

OCTOBER 20, 2011

s.22

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

Introduction

On October 7, 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 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 that were sent to you in disclosure. You acknowledged that you had received them. I have proceeded with the hearing based on this confirmation.

I note that the investigating officer wrote "October 6, 2011" as the date of service on the Certificate of Service, but I find that this was a clerical error, that you were not prejudiced by this error, and that you were actually served with the Notice on October 7, 2011.

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 "fail"?

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 Slofstra stated that he witnessed you in care or control of the vehicle on October 7, 2011, at 2033 hours.

In the oral hearing, you told me that you were in your vehicle in order to roll up the windows and secure your belongings in the vehicle, while you waited for your mother to attend to give you a ride home.

s.22 e evening, s.22 was driving the vehicle, because you had consumed liquor. s.22 was in a v cident, which you believed was her fault. She was annoyed k the side of the other driver. Later in the evening when you were at her place, the discussion became more heated, s home. You said that you called your mother for a ride home. I note that s.22 overheard you making this call, as indicated in her statement.

You told me that the police arrived on the scene when you were locking up the vehicle, and the officer would not listen to your explanation. Initially, you had turned the key in the ignition to roll up the windows, but did not engage the engine. The windows moved very slowly, so you turned on the vehicle, given the battery problems you were having.

I have reviewed the officer's evidence and it coincides with much of what you said happened on the night in question. Further, all of your evidence strongly supports the contention that you had made arrangements for alternate transportation, and that you would not put yourself or the public at risk by putting the vehicle in motion. I find your submissions to be compelling. Given all the evidence that is before me, I find that on a balance of probabilities, it is more likely than not that you were not and did not intend to drive or be in care or control of the vehicle on October 7, 2011. 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 7, 2011, at 2033 hours.

Having made this finding, there is no need for me to consider any 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 7, 2011, at 2033 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 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

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 s.22 breath or in the vehicle prior to making the demand." Mr. Carr drew my attention to 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

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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

November 10, 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* 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

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

October 28, 2011

s.22

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

Introduction

On May 4, 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* 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 *Motor Vehicle Act* states that if I determine that you were prohibited from driving for a longer time period than the *Motor Vehicle 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 full disclosure of the documents before me was provided to your lawyer. 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 fail?

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") and the corresponding Occurrence Report, the investigating officer explained that a taxi driver identified you as the driver of a vehicle that backed into his taxi and failed to remain on the scene. The officer recorded the date and time of driving/care or control as May 4, 2011, at 0253 hours.

You explained s.22
were never the driver. Rather, y
was the driver. s.22 and the other two passengers,
evidence confir s.22 they were in your presence at
the driver. I have also considered the ICBC Claims Adjuster's email in which he accepts liability
on your behalf for reversing into the taxi. were not

Having carefully considered all of the evidence before me, I accept that the cab driver incorrectly identified you as the driver. As such, 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 May 4, 2011, at 0253 hours. Having made this finding, there is no need for me to consider the final issue.

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on May 4, 2011, at 0253 hours.

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

s.15

cc: Alan J. Truong
Fax: 604-568-4597

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

cc. Chris Massey
fax 250.920.0177

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* (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 of the documents that were disclosed to you. I have proceeded with this review on the basis of this confirmation.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a fail?

In the Report to Superintendent (RTS), the investigating officer reported that on October 16, 2011, at 19:47 hours, he administered a test of your blood alcohol level on an ASD, the result of which was a 'fail'. The constable reported the ASD calibration expiry date as "2011-06-12". The constable reported informing you of your right to a second test, which you did not request.

Because the calibration on the ASD had expired, I cannot be satisfied that an ASD registered a 'fail' on October 16, 2011, at 19:47 hours.

Having made this finding, there is no need for me to consider 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, 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 to dispose of the vehicle.

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

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

OCTOBER 27, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No.

s.22

Introduction

On July 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, 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

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

r written submissions, including your affidavit and those of s.22
I also reviewed your lawyer's submissions.

I am confused by the relevance of s.22
connection to the IRP, other than

affidavit, as he does not appear to have any
son you were driving on the day in question.

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 fail?

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 Ricioppo stated that she witnessed you driving or in care or control of the vehicle. In the Synopsis, the officer indicated that on July 29, 2011, at approximately 13 hours, while stationary at a Husky station on Highway 97 at Lodge, she saw a black s.22 travelling well above the 70km/hr speed limit. Constable Ricioppo conducted a traf this vehicle at Berry Road and Highway 97. You were identified as the driver of the vehicle.

The officer's reason for pulling you over is not relevant to the issues that I can consider under the Act. I am authorized to consider only whether you were a driver or not. 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 July 29, 2011, at 0313 hours.

Did the ASD register a "fail"?

In part four of the RTS, Constable Ricioppo stated that you provided a breath sample into an ASD for analysis and that the device registered a "fail" at 0328 hours. In paragraph 12 of your affidavit, you said that you did not feel impaired, despite having consumed two drinks within two hours. You also noted having been unsuccessful in your search for a restaurant, but you did not indicate whether you managed to eat or not that evening. Regardless, I am authorized under the Act to consider the result of a breath analysis by an ASD, not whether you felt impaired by alcohol.

The officer noted that she advised you of your right to request a second breath analysis on a different ASD, but she did not indicate your response. There is no information on this matter in the Synopsis, either.

In your affidavit, you said that you did not believe that the "fail" result on the ASD was accurate, and you demanded taken to the police station for a more accurate test. In her affidavit, your s.22 corroborates your evidence. The officer is not required by the Act t station for a different type of test in order to ascertain the level of alcohol in your body. As your lawyer notes, however, section 215.42 of the Act requires a peace officer to perform a second analysis on a different ASD, if the person requests it forthwith. I find it inconsequential that you had not yet been served with the Notice when you asked for the second test.

What I do find odd is that the officer would bother to ask you if you wanted a second test, if she was not prepared to offer you the test. Contrary to your lawyer's suggestions in paragraph 6 of her letter, a peace officer is not obliged to advise you of your right to this opportunity, just because it is a question on the RTS. However, it appears that the officer did advise you of this right.

After considering all of the evidence that is before me, I find on a balance of probabilities that it is more likely than not that you requested, but were not provided with the opportunity for a second test on a different ASD, as required by section 215.42 of the Act.

Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on July 29, 2011, at 0328 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, but I am not satisfied that the ASD registered a "fail" on July 29, 2011, at 0328 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. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. Original receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You may send your receipts and invoices to the address on page one of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle was not reclaimed, the impound lot may have applied to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

cc. Lolita Rudovica
604-581-2017 (fax)

October 19, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 28, 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* and that the Approved Screening Device (the "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.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Matthew Low. 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

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") and the Notice, Constable Woods indicates that on September 28, 2011 at 0010 hours, he observed you driving on Cliffe Avenue in Courtenay.

In his written submissions, Mr. Low indicates that 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 the ASD register a "WARN" or a "FAIL"?

In his Report, Constable Woods indicates that you provided a breath sample into an ASD at 0017 hours that registered at "FAIL".

Mr. Low submits that I cannot be satisfied that the ASD provided an accurate "FAIL" reading; consequently, your driving prohibition should be revoked. This is because Constable Woods neglected to include the ASD's serial number, calibration expiry date and service expiry date, in his report.

I concur.

Decision

Based on the evidence before me, I am not satisfied that the ASD registered an accurate "FAIL" reading on September 28, 2011 at 0017 hours. I therefore revoke your 90-day driving prohibition and monetary penalty as required by section 215.5(1)(b)(i) of the *Act*. As a result, the prohibition has been removed from your driving record and you can attend a Driver Services Centre to obtain a new driver's licence.

The vehicle impoundment is also revoked. Consequently, the owner may go directly to the place where the 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 October 19, 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

cc: Matthew Low
Fax: (250) 334-2335

October 19, 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. 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* 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 *Motor Vehicle Act* states that if I determine that you were prohibited from driving for a longer time period than the *Motor Vehicle 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 full disclosure of the documents before me was 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 *Motor Vehicle Act*?
2. Did the ASD register a fail?

Facts, Evidence and Analysis

I will go straight to the second issue.

Did the ASD register a fail?

You were given an ASD test at 02:30 hours, which registered a fail. However, I note that the calibration expiry date occurred before the test was performed. Therefore, I do not consider the test result to be reliable. Based on the evidence, I am not satisfied that the ASD into which you provided a sample at 02:30 hours on October 7, 2011, registered a fail.

Decision

I am not satisfied that the ASD registered a fail. 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 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.

October 5, 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 Act, and that the approved screening device (ASD) registered 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 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. Did the ASD register a fail?
2. Were you a driver within the meaning of section 215.41(1) of the Act?

Facts, Evidence and Analysis

Did the ASD register a fail?

The investigating officer reported that he administered two tests of your blood alcohol level using ASDs. The second test is the one I must consider, which the constable administered at 22:33 hours, on September 24, 2011. The result of the second test was a fail.

However, the constable indicated the calibration expiration date of the ASD was 2011-09-10. The ASD calibration period had therefore expired and, as a result, I cannot consider the reading of the ASD.

In turn, I cannot be satisfied that an ASD did register a fail on September 24, 2011, at 22:33 hours.

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 an ASD registered a fail on September 24, 2011, at 22:33 hours.

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.

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you or someone authorized by 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 September 24, 2011. You are 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.

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 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

Records at this office indicate that full disclosure was 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 fail?

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 Shaw indicated that you admitted to being the driver. The officer notes that the date and time of driving was October 8, 2011, at 2250 hours. You do 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 8, 2011, at 2250 hours.

Did the ASD register a "fail"?

In part four of the RTS, Constable Shaw stated that you provided a breath sample for analysis into an ASD and that the device registered a "fail" at 2254 hours. You did not dispute this result.

I note, however, that the officer indicated that the ASD calibration expired on September 28, 2011. As a result, I find that I do not have an ASD result.

Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on October 8, 2011, at 2254 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 8, 2011, at 2250 hours, but I am not satisfied that the ASD registered a fail on October 8, 2011, at 2254 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 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.

October 18, 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* 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* 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 *Motor Vehicle Act* states that if I determine that you were prohibited from driving for a longer time period than the *Motor Vehicle 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.

Issues

There are two issues in this review:

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

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 88th Ave in Surrey. 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 23:33 hours on September 30, 2011, as recorded in the notice.

Did the ASD register a fail?

You were given an ASD test at 23:33 hours, which registered a fail. However, because the service expiry date of the device was not made available to me, I do not find that the test result is reliable. Based on the evidence, I am not satisfied that the ASD into which you provided a sample at 23:33 hours on September 30, 2011, registered a fail.

Decision

I am not satisfied that the ASD test that you provided resulted in a fail reading. 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 18, 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: G Jack Harris
Fax: (604) 859-1375

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

Adjudicator

cc: Jennifer Currie
Fax: (604 590 5626)

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 tra , 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 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 12, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) 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* 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*, and that the approved screening device (ASD) registered a "fail".

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 the ASD did not register a "fail".

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 confirm 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 two issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did the ASD register a "fail"?

Facts, Evidence and Analysis

Did the ASD register a "fail"?

Constable Celli administered two ASD tests on you on September 26, 2011, at 19:13 hours and 19:29 hours, with respect to his allegation that you operated or had care or control of a vehicle on that date. However, I note that in the constable's Report to Superintendent, the year he recorded for the service expiry date of the ASD used to conduct your second breath test is illegible. Consequently, I cannot be satisfied that the device had been properly serviced.

Page 2

Based on the evidence, I am not satisfied that an ASD registered a “fail” on September 26, 2011, at 19:29 hours.

Having made this finding, I do not have to consider anything further.

Decision

Based on the evidence before me, I am satisfied that an ASD did not register a “fail” on September 26, 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, 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 impound lot where your vehicle is being stored for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 11, 2011, the date you were notified 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.

cc: Jennifer Currie
(604) 590-5626

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

cc: Adam Alteen
Fax: 604-684-9690

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 pay towing and storage costs up to and including October 3, 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

OCTOBER 4, 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*, and that the approved screening device (ASD) registered a "fail".

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 the ASD did not register a "fail".

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 confirm 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 two issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
2. Did the ASD register a "fail"?

Facts, Evidence and Analysis

Did the ASD register a "fail"?

Constable Dosanjh indicated that on September 25, 2011, at 03:01 hours, he administered a test of your blood alcohol level using an ASD, bearing serial number: 049868. However, I note that this ASD has a service expiry date of 2011-04-29, indicating that the service date had expired some months earlier. Consequently, I am not satisfied that an ASD did register a "fail" on September 25, 2011, at 03:01 hours.

s.22

ecision

Page 2

Having made this finding I do not have to consider anything further.

Decision

Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on September 25, 2011, at 03:01 hours.

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, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If the vehicle owner has not already done so, she may go directly to the impound lot where her vehicle is being stored for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 3, 2011, the date you were notified that the vehicle was eligible for release. 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 of Motor Vehicles to dispose of the vehicle.

s.15

cc: Jennifer Currie
(604) 590-5626

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 you formed the reasonable suspicion at 05:15 hours, and stated "Demand read by police. S22 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

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

cc: Melissa Kaniuk
(604) 637-1617

October 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On June 26, 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 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

This is a re-hearing. Records at this office indicate that disclosure of the documents that were originally disclosed to you, were disclosed again to your lawyer, Lisa Helps, for this re-hearing. Ms. Helps confirmed she had received these documents.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a fail?

In the Report to Superintendent (RTS), the investigating officer reported that on June 26, 2011, at 01:27 hours, he administered a test of your blood alcohol level on an ASD, the result of which was a 'fail'. The constable reported administering a second ASD test, at 01:32 hours, the result of which was also a "fail." The constable reported the service expiry date as "2011-10".

The constable's reported service expiry date, however, is not sufficient for me to determine the exact date of the service expiry. Since I cannot determine if the service on the ASD had expired, I cannot be satisfied that an ASD registered a 'fail' on June 26, 2011, at 01:32 hours.

Having made this finding, there is no need for me to consider 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.

s.15

cc Lisa Helps
fax: 604 669 5558

October 18, 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 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 hearing, your lawyer, Kevin B. Westell, confirmed that he received full disclosure prior to the hearing.

Mr. Westell provided me with your affidavit, an expert opinion from Nizar Shajani, and the case *Spencer v. British Columbia (Superintendent of Motor Vehicles)*.

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 fail?

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 Martin identified himself as the investigating officer and stated that he witnessed you as the sole occupant in the driver's seat of a vehicle. In the RTS Constable Martin failed to record either the date or time of driving. In the attached Synopsis, Constable Martin recorded the related date /time as Sunday, October 9, 2011, at 0327.

In the Notice of Driving Prohibition, Constable Martin stated that he had reasonable and probable grounds to believe that on October 9, 2011, at 0205 hours you had care or control of a motor vehicle.

You do not challenge 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 9, 2011.

Did the ASD register a fail?

In your affidavit you stated that you left your work place at between 2:05 and 2:10, you stated that you were driving for 30 seconds before you were stopped. You stated that you consumed your last drink 30 seconds earlier.

Upon review of the evidence submitted by the officer, I find that there is insufficient evidence for me to establish clear timelines throughout the RTS.

You were given an ASD test at 0205 hours, which registered a fail. However, because of the inconsistent time lines recorded in the RTS I cannot be satisfied that the current police practice to wait at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol was followed. Therefore, I do not find that the test result is reliable.

Decision

I am not satisfied that the ASD test that you provided resulted in a fail reading. 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.

s.15

cc: Kevin B. Westell by fax: [604] 909-5174

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.

cc: Jennifer Currie
(604) 590-5626

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.

s.15

cc John C Chak
(fax: 604 282 7509)

October 26, 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. 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

On October 12, 2011, your legal representative, Sarah Leamon requested copies of the following pursuant to *Spencer v. British Columbia (Superintendent of Motor Vehicles) 2011 BCSC 1311*:

- 1) Any and all audio/and /or video recordings made during the course of the police interaction with my client, or that pertain to the police interaction with my client;
- 2) Any and all handwritten notes, reports, and materials made by any peace officer who had occasion to deal with my client;
- 3) Dispatch logs and records;
- 4) Maintenance and calibration records dating back one year of the Approved Screening Devices(s) used in this IRP;
- 5) Any and all other records, documents, or recordings in your possession or control which relate to the above noted IRP, including such records as are in the possession or control of the police agency that issued the IRP.

On October 13, 2011, this office provided Ms. Leamon with full disclosure. On October 13, 2011, Ms. Leamon acknowledged that she received disclosure; however, again she requested the above copies.

On October 20, 2011, at the scheduled time of the oral hearing I contacted Ms. Leamon and at the outset of the hearing she drew my attention to a letter dated October 19, 2011, to Constable Becker of the Port Mann Highway Patrol requesting copies of the above. I advised Ms. Leamon that I was prepared to adjourn the hearing until Tuesday, October 25, 2011, at 10:00 a.m. in order to allow her time to obtain this information.

On October 24, 2011, I received a fax from Ms. Leamon advising me that she was unable to obtain the materials to advance her case. In addition, Ms. Leamon stated that Constable Becker advised her that it is the duty of the Office of the Superintendent of Motor Vehicles to obtain, and disclose these materials.

On October 25, 2011, I advised Ms. Leamon that I was not prepared to adjourn to obtain the information. Consequently, I proceeded with the hearing based on the disclosure documents that were faxed to Ms. Leamon on October 13, 2011.

Ms. Leamon argued that to rely on the ASD result would be a violation of your constitutional rights under the *Charter of Rights and Freedoms*, specifically your section 10(b) right to counsel. In support of this argument, Ms. Leamon provided me with a copy of *R. v. Schultz*, which she submitted makes it clear that ASD results may not be used to incriminate a driver.

As an adjudicator with the Office of the Superintendent of Motor Vehicles, I do not have authority to grant *Charter* remedies and assess the constitutionality of legislation. I only have authority to decide issues outlined in section 215.5 of the Act.

Ms. Leamon referred me to a decision of my colleague, which I have considered, but am not bound to follow. Moreover, in that particular case the evidence was that a second test was not requested.

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 fail?

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

In Constable Becker's Report to Superintendent regarding your Immediate Roadside Prohibition (Report), he indicates that on October 10, 2011, at 0202 he stopped your vehicle at a ramp check. In the Notice of Driving Prohibition Constable Becker stated that you were stopped at United Boulevard at or near Coquitlam, British Columbia.

In your affidavit, you acknowledge driving.

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

Did the ASD register a “fail”?

In his Report, Constable Becker indicates that you admitted to consuming 2 beers, 4 hours earlier. In section 4 labeled “Approved Screening Device –Test Result”, Constable Becker recorded that you provided a sample of your breath at 0204 hours which resulted in a fail. Constable Becker indicated that you were informed of your right to request a second test and in Section 5 labeled, “Second Test”, Constable Becker ticked the box “No, requested but withdrawn”, with an explanation of “driver was offered the ASD but no sample was provided.”

In your affidavit you depose the following:

- On October 9, 2011, you attended a dance competition. You were the designated driver.
- At approximately 2:00 a.m. you left the competition.
- A few minutes after 2:00 a.m. you encountered a police road block.
- You admitted that you consumed two beers.
- Constable Becker read something from a card you did not understand; however, you were nervous, so you said you did.
- Constable Becker asked you to blow into a machine you did and it registered a “fail”. You were shocked, and you stated that you did not know what a “fail” reading meant.
- You asked for a more accurate test at the police station. You were denied.
- Constable Becker asked if you wanted to provide a second sample. You did not trust the instrument. You asked for an explanation, Constable Becker refused.
- You asked Constable Becker if you could contact a lawyer to explain the second sample and he allowed you to but said you still only had five minutes between samples. He stated that if it was not taken within five minutes it would not be valid.
- You contacted a lawyer twice and left 2 voice mails. The message from Legal Aid was that you would be contacted in approximately ½ hour.
- Constable Becker informed you that was too bad because the five minutes could not be extended.
- After a few minutes you were advised that the time was up and you had lost your opportunity. You asked him why there was a time limit and he admitted that he had made it up so that you were forced into making up your mind quickly.
- Throughout your interactions you were taking notes on your Blackberry device. You have attached a screen shot of the notes made for my consideration.

In considering the evidence before me, I find that after you were served the Notice, Constable Becker did not give you the opportunity to provide a second test. Based on the evidence before me, I am not satisfied that the ASD registered a fail on October 10, 2011.

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.

The owner of the may go directly to the location where your vehicle is impounded for the immediate release of her 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 beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent to dispose of the vehicle.

s.15

cc: Sarah Leamon by fax [604] 685-8308

October 27, 2011

s.22

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 (the “Notice”). 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* and that the Approved Screening Device (the “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.

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were provided to your legal counsel, Jennifer Currie. I have proceeded with the hearing based on this confirmation.

Ms. Currie asserts that the Regime set out in ss. 215.41 to 215.51 of the *Act* is not within the legislative competence of the Province of British Columbia and is an unlawful attempt to legislate in the area of criminal law, an area of exclusive Federal jurisdiction under s. 91(27) of the *Constitution Act*. Further, the *Constitution Act* does not provide the Province of British Columbia the legislative power to enact the Regime, and accordingly the Regime is of no force and effect.

Ms. Currie also asserts that the IRP you have been issued is a violation of your constitutional rights that have been granted under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). Consequently, your prohibition should be revoked.

While I appreciate Ms. Currie’s submissions, I have no authority under the *Act* to consider whether the legislation is unlawful or whether being issued an IRP based on an ASD “FAIL” result, is a contravention of 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 on page one of this decision. I have proceeded with the review accordingly.

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

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

In Constable Smith’s Report regarding your IRP (the “Report”) and attached Synopsis, he indicates that on October 9, 2011 at 1:02 a.m., he witnessed you drive up to a roadcheck on Leon Avenue in Kelowna. You were sitting in the driver’s seat and identified from your BC driver’s licence.

Ms. Currie provided no evidence regarding 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 the ASD register a “WARN” or a “FAIL”?

In his Report, Constable Smith indicates that you provided a sample of your breath at 1:05 a.m., into an ASD with serial number 093805, which resulted in a “FAIL”. At 1:08 a.m., you provided a second breath sample into an ASD with serial number 101238, which also resulted in a “FAIL”.

Ms. Currie submits that I cannot be satisfied that the ASD registered an accurate “FAIL” reading because ASDs are serviced on an annual basis and Constable Smith indicates that the service date of the second ASD is December 8, 2012. As this is more than one year from the date you provided your breath sample, there is no assurance that the ASD has been properly serviced. Consequently, your driving prohibition should be revoked.

I concur.

Decision

Based on the evidence before me, I am not satisfied that the ASD registered an accurate "FAIL" reading on October 9, 2011 at 1:08 a.m. 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. You may go directly to the place that your vehicle was 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 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.

s.15

cc: Jennifer Currie
Fax: (604) 590-5626

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

cc Stanley Nozick
Fax: (604) 531 - 8237