

August 15, 2012

s.22

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

Introduction

On May 6, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Claire Hatcher, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

I find there is one issue determinative of this review.

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

The investigating officer reported that an officer, officer Wong Moon, stopped a vehicle at 21:25 hours, and identified you as the driver. The investigating officer read an ASD demand at 21:39 hours, some 14 minutes after stopping you. The investigating officer has given no evidence as to why 14 minutes were required to make the ASD demand after stopping you.

You indicated that after you were stopped, officer Wong Moon handcuffed you, and then he and the investigating officer discussed your level of alcohol impairment, but they did not make a demand or otherwise engage you in any conversation at that time. You said officer Wong Moon proceeded to search your vehicle, at which time you wanted to speak to counsel. There is nothing in the officer's evidence related to a search of your vehicle, as you have you described. You said the time between the stop and when the officer made his ASD demand was about 20 minutes.

In view of the officer's lack of evidence as to the reasons for the 14 to 20 minute delay between the vehicle stop and the ASD demand, I am not satisfied the officer had a reasonable explanation for the delay or that the officer made the demand as soon as practicable. I am therefore not satisfied that the officer made a valid ASD demand.

In summary, I am not satisfied that you failed or refused to comply with the ASD demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

August 16, 2012

s.22

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

Introduction

On July 29, 2012, 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);
- the ASD registered a ‘fail’ as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Mr Rory Lambert on August 13, 2012. I proceeded with the hearing based on this information.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a ‘warn’, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Omoding and your lawyer's submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

Constable Omoding did not provide a Certificate of a Qualified ASD Calibrator. Since I cannot determine whether or not the screening device was appropriately calibrated, I cannot be satisfied that an ASD did register a 'fail' on July 29, 2012.

Based on the evidence before me, I am not satisfied that the ASD was reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 16, 2012. 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.

Adjudicator

s.15

cc: Rory Lambert
Fax: (250 386 2123)

AUGUST 3, 2012

s.22

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

Introduction

On July 28, 2012, 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);
- 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”) (the “Demand”); and
- you did not have a reasonable excuse for failing or refusing to comply with a Demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the grounds that your second test was not performed on a different ASD, the result of the ASD was not reliable, the ASD registered a WARN, but your blood alcohol content was less than 0.05 (50 milligrams of alcohol in 100 millilitres of blood), and your 7-day or 30-day prohibition should be reduced, because you did not have the required number of previous IRP(s). However, these grounds are not applicable to your situation, because you were prohibited from driving, because you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD. I will consider all the grounds that are relevant to the prohibition you received.

At the beginning of the hearing your lawyer, Scott Wright, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD Demand?
- If you failed or refused to comply with the Demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Upon reviewing the evidence of Constable Stables and your lawyer's submissions, I find that there is one issue that is determinative of this review.

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

Based on all the evidence before me, I am satisfied that an ASD demand did not exist. Having made this finding, I do not need to consider other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 3, 2012. 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. Scott Wright
604-681-0652 (fax)

August 8, 2012

s.22

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

Introduction

On July 22, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the review, I checked that your lawyer, Sarah Leamon, had received full disclosure of the documents before me. She acknowledged that she received all the documents.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue determinative of this review:

Was the ASD reliable?

Ms. Leamon made submissions with respect to the reliability of the ASD the officer used for the second test in your case. Having reviewed the evidence, I am not satisfied the ASD was reliable.

In turn I am not satisfied that the officer provided you an adequate opportunity for a second sample.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 7, 2012. 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.

August 14, 2012

s.22

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

Introduction

On July 25, 2012, 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);
- 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”) (the “Demand”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

In the Notice of Driving Prohibition (Notice) you were served on July 25, 2012, Constable Biever alleged that “you failed or refused, without a reasonable excuse, to comply with a demand made on you to supply a sample of your breath or blood under section 254 of the *Criminal Code*.”

After reviewing the materials before me, I note that Constable Biever has not submitted a copy of the Report to Superintendent or any other evidence to support the allegations in the Notice. Therefore, I am not satisfied that you failed or refused, without a reasonable excuse, to comply with a demand made on you to supply a sample of your breath or blood under section 254 of the *Criminal Code*

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 14, 2012. 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.

August 2, 2012

s.22

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

Introduction

On July 17, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation because you provided samples of your breath.

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Was the ASD reliable?

Upon reviewing the all of the evidence before me, I find that ASD serial number 055938 had a calibration expiry date of July 8, 2012. Further I note that the officer's evidence regarding the calibration expiry date of ASD serial number 055941 is inconsistent. As such, I cannot be satisfied that the ASDs were properly calibrated at the time of ASD breath test analysis', on July 17, 2012.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

The corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

August 17, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On July 29, 2012, 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);
- the approved screening device (“ASD”) ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that your legal counsel, Michael Mulligan, received full disclosure of the documents before me. I have proceeded with the review based on this confirmation.

Issues

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”?
- Were you advised of your right to a second analysis?
- If requested, was the second analysis provided by the officer and performed using a different ASD?
- Did the ASD register a “FAIL” as a result of your BAC exceeding 80 mg%?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In his evidence, Officer Buxton-Carr indicates that on July 29, 2012 at 0041 hours, he observed you driving on East Sooke Road.

Mr. Mulligan did not provide any 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 “FAIL”?

The police evidence indicates that you provided a breath sample into an ASD with serial number 038141 at 0044 hours, which resulted in a “FAIL”.

Based on the evidence, I am satisfied that the ASD registered a “FAIL”.

If requested, was the second analysis provided by the officer and performed using a different ASD?

The police evidence indicates that you requested the opportunity to provide a second breath test.

Mr. Mulligan submits that Officer Buxton-Carr had you provide a second breath sample into the same ASD in which you provided the first breath sample.

I concur.

Based on the evidence, I am not satisfied that Officer Buxton-Carr used a different ASD for your second breath sample.

Having made this finding, there is no need to consider the other issues in this review.

Decision

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

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 17, 2012. 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.

Adjudicator s.15

cc: Michael Mulligan via fax

August 15, 2012

s.22

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

Introduction

On July 29, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following issue.

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

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

Under the *Criminal Code*, a demand for a breath sample must be made as soon as practicable after a peace officer forms a reasonable suspicion that a driver's ability to operate a motor vehicle is impaired by alcohol. In your case, the officer's evidence is that he made the demand 20 minutes after he formed his reasonable suspicion.

Therefore, I am satisfied that a valid ASD demand did not exist.

As I have made this finding, I do not need to consider whether you failed or refused to comply with that demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 15, 2012, the date 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.

August 9, 2012

s.22

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

Introduction

On July 22, 2012, 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);
- the Approved Screening Device (ASD) registered a 'fail' as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Mr Tybring Hemphill, on July 26, 2012. I proceeded with the hearing based on this information.

I note that the charge indicated on the Notice was because a sample of your breath on an ASD registered a 'fail' and your ability to drive was affected by alcohol. The Notice submitted by Constable Brailey, indicates that the officer had reasonable grounds to believe that on July 21, 2012 at 23:52 hours on East Saanich Road that you had care or control of a motor vehicle on a highway or industrial road.

Driving Prohibition Review Decision
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In his submission, your lawyer attached to your affidavit a copy of the Notice served on you in which the date and place of the alleged offence were left blank. In the absence of such information there is no proper allegation.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 9, 2012. 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.

Adjudicator

cc: Tybring Hemphill
Fax: (250 655 3329)

August 10, 2012

s.22

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

Introduction

On July 22, 2012, 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);
- the approved screening device (“ASD”) ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that your legal counsel, Jennifer Currie, received full disclosure of the documents before me. I have proceeded with the review based on this confirmation.

Issues

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL” and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In his evidence, Officer Leydier indicates that on July 22, 2012 at 0300 hours, he observed your vehicle parked on the side of Highway 99 near Whistler. After approaching your vehicle, he observed you sleeping in the back seat. He knocked on the window several times and observed you slowly open your eyes. After you sat up, Officer Leydier observed you place an ignition key on the driver's seat. He noted that the key appeared to have been within your hand while you were sleeping or underneath you. Officer Leydier indicates that during his investigation, you were very emotional and stated several times that you had pulled off the road to sleep.

In your sworn affidavit you provide extensive details regarding the evening in question and deny that you were in care or control of the motor vehicle.

Ms. Currie provides several arguments to explain why you were not in care or control of the motor vehicle at the time Officer Leydier encountered you. She has provided a copy of the court decision, *R. v. McLachlan* [2009] BCSS 431, in support of her submissions.

Based on the evidence as a whole, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act, at the time in question.

Having made this finding, there is no need to consider the other issues in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 10, 2012. 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.

Adjudicator s.15

pc: Jennifer Currie via fax

August 14, 2012

s.22

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

Introduction

On July 25, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that “I was not advised of my right to a second test on an approved screening device (ASD)”; however, that ground is not applicable to your situation because you did not provide samples of your breath.

You applied on the ground that “I requested a second test but the officer did not perform the test”; however, that ground is not applicable to your situation because you did not provide samples of your breath.

At the beginning of the hearing your lawyer, Claire Hatcher, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Section 215.47 of the Act requires the officer's report to be in the form established by the Superintendent. As the Report to Superintendent requires the officer to sign the report, I find that the report is not in the form established by the Superintendent.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

Adjudicator

cc: Claire Hatcher
Fax: 604-687-3022

August 7, 2012

s.22

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

Introduction

On July 17, 2012, 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);
- the Approved Screening Device (ASD) registered a ‘fail’ as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a ‘fail’, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?

- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Wheeler and your submission, I find there is one issue that is determinative of this review.

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

In the Report to Superintendent (Report), Constable Wheeler of the Comox Valley RCMP stated that he observed you with a vehicle under your care or control at 02:04 hours on July 17, 2012. In his narrative the constable stated that at 01:50 hours, s.22 contacted the police to report that you, his girlfriend, were intoxicated and had just left his residence in a Honda Civic, with licence plate(s) s.22 . s.22 stated that you had threatened to drive to Campbell River. The police dispatch was also informed that you had punched s.22 in the face that evening.

As the police were en-route, s.22 informed the police dispatch that you had returned to the residence in the vehicle and were now parked out front and sitting in the vehicle. Constable Wheeler arrived on the scene at 02:04 hours and located the Honda Civic parked on the street. As he approached the driver's side door, he noted you were the sole occupant, sitting in the driver's seat. You stated to the officer: 'I am sorry for drinking in the car, but my keys are not in the ignition'. The constable noted the keys were next to you in the centre console. Constable Wheeler informed you that it did not matter that your keys were not in the ignition.

In your written submission you stated that on July 17, 2012, you had a huge fight with s.22 s.22 He kicked you out of the house and called the police. You believe he did this because he was angry with you. s.22 You had nowhere else to sleep but your vehicle. When the police arrived you were sitting in your vehicle smoking. You had no intention of driving. Your car was stationary, in park position and the keys were in the centre console. You had no intention of going anywhere, cognisant that you had consumed too much alcohol. You had nowhere else to go apart from your vehicle.

Part of the test for whether a person has care or control of a vehicle requires some use of the vehicle or its equipment that involves a risk of putting the vehicle into motion so that it could become dangerous. You argued that you were simply in the driver's side of the vehicle when the peace officer came upon the vehicle. You were not a driver; you did not have care or control. Although there may be a presumption of care or control when a person occupies the driver's seat that may be rebutted if you never engaged in a course of conduct that involved a risk of putting the vehicle in motion. To establish care or control, a person must voluntarily consume alcohol and be impaired; while in such a state, use the vehicle or its equipment and fittings in such a way as to create a risk of setting the vehicle in motion, so that it could become dangerous.

In your letter, you stated that you had no intention of driving and that the vehicle was parked. Your purpose for getting into the vehicle was for shelter, having been forced to leave s.22 s.22 residence. You knew you had too much to drink and your car provided shelter.

If a person could set a vehicle in motion, they may nevertheless still have care or control of a vehicle. Acts of care or control, short of actual driving, involve some use of the vehicle or course of conduct that would involve a risk of putting the vehicle in motion so that it could become potentially dangerous. A lack of intent to operate a vehicle does not necessarily mean that you did not have care and control.

When Constable Wheeler first attended the scene at 02:04 hours, you admit to being in the driver's seat. Neither you, nor the attending officer, indicated that the vehicle was inoperable. You were smoking a cigarette. Your vehicle, a Honda Civic was stationary, in parked position. Although s.22 told the police you threatened to drive to Campbell River, I note that he did not state he observed you drive the vehicle. He simply made the inference that you had driven when he stated to the police dispatch that the vehicle had returned. Given the altercation with you earlier in the evening, I do not place much weight on s.22 evidence.

At the time the police officer approached the parked vehicle, I find that it was not running, and the ignition key was on the centre console; there was no significant risk of the vehicle being put into motion. The vehicle was parked. I accept that you did not intend to drive the vehicle and had parked your car with the purpose of gaining shelter.

Based on the evidence before me, I find that it is more likely than not that you were not a driver within the meaning of section 215.41(1) of the Act on July 17, 2012, at 02:04 hours. As a result, there is no need for me to consider the remaining issues before me.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 7, 2012. 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.

August 15, 2012

s.22

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

Introduction

On July 25, 2012, 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);
- the ASD registered a ‘fail’ as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Sarah Leamon. She confirmed receiving the police evidence and I proceeded with the hearing based on this information.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a ‘warn’, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Maschke and your lawyer's submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

Constable Maschke provided Certificates of a Qualified ASD Calibrator (Certificate(s)) with his Report to Superintendent. I note that the both of the ASDs have the same calibration and expiry date, shown as August 13, 2012. I am unable to determine whether or not the screening devices were appropriately serviced or calibrated, and cannot be satisfied that an ASD did register a 'fail' on July 25, 2012.

Based on the evidence before me, I am not satisfied that the ASDs were reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 15, 2012. 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: Sarah Leamon
Fax: (604 685 8308)

August 17, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On July 28, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that your legal counsel, Kyla Lee, received full disclosure of the documents before me. At the beginning of the oral hearing Ms. Lee acknowledged that she had received disclosure. I have proceeded with the review based on this confirmation.

Issues

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL” as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- If requested, was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In his evidence, Officer Reinink indicates that on July 28, 2012 at 2119 hours, he observed you driving on 8th Street in Dawson Creek.

In your affirmed affidavit you acknowledge driving on July 28, 2012 at approximately 9:20 p.m., when you were stopped by police.

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

Did the ASD register a “FAIL” as a result of your BAC exceeding 80 mg%?

The police evidence indicates that you provided a breath sample into an ASD with serial number 100831 at 2120 hours, which resulted in a “FAIL”.

In your affidavit you assert that you had opened a bottle of Kokanee beer in your vehicle and had taken a few drinks just before you were pulled over by Officer Reinink. After stopping your vehicle, you took one last drink of beer to calm your nerves. You contend that Officer Reinink did not ask you when you consumed your last drink and you deny saying that you had your last drink two hours earlier.

Ms. Lee submits that although Officer Reinink indicates in his Report to Superintendent that you consumed your last drink two hours earlier, he does not indicate in his Narrative that he asked you the time of your last drink. Further, because Officer Reinink saw the open bottle of beer in your vehicle, this meant that there was a good possibility that you had recently consumed alcohol. Consequently, he should have waited sufficient time prior to having you provide a breath sample to ensure that residual mouth alcohol did not adversely affect the breath sample results. Ms. Lee has provided copies of several court decisions in support of her argument that because Officer Reinink had you provide a breath sample immediately after stopping your vehicle although he was aware that it contained an open bottle of liquor, I cannot be satisfied that the ASD “FAIL” was accurate.

I concur.

Based on the evidence, I am not satisfied that the ASD registered a "FAIL" as a result of your BAC exceeding 80 mg%.

Having made this finding, there is no need to consider the other issues in this review.

Decision

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

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 17, 2012. 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.

Adjudicator s.15

cc: Kyla Lee via fax

August 9, 2012

s.22

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

Introduction

On July 21, 2012, 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);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result;
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”); and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, Sumit Ahuja, that he had received full disclosure of the documents before me. He acknowledged that he received all the documents.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Were the ASDs reliable?

Facts, Evidence and Analysis

I find that there is one issue determinative of this review.

Was your BAC less than 80 mg% even though the ASDs registered a "FAIL"?

The investigating officer reported stopping you at a roadcheck. He reported you were driving at 02:04 hours. He reported that he issued the first ASD test at 02:05 hours, and a second ASD test at 02:08 hours. You provided evidence, supported by witnesses, that you were belching moments before attending the road block and after you exited the vehicle to follow the officer to the rear of his vehicle.

Consequently, I am not satisfied that the "FAIL" results were not affected by mouth alcohol and that BAC was 80 mg% or greater, even though the ASD registered "FAIL".

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

s.15
Adjudicator

cc. Sumit Ahuja
fax:604.576.5409

August 17, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On July 30, 2012, 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;
- 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,
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure has been provided to your lawyer, Mr Deepak Gautam. He acknowledged reviewing the disclosure documents and I have proceeded with the hearing based on this information.

Facts, Evidence, and Analysis

Having reviewed the evidence of Constable Primerano and your lawyer's submission, I find there is one issue that is determinative of this review.

Did you fail or refuse to comply with a demand?

Constable Primerano served you with a Notice, alleging that you operated or had care or control of a motor vehicle and you failed or refused to comply, without a reasonable excuse, with a demand for a sample of your breath under section 254 of the *Criminal Code*. I have considered both the Report to Superintendent (Report) submitted by the constable and Mr Gautam's

submission in relation to whether there was insufficient evidence that a demand was made in accordance with the requirements of section 254.

If the peace officer has reasonable grounds, pursuant to section 254(2) of the *Criminal Code*, to suspect that a person has alcohol in their body, the officer may demand that person provide forthwith a sample of breath for analysis by means of an ASD. There is an immediacy requirement implicit as regards the police demand for a breath sample, and an explicit mandatory response from the driver to provide a sample forthwith.

In his Report to Superintendent, (Report) Constable Primerano recorded timing of events on July 30, 2012, as follows:

- | | |
|--------------------|-------------|
| • Suspicion Formed | 02:00 hours |
| • ASD Demand | 02:01 hours |
| • Time of Refusal | 02:02 hours |

The constable's attached narrative provides context and further detail.

At 01:08 hours a complainant called the Burnaby RCMP to report a possible impaired driver. At 01:16 hours the vehicle was seen mobile and the information relayed via broadcast, to which Constable Primerano responded. At 01:45 hours he observed you in the vehicle described by the complainant, bearing BC licence plate(s) s.22 with the ignition running. The vehicle was stopped in the 6200 block of Tyne Street. The constable approached the vehicle and identified you by reference to a photo BC driver's licence. Constable Primerano noted an odour of liquor coming from the vehicle; your eyes were bloodshot and there was an odour of liquor on your breath; you admitted to consuming two drinks earlier at a s.22

At this juncture Constable Primerano returned to his vehicle to query your driver's licence. He later returned to your vehicle, and asked you to exit. Constables London and Fiedler arrived on the scene. Constable Primerano advised his colleague, Constable London, that you were impaired. Constable London read the ASD demand to you. You did not provide a sufficient breath sample.

In your affidavit you stated that on July 30, 2012, at around 1:30 am you parked your vehicle at s.22 While sitting in the car with friends a police officer approached. He looked inside the vehicle and saw your friends consuming alcohol. He asked you to produce your driver's licence. He then went back to his vehicle and returned later. He asked you to step outside. You obeyed his direction. After some time, another officer came onto the scene, spoke with Constable Primerano and made an ASD demand.

Your lawyer argued the ASD demand was not made forthwith. The times provided by Constable Primerano in his Report and narrative were at best, unreliable. They conflict, but the explanation given in the narrative and your account give rise to the reasonable inference that the physical symptoms were observed at 01:45 hours and the demand was not made for a further 16 minutes.

Mr Gautam referred me to a number of cases which address the requirement that an ASD demand be made forthwith: *R v Hughes* 2011 BCPC 0263; *R v Davidson* [1992] BCJ No 934; *R v Flinn* [1992] BCJ No 1205; *R v Messer* (unreported); *R v Kavaloff* (unreported), and, *R v Cleaver* 2001 BCPC 464. In each of these cases, the length of delay was less than 15 minutes, but the court found the demand had not been made forthwith.

Since the demand for the ASD sample was not made forthwith, it was not authorised by law. The requirements for a valid demand are specific and must comply with section 254 of the *Criminal Code*.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 17, 2012. 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.

Adjudicator

cc: Deepak Gautam
Fax: (604 593 5311)

August 10, 2012

s.22

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

Introduction

On July 25, 2012, 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);
- the ASD registered a ‘fail’ as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Kyla Lee. She confirmed receiving the police evidence and I proceeded with the hearing based on this information.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a ‘warn’, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Sunner and your lawyer's submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

Constable Sunner did not provide any Certificates of a Qualified ASD Calibrator. Since I cannot determine whether or not the screening devices were appropriately calibrated, I cannot be satisfied that an ASD did register a 'fail' on July 25, 2012.

Based on the evidence before me, I am not satisfied that the ASD was reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 10, 2012. 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.

Adjudicator

s.15

cc: Kyla Lee
Fax: (604 685 8308)

August 9, 2012

s.22

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

Introduction

On July 26, 2012, 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);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result;
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”); and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In the officer's narrative report, the investigating officer reported that he observed you in care and control of "BC marker s.22 at s.22." The officer reported observing you to have been unstable on your feet when entering the vehicle. By implication, the officer indicated that you were located in the driver's seat of the vehicle, since he reported approaching the driver side door to request your identification. The officer provided no other evidence to indicate how he concluded you were in care or control of the vehicle. The officer indicated that, after your vehicle was impounded, you left the area on foot, refusing a ride from police or a taxi. The officer reported you were in care or control of a motor vehicle at 04:10 hours on July 26, 2012.

You gave evidence, corroborated by witnesses s.22 and s.22 that you gave your keys to s.22 after arriving at a house gathering. She said that at no point during the night did she return the keys to you. When you, s.22 and s.22, got into your vehicle, you said you were waiting for a taxi, the service of which s.22 s.22 said she had called. None of you had put your seat-belts on. s.22 said she unlocked the vehicle for the four of you to enter, and s.22 said she saw s.22 unlock the vehicle, as did you. s.22 said that at one point, the officer reached into the ignition and could not locate the keys, and later demanded the keys, which s.22 gave to him.

In view of the lack of evidence from the officer, I am not satisfied that his evidence establishes you intended to drive that night. I am satisfied that, if the keys were not in the ignition and in the possession of s.22 the vehicle could not have been accidentally set in motion.

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on July 26, 2012, at 04:10 hours.

Having made this determination, I do not need to address other issues in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

August 10, 2012

s.22

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

Introduction

On July 21, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was successfully faxed to your lawyer, Harry Hunter, on July 27, 2012. I have proceeded with the review based on this confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue determinative of this review:

Were you advised of your right to a second analysis?

Mr. Hunter submitted that the evidence indicates that you were not properly advised of your right to a second analysis. Having reviewed both your evidence and the investigating officer's evidence, I accept this argument.

I am satisfied that you were not advised of your right to a second breath test analysis.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

s.15
Adjudicator

cc: Harry Hunter
Fax: 604-986-9286

August 1, 2012

s.22

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

Introduction

On July 13, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kevin Filkow, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following ground:

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

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

In the Narrative the officer stated that he witnessed your vehicle reversing back into a pub parking lot. When he spoke with you, you told him you received a call on your cell phone and did not want to drive and talk on the phone at the same time. He noted this as suspicious driving behavior. He also noted that your speech was slurred, your eyes were watery, and your balance was fair. He indicated that given these indicia, there was “enough suspicion to read the ASD”. He read you the ASD demand at 23:53 hours. The officer explained the obligation for providing a breath sample and you agreed to provide one. At 23:57 hours, the officer asked you the time of your last drink, and you informed him that you consumed your last drink at 9:00 pm. It was during this portion of the conversation that the officer stated that while standing a distance of three feet from you, he could smell liquor coming from your breath.

The reasonable suspicion requirement for a roadside breath demand is a relatively low standard. Essentially, it is suspicion of alcohol being in the body of the driver, and no more. While the officer stated the basis for his reasonable suspicion, I do not find that he met the standard for making an ASD demand when he did. Based on the timeline of his evidence, he did not make the observation of alcohol on your breath until after the demand was read. For this reason, I am not satisfied that the officer made a valid ASD demand. Having made this finding, I do not need to consider the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 1, 2012. 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: Kevin Filkow, Michaels & Filkow
Fax: 604-270-3787

August 10, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On July 21, 2012, 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);
- the approved screening device (“ASD”) ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that your legal counsel, Kyla Lee, received full disclosure of the documents before me. At the beginning of the oral hearing, Ms. Lee acknowledged that she had received disclosure. I have proceeded with the review based on this confirmation.

Issues

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL” and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In his evidence, Officer Pearson indicates that on July 21, 2012 at 0201 hours, he observed you driving on Marine Drive and Mountain Hwy in North Vancouver.

Ms. Lee did not provide any 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 “FAIL” and was it as a result of your BAC exceeding 80 mg%?

The police evidence indicates that you provided a breath sample into an ASD with serial number 059568 at 0205 hours, which resulted in a “FAIL”.

Ms. Lee submits that I cannot be satisfied that the “FAIL” result was reliable because the ASD calibration expiry date was July 13, 2012.

I concur.

Based on the evidence, I am not satisfied that the ASD registered a “FAIL” as a result of your BAC exceeding 80 mg%.

Having made this finding, there is no need to consider the other issues in this review.

Decision

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

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 10, 2012. 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.

Adjudicator s.15

cc: Kyla Lee
Fax: (604) 685-8308

August 9, 2012

s.22

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

Introduction

On July 21, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

- Were you a driver within the meaning of section 215.41(1) of the *Act*?
- Did the ASD register a “FAIL”?
- Were you advised of your right to a second analysis?
- If requested, was the second analysis provided by the officer and performed using a different ASD?
- Was the result of the ASD reliable?

- Was it as a result of your BAC exceeding 80 mg%?
- Was the Notice served on the basis of the lower analysis result?

Facts, Evidence and Analysis

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

In the Occurrence Report, Constable Krause indicates that on July 21, 2012 at 04:15 hours, police received a complaint from s.22 on behalf of s.22 stating that there was a male passed out inside a gray 2012 Chevrolet Cruze with BC licence plate s.22 at the drive-thru window at the McDonald's Restaurant. After arriving at your residence, Constable Krause located the unoccupied vehicle parked outside on the street. After knocking on the front door, you emerged from the back of your residence.

You explained that you live in the basement suite and heard the knocking on the upstairs suite door, so you went around to the front to see what was going on.

Section 215.41(1) of the Act states:

"In this section, "driver" includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion."

In your specific case, because you were not in or near your vehicle at the time Constable Krause encountered you, but rather inside your residence, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Having made this finding, there is no need to consider the other issues in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 8, 2012. 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.

August 29, 2012

s.22

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

Introduction

On August 11, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

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

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

Having reviewed all of the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

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

Decision

As a result of my findings, I revoke your driving prohibition and monetary penalty as required by s. 215.5(4) of the Act. I note the officer reported that he impounded your vehicle for 24 hours.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

August 28, 2012

s.22

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

Introduction

On August 7, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, Anjalika Rogers, that you had received full disclosure of the documents before me. She acknowledged that you received all the documents.

In Ms. Rogers’ oral submission, she stated that the Notice that was served on you and the Notice that the officer forward to the Superintendent are different. You provided a copy of the

“Driver Copy” of the Notice which you were served, and the Police Copy of the Notice is before me.

Your copy of the Notice served shows that boxes for a “3 days WARN” and “90 days FAIL” both contain checkmarks. Similarly, the part of your copy of the Notice that asks “Vehicle impounded?” shows checkmarks in both the “Yes” and “No” boxes.

On the Notice forwarded to the Superintendent, only the boxes “90 days FAIL” and the “yes” box after the question “Vehicle impounded?” contain checkmarks.

Ms. Rogers submitted that this situation is effectively the same as if no boxes were checked: you have not been properly alerted to the basis for the prohibition. Ms. Rogers submitted the legislation does not allow the officer or the Superintendent to correct a defective Notice, and the Notice is a nullity. She referred to *Lang v. British Columbia (Superintendent of Motor Vehicles)*, [2000] B.C.J. No. 2452 as support for this proposition.

Ms. Rogers further submitted that if the Notice that was forwarded to the Superintendent was a corrected document and not a copy of the one served on you, it is thus misleading evidence and undermines the credibility of the officer’s evidence as a whole.

In comparing your copy of the Notice with the Police Copy of the Notice, it is apparent that there are notations on your copy of the Notice of handwriting that appear either to be written with a lighter handwriting pressure, or are impressions from a previous carbon-copied document. Other reasonable alternative explanations are not apparent to me. The overwritten writing is clear enough that I can discern the number of letters comprising the driver’s name, though I cannot be certain of the name itself.

The number of letters in the underlying name appears to be different from the number of letters that comprise your name, and I am therefore satisfied the notations or impressions derive from a different driver’s Notice (the “Other Driver”). In my view, the two checkmarks for the “3 day WARN” and for the “NO” in the part of your copy of the Notice that asks “Vehicle impounded” show a handwriting style or pressure that is consistent with other underlying, lighter appearing, notations from the Other Driver’s notice.

In my view, it is more likely that the impressions or notations from the Other Driver’s Notice result from carbon paper located between the Police Copy and the Driver Copy. I acknowledge this is not evidence before me, but I find it is reasonable to conclude that when the officer completes the Notice, carbon paper lies between the Police Copy and the Driver Copy. This means that handwriting impressions made on Notices of Driving Prohibition forms intended for other drivers and that are lying on top of blank forms will not appear on the Police Copy itself, but may impress through to a Driver Copy form that lies beneath carbon paper that lies between the Police Copy and the Driver Copy, and thus leave an impression on the Driver Copy. I find this is a plausible and more likely explanation than Ms. Rogers’ explanation that the officer issued a corrected version of the Notice to the Superintendent.

In summary, given that the Police Copy of the Notice does not contain the “3 days WARN” checkbox, or the “No” checked for the part asking “Vehicle impounded”, the Notice served on you was in respect of a “90 days FAIL”, and that the “3 days WARN” box and the “No” in relation

to whether your vehicle was impounded, were intended for the Other Driver and were not intended to be included on your Notice.

As a result, I am satisfied that the Notice is not a nullity and that *Lang* is distinguishable because I find in your case you have been properly alerted to the basis of your prohibition. In turn, I am satisfied I may proceed with this review.

The issues I must consider are set out below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Were the ASDs reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was your BAC less than 80 mg% even though the ASDs registered a “FAIL”?

As stated in the Superintendent’s Report on Approved Screening Devices (ASDs) (the “Superintendent’s Report”), ASDs are calibrated to register a “FAIL” reading at BAC levels of 100 mg% or greater.

The Superintendent’s Report also indicates that breath samples are taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol.

The officer reported that you were driving or in care or control of a vehicle at 22:50 hours. He reported first observing you turning onto Dewdney Trunk Road from 256^h Street. On the Notice, the officer reported the location at which you were last driving was 260th St. and Dewdney Trunk Rd in Maple Ridge. He reported that he formed a reasonable suspicion at 22:51 hours that you had been driving with alcohol in your body, and that he read an ASD demand at 22:55 hours. The officer reported the time of the ASD test as 22:56 hours. You did not request a second test. The officer reported that the time of your last drink was unknown.

In your affidavit, you stated that prior to being stopped you were at the home of a co-worker, s.22 in Maple Ridge. You said you were at his home for 10 to 15 minutes after dropping him off after work. You had been working since 8:30 that morning for the entire day. You were tired and so you did not want to stay long. While you were at s.22 house, you consumed a single 12 oz can of Budweiser beer, and this was the only alcohol you had consumed that day. You said you

left s.22 home immediately after finishing your beer, and were pulled over approximately five minutes after leaving his home.

s.22 provided an affidavit that corroborated your evidence. He said he saw you consume one can of Budweiser beer while at his house for 10 to 15 minutes. He said that you and he had been together the entire day working at a job site, and to the best of his knowledge, you did not consume any other alcohol before you dropped him off.

Ms. Rogers submitted the evidence of toxicology consultant, W.K. Jeffrey, whose evidence is that your BAC would have been less than 50 mg% as a result of the one beer you said you had consumed. Mr. Jeffrey said further, that at the time of testing at 22:56 hours, you would have had residual alcohol in your mouth from your last drink at approximately 22:45 hours, which may have affected the result of the ASD. I understand Mr. Jeffrey has derived the time of 22:45 hours from your evidence that you finished your last drink within five minutes of when you were stopped, which the officer reported as 22:50 hours.

Overall, in view of the evidence of that shows the near proximity between where the officer stopped you and the location of s.22, and your corroborated evidence that shows you finished your last drink within five minutes of being stopped, and the possible effects of mouth alcohol on the ASD test, I am not satisfied that your BAC was 80 mg% or greater.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

s.15
Adjudicator

cc. Anjalika Rogers
fax: 604.687.3022

August 29, 2012

s.22

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

Introduction

On August 9, 2012, 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);
- 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”) (the “Demand”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Sylvia Andrews, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Upon reviewing Constable Boonstra's evidence and your lawyer's submissions, I find there is one determinative issue before me.

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

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

You were prohibited from driving for failing or refusing to comply with a Demand without a reasonable excuse. In order for you to comply with a Demand, it must be in accordance with section 254(2) of the *Criminal Code*. After considering all of the evidence before me, in your particular case, I cannot find that the Demand was made forthwith. Having made this finding, I do not have to consider any other issues.

Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a Demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

The corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

s.15
Adjudicator

cc Sylvia Andrews
fax 604-244-0617

August 31, 2012

s.22

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

Introduction

On August 12, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer Anjalika Rogers. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

There is one issue determinative of this review:

Did you fail or refuse to comply with a Demand?

Having carefully reviewed the officer's evidence, I am not satisfied that the demand was made forthwith as required by s. 254(2) of the *Criminal Code*.

I am satisfied that you did not fail or refuse to comply with a Demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 31, 2012. 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.

Adjudicator

cc. Anjalika Rogers
Bolton & Muldoon
fax 604 687 3022

August 29, 2012

s.22

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

Introduction

On August 19, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The investigating officer noted that she saw you in care or control of a motor vehicle on the Lougheed Highway in Burnaby. You confirmed you were driving. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

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

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

The officer was required to make a demand as soon as practicable after he had formed a reasonable suspicion that you had alcohol in your body. For some unexplained reason you were not read a demand until fourteen minutes after the officer formed that suspicion. Therefore, I am not satisfied that the demand was valid.

Given that, I need not address any other issue.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 29, 2012. 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.

September 18, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On August 30, 2012, 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;
- 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,
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure has been provided to your lawyer, Mr Paul Ferguson. He acknowledged reviewing the disclosure documents and I have proceeded with the hearing based on this information.

Facts, Evidence, and Analysis

Having reviewed the evidence of Constable Stables and your lawyer's submission, I find there is one issue that is determinative of this review.

Did you have a reasonable excuse for failing or refusing to comply with a demand?

Constable Stables served you with a Notice, alleging that you operated or had care or control of a motor vehicle and you failed or refused to comply, without a reasonable excuse, with a demand for a sample of your breath under section 254 of the *Criminal Code*. I have considered

both the Report to Superintendent (Report) submitted by the constable and Mr Ferguson's submission in relation to whether you had a reasonable excuse.

A reasonable excuse is some matter unconnected to the grounds for the prohibition that justifies or excuses actions which would otherwise constitute the offence. Where the defence of reasonable excuse is raised, the burden of proving that excuse is on the applicant, on a balance of probabilities.

Your lawyer submitted that you did not refuse to comply with Constable Stables' breath demand and you did not intentionally fail to provide a breath sample. You were unable to provide a sample because you did not understand the directions given to you by the constable.

In the Report to Superintendent (Report), Constable Stables of the Port Mann Highway Patrol recorded only one statement made by you, which was reiterated in his narrative: "I did not drink." He noted that you were polite and had an accented speech. In the context of whether you understood that a refusal or failure to provide a breath sample carried the same penalty as a 'fail' result, the constable noted that you understood. Constable Stables indicated in his narrative that you were shown and instructed how to provide a proper sample of breath numerous times.

In your solemn declaration, which was translated through an interpreter, you affirmed that you emigrated to Canada in s.22 You were an adult of s.22 . You never learned to speak English. You rely upon your husband, family and colleagues who speak both Korean and English. You can understand some words and get by through gesturing and guessing, as required. When you were pulled over by Constable Stables on August 30, 2012, you mentioned to the officer repeatedly that you did not speak English and that you wanted to connect with your son, so that he could translate and you would be able to understand the officer.

You told Constable Stables: "Tonight, no drink." You said this many times during the incident. Your lawyer argued that this form of words was an accurate rendition of your response to the constable's inquiry as to whether you had anything to drink.

You stated that the officer had a device and showed you what he wanted you to do. You did not fully understand what the officer was saying. You did not understand his instructions for giving a breath sample. You could comprehend some words and read the officer's body language. The officer made some gestures over his chest and motions with his own cheeks. You guessed that you had to blow after taking a deep breath, which you did. The officer did not use the device to demonstrate what to do. After three attempts to blow, you could tell the officer was frustrated, but did not know that was because you were not 'doing well with the device.' You did not know you were improperly blowing into the ASD. You did your best several times. Throughout this process you repeated that you did not understand. You tried handing your cell phone to the officer and said: 'My son.' You wanted to call your son so that he could explain to you what was happening.

Your son, s.22 , affirmed that you never formally learned English. At home you only speak Korean. He assists you with day to day tasks which require that English be spoken. You

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Page 3

have learned enough of the English language to use key words and improper grammar to get by when needed. In unfamiliar situations, you are very limited in what you can understand.

Your elder sister, s.22 who owns s.22
s.22 reaffirmed that you do not speak English, but perform essential duties to run the business. On occasion, you drive important clients home after they had been s.22
s.22. On August 30, 2012, you took three customers home at around 2:30 am. One of those customers, s.22 who was born in Korea and emigrated in s.22 as a young adult, affirmed that you drove him home. You appeared to behave normally, and he noticed nothing wrong with your speech or coordination.

Based on my review of all of the evidence, I find that your comprehension of English is restricted to short phrases and grammatically simple forms. The constable recognised that you spoke with an accent and were polite. The constable stated that he was satisfied you understood what was said to you, and he acted in good faith. You were not offered the services of an interpreter or placed in contact with your family. You attempted to follow the officer's instructions and provide a breath sample. There is no evidence of a conversation with the officer, but he did repeat his instructions to you numerous times.

Where special circumstances exist that would reasonably alert an officer that there could be a linguistic difficulty with understanding a demand and the instructions for providing a proper breath sample, such as the repeated phrase, 'I don't understand', the officer should have at least made some inquiry designed to assess your comprehension and ability to communicate in English. I am satisfied that you were not able to meaningfully understand the demand and comprehend the instructions to provide a sample of breath.

Based on the evidence before me, I find that on a balance of probabilities, you did have a reasonable excuse for refusing to comply with a demand on August 30, 2012, at 04:24 hours.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 18, 2012. 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.

Adjudicator

s.15

cc: Paul Ferguson
Fax: (604 688 8356)

September 24, 2012

s.22

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

Introduction

On September 7, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?

- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In the Report to Superintendent ("the Report"), the officer stated that on September 7, 2012, at 1800 hours you were driving or in care or control. In section 9, the officer ticked the box indicating that an independent witness observed you in care or control of the vehicle.

In your written submission you stated that you were approached by the officer while you were in your driveway.

Section 215.41(1) of the Act defines a driver as a person having the care or control of a motor vehicle on a highway or industrial road whether or not the vehicle is in motion.

The Act defines a highway as:

- (a) every highway within the meaning of the *Transportation Act*;
- (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and;
- (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited, but does not include an industrial road.

Given that a private driveway does not meet the definition of a highway and there is no evidence before me that you were driving or had care or control of a motor vehicle on a highway, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on September 7, 2012, at 1800 hours.

Having made this finding, I do not need to address the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 24, 2012. 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.

Adjudicator

s.15

September 26, 2012

s.22

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

s.22

Introduction

On September 8, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer. I have proceeded with the review based on this confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

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

Having carefully considered the evidence before me, I do not find that the ASD demand was made pursuant to section 254 of the *Criminal Code*. Consequently, I cannot find that you failed or refused to comply with that demand.

Having made this finding, I do not need to consider any further issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

September 7, 2012

s.22

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

Introduction

On July 17, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

As it is determinative of this review, I will only address the following issue:

Facts, Evidence and Analysis

Did you have a reasonable excuse?

Your evidence is that you were physically unable to provide a sample due to your medical condition. You provided records of your hospital stay, and in a subsequent statement the officer confirmed you had a heart attack at the time of the incident.

Having carefully considered the evidence before me, I accept that you had a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 August 17, 2012, the date 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.

September 20, 2012

s.22

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

Introduction

On September 8, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, Sarah Leamon, that you had received full disclosure of the documents before me. She acknowledged that she received all the documents.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Were the ASDs reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this review.

Was your BAC less than 80 mg% even though the ASDs registered a “FAIL”?

As stated in the Superintendent’s Report on Approved Screening Devices (ASDs) (the “Superintendent’s Report”), ASDs are calibrated to register a “FAIL” reading at BAC levels of 100 mg% or greater. The Superintendent’s Report also indicates that breath samples are taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol.

The investigating officer reported that at 01:59 hours, September 8, 2012, he pulled in behind a parked vehicle, for which he subsequently identified you as the driver. Upon rolling down your window, the officer detected a strong odor of alcohol from inside the vehicle and observed an open can of beer in the cup holder closest to you. The officer reported that he administered two ASD tests: one at 02:05 hours, and one at 02:11 hours - six minutes and 12 minutes, respectively, after you were driving or in care or control of a motor vehicle as reported by the officer.

In your affidavit, you stated that while you were in your vehicle and driving, you were drinking a can of beer. You said you were not thinking clearly due to a number of circumstances which you explained. When you stopped at the side of the road, seconds before the officer tapped on your driver’s side window, you continued to drink the beer.

When the officer asked when you last consumed alcohol, you indicated that your response of “about half an hour ago” was an untruthful response.

Overall, based on the evidence before me, I am not satisfied the officer’s evidence establishes on a balance of probabilities that you consumed your last drink more than 15 minutes before the ASD tests. In turn, I am not satisfied that your BAC was at least 80 mg%.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 20, 2012. 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.

September 20, 2012

s.22

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

Introduction

On September 4, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation because you provided samples of your breath.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative, the officer stated that on September 4, 2012, at 17:24 hours Saanich Police received a report of an impaired male driving a red Dodge Ram pickup leaving McLaren Lighting. The complainant indicated that the driver left the parking lot in an unknown direction and provided the licence plate number. Police proceeded to the address of the registered owner. The officer stated that a red pickup with the same plate was located in the residence driveway and he observed a male walking from the truck towards the front of the home. The officer walked up to the front door to identify the driver. A woman and man answered the door, and the officer asked to speak to whoever was just driving the truck. The male stated that he had just arrived home. The officer indicated that the male standing in the doorway was the same male he saw walking from the truck. You were identified as the male. In the Report to Superintendent, the officer indicated the date and time of driving or care or control as September 4, 2012, at 17:32 hours.

Having considered the police evidence, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on September 4, 2012, at 17:32 hours.

Having made this finding, I do not need to consider the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 19, 2012. 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.

Adjudicator

September 27, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 7, 2012, 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;
- 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,
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure has been provided to your lawyer, Brian Harvey on September 13, 2012. I have proceeded with the hearing based on this information.

You raised one issue which I will address as preliminary matters. You submitted that you believed you had followed due diligence and heeded comments attributed to the former Minister, Rich Coleman. While the views expressed may have referred to public education relating to drinking and driving, they do not speak to the matters I must consider here.

Facts, Evidence, and Analysis

Having reviewed the evidence of Constable Schnablegger and your lawyer's submission, I find there is one issue that is determinative of this review.

Did you fail or refuse to comply with a demand?

Constable Schnablegger served you with a Notice, alleging that you operated or had care or control of a motor vehicle and you failed or refused to comply, without a reasonable excuse, with a demand for a sample of your breath under section 254 of the *Criminal Code*. I have considered both the Report to Superintendent (Report) submitted by the constable and your submission in relation to whether there was insufficient evidence that the ASD was functioning properly.

You were served with a Notice on the grounds that you wilfully failed to provide a sample of breath. The ASD device deployed by the constable had a six digit serial number which accords with current police usage, as noted in the Superintendent's Report on ASDs. Constable Schnablegger tested the unit after your third attempt. He provided an adequate sample with a result of 000, which was shown to you.

You contended that Constable Schnablegger failed to provide prescribed information with respect to the ASD used. Without knowing the ASD type, calibration or service expiry date, you implied that the ASD may not have been working properly and could not be relied upon. You argued that in the case of an alleged failure to provide a breath sample the onus is on the police to provide some evidence that the screening device was an approved type and in proper working order. I accept the line of reasoning that you have put forward.

Since I cannot determine whether or not the screening device was approved or in proper working order, I cannot be satisfied that the demand was valid.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 27, 2012. 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.

Adjudicator

September 11, 2012

s.22

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

Introduction

On August 25, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation because you provided samples of your breath.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation. To date, I note that you

have not made submissions for this review before your scheduled hearing date of September 11, 2012, at 9:30 am.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In the Narrative, the Notice of Impoundment, the Notice, and the Certificate of Service, the officer stated that the date of driving or care or control was August 25, 2012, at 19:04 hours. However, in the sworn Report to Superintendent, the officer stated that the date of driving or care or control as August 26, 2012. With this conflicting evidence, I am unable to determine when you were a driver.

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.4(1) of the Act.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

September 21, 2012

s.22

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

Introduction

On September 1, 2012, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Did you fail or refuse to comply with a demand?

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 ASD. Consequently, I find the demand was invalid.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 21, 2012. 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.

Adjudicator

cc: Bruce Preston
250-287-3592

September 26, 2012

s.22

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

Introduction

On September 9, 2012, 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);
- the ASD registered a 'fail' as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a 'warn', and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Wong and your submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

Constable Wong did not provide a Certificate of a Qualified ASD Calibrator. Since I cannot determine whether or not the screening devices were appropriately calibrated, I cannot be satisfied that an ASD did register a 'fail' on September 9, 2012.

Based on the evidence before me, I am not satisfied that the ASDs were reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 26, 2012. 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.

Adjudicator

September 17, 2012

s.22

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

Introduction

On August 29, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I will go straight to the relevant issue.

Was the ASD reliable?

As your lawyer, John Chak pointed out, the officer provided certificates of a qualified ASD calibrator, which showed that both devices were past the acceptable calibration expiry dates. I am not satisfied that the ASDs were reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

Adjudicator

cc: John Chak
Fax: (604) 282-7509

SEPTEMBER 14, 2012

s.22

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

Introduction

On August 25, 2012, 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);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Bucknell and your submissions, I find there is one determinative issue in this review.

Was the ASD reliable?

In the Narrative, Constable Bucknell said he demonstrated that the ASD was in proper working order by providing a breath sample into it, while you watched. He said the ASD with serial number 047021 registered “000” upon analyzing his breath sample. You provided a breath sample into the device immediately thereafter, and the ASD registered a “FAIL”. While the demonstration assists in determining the reliability of the ASD, the officer failed to provide a Certificate of Qualified ASD Calibrator (the “Certificate”) for the device used. Without this Certificate, I cannot be satisfied that the unit was accurately calibrated or serviced when used to analyze your breath sample.

Based on the evidence before me, I am not satisfied that the ASD was reliable. Having made this finding, I do not need to consider other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

September 26, 2012

s.22

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

Introduction

On September 15, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?

- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The investigating officer noted that he saw you in care or control of a motor vehicle on Kinney Avenue in Penticton. You were parked on a cement walkway by the doors of Parkway School.

Your lawyer, Kurt Froehlich, pointed out that you were not on a highway or industrial road when the police arrived. You were not seen driving to the location where you were parked. You stated that on the night in question, you fell asleep after drinking too much. As a practical joke, your friends drove you to the school entrance and placed you in the driver's seat of your car and left the engine running. Fortunately, they opened the window.

I note that the car was parked by the doors of the school, some way off the road. Further, I also accept your explanation of the situation. Therefore, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 26, 2012. 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.

Adjudicator

cc: Kurt Froehlich
Boyle & Co.
Fax: (250) 492-4877

September 19, 2012

s.22

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

Introduction

On September 8, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I will go straight to the relevant issue.

Was the ASD reliable?

The officer provided a certificate of a qualified ASD calibrator, which showed that the device was past the acceptable calibration expiry date. I am not satisfied that the ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

September 21, 2012

s.22

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

s.22

Introduction

On September 1, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation because you provided samples of your breath.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following ground:

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

The officer provided the following timeline in her evidence:

Time of driving/care or control	01:40 hours
Suspicion formed	01:43 hours
ASD demand	01:45 hours
ASD test	01:47 hours

In the Narrative, the officer stated that inside the vehicle, on the floor of the driver’s side she observed, “one open and crushed can of Canadian beer and another unopened can of the same beer. Both felt cool to the touch”. She also noted a strong odour of liquor on your breath.

Given the evidence before me, I am satisfied that your BAC was less than 80 mg% even though the ASD registered a “FAIL”.

Having made this finding, I do not need to consider the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 21, 2012. 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.

Adjudicator

cc: Jennifer Currie, Stern Albert Shapray & Associates
Fax: 604-590-5626

September 6, 2012

s.22

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

Introduction

On August 18, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the review, I checked with your lawyer, Sarah Leamon, that you had received full disclosure of the documents before me. She acknowledged that she received all the documents.

Ms. Leamon argued that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, they are properly used by police only as an investigatory tool and not as the basis for your prohibition. She argued that, on the basis of *R. v. Schultz* 2009 BCSC 1521, I should therefore exclude the officer's evidence of the ASD results. However, the Superintendent when conducting a review under the *Motor Vehicle Act* does not decide questions of law and is not a court of competent jurisdiction. Therefore, I do not have jurisdiction to exclude the evidence for the reasons asserted by Ms. Leamon.

Ms. Leamon also referred to the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311, and the principles of administrative fairness. I am mindful of these considerations in my review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Were the ASDs reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this review.

Were the ASDs reliable?

The officer provided a Certificate of Qualified ASD Calibrator (the "Certificate"). The qualified calibrator certified that the ASD which the officer used for the first test was found to be within recommended limits and to the best of her knowledge, was functioning properly.

The officer has not, however, included a similar Certificate for the second test, and in the absence of a Certificate or other evidence as to the functionality of the ASD, I am not satisfied that the second ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 6, 2012. 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.

Adjudicator

cc. Sarah Leamon
fax: 604.685.8308

September 26, 2012

s.22

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

s.22

Introduction

On September 8, 2012, 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* (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);
- the approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jennifer Currie. I have proceeded with the review based on this confirmation.

In your application for review, you checked the boxes next to every review ground; however, since your IRP was served on the basis of an ASD “FAIL” result, the ground associated with an ASD “WARN” result, and the grounds associated with a refusal to comply with the ASD demand, are not relevant to the issues before me. Similarly, as you received a 90-day IRP, I cannot consider the ground that your 7-day or 30-day prohibition should be reduced.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Were the ASDs reliable?

Having considered the Certificates of Qualified ASD calibrator, I note that there is no evidence indicating the alcohol standard manufacturer, lot number or expiry date. As such, I am satisfied that the ASDs were not reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 26, 2012. 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
604-590-5626

September 20, 2012

s.22

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

Introduction

On September 3, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, I confirmed that full disclosure of the documents before me was provided to your lawyer, John Chak. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following issue.

Was the ASD reliable?

In the Report to Superintendent, the officer indicated that you provided two breath samples into two different ASDs, both of which resulted in a "FAIL". However, I find that I have not been provided with sufficient evidence with respect to the second ASD used to be satisfied of the "FAIL" result.

I am not satisfied that the ASD is reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 20, 2012, the date 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.

SEPTEMBER 14, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No

s.22

Introduction

On August 26, 2012, 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);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that you did not refuse or fail to comply with the officer’s demand to provide a breath sample; however, that ground is not applicable to your situation, because you were not prohibited for failing or refusing to provide a breath sample. You were prohibited from driving, because a sample of your breath on an ASD registered “WARN” and your ability to drive was affected by alcohol. I will consider all grounds that are relevant to the prohibition you received.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Noah Neaman. I proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Shannon and your lawyer's submissions, I find there is one determinative issue in this review.

Was the ASD reliable?

In the Report to Superintendent (the "RTS"), Constable Shannon indicated that you provided a breath sample into an ASD with serial number 101459. The officer also provided a Certificate of Qualified ASD Calibrator regarding an ASD with the same serial number. I note, however, that the qualified ASD Calibrator did not provide the manufacturer or the lot number of the dry gas Alcohol Standard used to check the calibration of this ASD. Accordingly, I find there is no evidence before me regarding the calibration of the ASD used to analyze your second breath sample, so I cannot be satisfied that the second ASD was reliable. Having made this finding, I do not need to consider other issues.

I am not satisfied that the ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 your vehicle was eligible for release, which was August 30, 2012. Receipts and invoices

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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 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.

Adjudicator

cc. Noah Neaman
604-874-1755 (fax)

September 7, 2012

s.22

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

Introduction

On August 18, 2012, 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);
- the ASD registered a 'fail' as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Mr David Milburn on September 4, 2012. I proceeded with the hearing based on this information.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a 'fail', and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Birnbaum and your lawyer's submission, I find there is one issue that is determinative of this review.

Were you advised of your right to a second analysis?

In his Report to Superintendent (Report), Constable Birnbaum indicated that after the first ASD test was completed he informed you of your right to a second test on a different ASD and that the lower ASD test result would prevail. The narrative attached to the Report provides further context to this statement: The constable mistakenly informed you of the consequences of blowing a 'warn,' with the implication that you had indeed blown a 'warn'. The constable then served you with a copy of the Notice on that basis.

Your lawyer argued that it was not properly explained to you that you had 'failed' your first ASD test and that you had a right to blow again into a different ASD, with the proviso that you would have the benefit of the lower result.

I accept that your first ASD analysis resulted in a 'fail' reading and that the investigating officer mistakenly informed you of the consequences of a 'warn' result. You were served with the Notice, at which point the constable acknowledged his error. He then purportedly offered you your right to a second analysis.

Based on the evidence before me, I am not satisfied that the constable advised you of your right to a second test.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 6, 2012. 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.

Adjudicator

s.15

cc: David Milburn
Fax: (604 526 5614)

September 21, 2012

s.22

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

Introduction

On September 3, 2012, 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* (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);
- the approved screening device (ASD) registered a “WARN” as a result of your blood alcohol concentration (BAC) being not less than 50 milligrams of alcohol in 100 millilitres of blood (50 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was the ASD reliable?

Having considered the Certificates of Qualified ASD calibrator, I note that there is no evidence indicating the alcohol standard manufacturer, lot number or expiry date. As such, I am not satisfied that the ASD was within the recommended limits or functioning correctly.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Adjudicator

cc: Kyla Lee
604-685-8308

September 28, 2012

s.22

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

Introduction

On September 22, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following ground:

Was the ASD reliable?

In the Report to Superintendent (the "Report"), the officer indicated that you provide a breath sample into an ASD with serial number 101643. The officer provided a Certificate of Qualified ASD Calibrator (the "Certificate") for the ASD. In reviewing the Certificate, I note that the calibrator did not provide a suitable calibration expiry date. Accordingly, I cannot be satisfied that the second ASD was reliable. Based on this evidence, I am not satisfied that the ASD was reliable. Having made this finding, I do not need to consider the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 28, 2012. 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.

Adjudicator

cc: Kyla Lee, Acumen Law Corporation
Fax: 604-685-8308

September 18, 2012

s.22

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

Introduction

On September 5, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Facts, Evidence and Analysis

In reviewing the evidence before me, I note that the Notice of Driving Prohibition states that you are prohibited from driving because a sample of your breath on an ASD registered a "FAIL" and your ability to drive was affected by alcohol. There is no evidence before me to support this claim. Consequently, I cannot uphold this prohibition.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 18, 2012. 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.

Adjudicator

September 18, 2012

s.22

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

Introduction

On August 29, 2012, 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);
- the ASD registered a 'fail' as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Ms Kyla Lee on September 6, 2012. She confirmed receiving the police evidence and I proceeded with the hearing based on this information.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a 'warn', and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

Driving Prohibition Review Decision
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- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Wong and your lawyer's submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

Constable Wong provided Certificates of a Qualified ASD Calibrator (Certificates) prepared by Officer J Schwenneker on August 21, 2012. The Calibrator neglected to note the manufacturer, lot number, and expiry date, of a dry gas Alcohol Standard used to check the calibration of the ASDs. Since I cannot determine whether or not the screening devices were appropriately calibrated, I cannot be satisfied that an ASD did register a 'fail' on August 29, 2012.

Based on the evidence before me, I am not satisfied that the ASDs were reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 18, 2012. 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.

Adjudicator

s.15

cc: Kyla Lee
Fax: (604 685 8308)

September 28, 2012

s.22

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

Introduction

On September 8, 2012, 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 prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that you received full disclosure of the documents before me. At the beginning of the oral hearing you acknowledged that you had received disclosure. I have proceeded with the review based on this confirmation.

Issues

- Were you a driver within the meaning of section 215.41(1) of the *Act*?
- Did the ASD register a “FAIL”?
- Were you advised of your right to a second analysis?
- If requested, was the second analysis provided by the officer and performed using a different ASD?
- Was the result of the ASD reliable?
- Was the ASD “FAIL” a result of your BAC exceeding 80 mg%?
- Was the Notice served on the basis of the lower analysis result?

Facts, Evidence and Analysis

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

In his evidence, Officer Rieger indicates that on September 8, 2012 at 0708 hours, he observed you driving on Georgia Viaduct in Vancouver.

During the oral hearing you acknowledged driving.

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

Was the result of the ASD reliable?

The police evidence indicates that you provided a breath sample into an ASD with serial number 024940 at 0709 hours, which resulted in a “FAIL”. You provided a second breath sample into an ASD with serial number 101471 at 0714 hours, which also resulted in a “FAIL”.

Officer Rieger has provided a copy of a Certificate of Qualified ASD Calibrator for each of the ASDs in which you provided breath samples. However, the certificate for the ASD with serial number 101471 is incomplete. Without this information, I cannot be satisfied that the ASD was reliable. Consequently, I am not satisfied that the ASD registered a “FAIL” as a result of your BAC exceeding 80 mg%.

Having made this finding, there is no need to consider the other issues in this review.

Decision

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

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 28, 2012. 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.

Adjudicator s.15

September 25, 2012

s.22

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

Introduction

On September 6, 2012, 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);
- the ASD registered a 'fail' as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Mr David Tarnow on September 14, 2012. I proceeded with the hearing based on this information.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a 'warn', and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Chan and your lawyer's submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

In the Report to Superintendent (Report), Constable Chan noted that a test result of 'fail' registered on an ASD at 23:01 hours on September 6, 2012.

I note, however, given that the service expiry date was recorded as September 4, 2012, in the Certificate of a Qualified ASD Calibrator, the ASD had expired at the time you received your screening. As a result, I cannot consider the ASD test result as reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 25, 2012. 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.

Adjudicator

s.15

cc: David Tarnow
Fax: (604 278 0525)

September 28, 2012

s.22

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

Introduction

On September 7, 2012, 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 prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that you received full disclosure of the documents before me. I have proceeded with the review based on this confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?

- Were you advised of your right to a second analysis?
- If requested, was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In his evidence, Officer Conroy indicates that on September 7, 2012 at 00:05 hours, a witness reported a stopped white vehicle in the 700 block of E 50th Avenue in Vancouver with the driver's side door open and a person slumped over in the driver's seat. At 00:20 hours, officers Conroy and London arrived on scene. They observed the vehicle with the driver's door open and you passed out behind the steering wheel.

The police parked behind the white vehicle and activated their emergency lights. Officer London walked to the driver's side and identified himself to you; however, you did not respond. Both officers observed the key in the ignition and the radio turned on; the engine was not running.

I have reviewed your written submissions and the statements from your friend and your neighbour. You deny driving on the evening in question. You also contend that although you were sitting in the driver's seat when police arrived, you had no intention of driving your sister's vehicle.

I find your evidence that you were not driving on the evening in question and had no intention of driving, equally compelling as the police evidence. As a result, I am not satisfied by the police evidence that you were a driver within the meaning of section 215.41(1) of the Act.

Having made this finding, there is no need to consider the other issues in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

The corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that the vehicle will be released.

Adjudicator s.15

September 17, 2012

s.22

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

Introduction

On September 1, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I will go straight to the relevant issue.

Was the ASD reliable?

As your lawyer, David Baker, pointed out, the officer provided a certificate of a qualified ASD calibrator, which showed that the device was past the acceptable calibration expiry date. I am not satisfied that the ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

Adjudicator

cc: David Baker
Fax: (604) 303-6922

September 20, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 3, 2012, 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;
- 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,
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure has been provided to your lawyer, Mr Paul Evans on September 7, 2012. I have proceeded with the hearing based on this information.

Facts, Evidence, and Analysis

Having reviewed the evidence of Constable Khoury and your lawyer's submission, I find there is one issue that is determinative of this review.

Did you fail or refuse to comply with a demand?

Constable Khoury served you with a Notice, alleging that you operated or had care or control of a motor vehicle and you failed or refused to comply, without a reasonable excuse, with a demand for a sample of your breath under section 254 of the *Criminal Code*. I have considered

Driving Prohibition Review Decision
Page 2

both the Report to Superintendent (Report) submitted by the constable and your lawyer's submission in relation to whether there was insufficient evidence that a demand was made in accordance with the requirements of section 254.

If the peace officer has reasonable grounds, pursuant to section 254(2) of the *Criminal Code*, he must make a demand for a breath sample, 'forthwith.' In the Report, I note that the time and date for the demand of a sample was 20:46 hours, on September 3, 2012. The time given for forming a reasonable suspicion was 20:26 hours.

Your lawyer argued that there was a substantial delay in making a demand. He asserted that there was no reasonable explanation for the delay or that it was connected to the officer's duties in relation to investigating the incident.

In his narrative, the constable described attending the scene of a single vehicle collision at 148th Street and 76th Avenue, Surrey. At 20:28 hours the constable formed a reasonable suspicion that you were operating a motor vehicle with alcohol in your body. Constable Thoury proceeded to state to you the ASD demand from his issued *Charter* card. In his Report the constable indicated that there was no delay in making the demand. However, I also note that the constable indicated that after the first ASD test was completed, he informed you of your right to a second test and that the lower ASD test result would prevail.

In your affidavit you stated that you saw Constable Khoury talking with other officers at the scene for some time. He came back to the police cruiser and demanded that you provide a sample of breath into a device.

Mr Evans submitted that Constable Khoury did not explain the 20 minute delay indicated at any point in the narrative. The only explanation provided by Constable Khoury was that he 'proceeded' to read the ASD demand. While the constable did describe the overall steps taken by him, there is a lack of precise explanation for the delay. The period of unexplained delay does not make it possible for me to determine if a demand was made forthwith. The requirements for a valid demand are specific and must comply with section 254 of the *Criminal Code*.

Since I am unable to determine if the ASD demand was made forthwith, I cannot be satisfied as to its validity.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 20, 2012. 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: Paul Evans
Fax: (604 593 5311)

September 21, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No

s.22

Introduction

On August 31, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation because you provided samples of your breath.

You applied on the ground that “My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s)”; however, that ground is not applicable to your situation because you received a 90-day prohibition.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following ground:

Was the ASD reliable?

The officer’s evidence is that you provided breath samples into two different ASDs, serial numbers 051190 and 101866. The officer provided a Certificate of a Qualified ASD Calibrator and an ASD Accuracy Check Log for ASD serial number 051190. He also provided an ASD Accuracy Check Log for ASD serial number 101866. However, I note that I do not have before me a valid Certificate of Qualified ASD Calibrator for ASD 101866. Without this evidence, I am unable to determine the service expiry date for this device. Consequently, I cannot be satisfied that ASD 101866 was reliable.

Having made this finding, I do not need to consider the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 21, 2012. 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.

A gray rectangular box used for redaction, containing the text "s.15" in red.

Adjudicator

September 27, 2012

s.22

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

Introduction

On September 9, 2012, 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);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, I confirmed that full disclosure of the documents before me was provided to your lawyer, Jamie Butler. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following issue.

Was the ASD reliable?

In the Report to Superintendent, the officer indicated that you provided two breath samples into two different ASDs, both of which resulted in a “FAIL”. However, I find that I have not been provided with sufficient evidence with respect to the first ASD used to be satisfied of the “FAIL” result.

I am not satisfied that the ASD is reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

SEPTEMBER 7, 2012

s.22

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

Introduction

On August 17, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Pearson and your lawyer’s submissions, I find there is one determinative issue in this review.

Was the ASD reliable?

In the Report to Superintendent (the “RTS”), Constable Pearson indicated that you provided a breath sample into an ASD with serial number 069346 that registered a “FAIL”. The officer also provided Certificates of Qualified ASD Calibrator (“Certificate”) regarding ASDs with serial number 101839 and another Certificate with illegible information on it. There is no evidence before me regarding the calibration of the ASD used to analyze your first suitable breath sample, therefore, I cannot be satisfied that the first ASD was reliable.

Based on the evidence before me, I am not satisfied the ASD was reliable. Having made this finding, I do not need to consider other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 7, 2012. 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.

Adjudicator

cc. Kyla Lee
604-685-8308 (fax)

September 28, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No

s.22

Introduction

On September 16, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Facts, Evidence and Analysis

In reviewing the evidence before me, I note that the Notice of Driving Prohibition states that you are prohibited from driving because a sample of your breath on an ASD registered a "FAIL" and your ability to drive was affected by alcohol. There is no evidence before me to support this claim. Consequently, I cannot uphold this prohibition.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 28, 2012. 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.

Adjudicator

September 7, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No.

s.22

Introduction

On August 22, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the outset of the oral hearing your lawyer, Kyla Lee, confirmed that she received full disclosure.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

I have reviewed your submission and the officer’s evidence. I find it more likely than not that the ASD registered a “fail” due to alcohol in your mouth, and not as a result of alcohol in your blood.

I am not satisfied that the ASD registered a “FAIL” as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 7, 2012. 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.

Adjudicator

cc: Kyla Lee, 604-685-8308

September 12, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No

s.22

Introduction

On August 23, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

In considering the officer’s evidence, I note that there is an inconsistency with regard to the time of your last drink. In the Report to Superintendent, the officer indicated that the time of your last drink was 20 minutes ago. In the Narrative, the officer indicated that you had a couple of drinks prior to driving, but that you did not provide any specifics. In your oral review you stated that you had consumed a couple of drinks and that your last drink was five minutes prior to being stopped by police. Having considered your evidence and the officer’s evidence, I find it more likely than not that the ASD registered a “fail” due to alcohol in your mouth, and not as a result of alcohol in your blood.

I am not satisfied that the ASD registered a “FAIL” as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 12, 2012. 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.

Adjudicator

September 28, 2012

s.22

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

Introduction

On September 7, 2012, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that your legal counsel, Mitch Foster, received full disclosure of the documents before me. At the beginning of the oral hearing Mr. Foster acknowledged that he had received disclosure. I have proceeded with the review based on this confirmation.

Issues

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL” as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- If requested, was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In his evidence, Officer Ostrom indicates that on September 7, 2012 at 2010 hours, he observed you driving on Cultus Lake Road in Chilliwack.

In your sworn affidavit you acknowledge driving.

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

Did the ASD register a “FAIL” as a result of your BAC exceeding 80 mg%?

The police evidence indicates that you provided a breath sample into an ASD at 2012 hours, which resulted in a “FAIL”. You provided a second breath sample into a different ASD at 2027 hours, which also resulted in a “FAIL”.

In your affidavit you indicate that you agree with Officer Ostrom’s evidence that you told him the time of your last drink was “just prior to driving” and that you told him that you had one beer at your friend’s longhouse on the reserve, then started to drive home. You assert that you also advised Officer Ostrom that your friend’s house was just around the corner. Recently, you got a ride to your friend’s house and measured the distance and time to where you were stopped by police. The distance was exactly two kilometres and it took 2 minutes and 36 seconds to drive. You finished your beer immediately prior to leaving your friend’s house and state with certainty that you provided your first breath sample within five to six minutes of your last drink.

Mr. Foster notes that the Superintendent’s Report on Approved Screening Devices indicates that breath samples are to be taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol. Mr. Foster argues that based on this, the first breath sample you provided was not a proper breath sample because although the police evidence indicates that Officer Ostrom was aware that you recently consumed alcohol, he had you provide your first breath sample only two minutes after driving. Mr. Foster acknowledges that Officer Ostrom decided to wait the requisite 15 minutes prior to taking the second breath sample; however, he contends that you were entitled to two proper breath samples. He referred to the court decision, *Sivia v. the Superintendent of Motor Vehicles* [2011] BCSC No. 1639, in

support of his argument that the court held that the review process under the IRP regime must allow drivers the opportunity to challenge the validity of the breath sample results. Mr. Foster asserts that the amendments to the Act as a result of the *Sivia* decision, implemented these changes, which includes a driver's right to provide two valid breath samples.

Mr. Foster submits that it was incumbent upon Officer Ostrom to provide you with the opportunity to provide two valid breath samples and he failed to do so. Consequently, I cannot be satisfied that the ASD "FAIL" results were accurate.

I concur.

Based on the evidence, I am not satisfied that the ASDs registered a "FAIL" as a result of your BAC exceeding 80 mg%.

Having made this finding, there is no need to consider the other issues in this review.

Decision

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

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 28, 2012. 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.

Adjudicator s.15

cc: Mitch Foster via fax

September 18, 2012

s.22

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

Introduction

On September 2, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kevin Filkow confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Herman and Mr. Filkow's submissions, I find there is one issue that is determinative of this review.

Was the ASD reliable?

In the Report to Superintendent (the "Report"), Constable Herman indicated that you provided a breath sample into an ASD with serial number 061464. The officer also provided a Certificate of Qualified ASD Calibrator regarding an ASD with the same serial number. I note, however, that the qualified ASD Calibrator did not provide a suitable calibration expiry date. Accordingly, I find there is no evidence before me regarding the calibration of the ASD used to analyze your second breath sample, so I cannot be satisfied that the second ASD was reliable. Having made this finding, I do not need to consider other issues.

I am not satisfied that the ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 18, 2012. 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.

Adjudicator s.15

cc: Kevin Filkow by fax: [604] 270 3787

September 11, 2012

s.22

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

s.22

Introduction

On August 31, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the grounds that: you had a reasonable excuse for refusing or failing to comply with the officer’s demand to provide a breath sample; and, your 7-day or 30-day driving prohibition should be reduced because you did not have the required number of previous IRPs. However, those grounds are not applicable to your situation because the Constable alleged on the Notice of Driving Prohibition that he was prohibiting you from driving for 90 days because a sample of your breath on an ASD registered a “FAIL” and your ability to drive was affected by alcohol.

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

In your written submission you state that you are a single parent and you would not knowingly do anything to jeopardize your means of transportation to get your son to daycare and yourself to work. You stated that you have a good driving record. Further, you provided two character references for my consideration. I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider references, hardship, personal circumstances, or an individual's driving record in this review. The scope of the review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this review.

Were the ASDs reliable?

The officer provided Certificates of a Qualified ASD Calibrator ("Certificate(s)") that state that A/Sgt Eassie is a qualified ASD calibrator. On June 10, 2012, A/Sgt. Eassie checked the calibration of the ASDs, serial numbers 084647 and 084646, used in the first and second tests, in accordance with the training he received. To the best of Eassie's knowledge, he certified that the ASDs were functioning correctly. The ASDs have a calibration expiry date of July 8, 2012.

Based on the evidence, I am not satisfied that the ASDs were reliable.

Having made this finding, there is no need to consider the other issues in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

Adjudicator s.15

September 25, 2012

s.22

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

Introduction

On September 9, 2012, 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);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer Paul Doroshenko. I have proceeded with this review based on that confirmation.

In your written submission you asked for a revocation or a variance of the IRP. You submitted that you have no past history of drinking and driving infractions and you brought it to my attention that you drive 8 hours a day with your job. I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, or an individual’s driving record in this review. The scope of the review is limited

to the grounds as defined in the Act. In addition, subject to section 215.5(3), the Act does not grant me any discretion to alter the terms of a driving prohibition.

You submitted under the heading labeled “Additional Contributing Factors” that you recently suffered a back injury and have been prescribed a narcotic, “Dilaudid 1 mg”, and a muscle relaxant, “Cyclobenzaprine 10 mg”. You submitted that you took both of these medications throughout the day and evening of September 9, 2012. You have provided a photo copy of a pamphlet warning that these prescriptions may make you drowsy or dizzy. While I acknowledge this information I do not accept that the medications influenced the results of the ASDs.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Williams and Mr. Doroshenko’s submission, I find there is one issue that is determinative of this review.

Was the ASD reliable?

In the Report to Superintendent (the “Report”), Constable Williams indicated that you provided a breath sample into an ASD with serial number 055639. The officer also provided a Certificate of Qualified ASD Calibrator regarding an ASD with the same serial number. I note, however, that the qualified ASD Calibrator did not provide a suitable calibration expiry date. Accordingly, I find there is no evidence before me regarding the calibration of the ASD used to analyze your second breath sample, so I cannot be satisfied that the second ASD was reliable. Having made this finding, I do not need to consider other issues.

I am not satisfied that the ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 24, 2012. 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.

Adjudicator s.15

cc: by fax: Paul Doroshenko [604] 685 8308

September 27, 2012

s.22

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

Introduction

On September 16, 2012, 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);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

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

Issues

I find there is one issue determinative of this review.

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

Facts, Evidence and Analysis

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

In the Occurrence Report ("Report"), the investigating officer reported that another officer, officer Sandhu, conducted a traffic stop of a vehicle. The investigating officer stated he was in attendance and identified you as the driver of the vehicle. In the Report to Superintendent ("RTS"), the officer checked a box to indicate that he witnessed you as the driver. He reported that you were driving or in care or control of a vehicle at 01:54 hours, on September 16, 2012.

In your written submission, you stated you had been out with s.22 and two other friends, but s.22 did not drink. You let him drive since he was sober. You indicated that your vehicle is a pick-up truck with back seats, and that you were sitting in the back while your friend, s.22 was driving. You said that the officer drove through a red light and pulled in behind you.

You said that s.22 moved from the driver's seat to the middle in order to let you out of the truck. You pushed the driver's seat forward, and got out of the driver's side door from the back seat. You said you wanted to explain to the officer what was going on, and that one of the officers recognized you immediately and said you were under arrest and hand-cuffed you. You stated the officer forced you to take a breathalyzer. You noted that the police allowed s.22 to continue driving your truck and he drove your other two friends home.

I note the officer's evidence that you were arrested for breach of conditions and that you were transported to cells. There is no indication that your vehicle was impounded, and I accept your evidence that s.22 drove your vehicle after you were arrested.

I find that the officer has not provided sufficient detail as to how he identified you as the driver of the vehicle. I note the evidence suggests a major component of the police investigation was on your breach of conditions.

Overall, I find your version of events is credible. I am not satisfied the officer's evidence establishes that you were driving at the relevant time. Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 16, 2012, at 01:54 hours.

Decision

As a result of my findings, I revoke your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

September 13, 2012

s.22

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

Introduction

On September 2, 2012, 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);
- 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
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative, the officer stated that on September 2, 2012, at 04:08 hours while conducting patrols, he observed a running vehicle in a driveway. You were identified as the occupant of the vehicle and you were seated in the driver's seat. In the Report to Superintendent (the "Report"), at section 9, the officer ticked the box indicating that he observed you in care or control of the vehicle.

In the hearing, you confirmed that you were approached by the officer while you were seated in the driver's seat of your vehicle which was parked in your driveway. You stated that you did not drive to that location. Your friend s.22 drove you to your home after a dinner out. You could not get in your house because you did not have your keys, so you decided to sleep in your car and wait for your brother to return home. You denied that your vehicle was running. You stated that the key was under the driver's seat. s.22 provided a statement in which he stated that you did not drive your vehicle that evening, he drove you to your home.

Section 215.41(1) of the Act defines a driver as a person having the care or control of a motor vehicle on a highway or industrial road whether or not the vehicle is in motion.

The Act defines a highway as:

- (a) every highway within the meaning of the *Transportation Act*;
- (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and;
- (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited, but does not include an industrial road.

Given that a private driveway does not meet the definition of a highway and there is no evidence before me that you were driving or had care or control of a motor vehicle on a highway, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on September 2, 2012, at 04:08 hours.

Having made this finding, I do not need to address the other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

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 September 13, 2012. 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.

Adjudicator