of your actions. He submitted that as in *R. v. Bennett* officers must do everything possible to get the accused to cooperate and take the test. Mr. Wright indicated that I have before me two versions of events. He directed me to the recent decision *Spencer v. British Columbia* and argued that there is no reason for me to favor one version of events over the other.

I have read and considered the cases Mr. Wright provided in making my decision. Your evidence is that the officer fabricated the following:

- The overwhelming odour of liquor on your breath;
- The difficulty you had complying with his requests in a timely manner;
- Your slurred speech, slow and deliberate movements; and
- That you did not blow air into the device and that you sucked on the mouthpiece.

I have carefully considered the officer's evidence. The officer's evidence is a compelling detailed account of the events. There are no discrepancies or inconsistencies in the report. It shows an investigation that proceeded routinely. I note that this was a routine road check. As such, it makes no sense that the officer would concoct an elaborate fabrication in order to give you an IRP. Ultimately, you have not convinced me that the officer fabricated his evidence.

While Mr. Wright stated that officers must do everything possible to get the accused to cooperate, in my view, the officer gave you ample opportunities to provide a sample.

Based on the evidence before me, I find that you deliberately avoided providing a sample. I also find it more likely than not that you refused to comply with the officer's demand.

Did you have a reasonable excuse?

You did not provide any submissions on this issue.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for refusing to provide a breath sample at the time.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 5, at 05:17 hours.

I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5 of the Act. You are prohibited from driving for 90 days, which came into effect on November 5, 2011. When your prohibition ends you may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle will remain in the impound lot for the remainder of the impoundment period. It will be eligible for release thirty days from the date IRP came into effect.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at <http://www2.gov.bc.ca/osmv/>.

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Adjudicator

cc: Scott Wright
604-681-0652

OCTOBER 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 18, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

At the beginning of the oral review I listed the documents that were sent to your lawyer, Jack Harris, in disclosure. Mr. Harris acknowledged that he had received them on your behalf. I have proceeded with the hearing based on this confirmation.

Mr. Harris expressed his opinion that the IRP program has not been sufficiently explained to the public and that it is not clear that the penalties imposed are immediate. He said that without the 21 days for a driver to get his life in order before the prohibition is imposed, it is difficult to manage such activities as attending the applicant's hearing in the lawyer's office.

Mr. Harris also suggested that the investigating officer should have filled out the Report to Superintendent (RTS) more completely, instead of providing most of her evidence in a Synopsis and an Occurrence Report (OR).

These matters are not relevant to the issues that I can consider in this administrative review. The only issues that I can consider are those, which are outlined below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the RTS and the Synopsis, Constable Fox stated that she stopped a vehicle you were driving at a Counter Attack roadblock on September 18, 2011, at 0230 hours. Neither you nor your lawyer disputed this evidence.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 18, 2011, at 0230 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the OR, Constable Fox stated that she noticed an “overwhelming odor of liquor present emanating from the interior of the vehicle.” She said that your eyes were watery and slightly bloodshot. When you exited the vehicle on the officer’s request, she asked you to spit out what was inside your mouth. After you spit out a wad of gum, she still noticed an odor of liquor on your breath and advised you that she would be reading the ASD demand. You asked what her grounds were for the demand and she advised that she had a reasonable suspicion that you were in care or control of the vehicle with alcohol present in your body. You admitted to having consumed alcohol.

Mr. Harris expressed concern over the officer’s notation on the RTS regarding the time of your last drink. Constable Fox wrote “Several hours ago.” Your lawyer was not able to find any similar notation in the Synopsis or the OR, although he did not explain how this is relevant to the issues that I am authorized to consider in this review.

In the OR, the officer stated that she read the ASD demand to you and that you said you understood the demand. You did not provide any evidence to the contrary. Based on the evidence before me, I am satisfied that Constable Fox made a valid demand for you to provide a sample of breath for analysis by means of an ASD on September 18, 2011, at 0234 hours.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. In the Synopsis, Constable Fox stated that after she read the ASD demand to you, you replied, "I will not provide a breath sample." The officer then asked if you were refusing to provide a breath sample and you responded "yes". Neither you nor your lawyer presented evidence to the contrary.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 18, 2011, at 0236 hours.

Did you have a reasonable excuse?

Mr. Harris focused on Constable Fox's statements in the Synopsis and the OR regarding the implications of your refusal to comply with the demand. In the middle of the second page of the OR, Constable Fox wrote,

"CST FOX explained to the driver that failing to provide a breath sample into the Approved Screening Device could result in a Criminal Code Charge of Refusal. CST FOX further explained that Refusal carries the same penalties upon conviction as an impaired driving charge upon conviction. CST FOX asked the driver if he understood what she had explained to him. The driver stated, 'Yes.'"

Mr. Harris said the language that the officer used amounted to misinformation, since receiving an IRP does not result in criminal charges. He suggested that the officer's comments equate to procedural unfairness. There is no evidence before me regarding how you perceived the officer's explanation, other than that you understood that a demand had been made.

In addition, it appears that Mr. Harris did not consider all of the evidence in coming to this conclusion. Constable Fox noted that Corporal Buckingham remained with you when the constable went to the vehicle to obtain registration documents. When she returned to you and Cpl. Buckingham, the Corporal told her that "he would be releasing his female on a 3 day IRP." Constable Fox then took your driver's licence (imposing an immediate consequence that your lawyer suggested was missing), and she noted that you told her you wanted a 3-day IRP.

"CST FOX explained that [you] could not be released on a 3 day IRP due to the fact that [you] did not provide a breath sample. s.22 responded, 'The other guy said he would release me on a 3 day IRP.' CST FOX explained to [you] that CPL BUCKINGHAM was dealing with another driver who was approximately 3 feet away from where CST FOX and [you] were standing. [You] looked at CST FOX and said, 'come on you have discretion.'"

I conclude from all the evidence that is before me, that on a balance of probabilities, it is more likely than not that you understood the consequences of failing or refusing to comply with a demand, and that you did not suffer any procedural unfairness in this regard. There is suggestion from your lawyer, but there is no evidence before me to the contrary.

I also note that Constable Fox gave you an additional opportunity to change your mind about providing a breath sample; again, you declined. The officer stated in the OR that you told her you did not believe that the ASDs were reliable, so “there was no way [you were] going to provide a breath sample because of that. [You] then explained that [you were] diabetic.” The officer explained that being diabetic has no bearing on your blood alcohol content. Apparently, you reiterated that you do not trust the machines and you cannot provide a breath sample, because you are diabetic.

You did not provide any evidence explaining why you do not trust ASDs, and you did not provide any compelling evidence that your health condition prevents you from providing a breath sample. Accordingly, I find that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 18, 2011 at 0236 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 18, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssq.gov.bc.ca/osmv/>.

s.15

Adjudicator

cc. Jack Harris
604-859-1375

OCTOBER 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 24, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that full disclosure was provided to you. I have proceeded with the hearing based on this confirmation.

Issues

There were three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS), Corporal Buckingham checked a box indicating that he witnessed you driving on September 24, 2011, at 0500 hours. You did not dispute this.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on September 24, 2011, at 0500 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Synopsis, Corporal Buckingham stated that you had “reddened eyes, watery eyes and dry lips.” He also noted the odour of stale liquor on your breath and person. The officer reported that you admitted to drinking the prior evening, and that you said you only had three hours of sleep that night. Corporal Buckingham stated that he made a demand for you to provide a sample of breath for analysis by means of an ASD on 0506 hours. You did not dispute the officer’s evidence in this regard.

Based on the evidence before me, I am satisfied that Corporal Buckingham made a valid demand for you to provide a sample of breath for analysis by means of an ASD on September 24, 2011, at 0506 hours.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. In the Synopsis, the officer stated that he explained how to give a breath sample into an ASD and noted that you said you understood what to do. The officer gave detailed notes about the five opportunities he gave you to provide a suitable breath sample. He said that you provided no airflow into the ASD on any of your attempts. You did not dispute the officer’s evidence that you failed or refused to comply with the demand to provide a breath sample on September 24, 2011, at 0508 hours.

Based on the evidence before me, I am satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

Did you have a reasonable excuse?

In your written submission, you said that in addition to suffering from a migraine on September 24, 2011, you had a sore throat, because you had been sick in the previous few days. You said that a respiratory infection caused you to be unable to provide a valid breath sample. You included a note in your submission from someone at the Scott Road Medical Centre, dated September 26, 2011. The note says, “seen today for sore throat and respiratory infection.” The

note confirms your illness, but it does not say that your condition affected your ability to provide a suitable breath sample into an ASD.

I also note the officer's evidence that he observed "no flow of mouth air through the A[S]D". This suggests to me that rather than being unable to provide a sample, you did not try to provide a breath sample into the ASD.

Based on the evidence before me, I am satisfied on a balance of probabilities that you did not have a reasonable excuse for failing or refusing to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD, on September 24, 2011, at 0508 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD, on September 24, 2011, at 0508 hours. I therefore confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 24, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at: <http://www.pssq.gov.bc.ca/osmv/> .

s.15

Adjudicator

October 14, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 24, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to your lawyer, Mr. Stanley Nozick, on your behalf. I have proceeded with the hearing based on this confirmation.

In the Notice of Driving Prohibition, Constable Cividino indicated that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD. However, other evidence provided by the police, specifically in the Report to Superintendent ("the Report"), provided the results of your ASD test, indicating that obviously you did not fail or refuse to provide a sample, and that fail/refusal was noted by the officer in error.

As a result of this error, I do not need to consider any other issues.

Decision

I cannot be satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 24, 2011. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc Stanley Nozick
Fax: (604) 531 - 8237

November 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 21, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Sarah Leamon. She confirmed receipt of the police evidence: the Notice, Certificate of Service, Report to Superintendent, and a Synopsis. She also requested the Superintendent's Office provide any audio and/or video recordings made at the roadside, if available. She referred me to the case of *Spencer v British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311, and in particular, paragraph 62. She did not provide evidence that an attempt had been made to obtain police audio/ visual materials, and did not request an adjournment. In the absence of such additional materials, I proceeded with the hearing.

In her oral submission, your lawyer argued the regime set out in the Act governing Immediate Roadside Prohibitions is unconstitutional. She also argued that the regime infringes upon rights

protected under the *Canadian Charter of Rights and Freedoms* (Charter). Specifically she argued that an ASD may only be used pursuant to the *Criminal Code* to establish the grounds for an investigation of impaired driving. Under an Immediate Roadside Prohibition they are being used as an essential ground for a prohibition. Ms Leamon also referred me to the case of *Regina v Brigitte Schultz* (2005) BCSC 1521. She argued that the scheme of the Immediate Roadside Prohibition provisions set out in the Act is not within the legislative competence of the Province. She maintains that the results of an ASD test can only be used as an investigative tool or to confirm or reject a peace officer's suspicion that a person's ability to drive is affected by alcohol. The scope of this review, however, is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?

In the Report to Superintendent (Report), Constable Basran, stated that he identified you as the driver of a vehicle at 01:50 hours on October 21, 2011. You were observed by the constable when a vehicle traffic stop was conducted. In his attached Synopsis, the constable noted that he was travelling eastbound on Highway 91 at Nelson Road, Richmond. While in an unmarked police vehicle, he observed a black Nissan Altima travelling at approximately 140 km/hr in a 100 km/hr zone. The traffic stop took place approximately one kilometre west of the Nelson Road off ramp.

In your affidavit, you acknowledged being the driver of a vehicle on October 21, 2011. You drove a rental vehicle for approximately 15 minutes, shortly after 1:30 am. You noticed the flashing lights of a police vehicle in your rear view mirror. You pulled off the road and came to a complete stop. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on October 21, 2011, at 01:50 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Report, Constable Basran noted that you had an odour of alcohol on your breath when you spoke to the officer. He observed that you had glassy eyes. The constable noted that you admitted to consuming two beers earlier and the time of your last drink was 2 hours prior. The constable formed a suspicion that you had alcohol in your body. At 01:55 hours the constable made a demand for you to provide a sample of breath pursuant to the *Criminal Code*. The constable noted that you understood the demand.

You have not challenged this issue or provided evidence to the contrary. In your affidavit you acknowledged drinking three beers with dinner earlier that evening. At approximately 9:30 pm you finished your third beer. I find there is sufficient evidence to support the constable's subjective belief that you had alcohol in your body. Accordingly, I am satisfied a valid demand was made by Constable Basran at 01:55 hours, on October 21, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', the constable stated that he explained the consequences of not providing a suitable sample. The constable stated that you were 'given three opportunities to provide a sample and would not blow hard enough on purpose.' The constable provided a further description in his Synopsis. Constable Basran explained how to provide a breath sample in layman's terms. You were instructed to blow into the mouthpiece; you would have three opportunities to provide a sample. On each attempt to blow you failed to provide a suitable sample. In the constable's opinion, you did this on purpose by not blowing into the ASD hard enough.

The essential elements of the offence described under section 254 of the *Criminal Code* consist of a proper demand and a refusal or failure to comply with that demand. Your lawyer argued that you did not refuse to provide a sample of breath. In your affidavit, you asserted that you were willing to provide a breath sample, and attempted to do so three times. You stated that on your first attempt you placed your lips around the 'straw' and began blowing into the ASD. You blew into it normally. After you had finished, the constable informed you that you had not blown hard enough. On the second opportunity to provide a sample, you blew harder into the ASD with the same result. You believed you were blowing the 'best' you could. You did not understand why your breath sample was insufficient. On your third attempt you stated that you blew 'very hard.' When you had finished the constable charged you with deemed refusal.

You asserted that Constable Basran told you that you were not blowing because he was not getting a reading on the ASD. You concluded that there must be something wrong with the ASD itself. You stated that you challenged the constable on this point, and his response was: "No. You aren't blowing."

A failure to provide an adequate sample is established when the inference can be drawn that a person intended the natural consequences of his acts: an adequate sample was not provided after a clear explanation was given as to how to blow into the ASD; an adequate opportunity was given to blow into an ASD; and the ASD was in working order. It is clear from the evidence that the ASD was calibrated and serviced. The screening device was an ALCO Sensor IV DWF, with a serial number 101556. Your lawyer referred to the decision of another adjudicator.

In that incident there was no evidence of a working ASD: the peace officer had not provided a serial number, calibration or expiry date.

Ms Leamon suggested that the ASD could not be relied upon. She pointed out that the ASD calibration expiry date shown in the Report was more than 30 days beyond the incident itself. In an RCMP Memorandum dated September 4, 2008, submitted as supporting evidence by your lawyer, the Toxicology Services Section recommends:

ASD Calibration: An ASD must be checked for proper calibration every 14 days by a qualified technician in the calibration of the applicable ASD.

However, I do not find she has provided persuasive evidence in support of this proposition. Current police practice, as noted in the Superintendent's Report on ASDs, is for ASDs used in British Columbia to be calibrated on a monthly basis. Moreover, there is no requirement for the peace officer to put forward evidence that the ASD was properly serviced and calibrated, so long as the officer had reasonable grounds to believe the ASD was functioning properly. In *R v Lyubarsky*, 2009 ONCJ 20 the court held that a peace officer could make a presumption of regularity in respect to an ASD and rely upon its test result. Where a mechanical device, such as an ASD, is normally in 'good working order', it is presumed, until the contrary is proved, that it was functioning properly when deployed. The ASD in question was an approved type and had been serviced. Neither you, nor your lawyer, has provided evidence that the ASD's functionality was in any way compromised or that it was not working properly. It is clear from the constable's evidence that you were deliberately not blowing properly into the device. Although you stated in your affidavit that you blew into the ASD, I note that you did not persuasively challenge the constable's observations regarding your unsatisfactory blowing technique. You were given an adequate opportunity to provide a breath sample for analysis by an ASD. Although Constable Basran cautioned you, and prompted you to provide a sample, you failed to do so, at least three times. You were not provided with an opportunity to blow into another ASD, since you failed to provide a proper sample using the ASD, and there was no test result.

Given the evidence before me, I am satisfied that you failed to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 02:00 hours, on October 21, 2011.

Did you have a reasonable excuse?

Neither you nor your lawyer has provided persuasive evidence forming the basis of a reasonable justification for your behaviour. I am satisfied that you did not have a reasonable excuse for failing to comply with a demand.

I find that on a balance of probabilities, you did not have a reasonable excuse for failing to comply with a demand on October 21, 2011, at 02:00 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 21, 2011, at 02:00 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1)(b)(ii) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 21, 2011. You may resume driving 90 days after that date, provided you have obtained your original driver's licence from the Insurance Corporation of British Columbia. If you would like your driver's licence couriered back to you after the prohibition, please call Driver Licensing toll free at 1 800 950 1498 within the province. If you do not request your Alberta driver's licence to be returned to you within one year, it will be destroyed. The vehicle impoundment is also confirmed.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, the vehicle may be picked up. The owner is responsible for towing and storage charges that will have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

Pursuant to sections 215.45 and 25.1 of the Act; you may receive a separate letter requiring you to register in, and attend, any remedial program required by the Superintendent, including the Ignition Interlock program. For further information, please see our website at:
<http://www.pssg.gov.bc.ca/osmv/>.

s.15

s.15

Adjudicator

cc: Sarah Leamon
Fax: (604 685 8308)

November 18, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 29, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (the “ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, George Leven. During the oral hearing Mr. Leven confirmed that he had received disclosure. I have proceeded with the review based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with an ASD demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent regarding your IRP (the "Report"), Constable Smith indicates that on October 29, 2011 at 01:23 hours, you were involved in a motor vehicle accident in which you rolled your vehicle.

During the oral hearing you acknowledged driving.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, at the time in question.

Did you fail or refuse to comply with an ASD demand?

The issue of whether you failed or refused to comply with a demand is twofold. First, the evidence must establish that a demand was made on you pursuant to section 254 of the *Criminal Code*. Second, the evidence must establish that you failed or refused to comply with the demand.

In her Report under "Reasonable Suspicion for Demand", Constable Smith indicates that she detected a strong smell of liquor coming from you. Based on this, at 01:40 hours, Constable Smith formed a reasonable suspicion that you had alcohol in your body and made an ASD demand on you.

Based on this evidence, I am satisfied that a demand was made on you pursuant to section 254 of the *Criminal Code*.

In determining whether the evidence establishes that you failed or refused to comply with the demand, I have considered the following evidence:

In her Report, Constable Smith indicates that you understood the demand; however, you refused to comply with it. In answer to the question: "How did the driver fail or refuse to provide breath sample?" Constable Smith indicates that you stated that you refused to give a sample as you knew you would fail due to having one beer. She also notes that you were very uncooperative and exhausted all attempts to provide a sample suitable for analysis. Constable Smith indicates that you were given four warnings, but you gave a poor effort and then refused.

With respect to your submission that you were given only 3 opportunities, whereas Constable Smith indicates that you were provided with 4 opportunities, there is no requirement under the *Criminal Code* or the *Act*, that a police officer provide a specific length of time or a minimum number of opportunities, for a driver to provide a suitable breath sample. Constable Smith indicates that you were provided with several opportunities to provide a breath sample; however, you did not.

Although you submit that you gave your best effort to provide a sample and did not deliberately refuse to provide a breath sample suitable for analysis, you acknowledge that you did not provide a sample suitable for analysis. Consequently, based on the evidence, I find that on October 29, 2011, a demand was made on you pursuant to section 254 of the *Criminal Code* and you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In determining whether you had a reasonable excuse to fail or refuse to comply with a demand, I must look at the excuse you gave to the police officer at the time of the refusal.

During the hearing you stated that you were joking when you told the police that you did not want to provide a breath sample because due to the new drinking and driving laws, you would blow a "FAIL". You said you were simply mocking the new BC laws.

You stated that both police officers got verbally aggressive with you and were both speaking at once, so you could not understand them. You assert that it was the paramedic who told you that if you refused to provide a breath sample, it would be the same consequences as blowing over .08. You then realized that you needed to provide a breath sample in order to prove your innocence.

After Constable Smith instructed you on how to provide a breath sample, you made your best effort. However, as hard as you tried, you ran out of breath. After giving you 3 opportunities to provide a breath sample, Constable Smith told you that she had had enough because you were not doing it properly. You assert that you found it painful to sit up and you barely had your eyes open. You contend that when you attempted to blow into the ASD, it gave you pain in your chest area and your ribs.

Mr. Leven provided a copy of the paramedic's report and submits that this document proves that you were unable to provide a suitable breath sample due to your injuries. Consequently, you had a reasonable excuse and your driving prohibition should be revoked.

While I have considered your evidence and Mr. Leven's submissions, I have reviewed the paramedic's report and note the following:

Under "Chest", the paramedic wrote, "equal expansion, zero pain; clear to bases". He also noted in the report, that you said your kidneys hurt and you had pain in the lower ribs of your back that you rated "2/10". The paramedic also indicates that he explained the importance of going to the hospital to be checked out; however, you refused.

I find nothing in the paramedic's report to indicate that your breathing was compromised. In fact, you stated during the hearing that it was the paramedic who advised you that it was in your best interest to provide a breath sample into the ASD. If your breathing had been negatively affected by your injuries, I find it unlikely that the paramedic would have suggested that you provide a breath sample. If your breathing was impaired, I find it more probable than not that he would have advised the police officers that you were unable to provide a suitable breath sample

due to your injuries. In addition, the fact that the paramedic gave you a choice of whether or not you attended the hospital, supports that your injuries did not impair your breathing. If you were seriously injured, the paramedic would have automatically taken you to the hospital, rather than given you a choice. Your refusal to go to the hospital also supports that your injuries were not that serious. In addition, you have provided no medical evidence from a doctor to indicate that you sustained injuries from the accident that prevented you from providing a suitable breath sample.

Although you state that your injuries prevented you from providing a breath sample suitable for analysis, I find you have provided no compelling medical evidence to indicate that this was the case.

Decision

I am satisfied that on October 29, 2011, you were a driver within the meaning of section 215.41(1) of the *Act* and you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I therefore confirm your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(ii) of the *Act*. You may resume driving after serving your prohibition, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also confirmed. Once the impoundment period is over, you can make arrangements to have the vehicle released. You are responsible for all towing and storage charges, including the day the vehicle is eligible for release. You should know that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the MVA. For further information, please see our website at <http://www.pssq.gov.bc.ca/osmv/>

s.15

Adjudicator

pc: George Leven
Fax: (250) 564-0563

October 19, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 1, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (“Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (“ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s reports.

Preliminary Matters

At the beginning of the oral review, I listed the disclosure documents and you confirmed that you had received them. I have proceeded with the hearing based on this confirmation.

During the oral hearing, you stated that you cannot afford the costs associated with this driving prohibition. You also stated that you need your licence for work. I acknowledge and appreciate your situation. However, under the *Act* I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. The scope of the review is limited to the grounds defined in the *Act*. The issues I can consider are limited to the issues as listed below.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the IRP Report to Superintendent ("IRP Report"), Peace Officer Cameron is identified as the investigating officer. In the IRP Report, the investigating officer checked the box to indicate that you admitted to being the driver of the vehicle. The officer provided a synopsis report which indicates that the police responded to a complaint of a female lying on the road and a male shouting for help on Hwy 3 near Goatfell. In the synopsis report, the officer indicated that s.22 was laying on the south bound shoulder covered in blankets and you were attempting to comfort her. Additionally the officer indicated that when you were asked what happened, you stated that you were on your way home to Cranbrook, after buying a new truck the day before, and out of nowhere s.22 stated "I'm gonna jump out of the truck" at which point she jumped. The officer also stated that you were abusive towards the paramedics and so you were removed from the area. In the IRP Report, the officer stated that the date and time of driving or care or control was October 1, 2011, at 06:45 hours.

During the oral hearing, you stated that you had just purchased the truck. You also stated that your wife, s.22, was very drunk. Furthermore, while you were driving home to Cranbrook, your wife did indicate that she was going to jump out of the truck, and did in fact jump out of the truck while you were driving. Your submission during the oral hearing supports the evidence from the officer. Ultimately, you have acknowledged that you were the driver.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* on October 1, 2011, at 06:45 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the IRP Report, the officer indicated that his reasonable suspicion for his demand was based on the following; "odor of liquor on breath, slurred speech, beer in truck". In the synopsis report the officer stated that he noted an odor of liquor on your breath and that your speech was slurred. In the IRP Report, the officer stated that he read an ASD demand to you on October 1, 2011, at 07:40 hours, and that you understood the demand.

During the oral hearing, you stated that you did not have anything to drink, but your wife was very drunk. You submitted that the smell of booze was a result of your wife drooling all over you while you were trying to comfort her. You also submitted that your slurred speech was a result of the cold temperature outside while you were waiting for help for your wife. Additionally, you

told me that the beer that was in the truck was located behind the seat and you would not have been able to reach it from the front seat.

While you have suggested that the odor of alcohol was a result of your wife drooling on you, I note that the officer specifically stated that the odor of liquor was on your breath, not on your clothing. Furthermore, I do not see how your wife could have been responsible for the odor of liquor on your breath. Additionally, I am not convinced that a person's speech becomes slurred as a result of cold weather. Nonetheless, I find that the officer's observations, at the time of the incident, were sufficient to provide him with a reasonable suspicion that you had alcohol in your body.

Considering the evidence before me, I find that the officer had a reasonable suspicion to make the demand and that a valid demand for a sample of your breath into an ASD was made.

In the IRP Report the officer indicated that you understood the demand. Also in the IRP Report, when asked how the driver failed or refused to provide a breath sample, the officer indicated that you profanely stated that you were not blowing into "nothin' ". The officer's synopsis report corroborates the evidence in the IRP Report. In the IRP Report, the officer noted the date and time of failure or refusal to comply with the demand was October 1, 2011, at 07:40 hours.

During the oral hearing, you did not submit any evidence to refute this.

There is no indication, in the police evidence, that you made any attempt to provide a sample of your breath into an ASD. In fact, the officer's evidence clearly indicates that you informed the officer that you would not provide a sample of your breath and I have no evidence from you to the contrary.

Based on the evidence before me in its entirety, I am satisfied that a demand existed, and that you failed or refused to comply with that demand.

Did you have a reasonable excuse?

There is no explanation, by either you or the officer, why you refused to provide a sample of your breath into the ASD. During the oral hearing you told me that you had an impaired charge two years ago. You stated that you were guilty then, that you learned your lesson, and that this time you were not drinking and are not guilty.

If you had not been drinking, as you would have me believe, then I would have expected you to have provided the officer a suitable sample of your breath into the ASD. Rather, you profanely stated to the officer that you were not blowing into "nothin' ". Whether or not you believed you were guilty this time is not a reasonable excuse for failing or refusing to comply with a demand.

The fact is that the officer had reasonable grounds for a demand. The officer made a valid demand for a breath sample, and you failed or refused to comply with the demand without a reasonable excuse.

Based on the evidence before me in its entirety, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on October 1, 2011, at 07:40 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1) of the *Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 1, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up the vehicle. You are responsible for towing and storage charges that have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs sections 215.45 and 25.1 of the *Act*. For further information, please www.pssg.gov.bc.ca/osmv.

s.15

s.15

Adjudicator

November 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* ("the Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure documents were provided to your lawyer, Dilraj Gosal. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative, Constable Hillier identified himself as the investigating officer and stated that on November 5, 2011, at 00:10 hours he was participating in a stationary roadblock for impaired drivers when he stopped a blue Ford pickup. The constable stated that you were identified as the driver by your BC driver's licence and that you were the lone occupant of the vehicle.

You did not dispute the constable's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

In the Narrative, Constable Hillier stated that there was a moderate odour of liquor in the vehicle, you initially denied consuming alcohol and you had your head turned away from him. He stated that the odour of liquor was very distinct and moderate inside the vehicle and that your eyes were glassy and bloodshot. He stated that you admitted to consuming a glass of wine with dinner, then said you had a couple of glasses throughout the evening, but you would not be specific as to the amount or timeframe. You confirmed your last sip of liquor was more than 20 minutes prior to the stop and you told the constable you switched to soda water at some point in the evening. The constable stated that at 00:12 hours he had a suspicion that there was alcohol in your body, he read you the ASD demand and you understood it. In the Report to Superintendent (the "RTS"), the constable stated that there was a moderate odour of liquor in the vehicle and on your breath, that your eyes were glassy and bloodshot, you were uncertain as to when you last drink was, and you answered "no" then "yes" when asked if you had consumed alcohol.

In your affidavit, you stated that you agree with the times set out in the RTS "being: 00:12 time of ASD demand; and 00:13 being around the time that he decided that I had refused". You stated that you believe the process took a very long time and that "it seemed like about an hour" to you. You stated that when the officer asked you if you had anything to drink recently you stated "No". You stated that you agree that you denied any consumption because he asked you if you had consumed anything recently. You stated that you admitted to consuming wine "much earlier with dinner" and that you told him you had not consumed anything in the last 10 minutes, you had been drinking soda water and lime all evening because you were not feeling well. You stated that the constable asked you to pull your vehicle over and to blow into a machine to test for alcohol.

In his written submission, Mr. Gosal submitted *R. v. Kroll* in support of your case and argued that there were insufficient grounds for making an ASD demand. He stated that the case law is clear that there must be a minimum threshold that there is alcohol in the body. He stated that the demand must be pursuant to the *Criminal Code* and it must be a lawful demand. He stated that the officer did not reach a suspicion that you had alcohol in your body at the time of the

demand; there was only the detection of a moderate odour of liquor in the vehicle and your breath, and your glassy, bloodshot eyes.

Mr. Gosal also argued that the “Conjunctive requirement of Fail and Ability to Drive Affected by Alcohol...” was not met and that there is no justification for a delay in making the demand.

With respect to your evidence that you agree to the times in the RTS and that the time of refusal was 00113, I can find no such time recorded anywhere in the RTS or the Narrative. You stated that the process took a long time and seemed to take an hour, but you did not explain the source or your belief. As for Mr. Gosal's suggestion that there was a delay in making the demand, I can find no evidence of a delay. I have reviewed and considered all of the evidence before me with respect to the timing of the constable's investigation and I interpret the times as follows:

- Time of driving or care or control 00:10 hours
- Time reasonable suspicion formed 00:12 hours
- Time ASD demand read 00:12 hours
- Time constable starts to attempt to 00:13 hours
 obtain a breath sample
- Time of refusal 00:31 hours

Throughout the constable's evidence he recorded the times with a colon separating the hours from the minutes and it is my interpretation that he has also done so when recording the time he attempted to obtain a breath sample. Consequently, I find these times to be clearly noted in both the RTS and the Narrative and I can only conclude that you may have interpreted the notation of 00:13 in part 4 as 00113.

In addressing Mr. Gosal's argument that the “Conjunctive requirement of Fail and Ability to Drive Affected by Alcohol...” was not met, I note that on the Notice of Driving Prohibition (the “Notice”), the constable has checked the box indicating that he prohibited you from driving “because you failed or refused, without a reasonable excuse, to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device”. This language is taken directly from the Notice and is consistent with the evidence provided by the constable in both the RTS and the Narrative. Mr. Gosal referenced section 215.41(3); however, in this case, the relevant section of the Act is section 215.41(4) which states:

If a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device, the peace officer, or another peace officer, must take those actions described in subsection (3) (c) and (d).

With respect to Mr. Gosal's argument that the officer had insufficient grounds for making an ASD demand, I disagree. The constable's evidence is that there was odour of alcohol present in the vehicle and on your breath, your eyes were glassy and bloodshot, you admitting to

consuming alcohol that evening, and he suspected that there was alcohol in your body before he made the ASD demand. Based on this evidence, I am satisfied that the constable had sufficient grounds to make an ASD demand, and I am satisfied that he made a valid demand.

In the Narrative, the constable stated that he attempted to get a proper breath sample from you 12 times. He provided the following details of his investigation:

- 1st and 2nd attempts NOGO reading
- 3rd attempt VOID reading
- 4th and 5th attempts NOGO readings
- He warned you for failing or refusing to provide a proper sample
- you told the constable you were trying but you did not feeling well
- The constables stated up to this point, you were not coughing
- 6th attempt VOID reading
- He warned you again for failing or refusing to provide a proper sample and the consequences
- Constable obtained new breath tube and demonstrated how to provide a sample, you stated you understood
- 7th and 8th attempts NOGO readings
- 9th attempt VOID reading
- He warned you a 3rd time for failing or refusing to provide a proper sample
- 10th and 11th attempts NOGO readings
- 12th attempt VOID reading

At 00:31 hours Constable Hillier advised you that you were being detailed for failing/refusing to comply with the breath demand. He stated that he believed you were physically capable of provided a breath sample and that you failed or refused to comply with the demand made under the *Criminal Code*. He also stated that you had episodes of coughing between attempts to provide breath samples 7-12 and that you indicated that you were not feeling well. He stated there was no coughing at the time of the stop, during attempts 1-6, or after you were served with documents.

On page 3 of the Narrative, the constable provided the following evidence:

“BLOWING PATTERN. On all 12 attempts, s.22 began to blow very softly and what could be described as guarded. She would blow for 2-3 seconds then stop blowing or suck back. All the while Cst. HILLIER was coaxing her to blow and kept saying, blow blow blow.....” The constable also noted that he demonstrated exactly how to blow, both physically and verbally.

In the RTS, the constable noted the type, serial number and calibration and expiry dates of the ASD used in your case.

In your affidavit, you stated that you found the situation to be awkward because you had never been in a situation like it before and because you had a cold. You stated that on each occasion, you tried to blow into the device. You stated that the constable never showed you the results nor did he let you touch the device. You stated that the officer told you that you were refusing and

explained what a refusal charge meant. You stated that you told the constable you were not refusing, your breath was getting shorter with each attempt. You stated that the entire process took over 1.5 to 2 hours, that "at no time did I try not to blow", and you never refused to blow into the device.

Mr. Gosal argued that there is no direct refusal but a "deemed refusal". He submitted *R. v. Persaud* in support of your case and stated that it provides the proper analysis for refusal cases. He also stated that it is unclear whether the officer has submitted a fail or a refusal charge.

In addressing your evidence that the constable never showed you the results and he never let you touch the device, I know of no requirement for him to do either.

I have read the *Persaud* case; however, I find it to be markedly different from your case. The constable's evidence is that you did not provide a suitable sample and you acknowledged that you did not. He stated that you blew very softly in a guarded manner, that you would blow for 2-3 seconds then stop blowing or suck back. In my view this is not consistent with a sincere attempt to provide a sample of your breath. Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You stated that you had constant, direct observation of the device and you saw the constable change to mouthpiece only once. Mr. Gosal submitted a copy of an RCMP memo addressed to ASD Operators and argued that the constable failed to comply with proper procedures to ensure a valid test by failing to change the mouthpiece as required. He stated that the same mouthpiece can be used after a NOGO, as long as the attempts are made within the 1 minute window. He stated that from 00:12 to 00:31, over 18 minutes elapsed and that it is clear from the officer's evidence that he only changed the mouthpiece once. He stated the mouthpiece was supposed to be changed after any VOID and that the memo clearly states that the mouthpiece must be ejected.

I considered Mr. Gosal's argument and I have read the RCMP ASD memo and note that it states the following at paragraph 4, page 2:

"During each one minute test sequence window, a subject has a maximum of three attempts to provide a suitable sample, but if the subject only meets the minimum flow rate, the instrument will display a NO GO reading. It also states that if a third attempt is unsuccessful, a VOID reading will automatically occur". This is consistent with the constable's evidence that the ASD displayed a reading of 2 NOGO results in a row, then a VOID.

The memo continues on to say that the screen will go blank, and the operator must eject the mouthpiece and reinsert a mouthpiece to start over. It also states that it is recommended that a new mouthpiece be used to initiate the next breath test. While I accept that it is recommended that a new mouthpiece be used, there is no information provided in the memo to indicate what the consequence would be if the same mouthpiece was used. You did not provide any evidence on this issue and I can only speculate. I find it noteworthy though that you did not comment on whether or not the constable ejected the mouthpiece after each VOID reading nor did you

comment on whether not he changed the mouthpiece after he demonstrated how to provide a sample. In my view, it seems unlikely that you blew into the same mouthpiece the constable did and you did not say you did.

Additionally, I have reviewed the details of the ASD noted in section 4 of the RTS and found that the ASD meets the requirements of current police practices as set out in the Superintendent's Report on Approved Screening Devices. Ultimately, I am not convinced that the ASD was not functioning correctly or that the constable failed to properly administer the ASD test.

You also stated that in terms of the coughing, you disagreed with the constable's characterization of the facts. You stated that "each time I take a deep breath, I get worse coughs, so I was blowing slowly, but steady". You stated that you started coughing more with each attempt "as the lungs were just full, and phlegm and mucus". You stated that you saw a doctor on Tuesday and were provided with a prescription for antibiotics to clear the congestion in your chest. You provided a copy of your prescription dated November 8, 2011, which I note is the Tuesday after you were served with the prohibition.

The constable has provided a great deal of detail evidence regarding his observations of when you were coughing and when you were not and this tells me that the officer was observing you carefully during the course of his investigation. He stated that he believed you were physically capable of provided a breath sample and he does not describe you as being in any medical distress or having difficulty breathing or carrying on a conversation. While I acknowledge your evidence that you were not feeling well, you experienced some coughing episodes, and you obtained a prescription for antibiotics, I am not convinced that you were physically incapable of providing a breath sample.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that you failed or refused, without a reasonable excuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on November 5, 2011, at 00:31 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on November 5, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia. . If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Drivers Licence.

The vehicle impoundment is also confirmed. The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up your vehicle. You are responsible for towing and storage charges that accumulate during the storage, including the day the vehicle is eligible for release and any other additional charges. You should know that if

the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

You may receive a separate letter requiring you to register in and attend remedial programs under the provisions of sections 215.45 and 25.1 of the Act. For further information, please see our website at <http://www.pssg.gov.bc.ca/osmv/>

s.15

s.15

Adjudicator

cc: Dilraj Singh Gosal
Fax: 604-598-1117

November 29, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On November 13, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (“Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (“ASD”), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1), and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer’s reports.

Preliminary Matters

At the beginning of the oral review, I listed the disclosure documents and your lawyer, Sarah Leamon, confirmed that she had received them. I have proceeded with the hearing based on this confirmation.

Ms. Leamon argued that your prohibition be lifted as the ASD test results cannot be legally used to form the basis of it. She submitted that the ASD test results can neither be admitted nor relied upon under the IRP provisions. To do so would amount to a violation of your constitutional rights under the *Charter of Rights and Freedoms*. Specifically, it would violate your right to counsel under section 10(b). She provided the case *Regina v Brigitte Schultz* to support her argument.

While I have reviewed your lawyer's submissions, as an adjudicator, I have no authority under the *Act* to consider *Charter* arguments and grant *Charter* remedies. My role and authority in this review is outlined in the introduction of this letter. I will proceed with this review, and I will consider the issues that I am required to consider under the *Act*.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the IRP Report to Superintendent ("IRP Report"), Peace Officer Addison is identified as the investigating officer. The investigating officer checked the box to indicate that he witnessed you as the driver of the vehicle. The officer stated in the IRP Report that he observed you driving and that the date and time of driving or care or control was November 13, 2011, at 01:50 hours. The officer provided a synopsis report in which he provided additional details around the traffic stop. He stated in the synopsis report that he observed you driving a grey Dodge Calibre, BC licence plate s.22 , on the Georgia Viaduct at 01:50 hours, on November 13, 2011, and noted that there was a female passenger in the car. He indicated that he identified you using your BC driver's licence.

In your affidavit, you acknowledged that you were driving and that you were pulled over at a roadside stop by an officer.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* on November 13, 2011, at 01:50 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether a demand existed, and I must determine whether you failed or refused to comply with that demand.

The officer stated the following in the IRP Report:

- "Strong odor of liquor in vehicle and on breath"
- Time reasonable suspicion formed: "01:51" hours "denied consuming liquor"
- ASD demand read: "01:51" hours
- Did driver understand demand? "yes"

The officer stated the following in the synopsis report:

- "I was working CounterAttack and had motioned to s.22 to stop. She did not appear to see me and rolled passed me. s.22 only stopped when I tapped on the window."

- “She rolled down the window and I immediately smelled a strong odour of liquor. I asked s.22 if she’d had any alcohol to drink, and she said no. s.22 appeared nervous and did not look at me as she spoke. The passenger claimed she had been drinking.”
- “I asked s.22 to step out of the car and confirmed ID with BCDL. She was dressed up and said she had just come from a birthday party at a night club. Her eyes were glassy and I detected liquor on her breath.”
- “I suspected s.22 had alcohol in her system so I gave s.22 the ASD demand at 1:51 hours. After I gave the demand, s.22 walked away from me and bent over into the driver-side of the car for several seconds. She appeared to be consulting her friends.”

Ms. Leamon questioned the officer’s reasonable suspicion for the demand and took issue with the validity of the demand. She submitted that your affidavit explains any issue regarding the vehicle stop and your nervousness at the time. In your affidavit you stated that your eyes were not glassy, or if they appeared to be glassy, then it was likely because you were tired and had been up since 6:00 am. The affidavit from your passenger, s.22, states that your eyes did not seem to be glassy. Ms. Leamon stated that people are not required to admit the truth to officers and that just because you lied to the officer about your alcohol consumption at the time does not undermine your credibility. Ms. Leamon noted the officer’s evidence regarding the odour of liquor on your breath. She also noted that, according to the affidavits from both you and s.22, it had been several hours since you consumed the couple of ounces of champagne earlier that evening and further noted that you had chewed gum after the consumption. She opined that, as a result, it was unlikely that you still had an odour of liquor on your breath. Furthermore, she noted that the affidavits from both you and s.22 state that your breath did not smell like alcohol at the time of the stop. Summarily, Ms. Leamon submitted that, based on the affidavit from you and s.22, since your eyes were not glassy and there could not have been any odour of liquor on your breath, the officer had insufficient indicia to support his reasonable suspicion for the demand. As a result, the demand for a sample of your breath was not valid, as per section 254(2) of the *Criminal Code*. Consequently, your prohibition should be revoked.

Ms. Leamon provided the following cases for my consideration to support her arguments: *R. v. Ference*, *R. v. Hoodicoff*, and *R. v. Khunkhun*. She also provided a previous review decision from this office. I have considered the cases forwarded by Ms. Leamon and find them notably different from your case.

- In *Ference* the officer noted no smell of liquor on the accused person, from the accused’s mouth, nor within the vehicle proper. The court was satisfied that there was not the reasonable suspicion required for a valid demand to be made into the ASD.
- In *Hoodicoff* there was no slurred speech, no odour of alcohol from the accused let alone from the car, and the constable agreed that she hadn’t made such observations. There were no bloodshot or watery eyes. The officer confirmed that, primarily, the accused looked sleepy or tired. The court determined that the suggestion that the suspicion that the accused had alcohol in her body was a reasonable one cannot be sustained. Consequently, the ASD demand was not a lawful demand.
- In *Khunkhun*, the officer detected an overwhelming odour of liquor from the interior of the vehicle where there were three people in total, that is, two other people besides the

driver. The officer formed the opinion that she had a reasonable suspicion that the driver had consumed alcohol, but did not express her opinion at this point was that he had alcohol in his body. There is no evidence that the officer detected any odour of any kind coming from the driver's person or breath. The court found that the officer made the ASD demand prematurely as there were no reasonable grounds to make the ASD demand.

- In the previous review decision from this office, the adjudicator indicated that the officer only detected an odour of liquor coming from the vehicle, in which there were four passengers, all of whom had been drinking. Despite blowing on officers on two occasions, no odour of liquor was noted as coming from the driver's breath or person. Ultimately, the adjudicator found that the officer did not meet the required standard of reasonable suspicion, and therefore the demand was found to be invalid.

While I have read the previous review decision from this office, I find it important to note that, as acknowledged by Ms. Leamon, I am not bound by it. Summarily, in all four cases provided by Ms. Leamon, there was no evidence that the officers detected any odour of liquor from the driver's person or breath. However, in your case the officer's evidence is that not only did he detect an odour of liquor from the vehicle, but once the officer removed you from the vehicle, the officer's evidence is that he did detect an odour of liquor on your breath.

While Ms. Leamon may view the fact that you lied to the officer at the time about your alcohol consumption should not undermine your credibility, I do not share the same opinion. Assessing credibility involves findings of fact in each case and therefore no uniform set of rules for determining credibility can be established. In determining whether certain aspects of a witness' testimony are credible, a decision maker takes into account the integrity and intelligence of the witness and the overall accuracy of the statements being made. The witness' powers of observation and capacity for remembering are also important factors. Lastly, an assessment is made of whether the witness appears frank and sincere, or, biased, reticent, and evasive. The weight of the evidence refers to how much reliance should be placed on the evidence in coming to a conclusion in the case. The fact is that you have indicated that you lied to the officer at the time of the incident. I find that the reason people are not honest with police at the scene is more often than not for the purpose of benefitting themselves. The fact that you were not honest with the officer at the scene suggests that you had something to hide from the officer. If you had only consumed the two ounces of champagne several hours earlier as you stated in your affidavit, then I find it odd that you would lie about your consumption to the officer at the time. As a result, I am left finding your submission less credible and for that reason place less weight on your submissions.

While Ms. Leamon has argued that the officer did not have reasonable grounds to make the ASD demand, and that therefore the ASD demand was not valid, I disagree. Although you may have an alternate explanation for your glassy eyes, I find that the officer's observations at the time, especially the strong odor of liquor in the vehicle and on your breath, were sufficient to provide him with a reasonable suspicion that you had alcohol in your body.

Considering the evidence before me, I find that the officer had a reasonable suspicion to make the demand and that a valid demand for a sample of your breath into an ASD was made.

There is no indication, in the police evidence, that you made any attempt to provide a sample of your breath into an ASD. In the IRP Report, the officer indicated that the date and time of failure or refusal to comply with the demand was November 13, 2011, at 01:55 hours. When asked, in the IRP Report, how the driver failed or refused to provide a breath sample, the officer made the following note: "Driver stated she would not provide a sample without her father present. When advised of law and consequences of refusal, driver stated 'no' she would not provide a sample." In the officer's synopsis he indicated that after he gave you the ASD demand, you walked away from the officer and bent over into the driver-side of the car for several seconds. You appeared to be consulting with your friend. Again the officer directed you to provide a breath sample, but you stated you would not do so without a parent present. The officer stated, in his synopsis, that he explained that you were required by law to provide a breath sample. You repeated that you would not provide a sample without a parent present and that you wanted to call your lawyer. Again the officer explained that you were required to provide a sample and held up the ASD. He asked if you were going to provide a breath sample, and you said no.

Your evidence indicates that you did not make any attempt to provide a sample of your breath. You stated in your affidavit that your response to the ASD demand was "no, I want to talk to someone first." You indicated that you did not know what to do, and that you did not want to do anything before speaking to either your father or legal counsel.

Based on the evidence before me in its entirety, I am satisfied that a demand existed, and that you failed or refused to comply with that demand.

Did you have a reasonable excuse?

The evidence from the officer indicates that you were given more than one opportunity to comply with the ASD demand. The evidence from the officer also indicates that he explained that you were required by law to provide a breath sample, and that he advised you of the law and consequences of a refusal and that more than once you indicated that you would not provide a sample.

In your affidavit you indicated that the officer advised you that you would have to take a breathalyser test and that you saw him holding something in his hands. You indicated that he was holding a small gray machine in his hands and had something in a clear plastic bag. When the officer asked you if you were going to blow, you responded "no, I want to talk to someone first."

Ultimately, I do not find that you had a reasonable excuse. Based on the evidence before me in its entirety, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act* and that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on November 13, 2011, at 01:55 hours.

I therefore confirm your driving prohibition and monetary penalty, as required by section 215.5(1) of the *Act*. You are prohibited from driving for 90 days. Your prohibition took effect on November 13, 2011. You may resume driving 90 days after that date, provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle will remain in the impound lot for the remainder of the impoundment period. Once the impoundment period has been completed, someone authorized by you may attend the impound lot and pick up the vehicle. You are responsible for towing and storage charges that have accumulated during the storage, including the day the vehicle is eligible for release and any other additional charges.

You may receive a separate letter requiring you to register in and attend remedial programs under sections 215.45 and 25.1 of the *Act*. For further information, please visit [.pssg.gov.bc.ca/osmv](http://pssg.gov.bc.ca/osmv).

s.15

s.15

Adjudicator

cc: Sarah Leamon
fax: 604-685-8308

OCTOBER 19, 2011

s.22

AMENDED LETTER

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 9, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device (ASD), and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), that you did not fail or refuse to comply with a demand, or that you had a reasonable excuse for failing or refusing to comply. If I revoke your prohibition, I must also cancel the monetary penalty for which you would otherwise be liable under section 215.44(1) and revoke the corresponding vehicle impoundment.

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Jeremy Carr, prior to your scheduled written hearing. I have proceeded with the hearing based on this confirmation.

I acknowledge receipt of a document from Mr. Carr called "Constitutional Questions Act Notice" that he faxed in to our office along with his submission.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue: first, I must determine whether or not a proper demand was issued to you and, if so, I must then determine whether or not you failed or refused to comply with the demand.

In his Report to Superintendent (RTS), Constable Haney stated that when responding to the scene of a reported accident on October 9, 2011, he noticed that you had very red, bloodshot, watery eyes, "poor physical coordination in that (sic) dropped wallet on ground. Almost fell over when standing roadside." Under the heading "Admission of consumption" Constable Haney wrote "Denied any consumption of alcohol." Below that, the officer wrote "Three witness (sic) arrived on scene just after accident. Driver stated he not (sic) consumed any alcohol."

Mr. Carr submitted that the case of *Spencer v. Superintendent of Motor Vehicles* reminds us that an adjudicator must not assume from the existence of a demand, that the demand was properly founded. He noted that "it is extremely significant that Cst. Haney did not perceive any smell of alcohol whatsoever on Mr. Woods' breath or in the vehicle prior to making the demand." Mr. Carr drew my attention to the indicia that Constable Haney noted in his RTS and he stated that the indicia are insufficient to warrant an ASD demand therefore, the demand was invalid. Mr. Carr added that because the demand was invalid, there can be no failure to comply with the demand. I find that I agree with Mr. Carr.

Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a demand on October 9, 2011, as alleged by the constable.

Having made this finding, I do not have to consider anything further.

Decision

I am satisfied that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 9, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.22

IRP Review Decision

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If you have not already done so, you may go directly to the location where your vehicle is impounded, for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 19, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

cc: Jeremy Carr
(250) 388-7327