

January 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 21, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review

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

Facts, Evidence and Analysis

Did the ASD register a “warn” or a “fail”?

In the Notice Of Driving Prohibition (“the Notice”), Constable Deziel introduces herself as the investigating officer, and indicates that a sample of your breath registered a “FAIL” at 00:33 hours on December 21, 2010.

Upon review of the police evidence I note that the associated Report To Superintendent (“Report”) to go with the Notice has not been provided. Your lawyer, Paul Doroshenko, argues that without this Report I have no evidence to confirm the ASD registered a “FAIL”. I concur. Without the Report I cannot be satisfied that the ASD was properly calibrated and serviced, and consequently do not have an ASD result.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am not satisfied that an ASD did register a “FAIL” on December 21, 2010, at 00:33 hours.

I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5(4) of the Act. You may resume driving once you have obtained a driver’s licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

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 January 5, 2010. 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.

January 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 23, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Everitt identified himself as the investigating officer and states that he witnessed you driving out of a pub parking lot. He states that you were the lone occupant and notes that date and time of driving or care or control as December 23, 2010, at 19:39 hours.

You have not refuted this evidence. Based on the evidence before me, I am satisfied that you were the driver within the meaning of section 215.41(1) of the Act on December 23, 2010, at 19:39 hours

Did you fail or refuse to comply with a demand?

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

In the RTS the constable has noted that an approved screening device (ASD) demand was read to you at 19:45 hours on December 23, 2010, and has checked the box indicating that you understood the demand. You have not disputed this evidence. Based on the evidence before me, I am satisfied that the constable made a proper ASD demand at 19:45 hours on December 23, 2010.

In section 4 of the RTS the constable has made the notation of "55 mg% shallow blow". He has also recorded that you were informed of your right to a second test but he has changed the wording to reflect that it was at his request that you provide a second sample. Under section 5 the constable has recorded the word "refused" and recorded the time of refusal as 19:49 hours. His notes in section 6 state that your second sample did not register on the ASD and that you were very uncooperative.

In the hearing you stated several times that you did not refuse provide a sample, that you blew as hard as you could twice and on your third attempt, the constable ripped the ASD from your mouth, cutting your lip, and yelled at you. You stated that at this point you were concerned with what he might do and wanted to speak with a lawyer.

As the constable has recorded a result for the first ASD test in section 4, and he is the one who requested you provide a second test, not you, I find that you did not refuse to provide a sample of your breath on an ASD. Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with an ASD demand. Having made this finding, there is no need for me to address the remaining issue.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, but that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on December 23, 2010, at 19:49.

Driving Prohibition Review Decision
Page 3

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 5, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

January 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 17, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you driving on Highway 97 in Kelowna. There is no evidence to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of *Motor Vehicle Act* at 02:35 hours on December 17, 2010, as noted on the notice and in the officer's narrative.

IRP Review Decision
Page 2

Did you fail or refuse to comply with a demand?

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

When an officer forms a reasonable suspicion that a driver has alcohol in his body, he must read the ASD demand forthwith if he requires a breath sample. In his report, the officer noted that he formed his reasonable suspicion at 02:35 hours yet he did not make the demand until a further eleven minutes had elapsed. I do not find that a valid demand was made, and therefore, find that you were not required to provide a breath sample.

Decision

I am not satisfied that you failed or refused to comply with a valid demand because I find the demand was invalid. I therefore revoke your driving prohibition and monetary penalty as required by section 215.5 of the *Motor Vehicle Act*.

The vehicle impoundment is revoked and s.22 has been notified. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 5, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Michael Johnson
Fax: (250) 868-3080

January 6, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 16, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Culbertson noted that you were observed entering the vehicle in the driver's seat and driving over a curb. The vehicle was stopped and you found to be the lone occupant with the keys in the ignition. The constable noted the date and time of driving/care or control as December 16, 2010, at 19:45.

You have provided no evidence to contradict the officer's. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on December 16, 2010, at 19:45.

Did the ASD register a fail?

In the RTS, the constable indicated that he read you an ASD demand at 17:45 hours, and administered an ASD test at 19:45 hours. The constable indicated that he informed you of your right to a second test and he ticked the box "no, test was not requested".

In your oral review you disputed that the constable informed you of your right to a second test. You stated that you asked the officer for a second test, but you were advised that it wasn't required. When another officer arrived on scene you asked him for a second test, but the officer told you that "you were lucky you weren't being charged criminally". You also noted that the time of the ASD demand and the time of the result do not make sense.

Based on the evidence before me, I am satisfied that you requested a second ASD test and were not given one. Consequently there was no result on a second test for me to consider and I am unable to make a finding as to whether an ASD registered a fail.

Decision

I am not satisfied that an ASD registered "fail" December 16, 2010, at 19:45. I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(b) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Driving Prohibition Review Decision
Page 3

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 6, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

January 6, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 17, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a "fail"?

In her report, Constable Aylett stated that she read you an ASD demand at 00:16 hours on December 17, 2010. She noted that the ASD registered a "fail" at 00:17 hours.

In your written submission you pointed out that the calibration expiry date noted as December 12, 2010, was expired at the time you received your screening. You submitted that the results are not accurate.

Driving Prohibition Review Decision
Page 2

I agree with your submission. As a result, I cannot consider the reading of the ASD. Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on December 17, 2010, at 00:17 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 6, 2010. 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

January 6, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 19, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

I note that ASD serial numbers, calibration and service expiry dates have not been recorded. Therefore, I am not satisfied that the ASDs were properly serviced.

I am not satisfied that an ASD registered a "fail".

Driving Prohibition Review Decision
Page 2

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am not satisfied that the ASD registered a fail.

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 6, 2010. 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

January 6, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 19, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issue

There is one issue determinative of this review.

1. Did the ASD register a fail?

Facts, Evidence and Analysis

Did the ASD register a "fail"?

In the Report to Superintendent (RTS) and the Nanaimo RCMP Narrative Text Hardcopy, Constable Butler identified herself as the investigating officer. On the RTS, the constable reported she administered one ASD test at 2120 hours, December 19, 2010, the result of which was a "fail." On the RTS, the constable indicated that she informed you of your right to a second test. You did not request a second test.

The constable did not record a service expiry date for the ASD. Without this, I cannot consider the reading of the ASD. As a result, based on the evidence before me, I am not satisfied that an ASD registered a "fail".

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act, although I acknowledge your submissions on that point.

Decision

I am not satisfied that the ASD registered a "fail" on December 19, 2010, at 2120 hours.

I therefore revoke your driving prohibition, as required by s. 215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also revoked.

JANUARY 6, 2010

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 19, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

As per the Notice of Driving Prohibition, Constable Mander alleged that on December 19, 2010, you were operating or had care or control of a motor vehicle in Vancouver, while your ability to operate the vehicle was affected by alcohol. However, Constable Mander neglected to submit a report or any other evidence, to substantiate that allegation. Therefore, based on the evidence before me, I am satisfied that you were not a driver within the meaning of s. 215.41(1) of the *Motor Vehicle Act* and an ASD did not register a "fail" on December 19, 2010.

IRP Review Decision
Page 2

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4)(a)(1) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 6, 2010. 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: Paul Doroshenko
(604) 685-8308

January 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 23, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review

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

Facts, Evidence and Analysis

Did the ASD register a "warn" or a "fail"?

As I do not have a Report to Superintendent, I cannot be satisfied that the ASD was properly calibrated and serviced, and consequently do not have an ASD result.

Driving Prohibition Review Decision
Page 2

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am not satisfied that an ASD did register a "FAIL" on December 23, 2010.

I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5(4) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

Adjudicator

January 11, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 26, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

I note that the officer has not recorded the 'Service Expiry' date for the ASD in the Report to Superintendent. As such I find no evidence to show whether or not the ASD was past its service date and consequently do not have an ASD result. Therefore, based on the evidence before me, I am not satisfied that the ASD into which you provided a sample registered a fail.

Having made this finding, I do not need to consider whether or not you were a driver within the meaning of section 215.41(1) of the *Act*.

Decision

I am not satisfied that the ASD into which you provided a sample registered a fail. I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the *Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

January 14, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 24, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

Your lawyer, Anjalika Rogers, has argued that you were not in care or control of the motor vehicle. She drew my attention to the officer's report, and noted that the officer did not witness you operate the vehicle. She suggested that the officer's only evidence identifying you as the driver is a reference to information he received from an unnamed gas station attendant, with no related witness statement. Your affidavit indicated that s.22 operated the vehicle, but that she left the scene prior to police attending. Ms. s.22 confirmed this in her affidavit, and indicated that she left the scene prior to police arriving as she did not wish to be seen in the vehicle with you for personal reasons.

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. Having made that finding, it is unnecessary for me to address the remaining issues.

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act. I therefore revoke your driving prohibition and monetary penalty, as required by s.215.5(1) of the Act. You may resume driving provided you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

cc Anjalika Rogers
Fax (604)687-3022:

January 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

I note that the ASD 'Calibration Expiry' date was recorded in the Report to Superintendent as 2010/04/01. This indicates that the ASD calibration was past its expiry date and consequently I do not have an ASD result. Therefore, based on the evidence before me, I am not satisfied that the ASD into which you provided a sample registered a fail.

Having made this finding, I do not need to consider whether or not you were a driver within the meaning of section 215.41(1) of the *Act*.

Decision

I am not satisfied that the ASD into which you provided a sample registered a fail. I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the *Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 17, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

JANUARY 18, 2011

s.22

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

Introduction

On December 30, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

Constable Mrcela indicated that on December 30, 2010, at 01:32 hours you were operating or had care or control of a motor vehicle on Carrall Street in Vancouver. In his report, the officer stated that he and his partner observed two visibly intoxicated females exit the s.22 and walk across the street towards a s.22 that was parked on the side of the street. He said the vehicle was opened by a key fob and one of the females went to the passenger side followed by the other female. He added that the other female lost her balance at the rear of the vehicle, then she changed direction and headed towards the driver's side. She got into the driver's side of the vehicle and put the seatbelt on.

The officer repositioned his police vehicle, initiated the emergency lights and approached the driver's side of the vehicle. You were identified as the individual occupying the driver's seat of the vehicle.

In your submission you stated that on the night in question, you, your cousin s.22 and a friend, s.22 arrived at the s.22 at approximately 12:15 am. You said that prior to arriving at the restaurant you had not consumed any alcohol. You added that you were driving the vehicle earlier that evening, when you went to eat at the s.22 in Vancouver.

You said that at the s.22 you consumed two drinks and after about an hour had passed, you asked the manager of the s.22 to call you and s.22 a cab as you were going to head over to a nightclub on Granville Street. You said that once the cab arrived s.22 was going to drive your vehicle home and park it for the night as he had to work in the morning. You said that you and s.22 left the restaurant while s.22 was paying the bill because s.22 wanted a cigarette. You decided to wait in the car as it was cold outside and you were in an area that is not safe for two females to be in at night.

You said the keys to the vehicle were in your purse, they were never in the ignition and the engine was not running. You said that you put your seatbelt on as you always do when you get into a car. You said in hindsight, you can see why it may have given the officer the wrong idea, but you said it is a habit you have drilled in your head.

You said that when the officers approached the vehicle you opened the door because you could not roll down the window as the keys were not in the ignition. You said you immediately told the officer your cousin s.22 was going to drive and that you had already called a cab. You said when the officer asked s.22 who was driving, he told them that you were but when you clarified with him that the officer was actually asking who was going to drive, s.22 told them that he was driving the car home from the restaurant.

Along with your submission you sent in copies of letters from s.22 which corroborate your version of the events of that morning. You also sent in a copy of a letter from s.22 the owner of the s.22

In his letter s.22 stated that on the morning in question, at about 1:15 am, a patron "who became known to me as s.22" asked him to call her a cab as she and a female companion were planning on leaving the bistro without the males in their party. He said he called a cab immediately and gave the dispatcher the address of the bistro. He said that the girl who asked him to call the cab was named s.22 as that is the name she provided for pick up by the cab.

In considering the evidence before me, I am satisfied that you were not a driver within the meaning of section 215.41 of the *Motor Vehicle Act* on December 30, 2010, at 01:32 hours.

s.22

IRP Review Decision
Page 3

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4)(a) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15

Adjudicator

cc: Jamie Butler
(604) 739-9888

January 18, 2010

s.22

Immediate Roadside Prohibition No. s.22

Introduction

On December 28, 2010, a peace officer served you with a Notice of Driving Prohibition. However, the initial ASD readings were obtained as a result of a test administered by a Canada Border Services Officer, who is not a "peace officer" under the *Motor Vehicle Act*. Consequently, it has been determined that the IRP is not valid and will be removed from your driving record.

You will now be issued a duplicate driver's licence. To obtain this duplicate driver's licence, you must go to a Driver Licensing Centre with primary and secondary identification. The duplicate licence will be of the same class and is subject to all the same restrictions and conditions as the licence or permit taken by the peace officer.

I have also released your vehicle from the impound lot. The Superintendent will pay for towing and storage charges up to and including today.

A refund of your review fee has been authorized and will be sent in approximately six to eight weeks. However, the refund may be used to offset any outstanding fines or debts owed to the Province of British Columbia.

s.15

Adjudicator

CC: Henry Sarava
(604) 552-7709

January 19, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a "fail"?

The Report to Superintendent indicates that you provided a sample of breath into an ASD and it registered a "fail." However, I also find that the calibration expiry indicates the date as 2011/01/07, two days before the prohibition was served. Consequently, I cannot consider the ASD result.

Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on January 9, 2011, at 00:27 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Driving Prohibition Review Decision
Page 2

Decision

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 20, 2010. 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: Paul Pearson
250-480-0004

January 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the investigating officer, Constable Addison, stated he witnessed you as the driver of the vehicle. The constable provided a synopsis in which he stated, "Traffic stop initiated in the 300 Ravmur Street, just south of E. Cordova. Driver observed in care and control. Identified as s.22 using a valid Alberta Driver's Licence." The constable stated on the Notice of Driving Prohibition that the date and time of driving or care or control was January 8, 2011, at 01:24 hours.

In the oral review, you stated that after an evening out with a friend, you borrowed your uncle's car, and proceeded to give her a ride home. After stopping briefly to request a light for your cigarette, you got back into the vehicle and after driving for only about a minute, were pulled over by the police.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on January 8, 2011, at 01:24 hours.

Did the ASD register a warn or a fail?

In the RTS, the constable indicated that an ASD demand was read on January 8, 2011, at 01:27 hours and that you understood the demand. The RTS indicates a test was done at 01:28 hours and that the result of the test was a "fail".

In your review you confirm that when requested, you blew into the ASD device until it beeped and were told that you blew a fail.

The RTS indicates you were then informed of your right to request a second test, but that a second test was not administered, as you did not request one. The synopsis indicates that when you were given the opportunity for a second ASD test, you declined saying, "No, I think that one is pretty accurate."

You stated that you were informed of your right to a second test, but after asking how accurate the devices were, and the officer advising you "very", you said "if that's true, then no need."

You state that you went back to your vehicle and after talking it over with your friend, figured out how much alcohol you actually consumed, and figured that you shouldn't be impaired. You state approximately 10 minutes later, you got out of your vehicle and approached the constable who was doing the paperwork on the hood of his vehicle. You state you asked the constable for a second test but were told no, 10 minutes had passed and it would make a difference in the test.

In the synopsis the constable stated, "30 minutes later when he was being served the paperwork, s.22 then asked if he could provide a second sample." He further stated, s.22 was told that he was required to request that sample forthwith, however he had declined and there would not be a second opportunity as 30 minutes had now passed."

Although the constable denied your request for a second test because you had already been provided that opportunity and you declined, section 215.42(1) states that if an analysis of the breath

Driving Prohibition Review Decision
Page 3

of a person by means of an approved screening device under section 215.41 (3) registers a warn or a fail, a second analysis must be performed if, after a peace officer serves on the person a notice of driving prohibition under section 215.41 (3) (d), the person forthwith requests the second analysis.

Based on the evidence before me, I am satisfied that you requested a second ASD test after you were served the notice of driving prohibition and were not given one. Section 215.42(3) further states that if a person provides a sample of breath for a second analysis, the result of that second analysis governs, and any prohibition resulting from the analysis continues or is varied accordingly. Consequently there was no result on a second test for me to consider and I am unable to make a finding as to whether an ASD registered a fail.

Decision

I am not satisfied that an ASD registered "fail" on January 8, 2011. I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4)(c)(i) of the Act.

Please note that the corresponding vehicle impoundment is also revoked.

Adjudicator

January 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 31, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

After reviewing the evidence, I find that I cannot reasonably conclude that you were a "driver" for purposes of section 215.41(1) of the Motor Vehicle Act at 00:40 hours on December 31, 2010

Having made this finding I need not consider the remaining issues.

I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5(4) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

s.15

Adjudicator

January 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

As there is no evidence before me from the peace officer, I am unable to determine if the ASD registered a warn or a fail, or if you were a driver within the meaning of section 215.41(1) of the Act.

Driving Prohibition Review Decision
Page 2

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The 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 January 21, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle

Adjudicator

cc: Gavin Jones
Heritage Law Group
250-868-3080

January 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 31, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

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

Facts, Evidence and Analysis

Did the ASD register a fail?

Having reviewed all of the material before me, I am unable to find that the ASD the officer used was operating properly.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on December 31, 2010.

Decision

I am satisfied that the ASD did not register a fail on December 31, 2010.

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

The vehicle impoundment is revoked.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 21, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Brian Mickelson
Fax: 604-637-1617

January 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

The Report to Superintendent indicates that you provided a sample of breath into an ASD and it registered a "fail" at 22:48 hours. However, I find that the type of ASD used has not been indicated. As a result, I cannot consider the result of the ASD. Based on the evidence before me, I am satisfied that an ASD did not register a fail on January 1, 2011, at 22:48 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

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 January 21, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

January 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

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

In reaching my decision on this review, I must consider all relevant information provided to me. As I have no evidence before me from the investigating officer, I am unable to consider the issues in this review.

I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 21, 2011. You are responsible for any storage costs beyond this 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

January 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

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

In the Report to Superintendent (RTS), Corporal Yong identified himself as the investigating officer and stated that he witnessed you in the driver's seat of a vehicle that was legally parked on the street. He stated that the keys were in the ignition, the vehicle was running at an idle and the door was closed. In the Vehicle Impoundment RTS the corporal stated that he was responding to a report of a group of youths on the street with liquor, and in the Synopsis he stated that he saw you climb into the driver seat of the gray pickup. He noted the date and time of driving or care or control as January 1, 2011, at 00:54 hours.

In your affidavit, you stated that you had planned to attend a New Year's Eve party on Chaucer Avenue and prior to leaving for the party, you made arrangements with your mother for a ride home. You stated that she gave you money for cab fare if you needed it, and at no time did you intend to drive. You stated that the party ended at 12:30, you called your mother for a ride at 12:39, and she told you she was on her way to get you. You stated that it was -4 degrees and you were cold so you asked one of your friends if you could wait inside his car. You stated he opened the driver's side door, turned on the engine and heater, you got in to warm up, and he remained outside the vehicle. You said that at no time did you put the seatbelt on or touch the steering wheel and you had only been in the vehicle for about 2 minutes before the officer approached you. You stated you told him you had no intention of driving, that you had called your mother for a ride, and were warming up while you waited for her to arrive. You also stated that you heard your friend whose car you were waiting in, tell the officer that you would not be driving his car and that you were warming up waiting for your mother to pick you up. Lastly, you said your mother arrived while you were sitting in the back of the police car and the officer was writing you a ticket. You said that once again, you explained to the officer that you had called your mother earlier for a ride and that's why she was now at the residence.

Your mother provided an affidavit which corroborates your evidence that prior to going to the party you made arrangements with her to be picked up. She stated that she was delayed in getting to you because she picked up your two siblings on the way. She also stated that when she arrived at the Chaucer Avenue residence, you were in the back of the police car and she spoke to the officer and explained that she was your ride home. She stated that she showed him the call log on her phone which confirmed you had called her at 12:39 am for a ride.

Your lawyer, Erin Dance, referred to *R. v. Toews* and *R. v. McLachlan, Kodjabachev and Gill* in support of her submission and I have considered them. In the hearing, she stated that you did not interact with the vehicle in any way that could have caused it to be put in motion; you did not use the key to unlock the door or to start the engine and at no time did you touch the steering wheel or put the seatbelt on. You simply used the car as a shelter to keep warm from the cold while you waited for your mother to arrive and at no time did you ever intend to drive the car.

In reviewing the evidence before me, I accept your evidence that you did not intend to drive, that you made alternative arrangements for a ride home, and you followed through with them by calling your mother for a ride.

Driving Prohibition Review Decision
Page 3

Based on the evidence before me, I am satisfied that you were not a driver within the meaning of section 215.41 of the Act on January 1, 2011, at 00:54 hours. Having made this finding I do not need to consider the final issue.

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on January 1, 2011, at 00:54 hours.

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

Adjudicator

cc: Erin Dance
Fax: 604-488-1413

January 24, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Detailed Report Occurrence Report (Occurrence Report), Constable Cotton reported that he was dispatched at 12:12 a.m., January 3, 2011, to investigate a report of a driver about to leave the s.22 and Bar (the "pub") in Richmond. The constable reported that when he arrived, he observed a vehicle and bar staff. The constable said the vehicle was running and the rear window appeared to be on, as the window was partially defrosted. The constable said that as he approached, he observed a male person standing outside the vehicle who identified himself as the bar manager, and who pointed out the running vehicle. The constable identified you as the person seated in the driver's seat, with the keys in the ignition. On the Report to Superintendent (RTS), the constable reported the time of driving or care or control of a motor vehicle was 12:16 a.m., January 3, 2011.

You were represented by lawyer, Paul Doroshenko, in an oral review. You gave evidence as follows. You arrived with your friend s.22 at the pub about mid-afternoon. You were to meet a cousin there. Your original intention was for you not to drink and to be the vehicle driver when you departed. There was a hockey game on television, beginning about 5 pm. and you both decided to stay and to consume alcohol. You planned then to return to s.22 place in Richmond, about a ten minute drive away. s.22 sister s.22 lives in the area, and you had planned to get a ride from s.22 or, if she was not available, to take a cab home. You were aware that the pub allows patrons to leave their vehicle in the parking lot across the street. s.22 was confident that s.22 would be able to pick you both up, and s.22 was making efforts to contact s.22

At some point during the course of the evening, you and s.22 had a disagreement, and s.22 left the table where you were sitting. You recall s.22 saying she would retrieve her keys and purse, and when you received your bill, near midnight when the pub was closing, you were uncertain where s.22 was. The bartender said that s.22 had left. You noted that, as you had consumed a number of drinks, you were in no condition to drive, and were not planning to drive. You were preoccupied with your disagreement with s.22 and were trying to determine her location. You paid for your part of the bill only, as you did not want to pay for her part of the bill.

I note that Mr. Doroshenko led evidence to explain some discrepancies in cell-phone records made from you to s.22 and from s.22 to you. Some time durations as recorded were inconsistent as between the two sets of records. Mr. Doroshenko suggested this is due to double billing or simply inaccurate device recordings. Although recorded call durations may not be consistent between these records, I accept the sequence of the calls as recorded and do not make a finding as to the reason for any inconsistencies.

At 12:02 a.m. you made a call to s.22. You said you don't remember speaking with her at that point, perhaps having left a message. You said you were looking for s.22 inside the bar and then went outside to look for her and went to see if she might be at your car. You said the bartender came outside the bar and told you he was calling the police. You said you didn't care because you were looking for s.22. You said that because it was cold and because the bar was closing, you got into your car and turned the heat on. You said at that

Driving Prohibition Review Decision
Page 3

point you made another call to s.22 and she did not respond. The call records indicate you made two calls at 12:12 am, which coincides with the time the constable recorded the time he was dispatched to the scene. Your evidence indicates s.22 called at 12:13 a.m., which you said was a mis-call. You received another call from s.22 at 12:15, which you answered. During that call you asked where she was during the evening and where she was at that point. During that call you indicated the police had arrived and you had to go. This is corroborated by the constable's evidence who reported on the RTS that you were driving or in care or control of a vehicle at 12:16 am. You said that at 12:19, when the constable had come back to his car to retrieve an ASD, you texted s.22. In that exchange s.22 noted that her sister arrived and "u could have come with us". Your evidence indicates that later that night, you told s.22 you had called her "non-stop".

You said that when you were in your vehicle, you turned it on, but only for heat. You didn't put your seat-belt on and didn't put the stereo-faceplate onto the stereo, which you indicated you would normally do if you were preparing to drive. You said the manual standard vehicle was in neutral and the emergency brake was on. You said in order to drive you needed to engage the clutch and release the emergency brake, and you didn't have your foot on the clutch to do this.

In her evidence, s.22 said your disagreement with her occurred around 11:00 p.m. She said she went for a walk and lost touch with you. She said she came back to the bar around midnight and didn't see you. Her sister arrived around 12:10 a.m. and s.22 left with her sister. When you made contact with each other by text at 12:19 a.m., s.22 said she and her sister were five or ten minutes away. She said her sister had come for you both and she asked if you had a ride and that they could come back to get you.

You have included call history records of eight communications from s.22. The exchanges indicated that s.22 returned around midnight to pay her portion of the bill, and I accept her evidence that that her sister arrived at about 12:10 and that they left together shortly afterward. I accept from the evidence that she was still prepared to give you a ride at that point.

In your evidence you said that you had three other friends whom you would have attempted to contact for a ride, had s.22 and her sister not been available, and had the police not arrived. Barring that you said you would have taken a cab to s.22 place. You said the police arrived "too soon" before you were able to make contact with anyone.

I accept that both you and s.22 had made alternate arrangements for a ride and you did not originally intend to drive. I find you made a number of attempts to contact s.22 and that when the bartender informed you that he was calling the police – sometime between 12:02 a.m. and 12:12 a.m. – you began to make further attempts to contact s.22 particularly twice at 12:12 a.m. and at 12:15 a.m., and at that time you did not intend to drive. I accept that s.22 attempted to contact you at 12:13 a.m., and I accept that s.22 was willing to come back with her sister to retrieve you. I also find there was no risk that you would have accidentally set the vehicle in motion. Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41 of the Act on January 3, 2011, at 12:16 a.m. Having made that finding, I do not need to consider any further issues in this review.

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act and I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

cc. Paul Doroshenko
fax 604-685-8308

January 24, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

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

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

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

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

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

Issues

There are two issues in this review:

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

Did the ASD register a "fail"?

In his Report to Superintendent, Officer Gansner notes he administered a breath test to you on an Alco-Sensor IV DWF, serial number 054595, at 0319 hours on January 9, 2011. He notes that the calibration expiry date of the device is April 30, 2011. In his written submission, your

Driving Prohibition Review Decision
Page 2

lawyer, Paul Doroshenko, submitted a copy of a memo from RCMP Alcohol Test Committee Member and Chair of the Standards and Procedures Sub-Committee of the RCMP, dated October 15, 2008. For ease of reference, I quote from the memo here. It states:

“... as of 2008-09-18 the Alcohol Test Committee, through the recommendation of the Standards and Procedures Sub-Committee, has amended the standard under Section B. Approved Screening Devices, Item 1, to read, ‘The calibration of the Approved Screening Device shall be checked by a Screening Device Calibration Technician with an Alcohol Standard at least every thirty-one days’.”

Calibration checks are used to ensure the accuracy of the device. In this instance, based on the evidence above, it is clear that the RCMP have recommended that the ASD be calibrated every 31 days. Your lawyer has argued that there is no way to confirm the reliability of the ASD used on the day in question given that its calibration expiry date is well beyond the 31-day period within which the committee recommends that testing occur to ensure the ASD's accuracy.

I agree. I am not satisfied of the ASD's reliability, and as such, I am not satisfied that an approved screening device registered a “fail” on January 9, 2011. Having made this finding I do not need to consider any further issues.

Decision

I am not satisfied that an ASD registered a “fail” on January 9, 2011. I therefore revoke your driving prohibition, as required by section 215.5(4)(c) of the Act. Please note that the corresponding vehicle impoundment is also revoked.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs directly to the impound lot, up to and including January 24, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc. Paul Doroshenko
Fax: 604.685.8889



January 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 11, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

Having reviewed your lawyer's submissions, and the report by the officer, I am unable to determine that the officer used an ASD to obtain your breath sample.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on December 11, 2010.

Decision

I am satisfied that an ASD did not register a fail on December 11, 2010.

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

The corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

Cc: Sarah E. Leamon
Acumen Law Corporation
Fax: 604 685-8308

JANUARY 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

On January 5, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition.

I have reviewed Mr. Carr's submissions on your behalf with respect to the Approved Screening Device (ASD). As Mr. Carr noted, the investigating officer did not indicate which type of ASD was used to analyze your breath sample, so I cannot consider the ASD result.

Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on January 5, 2011 at 2259 hours.

Decision

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

Your vehicle impoundment is also revoked. I have sent an Order of Release to the impound lot where your vehicle is stored. You, or someone you authorize, may attend the impound lot and pick up your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 25, 2011. You are responsible for any storage costs beyond that date. You should know that if this vehicle is not retrieved, the impound lot may take steps to dispose of the vehicle 14 days after mailing notice to you of its intention to do so.

s.15

Adjudicator

cc. Jeremy Carr
 250-388-7327

January 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 11, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Driving Prohibition Review Decision
Page 2

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

Having reviewed all of the material before me, I am unable to find that the ASD the officer used was operating properly.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on December 11, 2010.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am satisfied that the ASD did not register a fail on December 11, 2010.

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

The associated vehicle impoundment also revoked.

Adjudicator

Cc: Joel Whysall
Fax 604 637-1617

January 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 11, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Driving Prohibition Review Decision
Page 2

Facts, Evidence and Analysis

Did the ASD register a fail?

Having reviewed all of the material before me, I am unable to find that the ASD the officer used was operating properly.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on December 11, 2010.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am satisfied that an ASD did not register a fail on December 11, 2010.

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

The vehicle impoundment is also revoked. I note that you were successful in a review of the impoundment of your vehicle and your vehicle has already been released from the impound lot. Upon receipt of your proof of payment, we will reimburse you for towing and storage charges you paid up to and including the day the vehicle was released, we will also reimburse the \$450 early release fee you paid to have the vehicle released. You may send your invoice and receipt to the Superintendent of Motor Vehicles at the address on the bottom of the previous page.

Adjudicator

Cc: Kevin Filkow
Michaels & Filkow
Fax 604 270-3787

January 26, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 7, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the investigating officer, Sergeant McDaniel, stated she witnessed you as the driver of the vehicle. The sergeant further wrote on the RTS, "Sgt. McDaniel conducted a traffic stop due to an improper turn. Driver was observed driving by Sgt. McDaniel." The sergeant stated that the date and time of driving or care or control was January 7, 2011, at 00:10 hours.

In your oral review you stated you had been downtown Vancouver with a friend, you had three drinks between 8:00 and 11:00, and then caught the SkyTrain to New Westminster where you had left your vehicle. You arrived at New West SkyTrain station around 12:00, and as you were not feeling any effects of the alcohol, proceeded to drive home. While driving, you made a left turn at a location that didn't allow left turns and were pulled over by the police.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on January 07, 2011, at 00:10 hours.

Did the ASD register a warn or a fail?

In the RTS, the sergeant indicated that an ASD demand was read on January 7, 2011, at 00:20 hours and that you understood the demand. The RTS indicates the test was done at 00:20 hours and that the result of the test was a "fail".

In the review you stated that initially the sergeant had no suspicion that you had had anything to drink but when she was issuing you the violation ticket, she informed you, she "just got a whiff of beer", and asked if you were sure you had not been drinking. After a brief discussion, you were asked to blow into an ASD and were also asked if you were confident that you would pass, to which you replied "yes". You blew into an ASD and the sergeant showed you the result, which was a fail.

You stated that you did not know what failed meant; you were told it was just an administrative thing and thought that you would just be facing fines. You state the sergeant went back to her cruiser and when she returned, read to you from a card and offered you a second opportunity to blow into an ASD. You were thinking you wanted to blow, and understood you would be blowing into the same machine. After you were informed the machine is calibrated, reliable, the test is accurate, and the result would be the same, you thought, what is the point?

The RTS does not indicate that a second test was offered, but it does indicate that a second test was not requested.

You stated that while the sergeant was back at her cruiser, another officer informed you of the driving ban. When you made further enquires to that officer, he didn't want to discuss it for whatever reason. When the sergeant came back and served you with the Notice of Driving Prohibition, she confirmed the ramifications and consequences. You stated that you were under the assumption that it would be a fine and as you realized the true consequences said that you would now like to provide a second sample. The sergeant said you were too late and informed you of the appeal process.

Driving Prohibition Review Decision
Page 3

Section 215.42(1) states that if an analysis of the breath of a person by means of an approved screening device under section 215.41 (3) registers a warn or a fail, a second analysis must be performed if, after a peace officer serves on the person a notice of driving prohibition under section 215.41 (3) (d), the person forthwith requests the second analysis.

Section 215.42(3) further states that if a person provides a sample of breath for a second analysis, the result of that second analysis governs, and any prohibition resulting from the analysis continues or is varied accordingly.

Based on the evidence before me, I am satisfied that you requested a second ASD test after you were served the notice of driving prohibition and were not given one. Consequently there was no result on a second test for me to consider and I am unable to make a finding as to whether an ASD registered a fail.

Decision

Based on the evidence before me, I am satisfied that an ASD did not register a fail on January 7, 2011.

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

Your 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 January 26, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Paul Doroshenko
604 685-8308

JANUARY 27, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 6, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

As per the Notice of Driving Prohibition, Constable McGuinness indicated that on January 6, 2011, you failed or refused to comply with a demand for a sample of your breath. However, the evidence in his Report to Superintendent (Report) does not support this charge. In his Report, he indicated that he administered 2 tests of your blood alcohol level that night, the results of which were both a "fail". There is no evidence before me that you failed or refused to comply with the officer's demand.

Decision

Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device on January 6, 2011.

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay the towing and storage costs up to and including January 26, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

January 27, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 7, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "warn".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "warn".

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

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

Issues

Having reviewed the evidence, I find that there is one determinative issue in this review.

1. Did the ASD register a "fail"?

Facts, Evidence and Analysis

Did the ASD register a "fail"?

Having reviewed all of the material before me, I am unable to find that the ASD the officer used was operating properly.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on January 7, 2011.

Decision

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 27, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

A refund of the \$500 IRP penalty fee which you paid will be processed. Please be advised that the refund will take up to six to eight weeks.

s.15

Adjudicator

January 28, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 15, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Driving Prohibition Review Decision
Page 2

Facts, Evidence and Analysis

Did the ASD register a fail?

Having reviewed all of the material before me, I am unable to find that the ASD the officer used was operating properly.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on January 15, 2011.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am satisfied that the ASD did not register a fail on January 15, 2011.

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment 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 January 28, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Tybring Hemphill
Fax: 250-655-3329

JANUARY 28, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

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

Issues

Having reviewed the evidence of Constable Turner, I find there is one clear issue in this review.

1. Did the ASD register a "fail"?

Facts, Evidence and Analysis

Did the ASD register a "fail"?

In the Report to Superintendent (RTS), Constable Turner identifies himself as the investigating officer. The constable indicates in the RTS that you provided a breath sample into an ASD on January 16, 2011, at 0308 hours and that the device registered a fail.

I note in part four of the RTS, that the constable did not record the service expiry date of the ASD used. As a result, I cannot be satisfied that the ASD was properly serviced prior to analyzing your breath sample, so I cannot consider the result of the device.

Based on the evidence before me, I am not satisfied that an ASD registered a "fail" on January 16, 2011, at 0308 hours.

Decision

I therefore revoke your driving prohibition, and monetary penalty as required by section 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Your vehicle impoundment is revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 28, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

January 28, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

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

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

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

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

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

Issues

There are two issues in this review:

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

Driving Prohibition Review Decision
Page 2

Did the ASD register a "fail"?

In his Report to Superintendent, Officer Haftner notes he administered a breath test to you on an Alco-Sensor IV DWF, serial number 047528, at 0052 hours on January 16, 2011. He notes that the calibration expiry date of the device is 2011/06/01, that is, June 1, 2011.

The protocol for checking the calibration of an ASD is every 31 days. In this instance, there is no way to confirm the reliability of the ASD used on the day in question given that its calibration expiry date is well beyond the 31-day period within which it is recommended that testing occur to ensure an ASD's accuracy.

I am not satisfied of the ASD's reliability, and as such, I am not satisfied that an approved screening device registered a "fail" on January 16, 2011. Having made this finding I do not need to consider any further issues.

Decision

I am not satisfied that an ASD registered a "fail" on January 16, 2011. I therefore revoke your driving prohibition, as required by section 215.5(4)(c) of the Act. Please note that the corresponding vehicle impoundment is also revoked.

I note that you have already picked up your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs for the three-day impoundment. You may submit your receipts to the address on page one of this letter.

Adjudicator

January 31, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

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

Facts, Evidence and Analysis

Did the ASD register a fail?

Having reviewed all of the material before me, I am unable to find that the ASD the officer used for the second test was properly calibrated. As the Act states that the second test governs, in

Driving Prohibition Review Decision
Page 2

spite of your request that this test not be considered, it is in fact this test that will result in the revocation of your prohibition.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on January 20, 2011.

Decision

I am satisfied that the ASD did not register a fail on January 20, 2011.

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

The vehicle impoundment is also revoked.

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 January 31, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

February 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

Driving Prohibition Review Decision
Page 2

In his Occurrence Report attached to his Report to Superintendent Constable Smith notes that an anonymous caller advised the police that a male had been observed "sleeping it off" behind the wheel of a parked pickup truck on Stanley Park Causeway in an emergency pull-off. The officer notes that he approached your vehicle, and observed a "heavy set Caucasian male lying across the front seat". He states he opened the passenger side front door, waking you up, and that you stated that your vehicle had broken down and that you were waiting for a taxi. He noted that a single key was in the ignition, and identified you as the individual having care or control of the vehicle at 0628 hours on January 16, 2011.

In your affidavit, you confirm that you had been driving the vehicle. However, you state that you had purchased the vehicle the day before, had been driving it when it had broken down, and that you had just been "able to get it into the emergency pull over when it died completely". You state that the vehicle was inoperable and that after the vehicle came to a stop, you tried to call for assistance but realized that your cellular phone was not working. You state that none of the cars that passed you stopped, and that you decided to wait in the vehicle until someone came with assistance. You indicate that you consumed "a small amount of wine that had been located in the car after it had broken down and I was waiting for someone to assist me". You add that you fell asleep in the vehicle in the front seat, and add that your head was located on the driver's seat and your lower body extended across the passenger seat. You note that your shoes were off and on the floor of the passenger seat.

In your affidavit, you also state that you had no intention of driving or of setting the vehicle in motion, and that, in any event, the vehicle was inoperable and incapable of being moved from the time that you arrived at the pull over on the causeway.

In the oral hearing, your lawyer, Michael Shapray, stated that there is no evidence that you were the driver or that you had care or control of the vehicle, and that you therefore do not meet the definition of driver as per section 215.41 of the Act. He states that neither the person who called the police anonymously nor the investigating police officer, observed you driving. He states that the investigating officer confirmed your own evidence that you were stopped and asleep in your vehicle in an emergency pull off and that you were lying across the front seat. And he notes that the officer's report indicates that you informed the officer that your vehicle had broken down and that you were waiting for a taxi. With the vehicle broken down, he adds, there was no risk of the vehicle being set in motion. He states that there was no evidence that the vehicle could be moved, and the engine was not running. Mr. Shapray has submitted the case studies of *R. v. McLachlan*, *R. v. Kodjabachev*, and *R. v. Gill* in support of his arguments.

Section 215.41(1) defines a driver as including "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 determining whether or not you had care or control of the vehicle, I need to consider two issues: the likelihood or risk that you may have been able to put the vehicle in motion; and your intention to do so. With respect to risk, I note that the officer's report is silent as to whether or not the vehicle was running, but I accept your submission that the vehicle was "turned off" when the officer approached you. Further, you have stated that your vehicle broke down, and that you tried to call for assistance, but that your cell phone was not functioning. The details of your submission differ slightly from that contained in the officer's report, where the officer indicates

Driving Prohibition Review Decision
Page 3

that you told him you were waiting for a taxi. However, the officer's report states clearly that you informed him that your vehicle had broken down. You also state that you consumed the alcohol after pulling into the emergency stop, and the officer notes in his report that he found a half-empty bottle of wine in the vehicle.

While I have no evidence that the vehicle was in fact inoperable, I find your version of events to be generally consistent with that contained in the officer's reports. Given that you were asleep in the vehicle, that it was likely to have been turned off, that you were pulled over in the emergency stop zone, and that your evidence is consistent with that of the officer, I am not satisfied that you had the intention to set the vehicle in motion. At the same time, the officer's report confirms that you were asleep in the vehicle, lying across the front seat. For this reason, I do not believe the vehicle was at risk of being set in motion.

I am not satisfied, therefore, that you were a driver under section 215.41(1) of the Act at 0628 hours on January 16, 2011.

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

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act. I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that the corresponding vehicle impoundment is also revoked.

In attempting to release the vehicle, I discovered that our electronic files do not identify you as the registered owner of the vehicle, but rather, identifies a different individual. I contacted your lawyer by telephone and await clarification.

Adjudicator

cc. Michael Shapray
Fax. 604.590.5926

February 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

I note that the officer has not recorded the 'Service Expiry' date for the ASD in the Report to Superintendent. As such I find no evidence to show whether or not the ASD was past its service date and consequently do not have an ASD result. Therefore, based on the evidence before me, I am not satisfied that the ASD into which you provided a sample registered a fail.

Having made this finding, I do not need to consider whether or not you were a driver within the meaning of section 215.41(1) of the *Act*.

Decision

I am not satisfied that the ASD into which you provided a sample registered a fail. I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the *Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 1, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

FEBRUARY 1, 2011

s.22

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

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Preliminary Matters

In your submission you stated that you are a single mother and you are required to transport your daughter to and from school. You said you regret making a mistake, you asked that you be given a chance, and you promised that you would not make the same mistake again. However, while I understand that a driving prohibition can result in hardship, I am not authorized by the *Motor Vehicle Act* to consider an individual's personal circumstances. In this review, I am only authorized to consider and make decisions on the issues as noted below.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

Constable Halewood reported that on January 22, 2011, at 02:00 hours, he and his partner pulled a vehicle over, after they observed the driver make a right hand turn onto Loughheed Highway, from the left lane of Westwood Street in Coquitlam. You were identified as the driver of the vehicle and your identity was confirmed by your driver's licence. As there is no evidence before me to refute that you were the driver, I am satisfied that you were a driver within the meaning of section 215.41 of the *Motor Vehicle Act*, on January 22, 2011, at 02:00 hours.

Did the ASD register a fail?

Constable Halewood indicated that at 02:18 hours, a demand was issued to you for a sample of your breath for analysis by an ASD. He explained that the delay in issuing you the demand was because he called for a Korean member to attend to speak with you, due to a severe language barrier.

Constable Halewood indicated that he administered a test of your blood alcohol level at 02:20 hours, the result of which was a "fail". However, I note that he neglected to record the ASD service expiry date. Without knowing the service expiry date, I cannot determine if the ASD the officer used had been properly serviced. Consequently, I find that I cannot rely on the ASD test result.

Based on the evidence before me, I am not satisfied that an ASD did register a "fail" on January 22, 2011, at 02:20 hours.

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4)(c)(i) of the *Motor Vehicle Act*. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

February 2, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Issues

There are three issues in this review:

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

Driving Prohibition Review Decision
Page 2

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the investigating officer, Constable A. Goyal, stated he witnessed you as the driver of the vehicle. The constable further wrote on the RTS, "Vehicle observed in parking lot with tail-light and box lights on. Keys in ignition with music on. Driver (sole occupant) seated in driver seat." The constable also noted these details in the Occurrence Report and further stated. "The driver finally produced his BC driver's licence which identified him to be s.22 The constable stated that the date and time of driving or care or control was January 17, 2011, at 23:47 hours.

In your oral review you stated you had only been in your vehicle in order to charge your cell phone and had no intentions of driving anywhere. You stated you are working away from home, and only brought the car charger for your cell phone. You are the owner of the company and your cell phone is vital as you receive multiple calls on it. You had been using your phone earlier on in the evening, trying to help a friend in Mexico sort out his Visa, and around 8:00 as it was almost all used up, took it out to the truck to charge. You plugged the phone in, talked to your wife and about 10 or 15 minutes later, went back to your room to watch television. Around 11:00 after drinking and watching movies, you were ready for bed but remembered your phone was in the truck. You told your friend that you were going to get your phone and went back to your vehicle. You got into the vehicle and turned the key back as the ignition must be turned on in order to charge the phone. It doesn't take long to charge your phone, and once it was charged, you were going to go to sleep.

You state when the officer arrived, you told him you were just charging the phone. The officer asked if you had been drinking, and when you replied yes, he asked you to get out of the vehicle. You asked if you did something wrong, and when he mentioned a breathalyzer, you hesitated and asked what was happening. It was then that the constable explained care and control.

I note the constable wrote in the Occurrence Report, "Cst. GOYAL observed the driver to have glassy eyes and also obtained an odour of liquor. The driver then began to tell the member that he was just getting his cell phone charger and some equipment from the truck for his construction workers and that he was not driving. Cst. GOYAL advised the male that care and control of a vehicle was also an offence and that he was being detained now for an impaired investigation as the member could smell the liquor on the driver's breath."

You state a little while later, your foreman came outside and explained to another peace officer that you had only come out to charge your phone. You state you were in the police car at this point and had no contact with him.

In the written statement by s.22 your roommate, he confirms that you went out to get your phone charged. He stated that after a few minutes had passed and you hadn't returned, he went outside. He saw a police car parked behind your parked truck and approached one of the police officers. He talked to him and explained your intent to charge your phone.

Driving Prohibition Review Decision
Page 3

I note the constable also wrote in his occurrence report, "R/Cst. GIBBENHUCK on-scene and a friend of s.22 came out of his apartment providing explanations for s.22 actions."

You stated that if the constable would have just taken a bit more time and assessed or analyzed your situation as it pertains to care and control, he would not have done what he did. The keys were turned back to charge the phone, not forward to start the truck. Your foreman confirmed that you were only there to get your phone. You had no need to go anywhere. He could have checked to see if you had another charger or checked with the other co-workers upstairs. Although he stated in the Occurrence Report that the truck was completely empty and did not have any construction or work equipment inside the cabin or in the flatbed, he failed to look behind the back seat to see that most of the stuff was there. It was there because with everyone in the truck there is no other room.

In reviewing the evidence before me, I accept your evidence that you did not intend to drive, that you had only been in your truck in order to charge your cell phone.

Based on the evidence before me, I am satisfied that you were not a driver within the meaning of section 215.41 of the Act on January 17, 2011, at 23:47 hours. Having made this finding I do not need to consider the other issues.

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on January 17, 2011, at 23:47 hours

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

The vehicle impoundment is also revoked. I note that you were successful in a review of the impoundment of your vehicle and your vehicle has already been released from the impound lot. Upon receipt of your proof of payment, we will reimburse you for towing and storage charges you paid up to and including the day the vehicle was released, we will also reimburse the \$450 early release fee you paid to have the vehicle released. You may send your invoice and receipt to the Superintendent of Motor Vehicles at the address on the bottom of the first page.

Adjudicator

February 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

On January 15, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition.

I have reviewed your and Mr. Filkow's submissions regarding your 90-day Immediate Roadside Prohibition. Considering the totality of the evidence before me, I am revoking this prohibition as required under section 215.5 of the *Motor Vehicle Act*.

Your vehicle impoundment is also revoked. I have sent an Order of Release to the impound lot where your vehicle is stored. You, or someone you authorize, may attend the impound lot and pick up your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 3, 2011. You are responsible for any storage costs beyond that date. You should know that if this vehicle is not retrieved, the impound lot may take steps to dispose of the vehicle 14 days after mailing notice to you of its intention to do so.

s.15

Adjudicator

cc: Kevin Filkow
 Michaels & Filkow
 Fax: [604] 270-3787

February 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 21, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Preliminary Matters

On January 26, 2011, you applied for an oral review of your Immediate Roadside Prohibition. At the time of your application, your lawyer, Paul Doroshenko, was provided with a copy of the Notice of Prohibition and Report to the Superintendent (RTS).

In his oral submission, your lawyer raised two preliminary matters: firstly, the validity of the serial number of the first ASD used by Constable Meleady; and secondly, the relative times that the Border Services Officer formed a reasonable suspicion and when the 'original' demand was made. Since neither of these issues are material to my decision, I will not consider them further.

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

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

In the RTS, Constable Meleady notes that you had an odour of liquor on your breath, glassy eyes, and slurred speech. The constable stated that you admitted to drinking four hours previously. Border Services Officers had requested a breath sample and at 19:25 hours and you blew a fail on an ASD. Based on this evidence, Constable Meleady formed a reasonable suspicion and made a demand for a sample of breath at 20:20 hours.

Although an original 'demand' was made by a Border Services Officer at 19:25 hours, such officers do not have the powers of a peace officer with respect to the *Motor Vehicle Act*, and therefore are unable to issue an Immediate Roadside Prohibition. The definition of peace officer in the *Motor Vehicle Act* is much narrower in scope than the definition under the *Criminal Code*.

You were taken into custody by the border agent(s) and kept under their supervision until about 20:20 hours. The 'fail' result recorded on an ASD by Officer Meleady was noted at 20:22 hours, which is only two minutes after a demand was first made.

Given the evidence before me, I am satisfied a valid demand was made.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the RTS, 'Failure or Refusal to Comply with Demand', Constable Meleady provided no evidence. His evidence in section 4 indicates that you did comply with the request on the first ASD test conducted by a Border Services Officer. The constable also noted that in response to a demand he read at 20:20 hours on January 21, 2011 you provided a sample of breath for analysis on an ASD. Accordingly, I find that the officer erred in his charge. The second ASD test recorded by Constable Meleady was made at your request and not in response to a demand, so I do not find that you failed or refused to comply with a demand.

Based on the evidence before me, I am not satisfied that you failed or refused to comply with a valid demand on January 21, 2011, at 20:20 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

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

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 February 3, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Paul Doroshenko (604 685 8308)

February 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

In your written submission, you referred to your employment and personal situation. I can appreciate that a 90 day driving prohibition may have far reaching implications for a person who needs to drive for employment and personal issues. However, under the Act I am not authorised to consider personal circumstances, employment or transportation needs in this review. The scope of the review is limited to the grounds as defined in section 215.5 of the Act.

Driving Prohibition Review Decision
Page 2

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the constable's Report to Superintendent (Report), the investigating officer Pfeifer stated that on January 23, 2011, he was summoned by a tow truck operator. A vehicle was in the ditch with a flat tire. The keys were in the ignition and you were in and out of the vehicle. You were the only person around.

The constable identified you as the driver on the basis of your admission. The officer did not indicate a time of driving/care or control in his Report. On the Notice, the officer believed that you were had care or control of a motor vehicle at 02:45 hours while on Hackbrown Road, Chilliwack, BC. In the Report, the constable states that he formed a reasonable suspicion fifteen minutes earlier at 02:30 hours. The officer did not provide evidence of the time of driving. Therefore, I am unable to find that you were operating the vehicle within the preceding three hours.

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 *Motor Vehicle Act* on January 23, 2011, at or about 02:45 hours.

Having made this finding, there is no need for me to consider whether or not the approved screening device (ASD) registered a fail.

Decision

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

Adjudicator

February 4, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 21, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Preliminary Matters

In his written submission, your lawyer Myron Plett noted that the charge indicated on the Notice was for failing to comply with a demand to provide a sample of breath for analysis by an ASD. The Report to Superintendent (Report), submitted by Constable Aasen, indicates in Section 4, however, that you complied with the demand and provided a breath sample at 23:03 hours on January 21, 2011. The officer submitted no evidence of a failure or refusal to comply with a demand. Section 6 of the Report, 'Failure or Refusal to Comply with Demand', was crossed out and initialed by the officer. I find that the officer erred in his charge. Accordingly, I do not find that you failed to comply with a demand.

Driving Prohibition Review Decision
Page 2

Decision

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

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 February 4, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Myron Plett (250 726 2180)

February 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent, Constable Morton identifies himself as the investigating officer and states that he observed you as having care or control of your vehicle at 0039 hours on January 30, 2011.

In your oral submission, you stated that you have spoken with the police and that they agree that the prohibition you received was "without merit". You state that you had no intention of driving, and that the vehicle keys were not anywhere near the ignition. You add that you were in the wrong place at the wrong time, and that the police found you as you attempted to retrieve cigarettes from your vehicle.

The Office of the Superintendent of Motor Vehicles received a letter dated February 2, 2011 from Sergeant Marvin Fefchak, of the Professional Standards Section of the Abbotsford Police Department. In the letter, Sergeant Fefchak states he interviewed the investigating officer in this incident, Constable Morton. He states that, based on a discussion with you and with the investigating officer, there was insufficient evidence to support the claim that you had an intention to drive; he adds that it is believable that you went to your vehicle for a purpose other than to drive, as you have argued in your submission. He also states that, contrary to Constable Morton's Report to Superintendent, the keys to the vehicle were located in the console of the vehicle, and not in the ignition. He states that Constable Morton acknowledged this error in his interview with him. Sergeant Fefchak concludes his letter by stating that the Abbotsford Police request that the OSMV revoke the prohibition and vehicle impoundment.

Given the results of the investigation conducted by the Abbotsford Police and whose results are reported in the February 2nd letter, I am not satisfied that you had care or control of the vehicle on January 30, 2011, at 0039 hours. As such, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on January 30, 2011, at 0039 hours.

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

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act. I therefore revoke your driving prohibition, and cancel the monetary penalty, as required by section 215.5 of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. Please note that the corresponding vehicle impoundment is also revoked.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 7, 2011. You are responsible for

any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

February 9, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

I have reviewed your and s.22 submissions regarding your 90-day Immediate Roadside Prohibition. Considering the totality of the evidence before me, I find that there is inconsistent evidence from the officer and I cannot reasonably be satisfied that you were a "driver" for purposes of section 215.41(1).

Having made this finding, there is no need for me to consider whether or not the ASD registered a "fail".

Decision

Based on the evidence before me, I am not satisfied that you were a "driver" on January 18, 2011. I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5 of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 9, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

February 9, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 25, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Preliminary Issues

Any issues that you may have had with the manner in which the officer conducted himself has no bearing on my decision in this review. Police behaviour disputes are between you and the department.

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

I will address the second issue first.

Did you fail or refuse to comply with a demand?

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

The officer noted in his report that you were in care or control of the vehicle at 03:28 hours, yet he made the demand for a breath sample at 03:16 hours. This does not make sense. However, on considering his synopsis of the incident, I note that he encountered your parked vehicle before the demand was made, at approximately 03:00 hours. He noted that he approached you and after being spoken to, you turned the engine off. The officer noted that you showed symptoms of impairment and that you had wine stains on your lips. You refused to step out of the vehicle but before you could close the door, the officer pulled you from the vehicle. He then read you the approved screening device (ASD) demand at 03:16 hours.

The *Criminal Code* requires the officer to read the demand forthwith once he has formed a reasonable suspicion that a driver has alcohol in their body. In your case, I believe that the officer formed his suspicion within a very short time of encountering you although he said that this occurred at 03:10 hours. Regardless, although you appeared somewhat uncooperative, I do not see why he waited six minutes before reading the demand. Therefore, I do not find the demand to be valid. You need not provide a breath sample in response to an invalid demand.

Decision

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

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

The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 9, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

February 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 22, 2011, a peace officer served you with a Notice of Driving Prohibition. However, the ASD readings were obtained as a result of a test administered by a Canada Border Services Officer, who is not a "peace officer" under the *Motor Vehicle Act*. Consequently, it has been determined that the IRP is not valid and will be removed from your driving record.

You will now be issued a duplicate driver's licence. To obtain this duplicate driver's licence, you must go to a Driver Licensing Centre with primary and secondary identification. The duplicate licence will be of the same class and is subject to all the same restrictions and conditions as the licence or permit taken by the peace officer.

I have also released your vehicle from the impound lot. The Superintendent will pay for towing and storage charges up to and including today.

A refund of your review fee has been authorized and will be sent in approximately six to eight weeks. However, the refund may be used to offset any outstanding fines or debts owed to the Province of British Columbia.

s.15

Adjudicator

Cc – Ron Buddenhagen
Fax: 250-426-3357

February 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

Decision

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.41(1) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

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

s.15

Adjudicator

cc: Jesse Gelber
McEwan, Harrison & Co.
Fax: 250-368-9401

February 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

The Report to Superintendent (RTS) has indicated Constable Smith as the investigating officer. Cst. Smith stated in the RTS that you were observed "passed out" in the passenger seat of the vehicle, with the engine on. The General Occurrence Report (the Report) written by Officer Christopher Woods states that you were observed sleeping "in the seat and had to be woken up" by the officers. The Report states that you advised the officers that you had come downtown with s.22 and that you did not know where he was. The officer noted the date and time of driving/care or control as January 30, 2011, at 06:10 hours.

Driving Prohibition Review Decision
Page 2

Your evidence is generally consistent with the police evidence. You submit that from the club you took a cab to s.22 vehicle, which was parked in an Impark parking lot at Helmcken Street and Granville Street. You were in the vehicle looking for s.22 house keys in order to proceed, in the cab, to his house but while you were looking for the house keys the cab took off and left you there. You stated that you did not have any money left because you spent it all in the club earlier that evening. You decided to sleep in your cousin's vehicle because you were by yourself and did not feel safe at night to walk anywhere or to a bank machine. You explained that the vehicle has a safety feature on it that prevents the vehicle from accidentally being set into gear. In order to take the vehicle out of park you have to simultaneously step on the brake and shift from park into gear. You further note that the vehicle was running to keep warm as it was minus one degree out that evening. You stated that you had absolutely no intention of driving your cousin's vehicle at any point in time on January 30, 2011.

s.22 evidence is congruent with yours. s.22 submits that he drove you and he to the s.22 nightclub that evening and he parked it in an Impark parking lot on a flat surface. He stated that he paid the cab driver and instructed the cab driver to take you to his vehicle and then onto s.22 house. He assumed the cab driver, as instructed, took you to s.22 vehicle where you retrieved his house keys and then got back in the cab and proceeded onto s.22 house. s.22 indicates that he did not return to his vehicle that evening because after he left the club he went out.

s.22 argued that in light of all the evidence it is clear that you were in s.22 vehicle, in the passenger's seat, for the sole purpose of sleeping and that there was no risk that you could have inadvertently put the vehicle in motion and that you had no intention of driving. In support of her submission s.22 has referred me to *R. v. McLachlan*, where the driver was found in the asleep in the driver's seat of the vehicle but was not found in care or control of the vehicle. I also note that s.22 submitted a copy of the Notice of Impoundment to show that the vehicle you were in was that of s.22

I have reviewed your and s.22 submissions regarding your 90-day Immediate Roadside Prohibition. After considering the totality of the evidence, I find that there is insufficient evidence to conclude that you were a "driver" for purposes of section 215.41(1). Having made this finding, there is no need for me to consider whether or not the ASD registered a "fail".

Decision

Based on the evidence before me, I cannot be reasonably satisfied that you were a "driver" on January 30, 2011, at 06:10 hours. I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5 of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

Adjudicator

February 10, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issue

Having reviewed the evidence, I find that there is one determinative issue in this review.

1. Did the ASD register a "fail"?

Facts, Evidence and Analysis

Did the ASD register a "fail"?

I have reviewed your submission and the officer's report. Section 215.41(2) of the Act defines a "fail" as "an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood". 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 therefore satisfied that the ASD did not register a "fail" within the meaning of section 215.41(2).

Decision

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

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

s.15

Adjudicator

cc: Jennifer Currie
604-590-5626

February 11, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

The Report to Superintendent (RTS) indicates that you were given two ASD tests, one at 00:43 hours and the other at 00:50 hours, on January 30, 2011, both of which registered fails.

In your submission you state that although section 215.42(2) states that a second analysis must be performed with a different ASD then was used for the first sample, the officer used the same ASD for both of your tests. You state when you went to the police vehicle to request a second test, you saw the officer change mouth pieces on the only instrument you saw in his vehicle. If he had used a different machine for the first sample he must have been carrying two machines in his vehicle. Before he started his paperwork, he would have had to put away the first machine and take out a second. You state the machine was located on the seat beside him and before you provided a second sample you saw him discard a white mouth piece and put a new one on. You could not imagine him leaving a used mouth piece on a machine from the last person. You feel the whole scenario just doesn't make sense.

As the evidence you have provided is contradictory to the police evidence, I must determine which evidence is more credible. In order to accept your evidence, I would have to find that the officer fabricated his evidence or intentionally left out significant details of the event. Here, I prefer the officer's evidence as his role is to observe and accurately report the details of his investigation. I note that although the officer has recorded the same calibration and service expiry date for both ASDs, he has noted a different serial number for each. You have provided a lot of details of what, in your view, happened that evening, however; you have not provided any direct evidence nor have you provided any evidence as to why the officer would have intentionally fabricated his evidence or intentionally left out significant details. As a result I am satisfied that the officer used two different ASDs.

However, the Act states that where a second test is taken, the result of the second test is the one that governs. Although the investigating officer indicated the type of ASD used on the first test, he has not indicated the type of ASD used for the second test. As a result, I cannot consider the result of the second ASD test.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on January 30, 2011, at 00:50 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am not satisfied that an ASD registered a "fail" on January 30, 2011, at 00:50 hours.

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

Driving Prohibition Review Decision
Page 3

The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 10, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

February 11, 2011

s.22

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

Introduction

On September 29, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), Constable Willems identified himself as the investigating peace officer and indicated that he witnessed you as the driver. He located you in the driver seat of a parked vehicle. You had the keys, but they were not in the ignition. He indicated that the date and time of driving/care or control was September 29, 2010, at 22:32 hours.

Your evidence is that you were at a party and went to your vehicle to get your hoodie and cigarettes. Prior to that, you had contacted your mother to tell her that you would be staying at your friend's house. You assured her that the car was parked for the night.

Based on the evidence before me, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on September 29, 2010, at 22:32 hours. Having made this finding I do not need to consider the final issue.

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on September 29, 2010, at 22:32 hours.

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

Please note that the corresponding vehicle impoundment is also revoked.

FEBRUARY 14, 2011

s.22

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

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

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

Preliminary Matters

As per s. 215.42(3) of the *Motor Vehicle Act*, the result of an individual's second breath test analysis prevails. I note that the officer indicated that he administered two tests of your blood alcohol level on the morning in question, and that the result of the second test was a "warn" at 22:12 hours. Therefore, as per that section of the *Act*, the officer should have served you with a 3 day driving prohibition, not a 90 day driving prohibition.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Constable Hilborn alleged that you were operating or had care or control of a motor vehicle on January 26, 2011, and, that you blew a “warn” on a blood alcohol test he administered at 22:12 hours that morning.

Your lawyer, Jordan Allingham pointed out that the officer noted that the ASD service date on the unit used to conduct your second breath test was “2010/12” or December 2010, which had already expired. Mr. Allingham submitted that since the test was administered on an expired unit, the results are not reliable. I find that I agree with Mr. Allingham.

Based on the evidence before me, I am not satisfied that an ASD did register a “warn” on January 26, 2011, at 22:12 hours.

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4)(b) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the impound lot where your vehicle is being stored for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 10, 2011, the date that you were notified your vehicle was being released. 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.

February 15, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the investigating officer, Constable M. Brisson, stated he witnessed you as the driver of the vehicle. The constable further wrote on the RTS, "observed driver attempt to avoid road check, vehicle driven to end of cul-de-sac and parked, observed driver exit vehicle." The constable has also written that you had exited from the driver's side and that he located a key in your front right pocket. The constable stated that the date and time of driving or care or control was January 29, 2011, at 02:40 hours.

In your oral review you stated you had worked during the day, had a hockey game to play that night and had been driving earlier but were not driving when this incident occurred. You stated you had been out with a couple of friends^{s.22} and after the hockey game went to^{s.22} for a few drinks. You stated^{s.22} had met a girl at the pub and you were all invited back to her condominium. You stated^{s.22} who is also your neighbor, was the designated driver and he used a spare key given to him by your wife earlier in the evening to drive your car.^{s.22} sat in the front passenger seat and you sat in the back seat because^{s.22} didn't want to sit beside your stinky hockey equipment. On the way to the girl's place you went through the McDonalds drive-thru to get food. You then carried on to her place which was across the street and at the end of a cul-de-sac. You state when you got to the cul-de-sac, you all got out of the vehicle to eat because you didn't want to eat in the car with the smelly hockey equipment. You stated you were about half way through your burger when you heard someone say "you in the black jacket". You then noticed a police officer about a half a block away, walking down the street towards you. You state you weren't sure who he was talking to as both you and^{s.22} were wearing black jackets. You also weren't sure what he asked but thought he was asking whose vehicle it was, so you replied it was yours. A conversation then occurred in which the officer proceeded to accuse you of being the driver, and you told him you were not. The officer searched your pockets, pulled out a key and then asked you to go back to the police cars which were about a block away. On the way to the police cars you tried to explain to the officer that you weren't driving but he was not listening. Your friends also tried to explain to the constable that you weren't driving, but he wasn't listening to them either. Another, very aggressive, officer then told your friends to get away or they would be charged. You stated you never insisted you weren't drinking, you insisted that you weren't driving and you only provided the breath samples because you were told if you didn't, you would be charged with failing to provide a sample. You were told you were toast anyways, so you might as well take a chance.

In your friend^{s.22} written statement, he explains how he came to have the spare key to your vehicle and confirms that he was the designated driver that night. He confirms that he was the one who drove from the pub to the cul-de-sac and also submits that he tried to explain to the constable that you were not driving, but that the constable was not listening to him.

I have reviewed your and^{s.22} submissions regarding your 90-day Immediate Roadside Prohibition. After considering the totality of the evidence, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on January 29, 2011, at 02:40 hours. Having made this finding I do not need to consider the final issue.

Driving Prohibition Review Decision
Page 3

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on January 29, 2011, at 02:40 hours.

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

The corresponding vehicle impoundment is also revoked. I note that you were successful in a review of the impoundment of your vehicle and your vehicle has already been released from the impound lot. Upon receipt of your proof of payment, we will reimburse you for towing and storage charges you paid up to and including the day the vehicle was released, we will also reimburse the \$100 early release fee you paid to have the vehicle released. You may send your invoice and receipt to the Superintendent of Motor Vehicles at the address on the bottom of the previous page.

Adjudicator

FEBRUARY 16, 2011

s.22

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

Introduction

On February 4, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

Constable Ramsden alleged that on February 4, 2011, you failed or refused to comply with a demand for a sample of your breath, with respect to the operation or care or control of a motor vehicle, on Vye Road at McKenzie Road in Abbotsford.

IRP Review Decision
Page 2

Your lawyer, Richard Ballantyne, pointed out that, in his Report to Superintendent (RTS), the officer indicated that he formed the reasonable suspicion that you were operating a motor vehicle with alcohol in your body at 20:14 hours, and he issued you a demand for a sample of your breath at 20:09 hours, or 5 minutes prior to the time he formed the suspicion, which does not make sense. Further, the officer indicated that you failed or refused to comply with the demand at 20:09 hours, which was 5 minutes prior to the time he stated that he issued the demand. Mr. Ballantyne submitted that, based on the officer's evidence, I cannot be certain what time the demand was issued to you. I find that I agree with Mr. Ballantyne.

Based on the evidence before me in its entirety, I find that I cannot be satisfied that you did fail or refuse to comply with a demand on February 4, 2011.

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

Decision

Based on the evidence, I am not satisfied that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on February 4, 2011.

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4)(c)(ii) of the *Motor Vehicle Act*. You may resume driving, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

As you were notified by telephone, the corresponding vehicle impoundment is also revoked.

Adjudicator

cc: Richard Ballantyne
(604) 859-3361

FEBRUARY 16, 2011

s.22

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

Introduction

On February 4, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Constable Barnett alleged that on February 4, 2011, at 23:17 hours, she administered a test of your blood alcohol level using an ASD, the result of which was a "fail". However, she indicated that the calibration expiry date on the ASD unit she used was "10/08".

Since the calibration expiry date was supposed to be entered as "YYYYMMDD", I find that I cannot be certain what the notation "10\08" means. Consequently, I find that I cannot be certain the calibration on the unit had not already expired prior to the officer administering your breath test.

Since I cannot determine whether or not the calibration on the unit had expired, I cannot be satisfied that an ASD did register a "fail" on February 4, 2011, at 23:17 hours.

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

Decision

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

Please note that the corresponding vehicle impoundment is also revoked.

FEBRUARY 21, 2011

s.22

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

Introduction

On February 4, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Constable Krzus indicated that on February 4, 2011, at 01:05 hours he administered a test of your blood alcohol level, the result of which was a "fail". However, I note that the officer neglected to record the service expiry date of the ASD unit used to conduct your breath test. Since I cannot determine whether or not ASD service date had expired, I find that I cannot consider your breath test results.

Based on the evidence before me, I am not satisfied that an ASD did register a "fail" on February 4, 2011, at 01:05 hours.

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

s.22

IRP Review Decision
Page 2

Decision

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

Please note that the corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

cc: Paul Doroshenko
(604) 685-8308

FEBRUARY 21, 2011

s.22

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

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Constable Gray alleged that on February 3, 2011, at 00:04 hours you had care or control of a motor vehicle on 120th Street in Delta, and that a sample of your breath on an ASD registered a "fail". However, I note that the officer neglected to submit a copy of a Report to Superintendent or any other evidence to support the allegation. Consequently, I cannot be satisfied that you were in care or control of a motor vehicle and that you blew a "fail" on an ASD on February 3, 2011.

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

Decision

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

I note that your vehicle has already been released from the impoundment lot due to a successful review of the impoundment on the grounds of economic hardship. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 8, 2011, the date the vehicle was due for release.

Upon receipt of your proof of payment, we will reimburse you for towing and storage charges you paid. You may send your invoice to the Superintendent of Motor Vehicles at the address noted on the bottom of the first page.

February 22, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On January 30, 2011, a peace officer served you with a Notice of Driving Prohibition. However, the ASD demand was given to you by a Canada Border Services Officer, who is not a "peace officer" under the *Motor Vehicle Act*. Consequently, it has been determined that the IRP is not valid and will be removed from your driving record.

You will now be issued a duplicate driver's licence. To obtain this duplicate driver's licence, you must go to a Driver Licensing Centre with primary and secondary identification. The duplicate licence will be of the same class and is subject to all the same restrictions and conditions as the licence or permit taken by the peace officer.

I have also released your vehicle from the impound lot. The Superintendent will pay for towing and storage charges up to and including today.

A refund of your review fee has been authorized and will be sent in approximately six to eight weeks. However, the refund may be used to offset any outstanding fines or debts owed to the Province of British Columbia. z

s.15

Adjudicator

Cc – Derwin Petri
Fax: 604-625-2581

February 22, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 12, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the constable stated he witnessed you driving at the time of a traffic stop. He noted the date and time of driving or care or control as February 12, 2011, at 02:25 hours.

You did not dispute being the driver. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on February 12, 2011, at 02:25 hours.

Did the ASD register a fail?

In the RTS, the constable indicated that he read you an ASD demand at 02:29 hours, and administered an ASD test at 02:31 hours. The constable indicated that he informed you of your right to a second test and he ticked the box "no, test was not requested".

In your oral review you disputed that the constable informed you of your right to a second test. You stated that you told the officer you didn't believe that you had failed the test, that you shouldn't have failed the test and you requested to take the test again. You also stated that you told him you would even be willing to take a breathalyzer test but the officer stated, "No, we're done".

Based on the evidence before me, I am satisfied that you requested a second ASD test and were not given one. Consequently there was no result on a second test for me to consider and I am unable to make a finding as to whether an ASD registered a fail.

Decision

I am not satisfied that an ASD registered "fail" on February 12, 2011. I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(b) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 12, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle

February 22, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 12, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

Constable Almeida alleged that on February 12, 2011, at 01:30 hours you had care or control of a motor vehicle in the 500 block of John Street in Victoria, and that a sample of your breath on an ASD registered a "fail". However, I note that the officer neglected to record the service expiry date of the ASD unit used to conduct your breath test. Since I cannot determine whether or not ASD service date had expired, I find that I cannot consider your breath test results.

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

Decision

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

Please note that the corresponding vehicle impoundment is also revoked.

Adjudicator

cc: Andrew Tam *Mulligan Tam Pearson* by fax [250] 480-0004

FEBRUARY 24, 2011

s.22

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

Introduction

On February 12, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

On the Notice Of Driving Prohibition, Constable Gomes reported that you had care or control of a motor vehicle on Knight Street/Marine Drive in Vancouver, on February 12, 2011, at 2040 hours. The constable reported that a sample of your breath registered a "fail" on an ASD. However, the Superintendent has not received a Report To Superintendent or any other evidence to support the Notice the Driving Prohibition. Consequently, I cannot be satisfied that you were in care or control of a motor vehicle and that you blew a "fail" on an ASD on February 12, 2011.

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

s.22

IRP Review Decision
Page 2

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The vehicle impoundment is also revoked.

s.15

Adjudicator

c. David Hopkins
fax: 604-638-5214

February 25, 2011

s.22

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

Introduction

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

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

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

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

Preliminary Matters

During the oral review you explained how important your licence is for your various activities in the community. You also noted your remote location and the lack of public transportation and taxi services.

I acknowledge and appreciate your situation. However, I am not authorized by the Act to consider hardship, personal circumstances, employment or transportation needs in this review. The scope of the review is limited to the grounds as defined in section 215.5 the Act.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent for the IRP (the "Report"), Officer Morrison checked the box to indicate that he witnessed you as the driver. He stated that you were the sole occupant and were in the driver seat. He indicated that the date and time of driving/care or control was February 8, 2011, at 22:30 hours. In the Synopsis, the officer provided further details, explaining that prior to stopping you he observed the vehicle cross the centre line on multiple occasions.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on February 8, 2011, at 22:30 hours.

Did the ASD register a warn or a fail?

The officer's evidence is that you provided a fail result on an Alco-Sensor IV DWF ASD at 22:33 hours. He indicated that you provided a second fail result on a separate device at 22:35 hours. However, he did not check the box on the report to identify the type of device that he used for the second test, nor did he provide that evidence elsewhere. As such, I cannot be satisfied that the second device was an ASD, as required by section 215.41(3)(a) of the Act.

Based on the evidence before me, I am satisfied that an ASD did not register a fail on February 8, 2011, at 22:35 hours.

Decision

I am satisfied that an ASD did not register fail on February 8, 2011, at 22:35 hours. I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 24, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

February 25, 2011

s.22

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

Introduction

On October 17, 2010, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), Constable T. Reed identified himself as the investigating officer and stated that he witnessed you as the driver. In the Notice, he indicated that the date and time of driving/care or control was October 16, 2010, at 23:50 hours.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 16, 2010, at 23:50 hours.

Driving Prohibition Review Decision
Page 2

Did you fail or refuse to comply with a demand?

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

In the Report, the officer stated that you admitted to drinking, with your last drink at approximately 20:30 hours. He indicated that he made an Approved Screening Device (ASD) demand on October 16, 2010, at 23:52 hours, and you understood the demand.

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

I now turn to the question of whether you failed or refused to comply with the ASD demand. In the Report, the officer stated that you failed or refused to comply with the demand on October 16, 2010, at 23:56 hours. He explained that when asked if you were refusing the ASD demand you said, "YES".

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand on October 16, 2010, at 23:56 hours.

Did you have a reasonable excuse?

I accept your evidence that the officer advised you that the ASD malfunctioned. Under the circumstances, I accept that you had a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

I am satisfied that you had a reasonable excuse for failing or refusing to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on October 16, 2010, at 23:56 hours. I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4)(d) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

I note that your vehicle has already been released from the impound lot. Upon receipt of your proof of payment, we will reimburse you for towing and storage charges you paid up to and including November 17, 2010, the day the vehicle was eligible for release. You may send your invoice to the Superintendent of Motor Vehicles at the address on the bottom of the first page.

February 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 13, 2011, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

In your written submission, you referred to your employment and personal situation. I can appreciate that a 90 day driving prohibition may have far reaching implications for a person who needs to drive for employment and personal issues. However, under the Act I am not authorised to consider personal circumstances, employment or transportation needs in this review. The scope of the review is limited to the grounds as defined in section 215.5 of the Act.

Driving Prohibition Review Decision
Page 2

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a fail?

Constable Halliday alleged that on February 13, 2011, at 00:56 hours, he administered a test of your blood alcohol level using an ASD, the result of which was a 'fail'. However, he made no indication of the service expiry date of the ASD unit. As a result, I cannot consider the reading of the ASD.

Since I cannot determine whether or not the service on the unit had expired, I cannot be satisfied that an ASD did register a 'fail' on February 13, 2011, at 00:56 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the *Act* on February 13, 2011, at 00:51 hours.

Decision

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

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 25, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

February 25, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 13, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the investigating officer, Constable J. Barker, stated she witnessed you as the driver of the vehicle. The constable further wrote on the RTS, "Observed vehicle travelling on roadway, initiated stop, sole occupant behind wheel w/ vehicle running, occupant in driver seat with key in ignition." The constable stated that the date and time of driving or care or control was February 13, 2011, at 04:05 hours. You have not challenged this issue or provided any evidence to the contrary.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on February 13, 2011, at 04:05 hours.

Did the ASD register a warn or a fail?

In the RTS, the constable indicated that an ASD demand was read on February 13, 2011, at 04:20 hours and that you understood the demand. The RTS indicates a test was done at 04:23 hours and that the result of the test was a "fail".

The RTS indicates you were informed of your right to request a second test, a second test was done at 04:35 hours and the result of the second test was also a fail.

In accordance with the Act, your second test result governs. The second analysis, however, must be performed with a different ASD than was used in the first analysis. I note the constable used the same ASD for both tests and for that reason, I cannot be satisfied that the ASD registered a 'fail.'

Decision

Based on the evidence before me, I am not satisfied that an ASD registered a fail on February 13, 2011, at 04:35 hours.

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The 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 February 25, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

February 28, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts and Evidence

Did the ASD register a fail?

Constable Ip alleged that on February 17, 2011, at 18:48 hours, he witnessed you operating a motor vehicle. He stated that he could smell alcohol and you admitted you consumed one drink. He then administered a test of your blood alcohol level using an ASD, the result of which was a

Driving Prohibition Review Decision
Page 2

'warn'. However, he made no indication of the service expiry date of the ASD unit. As a result, I cannot consider the reading of the ASD.

Since I cannot determine whether or not the service on the unit had expired, I cannot be satisfied that an ASD did register a "warn" on February 17, 2011, at 18:50 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the *Act* on February 17, 2011, at 18:50 hours.

Decision

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

s.15

Adjudicator

February 28, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Constable Elliott alleged that on February 16, 2011, at 01:50 hours you had care or control of a motor vehicle on "Enterprise Way/Commercial Ave" in Kelowna, and that a sample of your breath on an ASD registered a "fail". However, I note that the officer has not submitted a copy of a Report to Superintendent or any other evidence to support the allegation. Consequently, I cannot be satisfied that you were in care or control of a motor vehicle and that you blew a "fail" on an ASD on February 16, 2011.

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

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 28, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

March 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 10, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

In your written submission you stated that with all the responsibilities that you have, you cannot afford to have your licence prohibited for 3 months. You admit that you shouldn't have had that one shot, but never thought this would happen with medication or that you would go through this. You will accept your mistake and pay any fine, but request that your 90 day prohibition be reduced, not for you, but for your kids, mom and family.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. The scope of the review is limited to the grounds as defined in the Act. In addition, the terms

and conditions of a prohibition may only be altered in situations as described in section 215.5(2) of the Act.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a fail?

The Report to Superintendent (RTS) indicates that you were given two ASD tests, one at 00:43 hours and the other at 00:52 hours, on February 10, 2011, both of which registered fails.

The Act states that where a second test is taken, the result of the second test is the one that governs. However, although the investigating officer indicated the type of ASD used on the first test, he has not indicated the type of ASD used for the second test. As such, I cannot be satisfied that the second device was an ASD, as required by section 215.41(3)(a) of the Act. As a result, I do not have a result to consider.

Based on the evidence before me, I cannot be satisfied that an ASD register a fail on February 10, 2011, at 00:52 hours.

Having made this finding, there is no need for me to consider whether or not you were a driver within the meaning of section 215.41(1) of the Act.

Decision

I am not satisfied that an ASD registered a "fail" on February 10, 2011, at 00:52 hours.

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

Please note that the corresponding vehicle impoundment is also revoked.

March 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you driving on Water Street in Kelowna. You confirmed you were 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 *Motor Vehicle Act* at 00:40 hours on February 18, 2011, as noted in the report.

Did you fail or refuse to comply with a demand?

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

As your lawyer, Cory Armour, pointed out, the officer did not give any evidence regarding why he had a reasonable suspicion that you had alcohol in your body, a requirement for making an ASD demand. Without that, I find that you were not given a valid demand.

Decision

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

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

The Superintendent of Motor Vehicles will pay towing and storage costs up to and including March 1, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

March 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Your lawyer, Anjalika Rogers, submitted that in order for a peace officer to serve a Notice, two conditions precedent must be met:

- 1) a sample of the driver's breath analysed on an ASD registers a 'fail'; and
- 2) the driver's ability to drive is affected by alcohol.

In your lawyer's opinion, the investigating officer's Report to Superintendent (Report) did not contain the requisite evidence to meet the second condition. She asserted that the ability to drive cannot be inferred from the fact of registering a fail on an ASD.

Driving Prohibition Review Decision
Page 2

The driver's ability to drive being affected by alcohol is not at issue in this review. Section 215.5(1)(b)(i) of the Act requires me to confirm a prohibition if I am satisfied that an approved screening device registered a 'fail.' Section 215.5(1)(b)(i), which governs this review, does not incorporate the requirement that the driver's ability to drive is affected by alcohol. That section requires me to confirm your prohibition if I am satisfied that you were the driver within the meaning of section 215.41(1), and that the approved screening device registered a 'fail.' Further, section 215.49(1) states that I must consider the peace officer's report and any other relevant documents and information forwarded to the superintendent by a peace officer.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (Report), Constable Fox identified you as the driver of a vehicle, being seated in the driver's seat, while the vehicle was running, with the keys in the ignition prior to stopping for a Counter Attack road-block at 19:15 hours on February 18, 2011.

In your affidavit, you acknowledge being stopped by police at a Counterattack road block in Port Coquitlam, BC.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on February 18, 2011, at 19:15 hours.

Did the ASD register a fail?

In the Report, Constable Fox noted that a test result of 'fail' registered on an ASD at 19:20 hours on February 18, 2011, following the demand for a breath sample. The constable indicated that she informed you of your right to request a second analysis, which you subsequently exercised 10 minutes later. In accordance with the Act, your second test result governs.

In her oral submission, your lawyer argued that where a person requests a second test that analysis must be undertaken on a different ASD in accordance with section 215.42 (2) of the Act. She noted that in the Report, Constable Fox stated that once the vehicle was stopped you did not consume anything, and by implication, you were under the officer's constant supervision. Your lawyer also drew my attention to the Vehicle Impoundment Report where Constable Fox stated: "ASD demand read; breath sample 'fail'; IRP second breath sample read; breath (2nd) sample, 'fail'." The constable's comments do not refer to a second or alternative ASD unit being used for the second test.

In section 4 of the Report, Approved Screening Device – Test Result, Constable Fox recorded identical information for the ASD Type, Calibration and Expiry dates for the first and second test results. The six digit serial number for the ASD units differed only in respect of the last digit: the first serial number ended with a '5' and the second with a '2'. You lawyer suggested that the discrepancy was by way of a clerical error. She also pointed out that Constable Fox neglected to record that the second test was at your request, since the grid below in section 5 had in fact been completed, this was another error. In the Vehicle Impoundment Report, your lawyer drew my attention to the constable's notation under section 4, Vehicle Owner Information, where the driver was described as 'the registered owner of leased vehicle.'

In your affidavit, you state that the officer 'suggested I take a second test. I agreed and after waiting a period of time I blew into the same device that I had blown into the first time, registering a fail a second time.' You subsequently state that, 'at no time during my detention did Constable Fox leave my side. She presented me with the device prior to the first test and then remained with me until after she had completed the paperwork and served me with the documents.'

Based on the evidence before me, I find that it is more likely than not that the peace officer has not satisfactorily met the conditions of section 215.42(1). As a result, I cannot consider the second and governing reading of the ASD. Given the evidence before me, I am not satisfied that an ASD registered a 'fail' on February 18, 2011, at 19:30 hours.

Decision

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your leased vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including March 1, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Anjalika N Rogers
Fax: (604 687 3022)

March 2, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 15, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, and that the approved screening device (ASD) registered a "fail".

I must revoke your driving prohibition if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a "fail".

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

The Constable alleged that on February 15, 2011, at 03:32 hours you had care or control of a motor vehicle on "Rosetown Ave" in Penticton, and that a sample of your breath on an ASD registered a "fail". However, I note that the officer has not submitted a copy of a Report to Superintendent or any other evidence to support the allegation. Consequently, I cannot be satisfied that you were in care or control of a motor vehicle and that you blew a "fail" on an ASD on February 15, 2011.

Having made this finding I do not have to consider the remaining issues.

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

March 2, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Facts, Evidence and Analysis

The Constable alleged that on February 16, 2011, at 06:40 hours you had care or control of a motor vehicle, and that a sample of your breath on an ASD registered a "fail". However, I note that the officer has failed to sign the Report to Superintendent. Consequently, I cannot be satisfied that you were in care or control of a motor vehicle and that you blew a "fail" on an ASD on February 16, 2011.

Having made this finding I do not have to consider the remaining issues.

Decision

I therefore revoke your driving prohibition, as required by s. 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia. The corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

cc: Tyleen Underwood by fax 250 352-6634

March 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On October 15, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), the investigating officer, S. Vinois, stated he witnessed you as the driver of the vehicle. The officer further wrote in the RTS, "Road check. Counter attack road block." Under the section on the RTS labeled "Evidence driver was in care or control of vehicle", the officer wrote, "Driver was in Driver's seat observed driving the vehicle by the member." The officer stated that the date and time of driving or care or control was October 15, 2010, at 22:38 hours.

There is no evidence before me contradicting the officer's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 15, 2010, at 22:38 hours.

Did the ASD register a warn?

In the signed affidavits from yourself and your three witnesses.

s.22

s.22 it is stated that you had gone to s.22 to pick up your friends who had called and requested you be their designated driver. It is stated that they asked you to join them for one beer which you ordered and consumed. Immediately after the completion of your one beer, you and your friends got into your car and you proceeded to drive them home. At no point did you feel impaired or affected by the one beer. About 5 minutes later, you came across a roadblock. The investigating officer could smelling liquor from your car, and at 22:39 formed a reasonable suspicion that you were impaired. You informed the constable that you had one beer, but he did not ask you when you finished that beer. You state the constable did not wait 15 minutes before administering the ASD test at 22:41, at which time you blew a "Warn". You believe that as a result of the officer not asking you the time of your last drink, and therefore not waiting 15 minutes, the resulting "Warn" reading on the ASD could have been false due to the presence of mouth alcohol.

In the RTS, the officer indicated the time of driving/care or control as 22:38 hours on October 15, 2010. He formed his reasonable suspicion for a demand at 22:39 hours as a result of smelling liquor your breath. He noted that you stated that you had only one beer and noted the time of the last drink as unknown. The RTS indicates that an ASD demand was read at 22:40 hours and that you understood the demand. The RTS indicates a test was done at 22:41 hours and that the result of that test was a "warn".

The RTS also indicates you were informed of your right to request a second test, but that a second test was not administered, as you did not request one.

Section 215.41(2) of the Act defines a "warn" as "an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood". Based on the totality of the evidence before me, I find it more likely than not that the ASD registered a "warn" due to alcohol in your mouth, and not as a result of alcohol in your blood. I am therefore satisfied that the ASD did not register a "warn" within the meaning of section 215.41(2). As a result, I must revoke your prohibition pursuant to section 215.5.

Driving Prohibition Review Decision
Page 3

Decision

Based on the evidence before me, I am not satisfied that an ASD registered a warn on October 15, 2010, at 22:41 hours.

I therefore revoke your driving prohibition and the monetary penalties you received, as required by s. 215.5(4)(b) of the Act. I have removed the prohibition from your driving record.

Refunds of your \$200.00 IRP penalty fee, and \$250.00 reinstatement fee have been authorized and will be sent in approximately six to eight weeks. If any outstanding fines or debts are owed to the Province of British Columbia, the refunds may be used to offset those debts.

The vehicle impoundment is also revoked. I note that your vehicle has already been released from the impound lot. Upon receipt of your proof of payment, we will reimburse you for towing and storage charges you paid up to and including October 19, 2010, the day the vehicle was eligible for release. You may send your invoice to the Superintendent of Motor Vehicles at the address below.

s.15

Adjudicator

CC: Mark Berry
Merrigan and Company
Fax: 604 581-2017

March 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) and the Penticton RCMP Narrative Text Hardcopy (Narrative), Constable Moore identified himself as the investigating officer. The constable reported that he observed a vehicle in motion and, after initiating a vehicle stop, the constable observed a driver in the drivers' seat of an operating vehicle. The constable identified you as the driver of that vehicle. In the RTS the constable indicated you were driving or in care or control of a motor vehicle at 0157 hours, on February 18, 2011. In your submissions, you admitted to driving or having care or control a vehicle at the relevant time and place. I acknowledge that you disputed the constable's evidence as to the speed at which you were travelling and other details regarding the circumstances, although I find I do not need to consider these matters in this review.

Based on the evidence before me, I am satisfied that you were a driving or had care or control of a motor vehicle at 0157 hours, on February 18, 2011.

Did you fail or refuse to comply with a demand?

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

In the RTS, the constable indicated he read an ASD demand at 0206 hours on February 18, 2011. In the Narrative, the constable indicated "ASD demand given." The result of that ASD test was a "fail". The constable indicated that you requested a second ASD test, which the constable administered. For the second test, the constable reported that you "would either not blow, or would blow but would not properly seal [your] lips around mouth piece." The constable said he explained a number of times how to provide a suitable sample and demonstrated this to you.

As a result of not obtaining a second ASD sample, the constable served you a Notice of Driving Prohibition on the basis that "because you failed or refused, without reasonable excuse, to comply with a demand under the Criminal Code to provide a sample of your breath for analysis by means of an approved screening device."

In your case, you requested the second test after having provided the first sample in compliance with the constable's demand for a breath sample. As a result, there is no evidence before me that you failed or refused to comply with a demand.

Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a demand. Having made this finding, I do not need to consider any further issues in this review.

Driving Prohibition Review Decision
Page 3

Decision

I am satisfied that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on February 18, 2011, at 0206 hours.

I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5 (4) of the Act. Please note that the corresponding vehicle impoundment is also revoked.

s.15

Adjudicator

March 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you driving on Highway 16 E in Vanderhoof. You confirmed you were 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 *Motor Vehicle Act*.

Your lawyer, David Jenkins, pointed out that the officer recorded the time of driving in his report as 22:57 hours, yet on the notice he noted that it was 22:49 hours. The attached statement shows that you were driving at both times so I do not find that I am concerned about this. Calls were made to the dispatcher that you drove into a ditch and out again at approximately 22:49 hours. The officer pulled you over at 22:56 hours. This accounts for both times being recorded.

Did you fail or refuse to comply with a demand?

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

You drove into a ditch and then back out again, twice! The officer noted that you were driving slowly when he attempted to pull you over. You did not move to the side of the highway, instead stopping in the middle of the road. As the officer exited his vehicle, you drove off, finally pulling into a livestock yard. On confronting you, the officer noted an odour of liquor on your breath. You also had problems removing your licence from your wallet when asked and with your balance. Consequently, he read you a breath demand at 23:08 hours. However, when you were taken back to the station, the officer decided instead to get you to blow into an ASD, apparently because of your good driving record. He read you an ASD demand at 23:29 hours.

An ASD demand must be made forthwith after the officer has formed a reasonable suspicion that the driver has alcohol in his/her body. In your case, it is clear that this suspicion was formed when the original breath demand was made. Had the officer presented you to a breathalyzer instrument at the detachment, and had you refused to provide a breath sample, I would uphold the prohibition. However, because the officer changed his mind and read the ASD demand to you, I find that it was invalid because it was not read forthwith as required by the *Criminal Code*. Given the evidence, I am not satisfied that you were read a valid demand.

Decision

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

Your vehicle impoundment is revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including March 3, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

March 3, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On February 15, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Issues

You provided written submissions, which I have reviewed and acknowledge. Having reviewed the evidence of the constable and your evidence, however, it is not necessary for me to consider your submissions further.

Issue

There is one issue determinative of this review.

1. Did the ASD register a fail?

Facts, Evidence and Analysis

Did the ASD register a “fail”?

In the Report to Superintendent (RTS), Constable Gingras identified himself as the investigating officer. On the RTS, the constable reported he administered one ASD test at 0231 hours, February 15, 2011, the result of which was a “fail.” On the RTS, the constable indicated that he informed you of your right to a second test. You did not request a second test.

The constable did not record a service expiry date for the ASD. Without this, I cannot consider the reading of the ASD. As a result, based on the evidence before me, I am not satisfied that an ASD registered a “fail”.

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

Decision

I am not satisfied that the ASD registered a “fail” on February 15, 2011, at 0231 hours.

I therefore revoke your driving prohibition, as required by s. 215.5(4) of the Act. You may resume driving once you have obtained a driver’s licence from the Insurance Corporation of British Columbia. 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 March 3, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.



January 17, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

I note that the officer has not recorded the 'Service Expiry' date for the ASD in the Report to Superintendent. As such I find no evidence to show whether or not the ASD was past its service date and consequently do not have an ASD result. Therefore, based on the evidence before me, I am not satisfied that the ASD into which you provided a sample registered a fail.

Having made this finding, I do not need to consider whether or not you were a driver within the meaning of section 215.41(1) of the *Act*.

Decision

I am not satisfied that the ASD into which you provided a sample registered a fail. I therefore revoke your driving prohibition and monetary penalty, as required by section 215.5 of the *Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

The vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including January 17, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

January 5, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On December 18, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) and the Victoria Police Department Narrative Text Hardcopy (Narrative), Constable Koropatniski identified himself as the investigating officer. The constable reported that he observed a vehicle “floating” across the centre lane and initiated a traffic stop. The constable indicated there was a lone occupant of the vehicle, seated in the driver’s seat. The constable identified you as that occupant, and reported the time you were driving or in care and control of a vehicle as 0336 hours, on December 18, 2010.

You have provided an affidavit in which you admitted to driving at the time the police officer pulled you over. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on December 18, 2010, at 0336 hours.

Did the ASD register a “fail”?

On the RTS, the constable reported that, at 0340 hours, December 18, 2010, he formed a reasonable suspicion that you had consumed alcohol. He read an ASD demand at 0343 hours, and administered one ASD test at 0343 hours, the result of which was a “fail.” On the RTS, the constable indicated that he informed you of your right to a second test, but you did not request one. The constable reported that you admitted to consuming alcohol but that you could not say how much or when your last drink was.

In your affidavit you said that you consumed your last drink at 0333 hours, after which you departed from a function you were attending. You said that you were in your car within two minutes, and began driving home. You said there was no traffic that evening, and you had been driving for only one minute before the police officer pulled you over. You said you were evasive with the officer about when you consumed your last drink because you had never been in that situation before, and did not know your legal obligations in relation to the officer’s questions.

You noted that the time between when you had consumed your last sip of alcohol and when the ASD test was administered, at 0343 hours, was ten minutes. You said that you tried to ask others at the function to provide corroborating evidence as to when you had last consumed alcohol, but no one recalled to the minute when you had last consumed alcohol and when you last drank alcohol in relation to when you left.

In your affidavit you said that you were not aware, on the evening in question, that recent consumption of alcohol could make an ASD test unreliable, and as such you did not request a second test. You and your lawyer, Andrew Tam, have argued that the ASD test was not reliable because you had consumed alcohol within 10 minutes of the test. Mr. Tam provided caselaw to support the argument that 15 minutes are required to allow the dissipation of mouth alcohol and for an accurate ASD reading.

Having considered the evidence and the arguments as a whole, I am not satisfied that you consumed your last drink more than 15 minutes from the time of the ASD test. As such I am unable to consider the reading of the ASD.

Driving Prohibition Review Decision
Page 3

Based on the evidence before me, I am not satisfied that an ASD registered a “fail”.

Decision

I am not satisfied that the ASD registered a “fail” on December 18, 2010, at 0343 hours.

I therefore revoke your driving prohibition, as required by s. 215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver’s licence from the Insurance Corporation of British Columbia. The 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 January 5, 2010. 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. Andrew Tam
fax 250-480-0004

February 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

I have two copies of the Report to Superintendent in front of me, each one indicating different times as to when the officer formed his reasonable suspicion and when the breath test was performed. One was unchanged whereas the other had the times altered. I prefer the former. The times on the unchanged form are compatible with the time of driving in both the reports and in your submission. Further, you describe the incident in much the same order as the police report and synopsis, the latter also agreeing with the unchanged report. Therefore, this is the report that I will consider in this review.

Issues

There are two issues in this review:

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

2. Did the ASD register a warn?

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you driving on Highway 97S near Summerland. You confirmed you were driving. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of *Motor Vehicle Act* at 10:55 hours on January 22, 2011, as noted in the report.

Did the ASD register a warn?

Despite the police report indicating otherwise, you said you took a second test and that registered a warn, as did the first. This was confirmed in the officer's synopsis. However, given that I have no information regarding the device used in the second test, which prevails, I cannot accept the reported result. Equally, I cannot resort to the result of the first test. Given all of this, I must accept that I do not have a result from the second test. Therefore, I find that the ASD did not register a warn.

Decision

I am satisfied that the ASD did not register a warn. I, therefore, revoke your driving prohibition and monetary penalty as required by section 215.5 of the *Motor Vehicle Act*. I have removed the prohibition and the unpaid penalty fee from your driving record.

Refunds of your \$250.00 reinstatement fee and your \$31.00 relicensing fee have been authorized and will be sent in approximately six to eight weeks. If any outstanding fines or debts are owed to the Province of British Columbia, the refunds may be used to offset those debts.

Adjudicator

January 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On November 17, 2010, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

There are two issues in this review:

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

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

Driving Prohibition Review Decision
Page 2

Facts, Evidence and Analysis

Did the ASD register a fail?

I note that in his narrative the officer identified the date of the incident as November 18, 2010. However, upon reviewing all of the material before me, including your affidavit, I am satisfied that the officer made a clerical error and that date should be November 17, 2010.

The officer's evidence is that after you provided a fail result on the ASD he offered you a second opportunity, which you declined. You subsequently made a phone call and then requested a second test. At that point, the officer advised you that it was too late to provide a second sample.

Your evidence is that you initially decided not to take a second ASD test, but after speaking on the phone with a lawyer you repeatedly requested a second test. You made those requests both before and after the officer served you with the Notice of Driving Prohibition. The officer refused to let you provide a second sample.

Based on the evidence before me, I am satisfied that you had a right to request and you did request a second ASD test, but the officer did not provide you with a second opportunity. As there is no second analysis for me to consider, I find that the ASD did not register a fail result.

Decision

I am not satisfied that an ASD registered a "fail" on November 17, 2010. I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked.

Adjudicator

cc: Erik L. Lund
Fax: 250-492-4877

FEBRUARY 14, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Issues

There is one, determinative issue in this review -- did the ASD register a fail?

Facts, Evidence and Analysis

On the Report to Superintendent, the investigating officer stated that she analyzed a sample of your breath in an ASD and that the device registered a "fail". The officer also indicated that

Driving Prohibition Review Decision
Page 2

the calibration expiry date for the ASD was 2010/07/30, which is prior to January 27, 2011 -- the date on which the Notice of Driving Prohibition was served. The calibration of the ASD was not current. Based on the evidence before me, I cannot consider the ASD result. Having made this finding, I do not have to consider anything further.

Decision

I am not satisfied that the ASD into which you provided a breath sample registered a fail. I therefore revoke your driving prohibition, as required by s.215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including February 14, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.