

October 9, 2013

s.22

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

Introduction

On September 18, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

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

In your submission you state that as a result of being pulled over you were subsequently arrested and detained by the officer at approximately 3:52am. You state that you were

immediately placed in the back of the police vehicle and were not read any of your rights. You state that you waited in the back seat of the police vehicle and you were left alone for approximately fifteen minutes. You state that at approximately 4:10am the officer returned and you were given your first opportunity to speak to him and you were then read your rights and asked to provide a sample of your breath.

In his submission, Mr. Nunrha states that the officer arrived at the scene at 3:52am and did not make an ASD demand until 16 minutes later at 4:08am. Mr. Nunrha states that there is an unexplained delay in making the ASD demand and case law has established that the delay from the demand to the taking of the sample must be added to the pre-demand period. Mr. Nunrha referred to the case of *R v Bazil*, but did not provide it for my consideration. Mr. Nunrha submits that since there was an approximate twenty minute delay the demand was not made as soon as practicable and due to the delay, the ASD was not reliable when it was used.

I have considered your submission, however; I find that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Nunrha also submits that under section 254(2) of the Act the testing must be immediate and investigative in nature. Mr. Nunrha states that you were not given your right to contact counsel as the demand was not made immediately, and therefore, the ASD results are not reliable. Mr. Nunrha referenced *R v Jaycox* in support of his position, but did not provide it for my consideration. Mr. Nunrha states that you were detained for approximately fifteen minutes, and there is no evidence from the officer that your rights were read to you prior to this. Mr. Nunrha states that there is some evidence of *Charter* rights being provided to you, but this was done at 4:10am, and was still a breach of your rights in any event.

I have considered Mr. Nunrha's submissions; however, this review is an administrative process and not a criminal proceeding. The scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues or to apply remedies under the *Charter*.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0352 hours on September 18, 2013. In the Narrative Text Hardcopy (the

“Narrative”) the officer indicates that you were pulled over for speeding and were identified as the driver via your BC driver’s licence.

In your submission you confirm that you were driving when you were pulled over by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, both resulting in a “FAIL” reading.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0410 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0413 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 042914 and your second sample of breath into ASD serial number 101737. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 042914 and 101737.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “FAIL” reading.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on August 28, 2013, he checked the calibration of ASD serial number 042914. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 25, 2013, and the service expiry date as August 20, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 23, 2013, he checked the calibration of ASD serial number 101737. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 20, 2013, and the service expiry date as January 25, 2014.

Mr. Nunrha submits that the delay in the demand renders the ASD results unreliable.

I have considered Mr. Nunrha's submission; however I do not have any evidence before me to indicate that the ASDs were not reliable.

I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 18, 2013

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Sukhbinder Nunrha
fax: 604 594-8280

November 14, 2013

s.22

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

Introduction

On October 24, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

At the beginning of the hearing your legal representative, Cathryn Waker, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The evidence in the Report to Superintendent (the “Report”) is that Officer Hofsink (the “officer”) established you as having care or control of a vehicle on October 24, 2013 at 19:22 hours.

The evidence in the Narrative Text Hardcopy Occurrence Report (the “Narrative”) is that you were involved in a motor vehicle collision. The complainant involved in the collision believed you were intoxicated and called the police. Upon arrival at the scene, the officer said your speech was very slurred and when he asked for your driver’s licence, you handed him two separate bags of insurance papers. The officer told you he needed to see your driver’s licence and said he had to prompt you to look in your wallet. He said he found your wallet for you so you could produce your driver’s licence. The officer said when you exited your vehicle, you were staggering and nearly falling over. He said you had to support yourself on your car. You also had a strong odour of liquor on your breath. The officer asked you what time your last drink was and you answered “two hours ago”. The officer said that the complainant reported that when speaking with you at the scene of the collision, she believed you were impaired.

In your Affidavit, you said that you drove from your residence to the ^{s.22} where you purchased two 375 ml bottles of Canadian Club Whiskey at 5:50 p.m. You said you consumed no alcohol on October 24, 2013, prior to going to the liquor store so you were not impaired by alcohol. After stopping at the liquor store, you said you went to the Real Canadian Superstore for groceries and gas. You were driving home from the Superstore, approaching the intersection of ^{s.22} when the collision occurred. You said you were very stressed. You parked your vehicle, turned off the engine, put on the emergency brake and left the keys in the ignition so you would not misplace them. You then drank one of the 375 ml bottles of Whiskey to calm your nerves. After you finished the bottle of Whiskey, you said you threw the empty bottle and the second still full bottle into the bushes off the side of the road. You then exited your vehicle to speak with the other driver. Because of a ^{s.22}, after speaking with the other driver you went back to sit in your vehicle to get your insurance and registration information. You sat in the driver’s seat while you looked for these documents.

Your lawyer submits that your driving prohibition should be revoked because you were not impaired at the time of driving and the accident, and because you were not in care or control when you sat in the driver’s seat after the collision. She said you were sitting in the driver’s seat after the collision because of your ^{s.22} and noted that the officer did not witness you driving.

You said you had consumed no alcohol on that day prior to the 375 ml bottle of whiskey in your vehicle after the time of the accident. However, you also said you told the officer that you consumed two beers two hours ago because you were concerned about the fact that you had just consumed the whiskey. In my view, this is not logical. I do not understand why telling the officer you had two beers two hours ago would be any less concerning than telling him about the whiskey. In addition, if you were a “few hundred feet from [your] home” and had “no intentions of driving” after consuming the whiskey, I fail to understand why you had concerns about telling the officer you consumed the whiskey. I find it noteworthy that instead of walking the few hundred feet from the accident scene to your home, you instead asked the officer to take you to the s.22

You said that after the collision, you pulled your car over, parked it at the side of the road, consumed the bottle of whiskey, discarded the empty bottle and the full bottle in some bushes at the side of the road, and then exited your vehicle to go speak with the other driver. You also said you do not believe the other driver saw you drink the bottle of whiskey or discard both bottles. In my view, it is not relevant whether she saw you drink the whiskey or discard the bottles. I do, however, find it difficult to believe that the other driver would have sat and waited to speak with you about exchanging insurance information while you sat in your vehicle and drank an entire bottle of whiskey.

Ultimately, I do not find your version of events to be very credible.

In terms of Ms. Waker’s submission that you were not in care or control when you sat in the driver’s seat after the collision, with respect I do not agree. You have already explained that you had driven from your residence to the s.22 and then to the Real Canadian Superstore. You were driving home from the Superstore, approaching the intersection of s.22 when the collision occurred. The officer established you as having care or control of the vehicle at 19:22 hours and formed reasonable suspicion that you had consumed alcohol. Section 215(1) of the Act defines a driver as a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion. I do not dispute that you were sitting in the driver’s seat after the collision. However, this does not negate the fact that you had been witnessed driving your vehicle up to the point of the accident. After the collision, your vehicle was still operable as is evidenced by the fact that you drove approximately 200 feet away from the scene and parked it at the side of the road. The officer located you parked at roadside, sitting in the driver’s seat with the keys in the ignition. There was nothing preventing you from driving away after the collision. For the above reasons, I find it reasonable to conclude that if the officer had not intervened, you would have driven away from the scene.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 19:31 hours and at 19:50 hours, the officer used ASD serial numbers 101691 and 045933 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 045933 at 19:50 hours.

I am satisfied that the second analysis was provided by the officer and on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were "fail"; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 101691 was checked for calibration on October 17, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 14, 2013, and a service expiry date of January 25, 2014.
- ASD serial number 045933 was checked for calibration on October 3, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 31, 2013, and a service expiry date of January 25, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You said that you had consumed no alcohol on October 24, 2013, prior to the 375 ml bottle of whiskey in your vehicle after the time of the accident. However, I have already found your version of events to be not very reliable. Consequently, I find your evidence regarding how much alcohol you consumed also lacks credibility. I find it noteworthy that both of your ASD tests resulted in a "fail" on two different ASDs, both of which I have already found to be fully functional. Based on a consideration of the evidence in its totality, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 24, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Cathryn Waker, Articled Student
by fax 604-681-0652

OCTOBER 1, 2013

s.22

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

Introduction

On December 3, 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 if I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device, and that you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Issues

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

In his written submission, Mr. King argued that you were not served with a “true copy” of the Notice, because the Certificate of Service at the bottom of the Notice says the officer personally served you “with a copy of the Notice of Driving Prohibition”. Your lawyer also attached the “DRIVER COPY” of the Notice that you received on the night in question. Mr. King pointed out that this document had both a “3 days” and a “90 days” prohibition period checked off.

I acknowledge that the version of the Notice you received appears to have two prohibitions

Driving Prohibition Review Decision
Page 2

checked off, but the OSMV/POLICE COPY has only the 90-day prohibition checked. I also notice that there are other markings and blurred writing on your copy of the Notice. It appears that due to carbon paper in the IRP pads, the officer's writing from previous prohibitions came through onto the sheet you received. This would explain why the police copy is cleaner than the driver copy.

Regardless, I infer the officer served you with the Driver Copy on the night in question and you received a copy of the police version with the disclosure documents. Further, there is nothing before me to indicate that you were prejudiced by receiving a messier version of the document initially. Your lawyer did not specify what he meant by the officer not serving a "true copy" of the Notice; however, please be aware that the rules of evidence in an administrative review are not as stringent those as in a criminal trial.

In point two on the bottom of page three of Mr. King's letter, he argued that it is impossible for me to judge your credibility versus that of the investigating officer, based on the evidence before me. I agree that determining credibility is a difficult part of decision-making in an administrative review; however, there are methods of resolving disparate evidence before me, such as watching for internal inconsistencies within the officer's evidence and within your evidence, respectively.

Further, the Supreme Court in *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, found that an adjudicator conducting a review under section 215.49 of the Act has the power to make findings of fact, including who to believe, if there is conflicting evidence, and to draw inferences.

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Schnablegger indicated that he witnessed you driving or in care or control of the vehicle at 2334 hours, on December 3, 2010. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with a demand?

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

In the RTS, Constable Schnablegger said he noticed you had an odour of liquor on your breath, watery eyes, slurred speech, and that you admitted to having consumed three drinks. He said your last drink was at 2324 hours. The officer indicated that he formed the reasonable suspicion that you had alcohol in your body at 2334 hours. On point three on the RTS, Constable Schnablegger wrote that he read the ASD demand at 2334 hours. The officer also said in the Report to Superintendent/Vehicle Impoundment (the "RTS/VI"), that he read the ASD demand.

In paragraph 8 of your statutory declaration (the "Stat Dec"), you said:

"Constable Schnablegger did not read [you] any 'demand' from any card; he simply told [you] to blow into the instrument as hard as [you] could until he told [you] to stop."

You said from your "experience", you knew this was not a valid demand under the *Criminal Code of Canada* or the ASD Demand. You also said you are s.22 who has never operated or taken any courses on ASDs. These two statements are inconsistent; you imply you are inexperienced regarding ASD operation, but based on your unspecified "experience" you suggest you could recognize a valid ASD demand if you heard one. This inconsistency raises concerns in my mind about the reliability of your statements in this regard. Further, your evidence indicates you attempted to provide a breath sample into an ASD, so I infer you understood what the officer expected of you and that it was mandatory.

I acknowledge your denial of having slurred speech, but the officer's other observations, including your admission of having consumed alcohol establishes reasonable grounds to make an ASD demand.

Based on the evidence before me, including my concern with the reliability of your evidence, I am satisfied on a balance of probabilities that the officer made a valid demand. I now turn to whether you failed or refused to comply with the demand.

In part six of the RTS, Constable Schnablegger said you were:

"...given 4 attempts to provide a breath sample. Each time a one + bar reading could be obtained. A 'NOGO' reading promptly followed. s.22 warned that this behaviour was refusal."

In paragraph nine of your Stat Dec you said you blew into the instrument, as instructed. You clarified this by saying you blew into the instrument until a light came on, which you believed was a suitable sample. You also said the officer told you to blow into the instrument as hard as you could until he told you to stop. Again, I find your statements to be contradictory. You said the officer told you to blow into the device until he told you to stop, not until a light came on. Further, contrary to your lawyer's first argument in his letter, your own evidence demonstrates that Constable Schnablegger gave you instructions on how to provide a sample, but that you did not follow his directions.

In paragraph ten, you said the first time you blew into the device you verily believe it registered a “warn”. You said you believed this is what the light that came on meant, although you did not explain how you knew this is what the light meant. Mr. King submitted two pages from an ASD operation manual. At the bottom of page 15, the manual states:

“The progress of the exhalation is displayed to the operator, but it is not visible to the subject so the only indication to the subject is the audible click of the sampling system when he has just about run out of breath.”

Objective evidence provided by your lawyer indicates that it was impossible for you to have seen a light come on or a “warn” reading. Given this and the inconsistencies in your statements, I am not persuaded to find your evidence to be reliable. I prefer that of the investigating officer.

Based on all the evidence before me, I am satisfied that you failed or refused to comply with the demand.

Did you have a reasonable excuse?

In your Stat Dec you implied that something was wrong with the ASD, because you tried as hard as you could to provide a sample. You said it is possible that the mouthpiece was blocked. As noted above, you also said you stopped blowing when you saw a light.

In the first page of his written submission, your lawyer said the operating manual indicates that after one minute or three unsuccessful attempts, a “void” should appear on the ASD, which requires the officer to insert a new mouthpiece. Your lawyer argued that this was never done.

Mr. King also suggested that I should find your evidence to be as credible, if not more so than that of Constable Schnablegger, particularly regarding whether the mouthpiece was blocked or replaced. However, your lawyer did not indicate why I should make such a finding. As noted above, inconsistencies within your evidence and contradictions with the operating manual led me to find your evidence to be less reliable than that of the officer. I acknowledged that it is inappropriate to give a peace officer a credibility advantage. Credibility is a finding of fact which must be reviewed on a standard of reasonableness.

Your lawyer said the officer’s evidence indicates that Constable Schnablegger should have inserted a new mouthpiece, but “this was never done”. Mr. King’s statements imply that the officer recorded everything that occurred in the investigation. Accordingly, since Constable Schnablegger did not say he changed the mouthpiece, Mr. King concluded that it did not happen.

You received this prohibition on December 3, 2010, a few months after the IRP regime was introduced in BC. At that time, peace officers did not typically provide narrative reports to accompany the RTS, as they do now. In part six of the RTS, Constable Schnablegger used all the space available on the form to explain how you failed or refused to provide a breath sample. I am not compelled by Mr. King’s submissions to conclude that the officer did not operate the

ASD properly, merely because he did not refer to the mouthpiece in the limited space on the RTS.

Further, you said the officer walked away from you three times when he crossed the street to talk to other members. You said he was not operating the machine when he walked about 40 feet away. I do not know what you mean by “operating the machine”; when an ASD is operating, it is obtaining or analyzing a breath sample. If you meant that Constable Schnablegger was not obtaining and inserting a new mouthpiece, I find it reasonable that you would have said that. In addition, you did not say you could see everything he was doing when he walked away from you, so I question your certainty that the officer “never changed any mouthpiece at the roadside and never checked it to see if it was blocked.”

Overall, I find you did not provide compelling evidence indicating that there was anything wrong with the ASD. Based on the evidence before me, I am satisfied on a balance of probabilities that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. I therefore confirm your driving prohibition, as required by 215.5(1)(b)(ii) of the Act. I note that you were prohibited from driving for 90 days on December 3, 2010 and you have already served your prohibition.

This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 30, 2013

s.22

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

Introduction

On September 7, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that on September 7, 2013, at 20:55 hours, Officer Curwin (the “officer”) established you as a driver or having care or control of a vehicle.

You gave oral evidence in which you dispute the timing of the officer’s evidence. You said you were still at your friend’s house having dinner at 20:55 and therefore could not have been driving at that time.

I acknowledge your submission, however the issue before me is whether you were a driver and you have not disputed that you were.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 21:10 hours and at 21:23 hours, the officer used ASD serial numbers 061128 and 054816 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 054816 at 21:23 hours.

Mr. Arndt submits that there was an unexplained delay in administering the ASD tests and referred to the case of *R. Woods* for the assertion that the police did not administer the second ASD test forthwith.

I acknowledge Mr. Arndt's argument and I disagree. The language at sections 215.42(1) (a) and (b) of the Act states that a peace officer must inform a person of their right to forthwith request a second analysis before the Notice is served on that person. Essentially that means that before serving you with the Notice, the officer was required to inform you of your right to a second analysis and your request was required to be made immediately thereafter. The initial ASD demand is made pursuant to the *Criminal Code* and the requirement is that the demand be made and the test be provided forthwith. The second ASD test is optional. Therefore, there is no requirement under the Act that it be provided forthwith, only that it be requested forthwith after the first ASD test. For this reason, there is no requirement for the officer to provide you with a second test immediately.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were "fail" I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 061128 and ASD serial number 054816 were checked for calibration on September 6, 2013. Both ASDs were found to be within the recommended limits and functioning correctly. Both ASDs have a calibration expiry date of October 4, 2013, and a service expiry date of June 10, 2014.

As there is no evidence before me to the contrary, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

Mr. Arndt led oral evidence by you and your wife to suggest that the result of the ASD test was falsely elevated by residual mouth alcohol as a result of burping and the ASD test being conducted too soon after your last drink. Mr. Arndt referred to the excerpts from the RCMP ASD Manual, and the criminal law cases of *R. v. Mastromartino*, *R. v. Bensmiller* and *R. v. Seivewright* as authorities for the assertion that police must delay at least 15 minutes before administering an ASD test when there are concerns of residual mouth alcohol.

You gave oral evidence which contradicts the officer's evidence in terms of the timing of the events on September 7, 2013. You said you and your wife were visiting at the s.22 arriving at 6:00 p.m. You said you left the s.22 between 9:00 and 9:05 p.m. While there, you said you drank four beers and had two helpings of dinner. You said you had indigestion and were burping. You then told me that you finished your last drink seconds before you left at 9:03 p.m. You were stopped by police at the road block between 9:05 p.m. and 9:07 p.m.

Your wife gave evidence that is basically the same as yours, however she said you left at "approximately" 9:05 p.m. and were stopped by police at "about" 9:05 or 9:07 p.m. Your wife also disputes the officer's timing in terms of when you were pulled over and when the first and second ASD tests were conducted.

s.22 the dinner party hostess, was also present at your oral hearing and provided me with information about the timing of events. s.22 said you left just after 9:00 p.m. and puts the time at 9:05 p.m. She is familiar with that time because she said the group had just been discussing the fact that it wasn't quite 9:00 p.m. and then you left five to seven minutes later. s.22 said you were on her back patio at 8:55 p.m. and does not think the officer's time noted for observing you driving at 8:55 p.m. is correct.

Both you and your wife say the officer did not wait the required 15 minutes to ensure there was no residual mouth alcohol. You told me that the officer did not hear you correctly when you answered how long ago your last drink was. You said it was two minutes ago, but the officer has noted that it was ten minutes ago. You also said you were burping just prior to providing breath samples.

The evidence I have from the officer is that at 20:55 hours your vehicle approached the road block at which she was working. The officer spoke with you and detected a strong odour of liquor coming from the interior of the vehicle. She noted you were speaking in short words/sentences and that you were chewing gum. The officer asked if you had consumed anything alcoholic and you denied any consumption. You stated that your wife in the passenger seat had been drinking. The officer asked you to pull off the road and into a nearby parking lot. She then asked you to step out of your vehicle to ensure the smell of liquor was in fact coming from your passenger. The officer asked you to remove the gum from your mouth and blow into her hand. In doing so, she detected a very strong smell of liquor on your breath. The officer advised you you were under investigation for impaired driving and made the ASD demand. She asked you what time you had last consumed liquor and you replied that you finished your last beer "about 10 minutes ago". The officer waited a timed 5 minutes to administer the first ASD test based on the gum having been in your mouth and because you advised you had consumed liquor 10 minutes prior.

With regard to your submissions as to the timing of events, I do not dispute that you were visiting at the s.22 for approximately three hours. However, I do question how everyone was keeping track of the time. For example, you do not tell me whether everyone had a wrist watch that they referred to, was it a clock on the wall, or were people checking and comparing the time on their cell phones? I note that whatever the timing pieces were, I cannot know for a fact that they were all synchronized. I also note that you provide conflicting times. You first told me you left between 9:00 and 9:05 and then say you were stopped at the roadblock at 9:05 or 9:07. You also said you left seconds after you finished your last drink, at 9:03. To conclude, I find your evidence is unclear in terms of establishing the time that you left the s.22

With regard to the issue of the possibility of residual mouth alcohol, I note that the officer states in her evidence that you replied that you finished your last beer “about 10 minutes ago”. The officer notes that she “waited a timed 5 minutes to administer the first ASD test based on the gum having been in [your] mouth and that [you] advised [you] had consumed liquor 10 minutes prior.” Given that the officer has put your answer regarding the time of your last drink in quotation marks, it leads me to believe that this is in fact the answer you provided. In addition, given that the officer makes a specific notation about the fact that she waited a **timed** fifteen minutes leads me to believe that she was referring to a timepiece as she observed and recorded the events of her investigation. For these reasons, I find the officer’s evidence to be more reliable.

I acknowledge that Mr. Arndt has sent me two screen shots of your wife’s text message sent on September 7, 2013, at 9:13 p.m. Your wife told me that she sent a text message in between your first and second ASD tests. The RTS indicates that your first test was conducted at 9:10 p.m. and the second ASD test was conducted at 9:23 p.m. Since the time of your wife’s text message is at 9:13 p.m. this would seem to coincide with the timing between the first and second ASD tests. This in turn would seem to confirm that the officer’s timing of events is in fact correct.

In addition, I note that when asked by the officer whether you had consumed anything alcoholic you initially denied any consumption. After advising you that you were under investigation for impaired driving, you told the officer that you finished your last beer “about ten minutes ago”. The fact that you provided the officer with two different answers about whether you had consumed anything alcoholic leads me to doubt the reliability of your evidence.

You told me that you were burping prior to the ASD tests. You said you were hiding this activity from the officer because you did not want to appear impolite. However, in my view police are trained to record and make observations to ensure proper ASD tests are conducted. These observations include observing a driver to ensure no gum chewing, belching or burping, and smoking. Police are trained to hold off conducting an ASD test to avoid a potentially false reading. The officer in this case did not observe you to be burping and/or belching. As such, I find it reasonable to conclude that she acted accordingly in proceeding with the IRP investigation. I am not persuaded by your evidence that you were burping prior to the ASD tests.

The officer said she detected a very strong smell of liquor on your breath. Although you first denied consuming anything alcoholic, you then admitted to consuming four beers on the night in question. I have already found that the ASDs were reliable and note that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 7, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jeffrey R. Arndt
By fax 1-778-455-3999

November 6, 2013

s.22

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

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records before me confirm that disclosure documents were faxed to you. I will proceed with the review based on this confirmation.

You checked the box next to I did not fail or refuse to comply with the officer’s demand to provide a breath sample. However, a refusal or failure to comply with a demand are not applicable to your situation. I will consider all grounds available to you in this review.

In your written submission, you take full responsibility for your actions. You requested a lesser penalty as you use your vehicle for work. Last, you submitted that this is your first offence.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, or an individual’s driving record in this review. The

scope of the review is limited to the grounds as defined in the Act. In addition, subject to section 215.5(3), the Act does not grant me any discretion to alter the terms of a driving prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent for the IRP (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 0050 hours on October 19, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that he was approached by the pub’s security personnel, advising the male entering a s.22 appeared intoxicated and was told to take a taxi instead of driving. The officer observed a male entering the vehicle in the driver’s seat and backing out of the parking stall.

The officer reported that he activated his emergency lights and pulled you over; you were identified as the driver by way of a photo British Columbia driver’s licence.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Narrative the officer indicated that you provided a “FAIL” result at 0106 hours.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer’s evidence is that you declined, stating “No, the security guard told me I should’ve phoned a cab. I should have had.”

There is no evidence before me to the contrary. I am satisfied that the second analysis was not provided by the officer.

Was the Notice served on the basis of the lower analysis result?

The officer recorded the single test result as "FAIL". You present no evidence to the contrary. With this being the single test result obtained, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificate regarding the ASD used in your case indicates that the device was found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

October 4, 2013

s.22

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

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

At the outset of your oral hearing you confirmed that you received full disclosure. You applied on two grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

You stated that you need your driver's licence for work. While I acknowledge and appreciate your situation, I am not authorized by the Act to consider 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. In this review, I can only consider and make decisions on the issues noted below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 14, 2013, 00:55 hours. In the Narrative the officer stated that an employee at the s.22 contacted the RCMP indicating that she advised a female driver that she was too intoxicated to drive home, but that the female drove anyway. The officer noted that the employee witnessed the female driver leave the bar driving a s.22. The officer identified you as the driver. He noted that when asked for your driver's licence you took some time to find it. He further noted that your words were slightly slurred and you had a strong odour of liquor on your breath.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 14, 2013, 00:55 hours.

Did the ASD register a “FAIL”?

In the RTS the officer noted that there were two tests and he recorded both results as “FAIL”. Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

You stated that the same ASD was used for the second test.

I have considered your statement. However, I have also considered the officer's sworn evidence which includes recordings in the RTS and Narrative, and copies of the Certificates of a Qualified ASD Calibrator which all identify convincing details that two ASDs were used. I prefer the officer's more detailed sworn evidence over your statement.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of a Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

I am satisfied that the ASDs were reliable.

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

You explained that you were drinking responsibly. You stated that you had four drinks and about 2 ounces in a four to four and a half hour time period. You also stated that the person who made the call to police thought you had dropped a glass, but you explained that you were just helping the waitress pick up the broken glass. You believed there was a mix up.

While you believed there was a mix up, I note that you did not dispute the officer's evidence that the employee advised you that you were too intoxicated to drive, yet you drove home anyway. I acknowledge your claim that you were drinking responsibly. However, in considering the evidence before me, I find it unlikely that two separate ASDs malfunctioned and produced results that did not accurately reflect your BAC. I find no compelling evidence before me that would lead me to question the ASD results.

I am satisfied that the ASDs registered a "FAIL" as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

October 10, 2013

s.22

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

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on four grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 18:45 hours on September 20, 2013.

You acknowledged that you were involved in a vehicle accident just before 7:00 p.m. on September 20, 2013.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASD registered a "FAIL" at 19:30 hours. There is no evidence before me to the contrary.

I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that you were advised of your right to a second analysis on a different ASD and that the lower result would prevail. In the Narrative, the officer provided evidence that your right to a second test "was read from the IRP booklet."

You indicated that after the first test you asked if you could go to the detachment to provide a test on a 'real' breathalyzer because you knew the machine was wrong. You said that the officer told you that was not an option, and he "told [you] [you] could blow again."

Under the Act, officers are not required to take drivers to the detachment to provide a breath sample. Further though, you did not address or deny the officer's evidence that he read you the right to a second analysis "from the IRP booklet". Although I do not know exactly what this booklet is, I infer that it is likely some type of police issued booklet with respect to conducting an IRP investigation under section 215 of the Act. I think it is unlikely that the officer would have to read from this booklet if all he said to you with regard to the second analysis was that "you can blow again". While officers are not required under the Act to advise drivers that the second analysis will be performed on a different ASD, I am satisfied by the officer's evidence in the sworn Report and attached Narrative that he did.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that you were provided with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Narrative the officer reported that s.22 the owner of the property on which your vehicle overturned, advised the officer that he noticed an odour of liquor on you when he assisted you in getting out of the vehicle. The officer stated that when he spoke with you at the rear of the ambulance he detected an odour of liquor, specifically beer, on your breath. The officer stated that when he asked if you had consumed any alcohol that day you stated 'No'. The officer reported that after the ASD demand was made, however, you stated that you had actually consumed two beers at approximately 2:00 p.m. that day and that you consumed no alcohol after those two drinks.

In the Report, the officer recorded the serial number for the ASDs used as 101258 and 101274, respectively. The officer also provided two Certificates of Qualified ASD Calibrator (the "Certificates"), which bear the same serial numbers as those noted in the Report.

You indicated that you originally denied consuming alcohol but then told the officer that you had, earlier. You stated, "I was not drunk at all and so I didn't think it would be an issue." You stated that you only drank three beers that entire day and it was over a number of hours, so there was no way you were over the limit.

You indicated that after the first test you asked the officer if he was certain the machine was accurate and he said it was. The officer told you that you could blow again and you indicated that for about two minutes you pleaded with him to take you to the police station, but he said that was not an option and asked you again if you were going to blow again. You stated that you agreed. You said that the officer took the mouthpiece off the device, opened up a wrapper of one of the mouthpieces in his case and put a new mouthpiece on the device. You said that the case was on the officer's car the entire time you were with him so you could see inside it, and there was no other device in it. You stated that the first machine remained in your view the entire time, and at no time did the officer go back to his car to get a new device.

Mr. Armour stated that he confirmed with a member of the s.22 RCMP that each device has its own case; therefore, when he or any other officers go out to enforce traffic safety, they take two separate cases with them, each with its own ASD inside. Mr. Armour submits that if the officer did in fact use two separate ASDs then he would have had to have retrieved the second device from inside his vehicle, and the officer does not provide any evidence that he did so. He also stated that it should be noted that the officer gave no details in his Narrative about ever changing the machine or obtaining a second device.

Mr. Armour submits that the timing of the two samples, taken two minutes apart, also supports your version of events. He indicated that during this time the officer provided evidence that he discussed the possibility of going to the detachment with you, and this is consistent with your evidence. Mr. Armour submits that according to the officer, in under two minutes he obtained a fail reading, had a discussion about providing a second sample and about going to the detachment, returned to the inside of the car to get a second ASD, turn it on and allow it time to do its internal checks and

boot up, obtain a reading of “nogo”, explain the meaning of “no-go” and how to provide a proper sample, change the mouthpiece and take a final sample. He stated that this seems implausible.

I have considered Mr. Armour’s submissions with respect to what the officer did within the two minutes after obtaining the first test result. I find there is nothing in the officer’s evidence to support that he had a discussion with you about going to the detachment, or that he explained the meaning of “nogo” or that he changed the mouthpiece after the “nogo” reading. Further, I find Mr. Armour’s submissions with respect to what the officer would have had to have done preparing the second ASD or where he would have been retrieving it from to be very odd, considering you are arguing that a second ASD was not used. As well, I find some of his submissions to be speculative and not “evidence” before me.

Mr. Armour referenced the case of *Spencer v. Superintendent of Motor Vehicles*, stating that in cases involving questions of credibility, police are not presumed to have a credibility advantage. He stated that in this instance, your evidence should be preferred for a number of reasons. I am familiar with *Spencer* and although I acknowledge that I cannot presume that the police have a credibility advantage, based on the evidence before me I disagree that I should prefer your evidence over the officer’s for the following reasons.

I have already made a finding that the officer advised you of your right to a second analysis on a different ASD and from the evidence, it appears that this occurred at 19:30 hours which was two minutes prior to the second analysis. As such, if the officer was using the same ASD, it does not make sense to me that you would not have spoken up, particularly when you were just advised it would be done on a different ASD, you claim that you doubted the accuracy of the first test result and that you requested to go to the detachment and provide a sample there.

I also find it noteworthy that you were initially dishonest with the officer when he asked about you consumption, simply because you were “not drunk” so you did not think “it would be an issue.” Further, I note that you advised the officer that you consumed two beers, but for this review you said that you consumed three. In other words, not only were you initially dishonest with the officer, I am left to wonder if you were untruthful again with the officer with respect to how many beers you consumed or if you have been untruthful in this regard for this review.

Last, I find the information Mr. Armour obtained from a member of the s.22 RCMP to support that it is more likely than not that the officer had two ASDs with him. I say this because the member said that whenever they go out to enforce traffic safety they take two separate ASDs. Further, as I previously found, the officer’s evidence is that he advised you that the second test would be on a different ASD. As well, I have evidence before me in the Report that two different ASDs were used, along with two Certificates bearing the same serial numbers as noted in the Report. I do not require additional evidence from the officer in his Narrative which detail his exact movements with respect to using a second ASD.

Based on all of the evidence before me, I do not find your evidence to be credible and I find I prefer the officer’s.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a “FAIL”.

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

In the Certificates, Andrew Butler certified that the ASDs were found to be within the recommended limits when he checked their calibration on August 28, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Cory Armour
Fax: 250-762-3163

October 29, 2013

s.22

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

Introduction

On September 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You checked the boxes next to three of the grounds on the application form. However, the grounds associated with a refusal or failure to comply with a demand are not applicable to your situation. I will consider all grounds available to you in this review.

At the outset of the oral hearing you confirmed that you had the disclosure documents. I have proceeded with the review based on that confirmation.

In your oral hearing you explained that you have medical issues, and you require your licence for your job. I acknowledge these submissions 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.

Issues

The following are the issues in this review:

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

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

In the Report to Superintendent for the IRP (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 2120 hours on September 5, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that he observed you stopped in the travel portion of the lane. He stated that you were straddling the centre line of the road urinating. The officer stated that he activated his emergency lights and followed you for approximately 3 kilometers. He stated that you eventually came to a stop in the middle of the travel portion of the road.

In the hearing you deny that the officer was following with his emergency lights for 3 kilometers. You stated that you were just looking for a place to pull over safely and you believe it was more like $\frac{3}{4}$ of a kilometer. In addition, you deny that you were urinating in the middle of the road.

I acknowledge that your evidence is quite different from the officer’s; however, you did not deny that you were driving.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided a “FAIL” result at 2129 hours.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

In his Narrative the officer reported that you declined the second test.

You stated that the officer did not offer you a second test.

Under the Act, an officer is mandated to inform a person of their right to request a second ASD test. Once this right has been offered it is the person’s choice to submit to a second test. The

evidence before me indicates that you declined the second test. I conclude that you were advised of your right and you declined.

Was the second analysis performed on a different ASD?

I have already made a finding that you did not request a second test.

Was the Notice served on the basis of the lower analysis result?

The officer's evidence is that one ASD test was administered, the result of which was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The analysis of your breath was performed on an ASD with the serial number 101283. The officer provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 16, 2013. This ASD had a Calibration Expiry Date of September 13, 2013, and a Service Expiry Date of September 19, 2013.

This Certificate confirms that this ASD was within the recommended limits and was functioning correctly. In the Report the officer swore that your ASD test was performed by a qualified ASD Operator and that the ASD was functioning correctly

There is no evidence to the contrary.

I am satisfied that the ASD was reliable.

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

The officer's evidence is that there was a strong odour of liquor on your breath, you were unsteady on your feet, and you had watery eyes. You admitted consuming alcohol and, when asked the time of your last drink, replied "half hour."

In the hearing you stated that you had a beer in the console of the van and you told the officer you just had a beer.

While you have asserted that you consumed a beer just before; I do not find this statement very convincing. I find that when the officer asked you when you had your last drink he turned his mind to the issue of mouth alcohol. Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. Therefore, because he turned his mind to this question I find it is more likely than not that if you had advised him that you just had a beer he would have waited the 15 minutes.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

You are prohibited from driving for 90 days. Your prohibition took effect on September 5, 2013. You have already served 12 days; therefore, you have 78 days remaining. Your prohibition commences November 1, 2013. Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

October 31, 2013

s.22

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

Introduction

On October 11, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer - Cst. Ricker - indicated that you were driving or in care or control of a vehicle at 2023 hours on October 11, 2013. Cst. Ricker, in the Occurrence Report, provides more evidence: a witness reported your vehicle swerving; he waited to watch for your vehicle, and followed your vehicle. Upon stopping your vehicle, he observed you as the driver of the vehicle, and identified you by your BC driver's licence.

In your statement, you confirmed that you were "pulled over around 8pm by officer Jeremy Ricker."

I am therefore satisfied that you were driving at the time and date placed in to evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 2031 and 2036 hours.

Mr. Armour provided no evidence on your behalf on this issue; he noted: "She is not saying the machine didn't register a fail or that the officer didn't use two different machines, or that she wasn't shown the results of the machines".

I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, Cst. Ricker indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the occurrence report, he notes this occurred at 2033 hours. He provides that you stated you wanted to provide a second sample: "Yeah, I guess."

There is no evidence to the contrary. Based on sworn evidence, I am satisfied that the officer advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed using a different ASD?

The officer's evidence in the Report is that he provided the second analysis on your request, on ASD serial number 101068. In the occurrence report, he notes proceeding with a second sample, and showing you the result.

In his submissions, Mr. Armour does not question the existence, or the result, of a second analysis. I therefore find this analysis occurring at 2036 hours to be the second analysis provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Cst. Ricker recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASDs serial numbers 101054 and 101068 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

For ASD serial number 101054, the qualified ASD Calibrator, J. Stanviloff, certified that on October 1, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 29, 2013 and the service expiry date as October 30, 2013.

For ASD serial number 101068, the qualified ASD Calibrator, J. Stanviloff, certified that on October 1, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 29, 2013 and the service expiry date as April 25, 2014.

Mr. Armour made no submissions on the issue of ASD functionality. I am therefore satisfied of the reliability of each ASD in obtaining samples at roadside.

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

Your lawyer summarizes your statements on your behalf in his letter dated October 21. Your stated drinking pattern calls the results of the ASDs into question. He bases this on the general rate of alcohol metabolizing in a person's system "at a rate of about one ounce per hour."

You provide details in your statement:

- you finished work at 6pm, then went to your friend's house;
- you had two vodka and coke with dinner;
- upon Cst. Ricker mentioning the odour in his interaction with you, and the reason for his stopping you, you agreed to provide a sample after informing him of two drinks;
- you deny not telling Cst. Ricker initially about your consumption;
- you also take issue with his Report stating "3 hours earlier" because you were working at that time.

s.22 a friend, also provides a statement that shows you got to her house at 6:15pm, and your two drinks, leaving her house "around 7:30 pm."

In comparing your version of events to that of the officer, I look carefully at two aspects of the evidence.

First, in furtherance to Mr. Armour's points on metabolization of alcohol, the calculation he relies on is very broad, not taking into account a number of other factors that are necessary to consider. Your statement does not provide further evidence in this regard. Factors not stated include the rate at which you consumed two vodka-cokes, and the amount of alcohol in each drink. In addition, your physical make-up and activities of that particular day also are relevant factors to this consideration.

Secondly, the timeline provided by you in your statements is not clear. With regard to the rate of consumption, two drinks within roughly a single hour is a significant amount, especially vodka with a higher alcohol percentage. In your statement you do not provide an exact time at which you left s.22 home; her statement provides the time "around 7:30 pm." You state you were pulled over "around 8pm" which does not account for the officer's recorded time of stopping you at 8:25pm. Taking s.22 provided time into consideration, this leaves approximately 55 minutes that are not accounted for in your statement. I find the officer's recording of time to be strictly accurate throughout the evidence he provides; you do not specifically protest the times recorded by the officer, nor do you provide accuracy on these points.

You do take issue with the evidence presented by the officer with regards to the time of your last drink. You state: "I read in his report that he says I said I drank them '3 hours earlier'". However, the Report and the occurrence report completed by Cst. Ricker both state: "about 3 hours ago" in those exact terms. The term you provide to deny Cst. Ricker's evidence is not strictly synonymous.

With this vagueness in place, I cannot accept your pattern of consumption overall, due to the lack of detail on specific amounts you drank, in addition to the varying estimations of time.

In contrast, I have evidence recorded by the officer that you provided two ASD samples which both registered "FAIL." I have found the ASDs to be functional and reliable at the time they were used at roadside. On a balance of probabilities, I find the ASD results to be reliable. The alcohol consumed in all likelihood resulted in "FAIL" results; there is no compelling evidence to establish a factual scenario otherwise.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 11, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Cory P. Armour
Tessmer Law Offices
fax: 250-762-3163

October 8, 2013

s.22

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

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

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

To date I have not received any submission from you with regard to your IRP. I have continued with this review based on the evidence before me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2016 hours on September 20, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that he received a report of a possible impaired driver in a s.22

s.22 The officer states that he parked his vehicle and waited for the s.22 to arrive at his location. The officer states that he observed the s.22 activated his emergency equipment and followed the s.22 to the owner's residence. The officer states that he observed the driver exit the vehicle and you were identified as the driver.

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

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

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

In the Report, the officer indicates that you had the odour of liquor on your breath. In the Narrative, the officer states that he formed his suspicion based on the initial driving complaint, his observation of you driving without headlights, being unsteady on your feet, slurred speech, and an odour of liquor coming from you. The officer states that after speaking to you for a few minutes, he read the ASD demand to you from a card.

I am satisfied that the peace officer made a valid ASD demand.

The officer indicates that he informed you that refusing to provide a breath sample carried the same penalty as providing a "FAIL" result on the ASD. The officer states that while he was reading the ASD demand you sat down in your vehicle and stated, "You're stressing me out Jon, I need a drink." The officer states that when he looked up he observed you to be drinking from a bottle of vodka. The officer states that he then took the bottle from you, and arrested you for refusal to provide a breath sample, and obstruction.

Having considered the officer's evidence, I do not find that I have any compelling evidence before me to indicate that you intended to provide a sample of your breath. The officer indicates that he explained the process of providing a sample of breath to you, and you refused to cooperate.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

I do not have any evidence before me to indicate that you had a reasonable excuse. I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

October 3, 2013

s.22

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

Introduction

On September 14, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Two of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jennifer L. Currie. I have proceeded with this review based on that confirmation. I acknowledge receipt of Ms. Currie's submissions, together with a copy of the case *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638, and your signed statement.

Ms. Currie submits that your driving prohibition should be set aside because the officer's evidence does not establish that he formed the belief that your ability to drive was affected by alcohol or, if he did, that such belief was based on reasonable grounds. Ms. Currie provided me with a copy of the *Wilson* case in support of her submission.

I acknowledge Ms. Currie's submission on this matter, and I have read and considered the *Wilson* case. I acknowledge the Court's ruling, however, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the "Report") is that on September 14, 2013, at 03:10 hours Officer McKinney (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

In your submission, you dispute the officer's evidence regarding your driving behavior; however, you do not dispute that you were a driver.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 03:11 hours and at 03:20 hours, the officer used ASD serial numbers 101343 and 101345 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101345 at 03:20 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were a "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 101343 was recalibrated on August 23, 2013, and then checked and found to be within the recommended limits. This ASD has a calibration expiry date of September 20, 2013, and a service expiry date of October 31, 2013.
- ASD serial number 101345 was checked for calibration on August 23, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 20, 2013, and a service expiry date of October 31, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

I have read and considered your signed four page statement. You provided me with some details about the day's events on September 13th, and then describe the events of that evening. You said you sat out on the patio of your friend's summerhouse but neither you nor s.22 consumed any alcohol. You both went to a party where you consumed one bottle of Corona beer between 8-8:30 p.m. You then went to a second party where you say you drank three 355 ml cans of Twisted Iced Tea, which is 5% alcohol. You drank between 10:10 and 1:00 a.m., at which time you said you stopped drinking because you planned on driving later. You said you were "very surprised" by the "fail" ASD test results. You said you weigh s.22 and you were certain that by the time you did the ASD tests, you had a BAC well under the legal limit for driving. In addition, you dispute the officer's evidence on several points. You assert that you did not have

red, watery eyes but if you did it was because you had been wearing your contacts for an extended period of time; you were not walking in a deliberate or predetermined way; you did not sway to any degree and you were not displaying any signs of impairment when dealing with the officer.

The officer's evidence is that, in addition to the appearance of your eyes, your deliberate/predetermined manner of walking and slight swaying, he detected a strong smell of liquor on your breath and body. I cannot comment on how impaired you say you felt at the time but note that you blew a "fail" ASD test result on two different ASDs which I have already found to be functioning correctly. As well, Section 215.41(2) of the Act states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%.

You said at paragraph 26 of your written statement that you do not understand why you blew a "fail" on the ASDs because you did not consume enough alcohol to have a blood alcohol level over 80mg%. However, at paragraph 13 you said that you were certain that by 3:00 a.m. you had a "blood alcohol level well under the legal limit" for driving." I question how you would know what your BAC was as there is no evidence before me to suggest that you had any means of knowing what your BAC was for certain. I do have evidence before me in the form of the two "fail" ASD tests taken on ASDs which I have already found to be functioning reliably. Consequently, I conclude that you must have been mistaken about your drinking pattern that night.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jennifer L. Currie
By fax 604-590-5626

November 8, 2013

s.22

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

Introduction

On May 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

Decision

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

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

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. **Original receipts and invoices with proof of payment** must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You 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: Kurt Frochlich
Fax: 250-492-4877

October 21, 2013

s.22

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

Introduction

On November 24, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Issues

The following are the issues in this review:

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

- Was the ASD reliable?

Facts, Evidence and Analysis

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

Was the ASD reliable?

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

Decision

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

Records at this office indicate that the vehicle associated with this IRP has already been released. Since your IRP review is successful and the prohibition is revoked, you are eligible to have the towing and storage costs reimbursed by the Superintendent. To ensure the correct charges are refunded to you, **you must attach receipts and invoices with proof of payment** and you must also enclose a copy of this letter.

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

s.15

Adjudicator

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

OCTOBER 21, 2013

s.22

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

Introduction

On September 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

When you applied for this review, the ground that you checked on the application was that you did not refuse or fail to comply with the officer’s demand to provide a breath sample. However, that ground is not applicable in your case, because of the reason for which you were prohibited. For your benefit, I have considered all grounds applicable to your situation.

At the beginning of the hearing, you confirmed that you had received all of the disclosure

documents before me. I proceeded with the review based on that confirmation.

In the oral hearing, you commented on the officer's evidence of your driving behaviour and the odour of liquor in the vehicle. These matters can contribute to an officer's reasonable suspicion that a person has alcohol in his or her body, which may lead the officer to make a valid ASD demand. However, the validity of the demand is not an issue in this review; it is relevant only in circumstances where a person fails or refuses to comply with a breath demand. As a result, factors that led the officer to make an ASD demand are not relevant to my considerations.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Enkirch indicated that he witnessed you driving or in care or control of the vehicle at 2030 hours, on September 28, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Enkirch said you provided a breath sample into an ASD and that the device registered "FAIL", as a result of the analysis. There is nothing before me to the contrary. I am satisfied that the ASD registered "FAIL" at 2034 hours, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Enkirch indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis, but that you declined to take advantage of this opportunity.

Was the second analysis provided by the officer?

I am satisfied that the second analysis was not provided by the officer, because you did not request a second test.

Was the second analysis performed on a different ASD?

This issue is not relevant, because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that the ASD used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificate of a Qualified ASD Calibrator regarding the ASD used in your case indicates that the device was found to be functioning correctly and was found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASD was reliable.

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

You told me that you had not consumed any alcohol on the night in question. You said you left work early – at approximately 7:07 to 7:09 pm, because you were s.22 You told me you had started to feel ill two days before. You said you did not explain your condition to the officer, because it was embarrassing. You said it takes you half an hour to get home and you explained that you had to stop at a few friends' places on the way to use their clean washrooms; you said you do not like to use gas station washrooms that are usually dirty.

You said you had two cigarettes and two orange juices ("OJs") at the first friend's place where you stopped. You said you also consumed some Benadryl and Nyquil there, although you did not say how much you consumed nor when this occurred.

You did not indicate how long you were at the first friend's home, but you told me you left work at approximately 7:09 pm and you did not dispute the officer's evidence of being pulled over at 8:30 pm. At some point after you left the first friend's house, you pulled over to text another friend to ask if you could stop there to use her washroom. The police pulled you over shortly after you sent this text message and started driving again.

Your evidence raises questions in my mind. You implied that you were very uncomfortable,

given your condition, so it seems odd that you would stay at your first friend's place for the length of time it would take to have two cigarettes and OJs. These factors cause me to question the reliability of your evidence of needing to get home as soon as possible and of your reported lack of alcohol consumption.

You said you work s.22 and you would be fired on the spot, if there was any indication that you had been drinking at work. You said it does not make sense to take the risk.

You had an explanation for why the officer noticed symptoms that are associated with a driver who is affected by alcohol – the driving behaviour, the odour of alcohol, the watery eyes, your difficulty retrieving your driver's licence and your apparent difficulty following directions. You told me that after you finished texting the second friend, you pulled back onto the road and realized you had left the emergency brake on. You also said you had a problem with a cord of some kind and that these things must have caused the swerving the officer witnessed.

You said the odour of liquor that the officer noticed was caused by a cider bottle that had exploded in the vehicle earlier. You said only a little of the bottle contents sprayed out, so it still looked fairly full to the officer. You said the other indicia of consumption the officer noticed were caused by your uncomfortable condition.

As noted above, I have concerns about the reliability of your evidence. If I accept your explanations for the undisputed symptoms of alcohol consumption that the officer observed, there are still two difficulties I note. First, your breath sample registered "fail" on an ASD that I found to be reliable, and second, you did not ask for a second analysis that could have proven the first test faulty. If you were shocked by the result of the first ASD test, it seems odd that you did not tell the officer that the result did not make sense and request a second test. Constable Enkirch's evidence in the Narrative is that he asked you if you wanted a second analysis twice and explained that you had nothing to lose by doing it. He indicated that you said "No, I don't want to."

The officer's evidence confirms that while waiting for the tow truck, you told him a number of times that you had to use the washroom. His evidence is that you said "I had a couple of d. . ." and then you stopped speaking. You told me you were not going to say "drinks", but that you felt humiliated to begin with and that the officer seems to be making his own assumptions about what was going on, so you did not finish the sentence. You told me you went in front of the vehicle to relieve yourself at this point. This could explain why you did not take time to do a second analysis, but it this does not get past the undisputed evidence that your breath registered a "fail" on a reliable ASD.

Further, while you were not required to provide any particular evidence for this review, I find it odd that you did not submit any corroborating statements from friends or co-workers to support your version of events.

You did not provide any persuasive evidence that would cause me to doubt the "FAIL" reading

on the ASD. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 28, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 13, 2013

s.22

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

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your IRP Application for Review you indicated three grounds for review, two of which are not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

In your written submission, you indicated that your licence is of great value to you. Specifically, that you require your licence as you live in a rural area and your employment duties include s.22

s.22 Therefore, without a licence your employment will be terminated. You submit that this will result in a “domino effect” that will most likely cause you to apply for welfare in the near future. Moreover, s.22 provided a letter that reiterated the importance of you holding a valid licence in order to continue your employment as s.22 I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances, employment or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the “RTS”), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2055 hours on October 26, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 2059 hours and 2101 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101033 and 056523, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Cst. William Douglas Long certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 5, 2013, and October 4, 2013, respectively. Cst. Long also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 31, 2013

s.22

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

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

One of the grounds that you applied on is not relevant to your circumstance. I will consider all the applicable grounds in this review.

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

In your submission you stated that your driving record will not indicate any prohibitions due to alcohol or no insurance.

Under the Act I am not authorized to consider an individual’s driving record in this review. The scope of the review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent for the IRP (the "Report"), the officer indicated that you were driving or in care or control at 1708 hours on October 12, 2013. The officer submitted an Occurrence Report (the "Narrative"), which forms part of the Report and is also sworn. In it, he noted that he was operating the Automated Licence Plate Recognition unit (ALPR) on highway 97 s.22 when he registered a hit on plate s.22. The hit showed the vehicle as uninsured. The officer reported that he conducted a traffic stop and you were identified as the driver.

There is no evidence to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

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

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

In the Report, the officer indicated that he formed his suspicion at 1716 hours and read the ASD demand at 1723 hours. He checked the box to indicate that you had an odour of liquor on your breath, and he indicated that your response to being asked the time of your last drink was "2 minutes before you pulled up".

In the Narrative, the officer stated that he formed the suspicion that you were impaired by alcohol given the following:

- The strong odour of liquor on your breath.
- Red eyes.
- Admission of consumption.

In the Narrative, the officer stated that after he read the demand; he asked you if you understood. Your response was "I think so". You were asked what you did not understand. You did not reply. The demand was read, and again you indicated "I think so."

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

In determining whether you failed or refused to comply with the demand, I turn again to the Report. The officer checked the box to indicate that you refused. He recorded the time of the refusal as 1728 hours.

The officer provided the following evidence for your attempts:

- 1st attempt you placed the mouthpiece in the left corner of your mouth and blew out the rest of your mouth. No air was being blown into mouthpiece and out the back of the ASD. The ASD display did not indicate any air being blown into the ASD.
- 2nd attempt you blew but stopped before a minimal volume of air was blown into the ASD.
- 3rd attempt you blew into the mouthpiece but stopped before a minimal volume of air was blown into the ASD.

- 4th attempt you blew into the mouthpiece but stopped before a minimal volume of air was blown into the ASD

The officer stated that he advised you of the consequences.

- 5th attempt you blew into the mouthpiece but stopped before a minimal volume of air was blown into the ASD.

You were deemed a refusal. There is no evidence of a valid result. I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You stated that if the officer believed you were over the legal limit to safely operate a vehicle and after 4 unsatisfactory results on the ASD he should have ordered a blood, saliva or urine test. However, I am not aware that the officer had any obligation to provide you with any alternative method.

You stated that you suffer from s.22 and one of the side effects is s.22
s.22 You stated that the muscles have to work harder to inhale and exhale.

I acknowledge that you suffer s.22 however your actions were not consistent with someone who was having difficulty in providing a sample; rather, the evidence suggest that you were not making earnest attempts in providing a suitable breath sample.

You stated that the officer observed that you were speaking clearly, loud, and breathing normal. You suggested that this is not consistent with intoxication. In considering this statement I find that the officer did not record this information beneath your actions and behavior for reasonable and probable grounds. He made this statement after the 5 attempts as an observation that he believed there was no reason you could not provide a suitable sample.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

September 25, 2013

s.22

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

Introduction

On August 2, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on the ground that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" however, that ground is not applicable to your situation because you did not receive a refusal IRP. For your benefit, I have considered all the grounds available to you.

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

In accordance with the BC Supreme Court's decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the "Superintendent's Report on Approved Screening Devices" which may have been disclosed to your lawyer is not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0040 hours on August 2, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver's licence.

In your evidence you state that you were driving your friends home from the bar when you were stopped by the officer.

I am satisfied that you were not a driver within the meaning of section 215.41, of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0042 hours and 0047 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary.

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0044 hours.

I have no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0047 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101230 and your second sample of breath into ASD serial number 101238. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101230 and 101238.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading.

I have no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on July 8, 2013, he checked the calibration of ASD serial number 101230. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 5, 2013, and the service expiry date as June 7, 2014.

For the second ASD, the qualified ASD calibrator certified that on July 8, 2013, he checked the calibration of ASD serial number 101238. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 5, 2013, and the service expiry date as September 17, 2013.

I have no evidence before me to the contrary.

I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

The officer indicates in the Report that your response to the time of your last drink was "45 minutes to an hour ago." In the Narrative, the officer indicates that your response to the time of

your last drink was, “couple drinks 45 minutes to an hour ago.” The officer also indicates that you had the strong odour of liquor on your breath.

In your submission you state that you did not consume any alcohol until you arrived at the Level nightclub. You state that while at Level you ordered two drinks, at approximately 10:20pm and 11:00pm. You state that around midnight your friend s.22 bought you another drink which you casually drank until 12:35am when your friends approached you and told you that they believed s.22 and that they wanted to leave immediately. You state that you had just taken a small drink when you went to leave. You state that it took about three minutes to leave the Level and to get into your car. You state that you were driving for about one minute before you encountered Cst. Smith. You state that when dealing with the officer you forgot that you had just consumed part of your last drink, and this is why you told him that your last drink was 45 minutes to an hour prior. You state that you were concerned for your friend’s well-being and it was not until the next day when you told your roommate, that you were reminded that he had bought you a drink shortly before you left the bar. You state that you only consumed two and a half one ounce drinks between 10:20pm and 12:35pm and it is your belief that the ASDs should not have registered a “FAIL” reading. You state that you believe the “FAIL” readings to be due to mouth alcohol.

s.22 states in her evidence that you did not consume any alcohol prior to your arrival at the Level. s.22 states that you consumed two drinks, after 10:15pm, and around 11:00pm. s.22 states that you were still consuming your final drink when you were approached by your friends who wanted to leave. s.22 confirms that you were driving for less than a minute before you were stopped by the officer.

You have also provided a statement from s.22 states that he purchased a drink for you around 12:00am. s.22 states that the walk from the Level to your vehicle took less than five minutes, and that you were stopped by the officer within a minute of driving. s.22 states that when you were talking the following day, he reminded you that you had been drinking your last drink immediately prior to leaving the club.

Your evidence also includes an expert report from Ms. Jakus, a forensic alcohol consultant. Ms. Jakus states that your final drink of vodka would not have been absorbed by the time of your ASD analyses and that based on your claimed drinking pattern, your BAC at the time of your ASD analyses would have been 0-14mg% and 0-13mg% respectively. Ms. Jakus also states that the Alco-Sensor IV DWF Testing Procedure provides the following instructions, “ensure that the subject has not consumed alcohol for at least 15 minutes and that there has been no smoking for at least 5 minutes.” Ms. Jakus also provided further documentations, affirming the 15 minute mouth alcohol timeframe. Ms. Jakus states that given your drinking pattern, it is her scientific opinion that the last half ounce of vodka that you consumed before leaving the club at 12:35am would have caused you to have residual mouth alcohol that would have contaminated each of the breath samples you provided. Ms. Jakus states that the Alco-Sensor IV DWF results would have been falsely high, and should not be relied upon. Ms. Jakus also states that you did not display the typical indicia of impairment. Ms. Jakus states that you only exhibited a strong odour of liquor on your breath, which is consistent with having recently finished a drink of hard alcohol.

Mr. Burnett states that the results of the ASD were attributed to alcohol in your mouth and not in your blood stream, and this is supported by your sworn report with respect to your drinking pattern, the opinion letter of Ms. Jakus, and the operating manual for the Alco-Sensor.

Mr. Burnett states that your drinking pattern, the reason as to why you left mid-drink, and that timeline of events are supported by the Statutory Declarations of s.22

Mr. Burnett states that you have explained why you inadvertently failed to advise the officer about your partially consumed drink just prior to being stopped. Mr. Burnett states that had the officer been aware of the recent consumption of alcohol he would have no doubt waited the 15 minute period, but as he was not aware of the recent consumption, he proceeded to take samples from you and "FAIL" results were obtained due to mouth alcohol. Mr. Burnett states that it is significant that the officer notes little if any signs of impairment by you. Mr. Burnett states that it is clear from the officer's evidence that the results from the Alco-Sensors can be believed, but your evidence supported by your witnesses presented under oath, and the written opinion letter of Ms. Jakus must be respected as well. Mr. Burnett states that the amount of alcohol consumed could not have accounted for the "FAIL" result, or even a "WARN" result, and the only explanation as to why they recorded a "FAIL" must be the presence of mouth alcohol.

I am mindful of the evidence that you have provided regarding your drinking pattern for the evening, and the series of events that lead to your interaction with the police officer, including the affidavits from your friends and the expert report from Ms. Jakus. The uncontroverted evidence is that when the officer inquired as to the time of your last drink, you stated that it was, "45 minutes to one hour ago." I acknowledge that you say that you had forgotten about the drink you had prior to leaving, but I cannot find that the officer erred in failing to delay the ASD analysis for a drink which he was not aware of. The time of your last drink is information to which only you have the knowledge. Your timeline suggests that you had a drink immediately prior to leaving the club, yet you also forgot about that drink until the next day when you were reminded by your roommate. I am mindful of your concern for your friends and the hasty nature with which you say to have departed the club; however, I find it odd that you would forget that you had been drinking when you have stated that it was also the last thing you did before leaving the club minutes before. I do not find it likely that if you consumed your drink immediately prior to leaving, that you suddenly forgot about it when dealing with the officer. Not only does it appear that you forgot about the sip that you took immediately prior to leaving, but you forgot entirely about the drink that you "proceeded to casually drink" for 35 minutes. Furthermore, I find it odd that you were not surprised or shocked by the ASD result, and did not express any concern over the ASD results at the time. I also find it odd that if you truly believed that your friends s.22 that you did not mention this to the officer at the time. Consequently, I do not find your version of events to be credible, and I am not persuaded that your drinking pattern is as you have stated. As Ms. Jakus has prepared her evidence based solely upon your version of events, I have given it little weight. Based on the evidence that was available, the officer had no reason to delay the tests or to question the validity of the results. I accept the results as valid.

I am satisfied that your BAC was not less than 80 mg%.

Decision

You are prohibited from driving for 90 days. I note that as you have already served 19 days of the prohibition, you need only serve the remaining 71 days, which commences September 26, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving

prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Clarke Burnett
fax: 250 869-1103

September 25, 2013

s.22

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

Introduction

On August 3, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on the ground that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" however, that ground is not applicable to your situation because you did not receive a refusal IRP. For your benefit, I have considered all the grounds available to you.

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

Ms. Lee provided *Wilson v. Superintendent of Motor Vehicles* and submitted that there is no evidence to suggest that your ability to drive was affected by alcohol. Ms. Lee stated that an allegation of “drifting” is not sufficient to cause concern that an ability to operate a vehicle is affected by alcohol. Ms. Lee stated that the only symptom of alcohol consumption you displayed was an odour of liquor on your breath, which is not sufficient to establish that your ability to drive was affected.

Ms. Lee also provided *R v Andree* to state that the officer must have subjective belief that your ability to drive is affected by alcohol. Ms. Lee states that in *Andree* the court found that red, watery eyes and an odour of liquor were insufficient grounds when viewed objectively.

I have read and considered the *Wilson* case and I acknowledge your lawyer’s submission with respect to the Court’s ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Further, I find that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2009 hours on August 3, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over by the officer and were identified as the driver via your BC driver’s licence.

In your affidavit you state that you pulled out of the parking lot and proceeded away from the lake. You state that you were driving for fewer than seven minutes before you noticed that a police vehicle was following you with its lights on. You state that you pulled your vehicle over on Stuart Road.

I am satisfied that you were a driver within the meaning of section 215.41, of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2014 hours and 2017 hours, both resulting in "FAIL" readings.

In your evidence you state that you provided two samples of your breath which both resulted in "FAIL" readings.

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2015 hours.

In your evidence you state, "Constable Smith explained that I had the option of taking a second test, and if I got a lower reading that result would be the one he would go with."

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2017 hours.

In your evidence you confirm that you provided a second sample of your breath.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101230 and your second sample of breath into ASD serial number 101238. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101230 and 101238.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on July 8, 2013, he checked the calibration of ASD serial number 101230. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 5, 2013, and the service expiry date as June 7, 2014.

For the second ASD, the qualified ASD calibrator certified that on July 8, 2013, he checked the calibration of ASD serial number 101238. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 5, 2013, and the service expiry date as September 17, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state that you were visiting with friends on a boat and consumed three beers with the last at 4:30pm. You state that you returned in the boat around 8:00pm and you stayed to help clean and offload the boat. You state that when you decided to leave you still had a small amount of beer left in your bottle from earlier and you finished it while cleaning up the empties. You state that at about 8:02pm you got into your vehicle and proceeded home. When you were confronted by the officer you state that you informed the officer that you told the officer that you had finished drinking four to five hours earlier, and that you did not inform the officer about your last mouthful of beer because you did not think that it mattered. You state that had you known at the time that your last sip could affect the results, you would have told the officer that you had just finished a drink, about four minutes earlier. You state that you have since learned about the effects of mouth alcohol and you are certain that your last drink was less than fifteen minutes from the time that you blew into both ASDs. You state that at no time did the officer explain the effects of mouth alcohol to you, and if he had, you would have told him of your recent drink.

You also state that when you returned home your father suggested that you attend the police station to have a test done there. You state that as you drove towards the police station you encountered the officer at the roadside. You state that your father stopped and told the officer what you wanted to do, but the officer told you that there was no point as you had no legal right to do so.

You provided a statement from s.22 who was with you in the boat. s.22 states that she took you and a few friends out on her boat for the afternoon on August 3, 2013. She states that most people had a couple of drinks but as the driver she wasn't able to keep track of people's every movement; however, she knows you to be a very responsible person and she does not believe that you had more than a couple of beers early in the afternoon. s.22 states that around 8:00pm the boat was brought out of the water and everyone proceeded to clean up. s.22 states that you had a few sips of the rest of a beer while emptying bottles. s.22 states that you did not appear intoxicated or she would not have allowed you to drive.

In the hearing, Ms. Lee stated that it is clear from your evidence that you truly believed that you were not impaired by alcohol. Ms. Lee stated that your willingness to attend the police station in order to obtain a further test is consistent with the conduct of a truly innocent person.

Ms. Lee stated that it is in keeping with common sense and ordinary human experience that you would respond as you did to the officer, as your sip of alcohol was not a drink, but a sip taken absentmindedly while cleaning up. Ms. Lee stated that the officer fulfilled his obligation by inquiring about the time of the last drink, but that your response does not mean that the concern is no longer present. Ms. Lee submitted that the strong odour of liquor on your breath, combined with the absence of further indicia of impairment is consistent with the presence of mouth alcohol and that if your "FAIL" results were correct, then you would certainly have displayed further indicia of impairment such as flushed face, or bloodshot watery eyes.

Ms. Lee stated that while the timeline implies that the second test was exactly 15 minutes after the last sip, this does not mean that it was 15 minutes, as it could have easily been 14 and a half minutes or thereabouts. Ms. Lee also provided a document entitled, "Resource Reading – Operators Approved Screening Devices" from the Forensic Laboratory Services RCMP, which states that, "if the peace officer honestly believes that the motorist has engaged in the above activity (consuming alcohol) within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity."

Ms. Lee also stated that the evidence indicates that you are a reliable person, and your actions show that you were truly of the belief that you were innocent and you were not being intentionally deceitful with the officer or in your affidavit. Ms. Lee referenced *Scott v. Superintendent of Motor Vehicles* to state that there is no reason to question your evidence, and that it is equally as probable that an officer would fabricate evidence as you would. Ms. Lee also referred to *Spencer v. Superintendent of Motor Vehicles* in that drivers do not know whether the ASD is functioning properly, and the onus cannot be placed on the driver to be aware of the effects of mouth alcohol.

I am mindful of the evidence that you have provided regarding your drinking pattern for the day, and the series of events that lead to your interaction with the police officer. The uncontroverted evidence is that when the officer inquired as to the time of your last drink, you stated that it was, "four to five hours ago." You state that when you provided your first sample and it resulted in a "FAIL" you were surprised. I do not have any evidence before me to indicate that you communicated this to the officer, or attempted to clarify your drinking pattern at this time. I am mindful of Ms. Lee's submission that the officer should have realized that the odour of alcohol on your breath was incongruent with any further indicia of impairment; however, a lack of blood shot eyes or flushed face does not indicate that the officer is required to delay the ASD analysis.

You state that you took a sip from the beer at 8:02pm. I find it odd that you state that, "I did not realize at the time that he needed to know the last time I took a sip of alcohol. I did not think it was important to provide that time." You did not think it important to provide that time to the officer, but you are able to state with certainty that it occurred at 8:02pm. I do not understand how you are able to provide such an exact time in your affidavit, but you did not provide any of this information to the officer at the time, even after your first "FAIL" sample. Further, you state that you took a sip from the beer and then were driving for no longer than seven minutes before you met the officer. You submit that you were helping your friend to clean up gear and empty bottles from the boat, but in order for your timeline to make sense, you must have taken a sip from the bottle and then immediately began to drive. I do not find this likely. If I conclude that the very last thing you did while helping to clean up was sip your beer, I still find that some time would have passed before you collected your belongings, walked to your car, started your car, and began to drive. In light of the difficulties with your timeline, I am not satisfied that your sip of beer was within 15 minutes of the second ASD analysis, and that the results were affected by

mouth alcohol. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

You are prohibited from driving for 90 days. I note that as you have already served 19 days of the prohibition, you need only serve the remaining 71 days, which commences September 26, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Kyla Lee
fax: 604 685-8308

September 24, 2013

s.22

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

Introduction

On August 4, 2013, 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*;
- the approved screening device (ASD) registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

The ground on which you applied for this review is not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

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

Mr. Carr argues the validity of the ASD demand based on allegations that the officer did not have reasonable suspicion to make the demand. I acknowledge Mr. Carr's submissions on this point; however, the basis of the officer's reasonable suspicion relates to the matter of whether

the officer made a valid demand. Section 215.5(4) of the *Act* requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in s. 215.5(4) of the *Act*, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Carr submits that this is a quasi-criminal administrative matter and that the burden must be strictly enforced against the Crown. He states that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be “clerical” in nature, can only be resolved in favour of you. He also states that you have no burden or disproof in this hearing and that there is no evidence before me which satisfies the burden of proof. I acknowledge Mr. Carr’s submission. However, I am mindful that this is an administrative process where issues are weighed on a balance of probabilities. As such, I will weigh any errors appropriately.

Mr. Carr referred to the cases of *Spencer v. Superintendent of Motor Vehicles*, *Gillies v. Superintendent of Motor Vehicles* and *Costain v. Superintendent of Motor Vehicles*. He stated that in *Spencer*, the judge held that the police are not deemed to have a credibility advantage, and the case must be determined impartially on the evidence. He stated that in *Gillies*, the court noted that credibility is a finding of fact which must be reviewed on a standard of reasonableness, and that an adjudicator must weigh the evidence to reach the conclusion. He points out that pursuant to *Costain*, the adjudicator is required to carefully and conscientiously weigh the evidence before him. Mr. Carr did not provide me with these cases; however, I am familiar with them and have proceeded with this review with *Spencer*, *Gillies* and *Costain* in mind.

There is a recent court decision, *Buhr v. British Columbia (Superintendent of Motor Vehicles)* BCSC 2013 1443, in which the court ruled the Superintendent’s Report on ASDs (the “Superintendent’s Report”) was inadmissible. Although unable to rely on the Superintendent’s Report, pursuant to section 215.49 of the *Act* I can consider statements or evidence submitted by you (the applicant), the report of the peace officer, and other relevant documents and information forwarded by the peace officer in making my decision. As your lawyer has referred to the Superintendent’s Report, the portion that is referred to forms part of your evidence in this review. I have not considered or relied on any other portions of the Superintendent’s Report in making my decision.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Narrative Text Hardcopy (the "Narrative") is that on August 4, 2013, your s.22 did approach a roadblock located southbound along Lakeshore Road in Kelowna. The Report to Superintendent (the "Report") indicates that you were established as driving or having care or control of the vehicle at 3:05 hours on August 4th.

As there is no evidence before me to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that you provided a breath sample for analysis on ASD number 093811 at 3:08 hours and the result of that sample was a "fail".

As there is no evidence before me to the contrary, I am satisfied that the ASD did register a "fail".

Were you advised of your right to a second analysis?

The police evidence at paragraph 7 of the Report is that Officer Lucash (the "officer") advised you of your right to a second test on a different ASD and explained that the lower of the two test results would prevail. He indicates on the Report that you did request a second ASD test.

Mr. Carr submits that your right to a second analysis was violated. The right to a second analysis recited from memory cannot satisfy the requirements of relaying the necessary information as per the Act.

With respect, I disagree with Mr. Carr. Pursuant to section 215.42(1) of the Act, if an analysis of the breath of a person by means of an ASD under section 215.41(3.1) registers a warn or a fail, the person has a right to forthwith request and be provided with a second analysis, and a peace officer must inform the person of that right before the peace officer serves the Notice. There is nothing in the Act that prevents a peace officer from reciting from memory a person's right to a second breath analysis.

I am satisfied that you were advised of your right to a second breath analysis.

Was the second analysis provided by the officer?

The evidence in the Report is that at 3:09 hours the officer conducted a second breath test. The result of this ASD test was a "fail".

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The evidence in both the Report and the Narrative is that your first breath test was conducted using ASD serial number 093811 and your second breath test was conducted using ASD serial number 086041. The officer noted both ASDs were in proper working order.

Mr. Carr submits that you advised him that at no time was a second ASD used to collect the second sample.

I have before me evidence from the Report and the Narrative which indicates two different ASDs were used. In addition, as you will see below, I have two Certificates of a Qualified ASD Calibrator (the "Certificates"), for ASDs bearing the serial numbers 093811 and 086041.

I find the officer's sworn evidence to be more compelling than a statement from you passed through your lawyer. Based on a consideration of the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the ASD reliable?

The evidence provided by the Certificates indicates the following:

- ASD number 093811 and ASD number 086041 were checked for calibration on July 8, 2013, and found to be within the recommended limits and functioning correctly. The ASDs have a calibration expiry date of August 5, 2013.

I am satisfied that both of the ASDs were reliable.

Was the Notice served on the basis of the lower analysis result?

The police evidence is that both ASD tests resulted in a "fail".

Your lawyer submits that neither of your ASD tests is reliable, therefore your right to have the lower of the first and second test results govern was violated.

I have already found that the ASDs were functioning correctly. Because both your first and your second tests resulted in a "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

Mr. Carr submits that breath samples must be taken at least fifteen minutes after the last drink was consumed to allow for elimination of mouth alcohol. He further submits that, because the officer did not wait fifteen minutes, it was not objectively reasonable for him to rely on the ASD test results.

Mr. Carr says that you advised him that you did not tell the officer that your last drink was "an hour ago...hour and twenty minutes." Rather, you told the officer you had consumed one drink immediately prior to being stopped and he asked no further questions.

I turn now to the evidence supplied by the officer. At paragraph 11 of the Report, in answer to the question "time of last drink", the officer wrote your response in quotation marks as being "an hour ago...hour and twenty minutes." This evidence is corroborated in the Narrative on page 1

where the officer clearly outlines the conversation he had with you about the time of your last drink. The fact that your response is in quotation marks leads me to believe that those were in fact the words you used.

On the date and time in question, the officer was working a stationary roadcheck to check the driver's licence and sobriety of drivers. It seems likely to me that part of his duties as a trained police officer is to ascertain all information necessary and pertinent to the investigation, and to observe and record the timing of events as they occur. In addition, the officer notes that he has been qualified in the usage of the Alco-Sensor IV DWF ASD since April 2002. Prior to your first ASD test, the officer checked your mouth and found it to be unremarkable. In my view, checking your mouth is another indication of the officer's awareness of the ASD process and his commitment to conducting a thorough investigation.

I find that the officer did turn his mind to the possibility of mouth alcohol and did proceed with the IRP investigation based on the information you provided to him regarding the time of your last drink. Here again I find the officer's sworn evidence to be more compelling than a statement from you passed through your lawyer.

Section 215.41(2) of the *Act* states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. Your BAC was tested on two properly functioning ASDs, both of which accurately resulted in a "fail" test result.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the *Act*. You are prohibited from driving for 90 days.

Your prohibition took effect on August 4, 2013. I note that as you have already served 18 days of the prohibition, you need only serve the remaining 72 days. Your prohibition commences September 27, 2013. The prohibition ends at 23:59 hours on December 7, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jeremy Carr
By Fax 250 388-7327

September 25, 2013

s.22

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

Introduction

On August 10, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied for this review on a number of grounds that are not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

In his written submission (the "Submission"), Mr. Carr references *Spencer v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311 and *Gilles v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 899, with regard to assessments of credibility, impartiality, and the duties of the adjudicator. Mr. Carr also submits that the legal burden of proof is upon the investigating officer and that because this case is a quasi-criminal administrative matter, any errors classified as "clerical" in nature can only be resolved in your favour. I am aware of these cases and the principles of administrative justice and have conducted this review with these issues in mind.

Mr. Carr references *Ssemaluulu v. British Columbia (Superintendent of Motor Vehicles)* et al, (2012), Victoria S-113825 (BCSC), Dley J., to assert that submissions of counsel should be given full weight in this review. Specifically, that lawyers are provided information by their clients and rely on this information to be correct when making their submissions. Justice Dley also stated that the, "legislation does not require a particular format by which evidence is to be provided." I have considered the excerpts from *Ssemaluulu* and have conducted this review based on the specific facts of your case.

Mr. Carr submits that the investigating officer did not have reasonable suspicion to issue an ASD demand making the demand invalid. Police evidence indicates that the officer formed reasonable suspicion that you were operating a motor vehicle, with alcohol in your body, after observing that you had glassy, watery eyes, a moderate odour of liquor on your breath, and admitted consumption. You assert that at no time did the officer allege that there was an odour of liquor on your breath. Further, Mr. Carr argues that the officer phrased his query of time of last drink differently in the Narrative Text Hardcopy (the "Narrative") than the Report to Superintendent (the "RTS"). Because there is a significant difference between the two queries, Mr. Carr submits that the officer failed to properly ascertain a time of last drink making the observed indicia insufficient. Accordingly, he submits that an ASD demand made with insufficient indicia of impairment is invalid. Section 215.5(4)(b) of the Act requires me to revoke a 90-day driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4)(b). Therefore, it is not an issue I am by statute permitted to consider in this review. The validity of the demand is an issue I must consider only in circumstances in which a driver has failed or refused to comply with the investigating officer's demand.

Mr. Carr references three cases, *R. v. Hemery* [2008] ABPC 209, *R. v. Hamilton* [2000] BC Prov Ct No. 20958, and *R. v. Smith* [1997] O.J. No. 3677. These cases were not disclosed at the time of this review hearing. I am satisfied that they were listed in support of Mr. Carr's argument that an ASD demand made with insufficient indicia of impairment is invalid; not to prove specific facts of your case.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn RTS, the investigating officer, Cst. Smith, indicates that you were driving or in care or control of a motor vehicle at 0231 hours on August 10, 2013. Further, in the Narrative, Cst. Smith submits that he observed your vehicle speeding 94 km/h in a posted 60 km/h zone. You were observed seated in the driver's seat, operating the vehicle, and your identity was confirmed with s.22

Mr. Carr submits that Cst. Smith stopped you for speeding yet you were not issued a speeding ticket. He asserts that this ought to be considered when examining Cst. Smith's credibility. I acknowledge Mr. Carr's submission; however, the reason why your vehicle was stopped is not vital in reaching my decision. This review is conducted based on the parameters set out in section 215.5(1)(b) of the Act.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

Evidence in the RTS indicates that at 0233 hours, Cst. Smith made an ASD demand on you. At 0236 hours you provided a breath sample for analysis on ASD serial number 101230. The test result was a “FAIL”. Further, at 0243 hours you provided a breath sample for analysis on ASD serial number 101238. The test result was a “FAIL”.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Narrative, Cst. Smith submits that at 0238 hours he advised you of your right to request a second ASD test and that you understood what this right offered. Evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower of the two ASD test results would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

Police evidence indicates that you requested a second ASD test and at 0243 hours provided a second breath sample for analysis. The test result was a "FAIL" and you were shown the result by Cst. Smith.

There is no evidence before me to the contrary. I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Smith indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 101230, with a temperature of 25 degrees Celsius and ASD serial number 101238, with a temperature of 23 degrees Celsius were used. Further, the unique ASD serial numbers are corroborated by a Certificate of a Qualified ASD Calibrator for each of the two devices.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 101230 was checked for calibration on August 6, 2013, with a service expiry date of June 7, 2014 and calibration expiry date of September 3, 2013;
- A qualified ASD Calibrator, Chad Ryan Lucash, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 101238 was checked for calibration on August 6, 2013, with a service expiry date of September 17, 2013 and calibration expiry date of September 3, 2013 and;
- A qualified ASD Calibrator, Chad Ryan Lucash, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Smith. These signatures confirm that any ASD tests referred to in the investigation were conducted by a qualified ASD operator and that the ASD units used were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

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

Police evidence indicates that at 0232 hours, Cst. Smith formed reasonable suspicion that you were operating a motor vehicle with alcohol in your body. Specifically, he observed that you had glassy, watery eyes and a moderate odour of liquor on your breath upon exiting your vehicle. In the Narrative, he submits that when asked if you had consumed alcohol within the last fifteen minutes you responded, "no", and indicated that you had consumed one drink earlier in the evening.

Referencing Paragraphs 68 and 69 of *Spencer*, Mr. Carr asserts that there is a significant power imbalance at the time an ASD breath test is administered. Specifically, that a driver has not been trained on how a breath test should be administered and is unlikely to know the factors that might affect whether an ASD properly registers a "WARN" or "FAIL".

In the Narrative, Cst. Smith indicates that he answered several questions you had about the IRP investigation. I also note that prior to administering the first breath test, he demonstrated how to provide a sample into an ASD. Mr. Carr does not refute this evidence. I am satisfied that Cst. Smith explained your requirements, as a driver, in the IRP investigation. The evidence before me indicates that he did not withhold information that would have caused you to be misinformed about your duties and rights during the investigation.

Further, it is submitted that you used mouthwash one minute prior to being stopped by Cst. Smith. Mr. Carr argues that the first ASD "FAIL" cannot be relied upon without considering the possibility of contamination by mouth alcohol. Specifically, that the presence of mouth alcohol (i.e. mouthwash) will falsely elevate the alcohol detected by an ASD and will result in an inaccurate measure of the concentration of alcohol in a person's blood. It is also submitted that because your second breath test was taken seven minutes after your first, that Cst. Smith failed to ensure that this test was not similarly contaminated by mouth alcohol. Accordingly, Mr. Carr argues that both ASD "FAIL" results were not accurate and invalid within the meaning of section 215.41(2) of the Act.

I acknowledge Cst. Smith did not ask the time of your last drink, rather if you had, "consumed alcohol within the last fifteen minutes." By framing the question in this context, I feel a reasonable inference can be made that he inquired as to the time of your last drink in a way that allowed him to determine if the test should be delayed due to the presence of mouth alcohol. I am satisfied that you understood what this question inferred (i.e. when you had consumed your last alcoholic drink), evident by your indication that you had had one drink earlier in the evening. Therefore, I feel a reasonable inference can be made that because you advised Cst. Smith you had consumed one drink earlier in the evening, it was through this admission that you confirmed

you had not consumed alcohol in the last fifteen minutes. As a result, a fifteen minute waiting period was deemed unnecessary and Cst. Smith proceeded with the first breath test.

Mr. Carr also submits that police evidence indicates Cst. Smith observed you driving, formed reasonable suspicion, read the ASD demand, and administered the first ASD test within five minutes. I understand he would like me to interpret this evidence to indicate that the first ASD "FAIL" registered approximately six minutes after you thoroughly rinsed your mouth with mouthwash. On this point, I acknowledge his submission that breath samples are to be taken at least fifteen minutes after the last drink was consumed to allow for the elimination of mouth alcohol. However, I am not persuaded by the facts before me that this applies in your case.

Mr. Carr states that you advised that at, "no time did Cst. Smith allege that there was an odour of liquor on [your] breath." Later in the Submission you advised that, "what Cst. Smith smelled was the mouthwash." You do not provide evidence that Cst. Smith advised you that he smelled mouthwash specifically, rather you provide a speculative statement that what he detected on your breath was mouthwash. I note that Cst. Smith submits that he detected an odour of liquor on your breath in two separate documents; not an odour of mouthwash. I also have no evidence before me as to the quantity of mouthwash used or the duration you thoroughly washed your mouth for. Further, Cst. Smith indicates that prior to administering the second ASD test that he answered several of your questions. One response noted in the Narrative was that a, "fail" ASD results (sic) means your blood alcohol level is at or exceeds 100 MG%, the criminal code limit is 80 MG%." I question if you felt that there was no reliable evidence that your BAC was over 80 mg% why you did not advise Cst. Smith that you had used mouthwash, one minute prior to being stopped, as a possible explanation for the ASD "FAIL" result.

Based on the evidence before me, I am satisfied that Cst. Smith proceeded with the first breath test because, at the time, there was no evidence before him that the test should have been delayed or the accuracy of the ASD "FAIL" result questioned. I am satisfied that this applies for the second test, as well. The use of mouthwash was information known only by you. If you felt that the odour detected by Cst. Smith was mouthwash, as you claim, the evidence before me indicates that you had the opportunity to advise him that you had used mouthwash one minute prior to being stopped. You chose not to disclose this information.

Further, Mr. Carr asserts that there is no reliable evidence that the ASD "FAIL" results were indicative of a blood alcohol level over the legal limit. I have already determined that both ASDs used in your investigation were reliable. Mr. Carr does not refute this evidence. Moreover, he does not refute police evidence that you admitted to consuming one drink earlier in the evening.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle, with alcohol in their body. I am satisfied that Cst. Smith made an ASD demand on you because he detected an odour of liquor on your breath and you admitted to consumption earlier in the evening. The evidence before me indicates that you blew two ASD "FAIL" results. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80 mg%. I have already determined that your second test was conducted on a different ASD and the ASDs used were reliable. On a balance of probabilities,

I am satisfied that your blood alcohol level was over the legal limit.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

I therefore confirm your driving prohibition and monetary penalty, as required by s. 215.5(1)(b)(i) of the Act. I note that as you have already served 17 days of the prohibition, you need only serve the remaining 73 days of the prohibition which commences September 26, 2013. The prohibition ends December 7, 2013. When your prohibition ends you may resume driving once you had obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 19, 2013

s.22

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

Introduction

On November 5, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

In the hearing you requested an early release from your prohibition based on compassion. You stated that you live alone, and your work requires you to drive throughout your sales area, which stretches from s.22 You stated that you do not need 90 days in order to

learn your lesson as this was a one time mistake that will never happen again. You stated that you need to drive for work, and so far s.22 has been driving for you, but he is s.22 old and the extra exertion is very hard on him. You stated that with bad weather coming and the days getting shorter, it is only going to become increasingly difficult for s.22 to assist you. You stated that you are fully willing to pay all related fines or fees, but you just want to find a way to save s.22 from driving you around.

I understand and acknowledge the difficulties, and far-reaching impacts associated with a driving prohibition. I commend you for taking responsibility for your actions; however, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. The scope of this review is limited to the grounds as defined by the Act. I have considered all grounds available to you.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 0042 hours on November 5, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over after exiting the parking lot of Whiski Jack’s Pub, and you were identified as the driver via your BC driver’s licence.

In the hearing you stated that you were at your friend’s house and not at the pub as noted by the officer.

I have considered your submission; however, I do not have any evidence before me to indicate that you were not driving the vehicle when you were pulled over by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 0045 hours and 0046 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test and you understood.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0046 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 092903 and your second sample of breath into ASD serial number 086031. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 092903 and 086031.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

The officer provided two Certificates, in which the qualified calibrator certified that the ASDs used in your case were found to be within the recommended limits when checked for calibration. The calibrator also certified that to the best of their knowledge the ASDs were functioning correctly.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on November 5, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 30, 2013

s.22

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

Introduction

On October 9, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”, however this ground is not applicable to your situation because on the Notice the investigating officer indicated you were being prohibited from driving because an

ASD test resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

During the hearing, you indicated that you have never been charged for impaired driving and have nothing previous on your record; therefore, that your prohibition should be dropped as a result. While I acknowledge your submissions, I do not have authority to consider a person's driving record in this review.

s.16, s.22

You indicated that you need your licence to get to work, into town, and work out of town. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 1525 hours on October 9, 2013. Further in the Narrative Text Hardcopy - Occurrence Report - 3 (the "Occurrence Report"), he indicates that s.22 called Cranbrook RCMP to report a minor collision involving s.22 s.22 indicated that he thought the driver of the s.22 was impaired. The officer attended the scene and identified you as the driver and registered owner of the s.22 and your passenger as s.22

You advised me that you closed your eyes when sneezing causing you to rear end a vehicle.

However, the reason why the accident occurred is not an issue I must consider in this review. Further, you do not refute driving at the time the collision occurred.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 1541 hours and 1553 hours, respectively.

You indicated that prior to the first "FAIL" result registering, the device displayed back and forth arrows and did not provide any numbers or decimal points.

While I acknowledge your submission, Section 215.41(2) of the Act states that:

"fail" means 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.

Accordingly, no numerical data is required as per the legislation.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101225 and 101210, respectively.

Conversely, you indicated that your second test was not done on a different ASD. Following the first "FAIL" result, the officer had you empty the contents of your pockets onto the trunk of his police vehicle and placed the ASD used for your first test on the trunk before handcuffing you. Accordingly, you submit that the officer is, "basically lying in [the] Narrative", because he used the exact same ASD and you questioned how the serial number changed on the second machine if the officer used the exact same one.

In the RTS, the officer indicated information for two distinct ASDs. Specifically, section 6 in the RTS contains information related to the first ASD test including the serial number of the device: 101225. Moreover, section 8 in the RTS contains information related to the second ASD test including the serial number of the device: 101210. The officer disclosed Certificates of a Qualified ASD Calibrator (the "Certificates") that bear the same serial numbers he indicated in sections 6 and 8 of the RTS. Further, in the Occurrence Report, he indicates that after the ASD demand was made on you that an, "Alco-Sensor IV DWF – SN: 101225 was prepared for use." Additionally, when you expressed that you would provide a second sample an, "Alco-Sensor IV DWF - SN: 101210 was prepared for use."

While you indicated that the officer put the same ASD on the trunk of his car and then handcuffed you, his evidence is that you were detained and asked to sit in the back of his police vehicle. While querying your driving history, you lit a cigarette unbeknownst to him. The officer's evidence and your evidence conflict; however, you did not refute lighting a cigarette or that you were detained in the back of the police vehicle. I question how you could light a cigarette if the contents of your pockets had been emptied on the trunk of the police vehicle and you had been handcuffed. This leads me to question the credibility of your submission because your evidence is not logical. I feel it is more likely than not that a second, different ASD was used to conduct the second analysis. Aforementioned, the officer indicated a unique serial number for each of the two devices in the RTS and Occurrence Report and disclosed Certificates bearing the identical serial numbers.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates in which Marguerite Maria Banich certified that the ASDs were found to be within the recommended limits when she checked their calibration on October 2, 2013. She also certified that to the best of her knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

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

In the Occurrence Report, the officer's evidence is that you were observed standing close to a very intoxicated s.22 with the smell of liquor noted to be very strong. After you were asked to move away from s.22 the officer asked you if you had consumed any alcohol

and you replied that you had only had coffee and Pepsi that day. Talking with you further, he observed a faint odour of liquor emanating from your breath, that you were avoiding eye contact, and presented s.22 He voiced his suspicion that your ability to drive was affected by alcohol in your body to which you retorted that you had been drinking the previous night. The officer stated that for the purpose of an accurate test, he asked you when your last drink was, with you indicating that you had had a shot of vodka a half-hour previous. Further, following the ASD demand, you "muttered" that you had had a couple of shots of vodka that day.

You advised me that you were not drinking at all during the day. Rather, that you were fighting a cold and taking Benadryl Extra Strength All in One and Contact Cold Sore Throat Daytime/Nighttime cold medicines, which might have affected the ASD readings. Accordingly, you questioned how the officer could have detected an odour of liquor on your breath as you had only drank coffee that day. On this point, you advised me that you do not drink during the week and if you do drink it is on the weekend. Further, the officer's evidence that you "muttered" you had had a couple of shots of vodka that day is incorrect because when you were asked if you had had anything to drink you responded, "no." As such, with respect to the officer's evidence that you advised him that you had had a shot of vodka a half-hour ago, you indicated that you had picked up your passenger who had offered you a shot of vodka approximately a half-hour ago; an offer you declined.

While you submit that the cold medicines may have affected the ASD readings, you did not provide me with any evidence to support your claim. It is not sufficient to simply make suggestions about what might have happened without providing any supportive evidence. Further, I find it very odd that you advised me that if anything, the officer should have given you a, "24 hour". I question why you would accept any form of driving suspension if you had not been drinking that day.

In addition, when you speak with people you indicated that you always look them in the eye contrary to the officer's evidence that you were avoiding eye contact. Moreover, your s.22 s.22 are a characteristic that anyone who knows you can confirm is always present. While I acknowledge your submissions, I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not how your actions or physical characteristics can be explained by factors independent of being under the influence of alcohol.

While you may believe that there is no way your BAC was at or above 80 mg%, you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs that I have found to be reliable. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg%. As such, I am satisfied that your BAC was not less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 9, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 11, 2013

s.22

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

Introduction

On September 23, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2230 hours on September 23, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that a witness reported a possible impaired driver with the licence plate s.22 travelling towards Cranbrook. The officer states that the witness informed officers that the vehicle had turned right onto 24th Avenue North. The officer indicates that shortly after the last update from the witness, he was on 24th Avenue North and did not observe the vehicle. The officer states that he observed the suspect vehicle in the driveway of a residence. The officer states that he attended the residence and the driver exited from the vehicle. The officer states that you were identified as the driver via your drivers licence. The officer states that you initially stated that you were on your way home from work and had not been on the Highway, but then changed your story and stated that the visibility on the highway was poor due to heavy rain which may have caused your driving pattern.

In your submission you state that you were not stopped by police. You state that moments earlier you had driven home from work and you were still in your vehicle which was in your driveway when you were approached by the officers. You state that the vehicle was not running and you had turned the lights and ignition off. You state that you were in your car reading text messages. You state that your interaction with the officers occurred entirely on your driveway which is the private property of yourself and your wife.

In his submission, Mr. Buddenhagen provides an excerpt from the section 215.41 of the Act which states:

- (3.1) If, at any time or place on a highway or industrial road,
- (a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and

Mr. Buddenhagen submits that in order for the demand to be lawful, the following preconditions must be met:

1. The demand must be directed "a driver"
2. The demand must be made pursuant to the Criminal Code

Mr. Buddenhagen submits that, "clearly, if a man is at home in his car, which is lawfully parked in his driveway, reading his text messages, any demand made to him in the driveway of his home is unlawful." Mr. Buddenhagen further states, "A person who is sitting in a parked vehicle in his own driveway, reading his text messages is not a "driver."

I acknowledge Mr. Buddenhagen's submission that you were not a driver, and that your driveway does not satisfy the definition of a highway as defined by the Act; however, the

evidence before me indicates that a witness notified police that they were driving behind a possible impaired driver at 2213, 2220 and 2222 hours.

I acknowledge the previous decision provided by Mr. Buddenhagen; however, I find the fact pattern to be different. You were not in your home when approached by the officer; rather you exited from the driver's side of the vehicle, and admitted to recently driving.

I do not find the fact that you had pulled into your driveway to nullify the fact that you were a driver, or to render the demand invalid. I find the facts of the situation to be clear. You were observed driving by a witness, the officer attended your residence, witnessed you exit the vehicle from the driver's door, and you stated that you were driving. The evidence before me clearly indicates that you were a driver.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2253 hours and 2257 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test and you requested to provide a second sample.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2257 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101208 and your second sample of breath into ASD serial number 101215. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101208 and 101215.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “FAIL” reading. The lowest analysis result was “FAIL”.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 4, 2013, he checked the calibration of ASD serial number 101208. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 2, 2013, and the service expiry date as November 12, 2013.

For the first/second ASD, the qualified ASD calibrator certified that on September 4, 2013, he checked the calibration of ASD serial number 101215. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 2, 2013, and the service expiry date as November 12, 2013.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 23, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Ron Buddenhagen
fax: 250 426-3357

October 8, 2013

s.22

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

Introduction

On September 18, 2013, 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;
- an approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

I note that you have indicated on your Application for Review that a lawyer will call regarding on what ground you have applied for the review. I confirm that I have not received any documentation or information from a lawyer in this matter. I note that you applied for this review on September 24, 2013, and at that time you were informed of the date and time of your hearing. To date, as I have not received any submissions from you or a lawyer on your behalf, I will proceed with the review with the evidence I have before me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that at 23:24 hours on September 18, 2013, Officer McIntyre (the “officer”) established you as driving or having care or control of a motor vehicle. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did an ASD register a “WARN”?

The police evidence in the Report is that at 23:28 hours, the officer used ASD serial number 101902 to take a breath sample from you and the result of your breath test was a “warn”. There is no evidence before me to the contrary.

I am satisfied that the ASD registered a “warn”.

Were you advised of your right to a second analysis?

The police evidence in section 7 of the Report is that after the first ASD test, the officer read you your right to a second analysis and that you did request a second ASD test.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The police evidence in the Report is that at 23:34 hours, the officer conducted a second breath test. The result of this breath test was a “fail”.

I am satisfied that the officer did provide the second analysis.

Was the second analysis performed on a different ASD?

The police evidence in the Report is that the second ASD test was conducted on ASD serial number 101903. There is no evidence to the contrary before me.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Your first ASD test result was a “warn” and your second ASD test result was a “fail”. The lower of the two results is the “warn” and, based on the “warn” result, the officer served you with the Notice indicating you were prohibited from driving for three days.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD number 101902 and ASD number 101903 were checked for calibration on August 30, 2013, and found to be functioning correctly and within the recommended limits. Both ASDs have a calibration expiry date of September 27, 2013, and a service expiry date of October 22, 2013.

I am satisfied that both ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on September 18, 2013.

s.15
Adjudicator

October 15, 2013

s.22

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

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

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

In your written submission, you indicated that police should not have taken your vehicle and driver’s licence, as they are your “bread/butter for working s.22 where you had been employed for five years. I acknowledge that a 90-day driving prohibition can have far-reaching and devastating implications for a person who needs to drive for various employment and personal reasons. However, in the context of this review the Act does not authorize me to consider an individual’s personal circumstances and employment needs. The issues that I must determine in this review are outlined in detail below.

s.16, s.22

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), the officer reported that you were driving or in care or control of a motor vehicle at 15:45 hours on September 21, 2013. In the Narrative Text Hardcopy (the "Narrative"), Cpl. Toye indicated that at 15:45 hours he was sitting in his police vehicle when he was alerted to some commotion in the parking lot of the s.22 (the "Store"). Cpl. Toye noted that several people were being escorted out of the Store by employees. Cpl. Toye stated that he got out and spoke to a female, identified as you. Cpl. Toye stated that you advised him "they were kicked out of the store", and while speaking with you a strong odour of liquor was detected on your breath. Cpl. Toye indicated that you had your car keys in your hand and the only vacant seat in the car was the driver's seat. Cpl. Toye stated that he asked you who drove to the Store and that you stated you had.

In your written submission, you stated that you were not driving, that you were parked in front of the Store, and the police were parked on the left side of your car. You stated that you were waiting in your car for the people who hired you when two guys flew out of the Store. You indicated that you looked at the police officer, got out of your car and then asked him "Did you see that?" You also indicated in your submission that after you arrived home from Kamloops you received a call from your friends asking you to drive them to s.22 You indicated that you decided to drive them and thought you only had two beers and you were not drinking enough to be intoxicated, so it would be ok.

In reviewing the evidence before me I recognize that there are some discrepancies between your evidence and that of Cpl. Toye with respect to the overall sequence of events which lead to the issuance of your IRP. I also acknowledge that the vehicle may not have been in motion at the moment you encountered Cpl. Toye. However, the evidence before me indicates that you drove the vehicle to the Store and that it is more likely than not that you were going to continue driving the vehicle had Cpl. Toye not approached you when he did.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

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

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

In the Narrative, Cpl. Toye indicated that you had a strong odour of liquor on your breath and that you admitted to consuming alcohol two hours prior to dealing with police. Cpl. Toye further indicated in the RTS that at 15:45 hours he formed his reasonable suspicion that you had alcohol in your body, and that in the same minute he read you the ASD demand. Cpl. Toye indicated in the Narrative that you advised him you understood the demand.

There is no evidence before me to the contrary. I am satisfied that the officer made a valid ASD demand.

I now turn to whether you failed or refused to comply with the demand.

In his Narrative, Cpl. Toye indicated that after he read you the ASD demand you stated that you would provide a sample. Cpl. Toye indicated that between 15:55 hours and 15:58 hours you unsuccessfully attempted to provide a sample of your breath and noted that ASD serial 081414 registered a "VOID" and then a "NoGo". Cpl. Toye indicated that on each attempt he gave you three chances to provide a proper breath sample, but you did not. Cpl. Toye stated that it was explained to you that not providing a proper breath sample is the same as refusing to provide a sample. Cpl. Toye noted that at 16:07 hours you agreed to provide a sample and at 16:08 hours Cpl. Toye attempted again to obtain a sample of your breath. Cpl. Toye noted that three attempts on a new mouthpiece were conducted, but all registered as a "NoGo".

It is noteworthy to point out that Cpl. Toye noted in the Narrative that once back at the detachment he had Cst. Ellis provide a proper sample of breath into ASD serial number 081414 without any issues. Cpl. Toye provided a Certificate of Qualified ASD Calibrator (the "Certificate") for ASD serial number 081414, indicating the ASD calibration expiry date as October 17, 2013, and the service expiry date as December 16, 2014. The Certificate also indicates to me that the ASD was within the recommended limits and functioning correctly on September 21, 2013.

There is no evidence before me that indicates to me that after Cpl. Toye made a valid ASD demand you provided a suitable sample of your breath into the ASD. Consequently, I am satisfied you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative, Cpl. Toye indicated that after he arrested, chartered, and warned you for refusal he asked you again if you would like to provide a breath sample and you replied "I tried. I can't even. My chest hurts." Cpl. Toye stated that you disclosed to him that you s.22
s.22 Cpl. Toye stated that s.22 and that he asked you what s.22 you
used, but you could not answer the question. Cpl. Toye noted that you s.22
s.22 at the time.

I find it noteworthy, that you did not refute or comment at all on Cpl. Toye's above stated evidence.

I recognize that Cpl. Toye's Narrative indicates that you told him you
however, I also note that Cpl. Toye, who stated that
you were
observed that

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Ultimately, I find there is no compelling evidence before me that would lead me to conclude that you were incapable of providing a sample of your breath into the ASD. Nor is there any evidence before me that anything was preventing you from providing a sample of your breath into the ASD.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

SEPTEMBER 19, 2013

s.22

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

Introduction

On September 2, 2013, 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. I am delegated the authority to conduct this review.

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

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

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

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr, prior to the review date. I have proceeded with this review based on that confirmation. Your lawyer provided written submissions on September 12, 2013. In reaching my decision in this written review I have considered all of the relevant evidence.

In his written submission your lawyer cited the *Spencer* and *Gillies* decisions arguing that adjudicators must follow the courts’ directives in these cases when conducting hearings. In conducting this review I am mindful of, and have applied, the principles of natural justice and administrative fairness required by these cases. I have evaluated the evidence on the basis that the officer bears the burden to provide evidence that, on a balance of probabilities, satisfies me that the driving prohibition should be upheld; if the evidence does not so satisfy me I must revoke the driving prohibition.

Your lawyer made a preliminary submission based on the decision *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. He submitted that there is insufficient evidence before me to establish that the officer had reasonable grounds to believe your ability to drive was affected by alcohol. There being insufficient or no evidence before me on this issue your driving prohibition should be overturned.

I have read and considered the *Wilson* decision. I acknowledge your lawyer's submission respecting the Court's ruling. Sub-section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that sub-section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground of review. I have no statutory authority, therefore, to revoke a prohibition on this basis.

Your counsel also submitted that the officer did not have the necessary grounds to demand that you provide a sample of your breath into an ASD. In the circumstances of your case, in which the officer's evidence is that a sample of your breath registered a "FAIL" on an ASD, I have no authority to determine the validity of the grounds upon which the officer made his demand.

For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

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

Facts, Evidence and Analysis

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

The officer's evidence is that on September 2, 2013 a complaint was received that a vehicle was being driven in an erratic fashion. At 1034 hours police located a vehicle at the side of the road matching the description provided by the complainant. You were alone at the vehicle and are its registered owner. The officer told you about the complaint which the police had received. You admitted that you were driving the vehicle and identified yourself with your driver's licence.

There is no evidence to the contrary.

Your lawyer submits that there is no evidence that you were driving a motor vehicle. The evidence that the police received from an unidentified complainant is hearsay evidence and cannot be relied on to establish that you were driving or had care or control of a vehicle. You were never observed in the vehicle. I should conclude that you were not a driver and revoke your driving prohibition.

Your lawyer suggests that I cannot accept the evidence of the unidentified complainant as proof that you were operating your motor vehicle. I can, however, accept that this was information received by the officer which caused him to conduct an investigation. The evidence obtained by the officer during his investigation is evidence which I can consider for its truthfulness. The uncontradicted evidence of the officer is that he told you the complainant's description of your driving and you admitted that you were driving. I am satisfied that you made this statement and that it was true. It was a statement against your interest; no one would admit they were driving in a manner that caused a complaint to be made to the police unless that admission was true.

I am satisfied that on September 2, 2013 you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "FAIL"?

The officer's evidence is that at 1043 hours you provided a sample of your breath into an ASD with serial number 101132. You were shown that the ASD registered a "FAIL."

Your counsel notes that there is evidence that three ASDs were used by the officer including the ASD with serial number 101132. A Certificate of a Qualified ASD Calibrator was provided for this ASD. Your counsel submits that none of your ASD tests yielded a "FAIL" result and your driving prohibition should be revoked.

The evidence clearly establishes that at 1043 hours you provided a sample of your breath into an ASD with serial number 101132 with a "FAIL" result.

I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to provide a second sample of your breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

Your counsel states that at no time was your request for a second breath test withdrawn.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you understood the offer of the right to a second test and asked to provide a second breath sample for analysis. You attempted six times with two different mouthpieces to provide a sample suitable for analysis into an ASD with serial number 066871. You were not making a good seal, not blowing, blowing softly or not blowing long enough for the ASD to register a suitable sample. A third ASD with serial number 066727 was available, set up with a new mouthpiece, and presented to you twice. Both times you placed your lips loosely around the mouthpiece and barely blew any air. The officer concluded that you were not making any attempt to provide a suitable sample and had withdrawn your request to provide a second sample. The officer tested the third ASD and found it in working order. The officer tested all of the mouthpieces used by you with all of the ASDs and all were found to be working properly. In

the Report to the Superintendent Constable Jacobson swore that the ASD tests referred to in it were conducted by a qualified ASD operator.

There is no evidence to the contrary.

Your counsel submits that you requested a second analysis and at no time withdrew this request. There is no mention made in the narrative of the ASD with serial number 066871 which was used to record the second ASD test result. There is no evidence regarding instrument type, temperature, time of test or test result recorded by this ASD. In the Certificate for this ASD there is no evidence that the calibrator was qualified to calibrate it. There is no legislative basis for an officer to use a third ASD device or record a result for a third ASD. The driving prohibition should be revoked

A second analysis is your right. The Act requires that you forthwith request a second analysis. This wording suggests that a driver requesting a second analysis proceed with diligence to provide a proper breath sample. I am satisfied that you failed to provide a seal, did not blow or only blew softly into the ASDs. The only reasonable inference I can draw from the evidence is that the approved screening devices were operating properly, the tests were performed by a qualified ASD operator, there were no impediments to the provision of an adequate sample of breath, and that your failure to provide a suitable breath sample was intentional. The officer reached the reasonable conclusion that you were willfully not providing suitable breath samples and that by acting in this manner you were withdrawing your request for a second analysis.

I agree with your counsel that the Act does not mandate the use of a third ASD device or that the results of a third ASD analysis be used. That is not, however, what happened in your situation. When it became apparent that you were encountering problems in providing a sample of your breath for analysis into the second ASD bearing serial number 066871 the officer set up a third ASD into which you could provide a breath sample. As a result of your willful failure to provide a suitable sample of your breath into the third ASD, no analysis of your breath occurred. No result for this third ASD was recorded.

Was the second analysis performed on a different ASD?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 101132. The officer attempted to obtain a second sample of your breath using two different ASDs but you withdrew your request for a second analysis and a second analysis was not obtained.

I am satisfied that a second analysis was not performed because you chose not to provide a second suitable sample and withdrew your request to have a second analysis performed.

Was the Notice served on the basis of the lower analysis result?

The evidence of the officer is that you provided only one sample of your breath for analysis into an ASD which recorded a "FAIL." The Notice was served on the basis of this single result.

There is no evidence to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The analysis of your breath was performed on an ASD with the serial number 101132. Constable Jacobson provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on September 1, 2013. This ASD had a Calibration Expiry Date of September 29, 2013 and a Service Expiry Date of October 20, 2013.

This Certificate confirms that this ASD was within the recommended limits and was functioning correctly. In the Report to the Superintendent, Constable Jacobson solemnly affirmed that your ASD test was performed by a qualified ASD Operator and that the ASD was functioning correctly

There is no evidence to the contrary.

I am satisfied that the ASD was reliable.

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

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I accept the "FAIL" result from an ASD I have found reliable and which was certified to be correctly functioning. There is no persuasive evidence to the contrary. I am satisfied that the alcohol in your blood which caused this result negatively affected your ability to operate a motor vehicle.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 2, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that, as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 23, 2013

s.22

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

Introduction

On September 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

I have read your submissions and the BC Supreme Court ruling on *Wilson*. Section 215.5(4) of the Act requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had ‘a reasonable ground to believe your ability to drive was affected by alcohol’ is not a reason for review in section 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

Issues

The following are the issues in this review:

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

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

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Whitbread – indicated that you were driving or in care or control of a vehicle at 0747 hours on September 5, 2013. He provides in his narrative report that he observed your vehicle directly, on approach to his location. He then stopped your vehicle and spoke to you at that time.

In your submission dated September 17, 2013, you provide the same version of events on this point. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "WARN"?

In the Report, the officer indicated that you provided two ASD "WARN" results at 0806 hours and 0809 hours.

There is no evidence to the contrary on this point. In your statement you confirm these details in the Report.

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. The constable's narrative report provides: s.22 stated he understood and wished to provide a second sample of breath."

On this point, you confirm verbatim the details provided by the officer.

I am satisfied overall that you were advised of your right to a second breath test analysis, and that the officer provided the second test to you on your request.

Was the second analysis performed on a different ASD?

The Report notes the detail that ASD serial number 061501 was used for the second test at 0809 hours; this is a separate serial number from that of 101303, for the ASD used in the first test.

You likewise provide: "At 0809 I blew into a second ASD device and the result read WARN." I am therefore satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Both the Report and the narrative report contain the officer's evidence that both ASD test results were "WARN." You confirm this detail in your written statement.

I am satisfied that the Notice was served on the basis of the lower analysis result, here being "WARN".

Was the ASD reliable?

The officer provided a Certificate of a Qualified ASD Calibrator for each ASD, in which Mark Kubitza certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, Mark Kubitza certified that on August 14, 2013, he checked the calibration of ASD serial number 101303. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 11, 2013 and the service expiry date as August 2, 2014.

For the second ASD, Mark Kubitza certified that on August 14, 2013, he checked the calibration of ASD serial number 061501. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 11, 2013 and the service expiry date as October 1, 2013.

You provide no evidence concerning the reliability of the ASD. I am therefore satisfied, based on the officer's evidence that the ASDs were reliable at the time the samples were taken.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on September 5, 2013.

November 18, 2013

s.22

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

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

Preliminary Matters

Mr. Carr provided principles from three contemporary cases which guide the adjudication process:

Spencer: police are not deemed to have a credibility advantage;

Gillies: “credibility. . . must be reviewed on a standard of reasonableness” -- adjudicators must weigh evidence

Costain: guidelines on how an adjudicator decides between conflicting evidence.

I am mindful of these principles and have applied them in conducting this review.

Mr. Carr makes submissions based on the officer's initial contact with you, his discussion with you, and the formation of a 'reasonable suspicion' that you had alcohol in your body while operating a vehicle. He questions the accuracy of the officer's inquiry as to the time of your last drink as a component of the reasonable suspicion, and the fact that he issued a demand from memory, which cannot satisfy the requirements of a proper ASD demand, where officers are trained to read this demand.

Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer -- Cst. Whitbread -- indicated that you were driving or in care or control of a vehicle at 0012 hours on October 26, 2013. Cst. Whitbread provides in the Synopsis that: he observed your vehicle approach a roadblock; you were identified as the driver with your BC driver's license.

In the submissions prepared by your lawyer Mr. Carr, he makes no submissions specific to this issue. I am therefore satisfied that you were driving at the time and date placed in to evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0013 and 0023 hours. Mr. Carr does not directly call this evidence into question; he questions the reliability of the testing procedure and devices. I address his evidence and submissions on these points below.

I am satisfied that the ASD registered "FAIL" results as they appear in the evidence of Cst. Whitbread.

Were you advised of your right to a second analysis?

In the Report, Cst. Whitbread indicates that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the Synopsis, he notes specific details:

At 0021 hrs Cst Whitbread read the Notice of Driving Prohibition and the Right to a second sample to OLSEN. OLSEN stated he understood and wished to provide a second sample.

Your submissions do not provide evidence on this point; you do not call the officer's evidence into question. I am satisfied that Cst. Whitbread advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed using a different ASD?

The officer's evidence in the Report is that he provided the second analysis on your request. In the Synopsis, after describing his reading of your right to a second analysis, he notes preparing another ASD at the time of 0023 hours; and s.22 provided a proper sample of breath resulting in a FAIL reading at 0021 hours." Although the time entry in this Synopsis notes a resulting sample at 0021 hours; I find the time in the Report is accurate with the time of 0023 hours.

Cst. Whitbread provides unique identifiers for each ASD. He included Certificates of a Qualified ASD Calibrator (the "Certificates") for each of these devices. I find it more likely than not that a different ASD was used for each of the first and second tests.

Were the ASDs reliable?

The officer provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASD serial numbers 086045 and 061490 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

For the ASD 086045 (also identified by id IT 9707 on the Certificate), the qualified ASD Calibrator, Cst. Narraway, certified that on October 9, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as November 6, 2013 and the service expiry date as August 21, 2014.

For the ASD 061490 (also identified by id IT 9704 on the Certificate), the qualified ASD Calibrator, M Kubitza, certified that on October 9, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as November 6, 2013 and the service expiry date as August 21, 2014.

Your lawyer, on your behalf, provides the following submissions:

- the officer didn't ask when your time of last drink was;
- you were upset and anxious about an emergency room visit that you forgot you had one beer only two minutes prior to the officer stopping you;
- you had just finished a beer when you received a phone call advising of s.22
- the "strong odour" noted by the officer is consistent with recent consumption.

A statement by your wife was provided for this review. She states she witnessed you consuming "only one beer, which he finished at exactly 12:10 am." She states this time as being accurate, because "he had just finished his last drink when we immediately received a phone call from the s.22" She notes that you

were separated from her during your interaction with the officer, so she could not hear the discussion.

With your version of events in contrast to that of the officer, I assess credibility and weigh evidence as per your lawyer's submission on the principles enunciated in *Costain*. At question is your very recent consumption, two minutes prior to being stopped by the officer, a time of "12:10am" noted by your wife.

Your wife sets out her evidence in a signed statement dated October 29, 2013. She notes she did not directly hear your discussion at roadside with the officer. You provide no first-hand account on this discussion with the officer; rather, your statements are provided through your lawyer, which are not sworn, and are hearsay. This is in contrast to the solemnly affirmed evidence provided by the officer.

The officer records you as stating that your wife had consumed a lot that evening, again there is no direct statement from you on this point. It is conveyed through your lawyer as a denial of certain points of your discussion with the officer. I therefore find it more likely than not that you did state this to the officer; it is recorded in his evidence as a first-person account of the discussion you had at roadside. Your wife does not provide a statement regarding her consumption; I therefore question her accuracy on the time you finished a beer when I accept that she had "drank a lot that night."

Your lawyer and wife both provide evidence on the shock you felt regarding s.22
s.22 Your lawyer provides that this is the reason you did not inform the officer of your most recent consumption, with that being two minutes before the officer stopping you. I have no record of your discussion with the officer at roadside other than the account provided on your behalf by your lawyer, which directly refutes statements recorded by the officer in his evidence. Respectfully, an ASD "FAIL" result has implications to your driving record; even taking s.22
s.22 into account, I cannot understand how you would not recall very recent consumption to the officer at roadside. I find also a contradicting pattern in your evidence: you recall with great accuracy what was said to the officer, you are positing that his evidence is "significant exaggeration and distortion of the facts". This is despite being in a state of shock at the time of the analysis carried out by the officer; one that led you to omitting an important detail of your recent consumption to the officer at roadside.

Mr. Carr looks to the 'technical information' document provided by the officer, particularly the prescription of a fifteen-minute waiting period. This is predicated on the officer's belief that there was very recent consumption of liquor. I accept the officer's evidence as fact. You stated "a couple of days ago", an answer that your lawyer verifies on your behalf, and find that the officer had no reason to impose a waiting period to eliminate the possibility of mouth alcohol. Therefore, I am satisfied of the reliability of the sample obtained on each ASD.

Was the Notice served on the basis of the lower analysis result?

Cst. Whitbread recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Mr. Carr posits that with neither of your tests being reliable, effectively your right to the lower of two analysis results governing this prohibition was violated. Given my finding on the reliability of the results obtained, I find his submission on this issue to be a nullity.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

Jeremy Carr
Carr Buchan & Company
fax: 250-388-7327

October 29, 2013

s.22

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

Introduction

On August 9, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

Records at this office confirm that disclosure documents were provided to your legal counsel, Ken Wylie. I have proceeded with the hearing based on this confirmation.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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"), the investigating officer indicated that you were driving or in care or control of a vehicle on August 9, 2013, at 0100 hours.

In the Narrative Text Hardcopy (the "Narrative"), the investigating officer reported that while conducting patrols and speed enforcement he observed you traveling toward him at 124 km/h in an 80 km/h zone.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

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

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

In the Report, the officer indicated that he formed his suspicion at 0109 hours and read the ASD demand at 0110 hours. He checked the box to indicate that you had an odour of liquor on your breath, and he indicated that your response to being asked the time of your last drink was "did not have anything to drink today."

In the Narrative, the officer reported that he detected the odour of an alcoholic beverage coming from your breath. The officer reported that you admitted that you were drinking on August 8, 2013. At 0110 hours the officer read out loud and from the card the ASD demand.

Although you told the officer that had not consumed alcohol that day I am satisfied that in view of the odor of liquor he detected the officer had a reasonable suspicion that you had been driving or were in care or control of a vehicle with alcohol in your body.

I am satisfied that the officer made a valid demand at 0110 hours.

In determining whether you failed or refused to comply with the demand, I turn again to the Narrative where the officer provided the following evidence. The officer reported that he explained several times what he wanted you to do and you sat in your vehicle and stared at him. The officer stated that you made no effort and would not blow into the ASD. The officer reported that he advised you that you were under arrest for refusing.

I am satisfied that you conveyed to the officer your unequivocal refusal to comply with his demand at 0116 hours on August 9, 2013.

Did you have a reasonable excuse?

Mr. Wylie submitted that the ASD calibration disclosure does not indicate the temperature of the device. Mr. Wylie cited *Buhr v the Superintendent of Motor Vehicles*, 2013 B.C.S.C. 1443 specifically to paragraph 6:

“a test cannot be initiated if the temperature of the unit was below 10 degrees Celsius or above 40 degrees Celsius”.

To support his position Mr. Wylie referenced paragraphs 27, 28, and 32 of the *Buhr* case.

Further, Mr. Wylie submitted that given the lack of evidence with regard to the reliability of the ASD you had a reasonable excuse for refusing or failing to comply with the officer's demand to provide a breath sample.

I acknowledge Mr. Wylie's submission and I do not agree that the disclosure documents do not indicate the temperature of the ASD. In the Narrative the officer reported that the ASD that was presented to you had a temperature of 25 degrees.

Here, I have found that the device was within the correct operating temperatures and there is no evidence before me that you were concerned about the operating procedures when you refused. Moreover, this is not a basis for a reasonable excuse.

Consequently, I am not satisfied that you had a reasonable excuse for refusing or failing to comply with the ASD.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on August 9, 2013. You have already served 16 days; therefore, you have 74 days remaining. Your prohibition commences October 31, 2013. Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Ken Wylie by fax 250 365-3488

October 8, 2013

s.22

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

Introduction

On August 18, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

I acknowledge receipt of your written submission. I note that you have requested a reduction in the penalties associated with your driving prohibition. You told me that your sons are active in sports, you

s.22

While I appreciate that it must be difficult to be without your car and driver's licence, under the Act I am not authorized to consider your past driving record, hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. As well, I am

not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that at 02:12 hours on August 18, 2013, Officer Thompson (the “officer”) established you as driving or having care or control of a motor vehicle. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 02:17 hours and at 02:25 hours, the officer used ASD serial number 040255 and 101145 respectively to take breath samples from you. The result of your ASD tests was a “fail”. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “fail”.

Were you advised of your right to a second analysis?

The evidence in the Report is that after your first ASD test, the officer explained to you your right to a second analysis and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that the officer did advise you of your right to a second analysis.

Was the second analysis provided by the officer?

As noted above, the evidence in the Report is that at 02:25 hours, the officer conducted the second ASD test on ASD serial number 101145.

I am satisfied the officer did provide a second analysis.

Was the Notice served on the basis of the lower analysis result?

Both results were a “fail” and as such I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD number 040255 and ASD number 101145 were checked for calibration on July 30, 2013 and found to be within the recommended limits and functioning correctly. Both ASDs have a calibration expiry date of August 27, 2013, and a service expiry date of September 14, 2013.

I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You said you believe the ASD's were not accurate due to you throwing up and having vomit residue in your mouth. You said that on the night in question you had been out with friends at the s.22 and you consumed one beer. When you went to the next bar, s.22 you said you were not feeling well and decided to be the designated driver. At the end of the night you said you had a shot of Tequila and left right after the shot. As soon as you started to drive you felt nausea. You were looking for a place to pull over, couldn't do so and you started to vomit. You said when you looked up you avoided any collisions but drove through a roadblock and the officer looked to be waving you past. As you climbed onto the Overlander Bridge you saw an RCMP vehicle begin to pursue you and a traffic stop was initiated. You said the officer did not have you do any sobriety checks but had you get into the back of his truck and immediately blow on the mouthpiece of the ASD. You said you tried to tell him you weren't feeling well but he did not care. He let you get out of the police vehicle, go to the bathroom and spit up the rest of your vomit after you had blown into both ASDs.

The officer's evidence is that you approached the road block at a high rate of speed, quickly swerved into the other westbound lane and continued down the road. The officer said he got into his vehicle and proceeded after you. The officer asked you how much you had to drink and you stated "one...no two beers." When the officer was speaking to you, he noted that you had a strong odour of liquor on your breath, slurred speech, and watery eyes and were smoking a cigarette. In addition, the officer noted that your balance was unsure and you appeared to be unable to walk a straight line. It appears from the Narrative that the officer asked you twice to put out your cigarette. The officer asked you how long ago your last drink was and you stated it was twenty minutes ago. The officer then waited five minutes before administering the first ASD test because you had just smoked a cigarette. The Narrative goes on to indicate that you told the officer you had four beers that night. The Narrative also indicates that after conducting the first ASD test, you said you needed to urinate. The officer allowed this and you "urinated on the grass next to the vehicle." The second ASD test was then conducted.

In considering what is before me in terms of establishing your drinking pattern, I note that:

- you told me you had one beer at the bar before going to s.22 you had one shot of Tequila just before leaving;
- you told the officer you had one beer, and then said two beers. You later admitted to consuming four beers. When the officer specifically asked you if you had any shots, you said "none"; and,
- your friend told the officer that he bought you a shot for picking him up; however, you had been socializing with that friend during the evening.

Based on the above, I find I have no reliable evidence as to your drinking pattern.

In considering your assertion that the ASD results are not accurate due to the vomit residue in your mouth, I note that:

- you told me that you were vomiting while driving and as you approached the roadblock;
- the officer pulled you over three minutes after you drove through the road block. He noted that you had a strong odour of liquor on your breath, slurred speech, watery eyes and you were smoking a cigarette. Of interest to me is how you found time to find and light a cigarette while driving at a high rate of speed and vomiting.
- It is curious that there is no mention in the Narrative that you had vomit on you or in your vehicle. As well, the officer said he noted a strong odour of liquor on your breath. If you had vomit in your mouth as you claimed you did, I find it curious that the officer could not smell it as I am aware that vomit generally does have a strong odour.

For the reasons stated above, I do not find your evidence to be very credible with respect to your drinking pattern or your assertion that you had vomit residue in your mouth. In addition, I note that the officer waited an additional five minutes before conducting the ASD tests because you had been smoking a cigarette. I find I prefer the officer's evidence and I have given it more weight in this review.

Based on a consideration of the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days.

Your prohibition took effect on August 18, 2013. I note that as you have already served 21 days of the prohibition, you need only serve the remaining 69 days. Your prohibition commences October 10, 2013. The prohibition ends at 23:59 hours on December 17, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 18, 2013

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

Introduction

On September 28, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on the grounds that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" and, "The ASD, which formed the basis for the prohibition, did not register a WARN reading;" however, these grounds are not applicable to your situation because you did not receive a refusal IRP, nor did an ASD register a "WARN". I have considered all the grounds available to you.

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

In your submission you state that you are employed at s.22 You state that you take full responsibility for your actions, but that this is your first offence and you need your licence for employment. You state that your employment is s.22 s.22 You have provided a letter from s.22 who states that you require your drivers license for your employment, and you have been employed s.22

While I understand and appreciate your situation, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I commend you for taking responsibility for your actions; however, the scope of this review is limited to the grounds as defined by the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0026 hours on September 28, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over by the officer and were identified as the driver via your BC driver's licence.

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

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided a sample of your breath at 0032 hours resulting in a "FAIL" reading.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0035 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Narrative that you did not request to provide a second sample of your breath.

Was the second analysis performed on a different ASD?

As you did not request to provide a second sample of your breath, the officer was not obligated to provide a second ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that your ASD analysis resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The qualified ASD calibrator certified that on September 12, 2013, he checked the calibration of ASD serial number 066134. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 10, 2013, and the service expiry date as July 4, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 28, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 3, 2013

s.22

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

Introduction

On September 13, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

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

I acknowledge receipt of your written submissions. You explained that you are a s.22 and that you use your car to get your son to and from school every day. You also drive to and from work in s.22 You said that without your car, you cannot work to the

degree that you need to in order to maintain a specific income. You asked that the 90 day driving prohibition be reduced to a 30 day warn to coincide with the 30 day impoundment. s.22

s.22

While I can understand that it must be difficult to be without your car and driver's licence; under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. A 90 day driving prohibition occurs as a result of a person blowing a "fail" result on an ASD and, as noted above, I have no authority under the Act to shorten or otherwise alter the terms of those prohibitions.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the "Report") is that on September 13, 2013, at 00:05 hours, Officer Chan (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the *Act*.

Did the ASD register a "fail"?

The police evidence in the Report is that at 00:16 hours, the officer used ASD serial number 058824 to take a breath sample from you. The result of your ASD test was a "fail". There is no evidence to the contrary before me.

I am satisfied that the ASD test registered a "fail".

Were you advised of your right to a second analysis?

The evidence in the Narrative Text Hardcopy (the "Narrative") is that after you blew the first "fail", the officer was turning to show you the ASD result but the ASD had reset. The officer reinserted the mouth piece and had you provide another sample of breath into the ASD which again produced a result of "fail".

The evidence at section 7 of the Report indicates that after explaining your right to a second analysis on a different ASD, you did not request a second ASD test. This is supported by evidence found on page 2 of the Narrative which states that the officer read you your right to a second ASD test. You stated that you understood and did not want to provide a second breath sample.

You wrote that you blew into the machine the first time and were not shown the result as it had already reset. The machine was reinserted into your mouth and you blew a second time. Again you were just told that the reading was a “fail” and you weren’t shown the result. You were then escorted to the police vehicle, put in handcuffs and helped into the back seat. You said you were asked if you wanted to do a second ASD test. You declined because you had already blown twice.

In my view, when the officer reinserted the mouthpiece and had you provide another sample of breath, he did so in an attempt to show you the “fail” result. When you were seated in the police car, then the officer made his decision to proceed by way of a driving prohibition pursuant to the Act. He then read you your right to have a second ASD test, to which you declined.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As noted above, you declined to do a second ASD test and so I am satisfied that the second analysis was not provided by the officer.

Was the second analysis performed on a different ASD?

As noted above, the second analysis was not performed because you declined the offer of a second ASD test.

Was the Notice served on the basis of the lower analysis result?

There was only one ASD test, the result of which was a “fail”. As such, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificate of a Qualified ASD Calibrator (the “Certificate”) indicates the following:

- ASD serial number 058824 was checked for calibration on August 22, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 19, 2013, and a service expiry date of June 17, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

OCTOBER 10, 2013

s.22

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

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your written submission, you addressed the officer’s observations that you pressed the accelerator and fumbled with the glove compartment. You also argued that the officer was overly quick and presumptuous in forming the suspicion that you had alcohol in your body. You

suggested that an officer must prove without a reasonable doubt that the person was driving under the influence.

A peace officer's observation of behaviours such as you addressed can contribute to the officer forming the reasonable suspicion that a person has alcohol in his body. This can lead the officer to make a valid ASD demand. However, the validity of the demand is not an issue in this review; it is relevant only in circumstances where a person fails or refuses to comply with a breath demand. As a result, the factors that led the officer to make an ASD demand are not relevant to my considerations.

The standard of review in an administrative hearing such as this is a balance of probabilities. In contrast, a criminal prosecution is determined on the basis of beyond a reasonable doubt.

In the last paragraph of your submission, you said you have operated a motor vehicle for 20 years and you have no history of impaired driving. You said it is not in your character to do so, and in hindsight, you strongly regret having had your last beverage or any at all. You said you firmly believe the penalties imposed do not fit the situation or circumstances.

I understand and appreciate that receiving a 90-day driving prohibition can have serious consequences in a person's life. However, under the Act I am not authorized to consider personal circumstances or a person's driving record in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

In addition, the Act allows me to alter the terms and conditions of a prohibition only where a higher prohibition has been applied in error and a lesser prohibition is required by the Act. There is no evidence before me that this is the case here.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable McLennan indicated that she witnessed you driving or in care or control of the vehicle at 0500 hours, on September 21, 2013. In the Narrative Text Hardcopy (the "Narrative"), the officer said a witness called to report a suspicious vehicle in the parking lot. You were later identified as the driver of the vehicle and the witness

reported that you drove the vehicle a few parking spots over, after sitting in the vehicle for several minutes.

Constable McLennan said she arrived on the scene at 0500 hours and found you in the driver's seat with the vehicle running and the headlights on.

In your written submission, you said you were not driving at 0500 hours and you had not driven for some time. You said you had no intention of operating the vehicle and you argued that the officer did not ask you your intentions or if you were waiting for someone or what your plans were for alternate transportation. You said your intention was to park the vehicle in the lot until daylight. You indicated that you did not feel "impaired", but rather, you felt fatigued, which decreases your night vision.

According to your evidence, you intended to drive when the sun came up. There is no evidence before me that you were waiting for someone else or that you had arranged for alternate transportation or that the vehicle was inoperable. You said you did not feel "impaired", yet your breath samples registered "fail" on two separate ASDs. Given this evidence, I find it reasonable to conclude that you would not have known if you were still under the influence of alcohol when the sun came up. An individual who is affected by alcohol and found behind the wheel, and has a present ability to set the vehicle in motion — without intending at that moment to do so — may nevertheless present a realistic risk of danger. If the witness had not called the police, there was a substantial risk that you would have set the vehicle in motion, which would have created a realistic risk of danger.

Based on all the evidence, I find that you were in care or control of the vehicle and I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable McLennan said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 0510 and 0515 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative, Constable McLennan indicated that she informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by

the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

Constable McLennan submitted a Certificate of Qualified ASD Calibrator (the "Certificate") stating that Michael Johnathon Scherpenisse certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Cst. Scherpenisse stated that on the 16th day of September, 2013, he checked the calibration of ASD with serial number 032554 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG307901, Expiry: 2015-03-20. This ASD was found to be within the recommended limits. It had a calibration expiry date of October 14, 2013, and a service expiry date of October 31, 2013. I note that the ASD serial number on the Certificate matches the serial number of the first ASD referenced in the RTS.

Constable McLennan submitted a second Certificate stating that Howard Austin Morine certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Cst. Morine stated that on the 4th day of September, 2013, he checked the calibration of ASD with serial number 101150 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG307901, Expiry: 2015-03-20. This ASD was found to be within the recommended limits. It had a calibration expiry date of October 2, 2013, and a service expiry date of August 26, 2014. I note that the ASD serial number on the Certificate matches the serial number of the second ASD referenced on the RTS.

You said you question the accuracy and reliability of the ASD and that the ASD currently in use is flawed and prone to misleading results. You said ASDs dismiss certain situations, timing, medical and other factors. I infer you are referring to this model of ASD, generally. You did not identify any way in which the two ASDs used in this investigation malfunctioned. Your comments are only suggestions of what might have happened. Evidence to support a suggestion is required in an administrative review. Based on all the evidence before me, I am satisfied that both ASDs were reliable.

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

In your written statement, you said you consumed three alcoholic beverages starting late on September 20th and into early September 21st, 2013. You said the last beverage was consumed approximately one hour prior to your interaction with the police. You said you were not even slightly intoxicated. You indicated that you are not a heavy drinker and that alcohol has never agreed well with your body.

You said you are willing to offer personal and professional character witnesses, but you did not do so. The application form states that any written information you wish to be considered should be provided to the Superintendent in advance of the time scheduled for the hearing. I can only consider the evidence that is before me at the time of the hearing.

You said you feel you are able to handle three drinks over several hours and you were extremely surprised by the "fail" result of the first ASD. You insisted that you did not interfere with the ASD when blowing into the device, as the officer indicated. You were not prohibited for failing or refusing to provide a breath sample, so your initial difficulties providing a sample are not relevant to the issues before me.

While you may have felt cognizant and cooperative, clear and concise in dealing with the officer, you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs that I found to be reliable. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013,

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 2, 2013

s.22

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

Introduction

On August 16, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an ASD test resulted in a “FAIL”. In his written submission (the “Submission”), Mr. Knight states

that, “clearly the indicated ground was in error and resulted from [you] not understanding the meaning of the wording.” I acknowledge this submission. All grounds for review that apply to your case will be considered in this review.

Mr. Knight submits that the Superintendent, through his agent, Cst. Dibblee, had no authority to issue the prohibition in the case before me. Referencing the Notice, Mr. Knight asserts that Cst. Dibblee indicated that you were served with a, “90 days – FAIL *because* a sample of your breath on an approved screening device registered a FAIL **and** your ability to drive is impaired by alcohol.” In Paragraph 22 of his Submission, Mr. Knight states that, “there is no evidence [Cst. Dibblee] *believed on reasonable grounds* that [your] ability to drive was affected.” Specifically, that Cst. Dibblee does not communicate, explicitly or implicitly, as to what his grounds were for believing your ability to drive was affected by alcohol.

Mr. Knight also disclosed *Hicks v. British Columbia (Superintendent of Motor Vehicles)*, [2000] B.C.J. No. 2889, which states that, “evidence is the grounds upon which the police officer may have had for forming his belief.” He argues that Cst. Dibblee offers insufficient evidence to support the issuing of the 90-day prohibition on the basis set out in the Notice. Put more simply, because Cst. Dibblee did not provide reasonable grounds for believing your ability to drive was affected by alcohol (as indicated in the Notice), the prohibition should be revoked because proof of reasonable grounds is required to give force and effect to the Notice.

Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Mr. Knight also states that an ASD “FAIL” does not imply that a person’s ability to drive is affected by alcohol. He used the example that a person with a BAC under 50mg/100ml may be significantly impaired, whereas a person with a BAC over 100mg/100ml may show no signs of impairment. The issue of how alcohol affects your ability to drive is not a determination I must consider in this review. The only issues before me in this review are those noted below.

Issues

The following are the issues in this review:

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

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

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Dibblee, indicates that you were driving or in care or control of a motor vehicle at 2326 hours on August 16, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Dibblee submits that he was conducting a road check and observed your vehicle turn around prior to reaching the check. You were observed operating the motor vehicle and identified with a valid British Columbia driver's licence.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

Evidence in the RTS indicates that at 2329 hours, Cst. Dibblee made an ASD demand on you. At 2330 hours you provided a breath sample for analysis on ASD serial number 101196. The test result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

Cst. Dibblee's Narrative submits that at 2336 hours he read you the right to request a second ASD test and that you understood what this right offered. Further, evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower of the two ASD test results would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

On line 7 in the RTS in response to the question, "Did the driver request a second ASD test?", Cst. Dibblee indicated, "NO". In the Narrative, in response to the question, "Was the request withdrawn (e.g. words and/or actions described in detail)?", Cst. Dibblee indicates, "No. Not requested."

There is no evidence before me to the contrary. I am satisfied that a second analysis was not provided by the officer because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS, Narrative, and the Submission indicates that the sole ASD test result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificate of a Qualified ASD Calibrator (the "Certificate") is as follows:

- ASD serial number 101196 was checked for calibration on July 25, 2013, with a service expiry date of June 17, 2014, and calibration expiry date of August 22, 2013, and;
- A qualified ASD Calibrator, Cst. Cara Volz, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Dibblee. These signatures confirm that any ASD test referred to in the investigation was conducted by a qualified ASD operator and that the ASD unit used was functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASD was reliable.

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

Cst. Dibblee indicates that at 2328 hours he formed the reasonable suspicion for the ASD demand. Specifically, Cst. Dibblee submits that he detected an odour of liquor emitting from your breath. When asked the time of your last drink, he submits that you advised him your last drink was at 1930 hours and that you had consumed two glasses of wine with dinner.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80 mg%. I have an ASD "FAIL" result before me and admission of consumption. Moreover, I have already determined that the ASD registered a "FAIL" and the ASD used was reliable.

There is no evidence before me to the contrary. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 21 days of the prohibition, you need only serve the remaining 69 days. Your prohibition commences October 4, 2013. The prohibition ends at 2359 hours December 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Jeremy Knight (by fax)
250-374-7777

October 17, 2013

s.22

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

Introduction

On September 27, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Your hearing was scheduled for Wednesday, October 9, 2013, at 9:00 a.m. At that time, Mr. Lacusta advised there was s.22 present. Mr. Lacusta also advised that he had not received a copy of the police documents and I acknowledged that these documents were not currently before me. Mr. Lacusta pointed out that as I had no jurisdiction to proceed, my decision must be to revoke your driving prohibition. I explained to Mr. Lacusta that it is not my practice to render a decision while on the phone. Mr. Lacusta then asked whether the vehicle

could be released from impoundment. He explained that someone had attended and tried unsuccessfully to have the vehicle released. I explained that an application for release of an impounded vehicle is a separate process through the Superintendent of Motor Vehicles. I further explained that if a decision is made to revoke a driving prohibition, release of the vehicle flows from that decision. At this point in the discussion, Mr. Lacusta and I mutually agreed that the conversation had reached its logical conclusion and the hearing was concluded.

Approximately half an hour after my conversation with Mr. Lacusta, at 9:49 a.m. on October 9, the police documents were faxed to our office. I re-opened the hearing at that time to provide Mr. Lacusta with document disclosure. Mr. Lacusta was offered an opportunity to review the police documents and was offered a choice of dates on which to reschedule either an oral or a written hearing. Mr. Lacusta expressed that he was unhappy with the fact that your hearing had been concluded and then re-opened; however, he agreed to reschedule the hearing for Wednesday, October 16, 2013 at 10:00 a.m.

I acknowledge receipt of Mr. Lacusta's fax received in our office on October 10, 2013. The fax consisted of an Affidavit sworn by s.22 present at the oral hearing on October 9, 2013, being s.22 said that he attended the hearing on October 9 to act as your s.22 He went on to say that the hearing lasted approximately eight to ten minutes and that I advised I was not in receipt of the written materials from the police. I agree this is true. s.22 goes on to say that at the end of the telephone communication I said "this hearing is concluded" and then hung up the telephone. I do not agree with this. As noted above, Mr. Lacusta and I agreed that the conversation had reached its logical conclusion and we mutually agreed to end the call.

s.22 also said that I said a decision would be faxed later that day. Again, I do not agree. It is my distinct recollection that I advised Mr. Lacusta that it is not my practice to render a decision during a hearing or to advise of any potential decision over the phone. Finally, at paragraph 4 of his Affidavit, s.22 points out that at no time did I indicate or advise that the hearing was being adjourned or otherwise set over to a new date. I agree this is true. However, according to the judge's ruling in the recent case of *Murray v. British Columbia (Superintendent of Motor Vehicles)* 2012 BCSC 1730, I did not have jurisdiction to proceed.

I called Mr. Lacusta on October 16, 2013, at 10:00 a.m. as scheduled and advised that I was calling to conduct your review hearing. Mr. Lacusta advised that he objects to the proceedings. I acknowledged Mr. Lacusta's objection and asked if he wanted to provide submissions on your behalf. He said he wanted to point to the relevant sections of the Act to support his assertion that your driving prohibition should be revoked.

Specifically, Mr. Lacusta said that:

- Pursuant to section 215.47 of the Act, the officer did not promptly forward to the superintendent the necessary documents including a copy of the notice of driving prohibition, certificate of service, the report and the information relating to the ASD.
- Pursuant to section 215.49 of the Act, at the date and time of the initial hearing (October 9, 2013), I did not have before me the relevant documents necessary for my consideration.
- Pursuant to section 215.5 of the Act, the matters on which I could rely were unavailable to me at the time of the first hearing.

Mr. Lacusta went on to say that his position is the Superintendent of Motor Vehicles has no authority under the Act to conduct a second hearing and he is therefore not going to submit any evidence. There has to be a revocation of your driving prohibition based on the fact there was no evidence available at the initial hearing on October 9, 2013.

I acknowledge Mr. Lacusta's concerns regarding the manner in which your hearing has progressed, as detailed above. However, I do not agree that I have no authority as a delegate of the Superintendent to proceed to re-open the hearing once all police evidence has been received. Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Dorian D.E. Lacusta, on October 11, 2013 at 11:44 a.m. I have proceeded with this review based on that confirmation.

Mr. Lacusta asked whether your hearing was being recorded and I advised that it was not. Mr. Lacusta then advised that it was not being recorded at his end either.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

Officer Healey provides evidence in the Report to Superintendent (the "Report") that on September 27, 2013, at 01:19 hours, you were established as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 01:39 hours, ASD serial number 101628 was used to take a breath sample from you. The result of your ASD test was a "fail". There is no evidence to the contrary before me.

I am satisfied that the ASD test did register a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

The evidence in the Report is that you did not request a second ASD test. The evidence from the Narrative Text Hardcopy (the "Narrative") is that at 01:57 hours, the officer read you your right to have a second ASD test. He said he also explained to you that, due to the "fail" of the first ASD test, a 90 day driving prohibition would be issued. The officer said he explained to you that a second ASD test would not result in any further penalty and may actually be to your advantage because the best result for the driver is used. Although the Narrative indicates that you said you did not understand, it also says that Constable Healey later spoke with you and you proved to have a good understanding of their conversation and the events that occurred. In addition, it seems that you understood when the officer asked you to produce your BC driver's licence because you did so. It seems clear that you understood to provide a breath sample for the first ASD test, because you did so. Finally, in my view it seems you understood and consented to a search of your cab because the officer said that open liquor was seized from the cab during a "consented search". In terms of the offer of a second ASD test, the officer noted that your response was "no thank you".

I am satisfied that the officer did not provide a second analysis because you did not ask for one.

Was the second analysis performed on a different ASD?

As noted above, the second ASD test was not conducted because you did not ask for one.

Was the Notice served on the basis of the lower analysis result?

There was only one ASD test conducted and the result was a "fail". As such, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificate of a Qualified ASD Calibrator indicates the following:

- ASD serial number 101628 was checked for calibration on September 22, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 20, 2013, and a service expiry date of July 8, 2014.

As there is no evidence to the contrary before me, I am satisfied the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Dorian D.E. Lacusta
by fax 604-852-2246

October 31, 2013

s.22

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

Introduction

On October 10, 2013, 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;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2100 hours on October 10, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver’s licence.

In your submission you confirm that you were stopped at an RCMP roadblock on October 10, 2013 at 2100 hours.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 2107 hours and 2114 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2108 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2114 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 085256 and your second sample of breath into ASD serial number 085260. The officer also provided the Certificate of a Qualified ASD Calibrator (the "Certificate") for ASD serial numbers 085256 and 085260.

In your submission you state that you had to blow twice into the same ASD.

I am unsure whether you intend to state that you provided both samples of breath into the same ASD, or if you had to provide two samples before the ASD registered a result. Regardless, I note that the officer has provided compelling evidence indicating that two different ASDs were used in your prohibition.

I am satisfied that the second analysis performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on October 4, 2013, he checked the calibration of ASD serial number 085256. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as November 21, 2013.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 4, 2013, he checked the calibration of ASD serial number 085260. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as April 25, 2014.

In your submission you state that you would like to know when the screening device was last calibrated. I am satisfied that the Certificate provides this information for you.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state:

- you consumed home-made wine the previous evening and did not consume any alcohol that day
- you work at s.22 and the chemicals that you work with have been proven to make a person drowsy and even impaired
- you believe that "Styrene", a compound in Resin is hugely responsible for the outcome of the ASD, as you cannot believe that you had any alcohol in your system almost 24 hours after drinking

I have considered your submission that the chemicals you work with, and your working conditions can cause you to be drowsy, and even impaired. I note that the ASD measures your BAC, and not your level of impairment. I do not have any compelling evidence before me to indicate how the chemicals that you work with would cause your BAC to be falsely elevated, or indicate that the results of the ASD analyses are not reliable. You provided two samples of your breath on two different ASDs, both resulting in "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 10, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 14, 2013

s.22

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

Introduction

On October 25, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

Preliminary

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice that the peace officer served on you.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that on October 25, 2013, at 22:20 hours, Officer Buchanan (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 22:32 hours and at 22:35 hours, the officer used ASD serial numbers 085262 and 093814 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 093814 at 22:35 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were “fail”; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator indicates that ASD serial number 085262 and ASD serial number 093814 were checked for calibration and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

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

You said you were stopped by police approximately two hundred yards from your home. You said you had consumed no alcohol during that day and started drinking your first beer at 9:30 p.m. You opened your second beer at 10:15 p.m. At about that time, a friend called and advised you she was having a panic attack and wanted you to come over. You said you finished your second beer at about 10:20 p.m. and then left to go to your friend’s residence. Within thirty seconds or less you encountered the roadblock. You said you did not mean to tell the officer that you finished your last drink five minutes prior to driving, but that you started your last drink five minutes prior to driving. You said that your first ASD test was not conducted more than fifteen minutes after your last drink of beer. You also said you burped because you had consumed your second beer so quickly. You said you were attempting to hide the fact that you burped from the officer because you thought it was impolite.

Mr. Arndt submits that your prohibition should be revoked because the result of the ASD test was falsely elevated by residual mouth alcohol. Mr. Arndt referred to excerpts from the RCMP ASD Manual, and the criminal law cases of *R. v. Mastromartino*, *R. v. Bensmiller* and *R. v. Seivewright* as authorities for the assertion that police must delay at least fifteen minutes before administering an ASD test when there are concerns of residual mouth alcohol. I note that all three cases provided by Mr. Arndt are criminal cases, which are instructive but not determinative of administrative reviews. This review is decided on a balance of probabilities, unlike a criminal standard which is beyond a reasonable doubt.

The officer’s evidence is that he could smell a strong odour of liquor coming from inside your vehicle. He asked if you had consumed any liquor and you advised that you had two beers, with your “last drink 5 minutes prior to driving”. The officer asked you to exit the vehicle to isolate the odour and once outside, the officer said he could smell a very strong odour of liquor on your breath, that you had a flushed appearance, bloodshot eyes, and that you swayed while standing and had slow deliberate movements. The officer said he waited an additional ten minute deprivation period to rule out mouth alcohol. The officer said he observed you continuously and you did not consume anything from pull over to release.

I acknowledge that you are trying to establish that the results of the ASD tests are falsely elevated as a result of mouth alcohol; however, I do not agree. The officer turned his mind to

the possibility of mouth alcohol and waited an additional ten minutes before administering the first ASD test. The first and second ASD tests were conducted at 22:32 hours and 22:35 hours respectively – being seventeen and twenty minutes after your last drink based on the information you provided to the officer. I am not persuaded that your two ASD tests were falsely elevated due to mouth alcohol.

You said that you burped, however you were not specific about when that was in relation to your ASD tests. You also said you were hiding this activity from the officer because you did not want to appear impolite. However, in my view the police are trained to record and make observations to ensure proper ASD tests are conducted. These observations include whether a driver is chewing gum, belching or burping, and smoking. Police are trained to hold off conducting an ASD test to avoid a potentially false reading. The officer in this case did not observe you to burp and/or belch, and in fact he indicated that “[you] were observed continuously” during the deprivation period. I am not persuaded by your evidence that you were burping prior to the ASD tests.

In reviewing the evidence in its totality, I am satisfied that there is sufficient evidence to find it more likely than not that the ASDs registered a “fail” due to alcohol in your blood, and not as a result of alcohol in your mouth. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 25, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jeffrey R. Arndt
by fax 778-455-3999

November 12, 2013

s.22

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

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Narrative Text Hardcopy (the "Narrative"), Constable Buchanan (the "officer") indicated that he pulled over a vehicle that was driving slowly and in a separate fashion on Highway 1 near Bench Road in Duncan BC. The officer noted that he met with the driver, who was located in the driver's seat with the keys in the ignition and vehicle running. You were identified as the driver of the vehicle and only occupant of the vehicle. In the Report to Superintendent ("RTS"), the officer indicated that you were driving or in care or control of the vehicle at 22:35 hours on September 27, 2013.

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

Did the ASD register a "WARN"?

In the RTS, the officer indicated that the first ASD test was administered at 22:42 hours and it resulted in a "WARN" reading. The RTS further indicates that a second ASD test was administered at 22:45 hours, and that it also resulted in a "WARN" reading.

There is no evidence before me that indicates the ASDs did not register a "WARN" result. I am satisfied that the ASDs registered a "WARN".

Were you advised of your right to a second analysis?

In the RTS, and Narrative the officer indicated that he informed you of your right to a second test on a different ASD and that the lower ASD test result would prevail. He noted that you requested the second ASD test.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second ASD test was completed at 22:45 hours.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the constable.

Was the second analysis performed on a different ASD?

In the Narrative the officer stated that the second ASD request was read to you verbatim from the IRP card at 22:43 hours and that you understood. In the RTS, the officer recorded that he advised you of your right to a second ASD test and indicated he informed you that the second ASD test would be on a different ASD, and that the lower ASD test result would prevail. Further in the RTS the officer recorded the serial number for the first ASD as 085262, and the serial number for the second ASD as 104836.

In your written submission, you stated that you a second ASD was not used for your second test. You explained that when the officer asked you to step out of the vehicle for your breathalyzer he open a case on the passenger seat of his SUV. In the case was a black breathalyzer and four individually sealed white mouthpieces. You indicated that you blew a "WARN" and that came as a shock to you, as you only had one beer after work. You stated that the officer then pulled out a small pamphlet and began to read you your rights which included you right to a second test to be given immediately if you requested. You noted that you requested the second test and that the officer removed the mouthpiece and put another one on and made you blow again into the same device.

I have considered and acknowledge your submissions in their entirety; however, while you have indicated that the officer did not use a different ASD for the second ASD test, I find that the officer has provided more compelling evidence that a different ASD was used for the second test.

I note that you have not refuted the officer's evidence in the Narrative that he read to you the second ASD request verbatim from an IRP card. Nor have you refuted the officer's evidence in the RTS that he informed you the second ASD test would be on a different ASD and the lower test result would prevail, and that you understood your right to a second ASD test. The evidence in the Narrative in conjunction with the officer's evidence in the RTS reasonably satisfies me on a balance of probabilities that the officer more likely than not was aware of the requirements of the second ASD test.

Under section 215.42(2) of the Act a second analysis must be performed with a different ASD than was used in the first analysis. The officer's evidence indicates to me that he was aware of the requirements of the second ASD test, specifically that the second test must be performed on a different ASD than the one used in the first ASD test. Therefore, it does not make sense to me that the officer would inform you that the second ASD test is to be administered on a different ASD, but then use the same ASD he used during the first ASD test. Nor does it seem reasonable to me that a person who has just been advised that second ASD test must be conducted on different ASD would not have at the very least questioned the officer's use of the same ASD he used in the first test.

Further, in his evidence, the officer has recorded two distinct ASD serial numbers, as well as provided two separate Certificates of a Qualified ASD Calibrator (the "Certificates"), each bearing a serial number that corresponds with those recorded in the RTS.

Ultimately, based on the evidence before me, on a balance of probabilities, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded in the RTS that both results registered as “WARN” results.

There is no evidence before me that refutes the officer’s evidence on this point. I am satisfied that the Notice was served on the basis of the “WARN” result, since each result was the same.

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer also provided two Certificates of an ASD Calibrator.

For the first ASD, the qualified ASD calibrator certified that on September 6, 2013, he checked the calibration of ASD serial number 085262. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 4, 2013, and the service expiry date as January 3, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 6, 2013, he checked the calibration of ASD serial number 104836. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 4, 2013, and the service expiry date as May 22, 2014.

There is no evidence before me that the ASDs used were not functioning correctly at the time of your ASD tests on September 27, 2013. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on September 27, 2013.

OCTOBER 7, 2013

s.22

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

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

When you applied for this review, you checked six grounds listed on the application form; however, not all of these grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

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

In your written statement, you said the officer told you he pulled you over, because you were speeding, but he did not tell you how fast you were going. This matter is not relevant to the issues I am authorized to consider under the Act.

You explained the reason why the officer noticed an odour of liquor, and you also said you did not slur your words. Observations such as this can contribute to an officer's reasonable suspicion that a person has alcohol in his or her body, which may lead the officer to make a valid ASD demand. However, the validity of the demand is not an issue in this review; it is relevant only in circumstances where a person fails or refuses to comply with a breath demand. As a result, factors that led the officer to make an ASD demand are not relevant to my considerations.

You said you thought the officer was being difficult with you and you explained that he would not give you a ride. While I acknowledge these submissions, the grounds upon which I may review your prohibition are narrowly defined, as I have set out in the introduction to this decision. I am not authorized to consider the way in which an officer conducts an investigation. You could take your concerns in this regard to the appropriate authority.

You said the officer gave two different times for when you were served the prohibition. I note on page three of the Narrative that he said you were served with the Notice at 0324 hours; however, you did not indicate, and I have not found another spot in which he gives the time he served you with the Notice.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Pierotti indicated that he witnessed you driving or in care or control of the vehicle at 0230 hours, on September 14, 2013. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Pierotti said you provided a breath sample into an ASD and that the

device registered “FAIL”, as a result of the analysis. There is nothing before me to the contrary. I am satisfied that the ASD registered “FAIL” at 0254 hours, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the “Narrative”), Constable Pierotti indicated that he informed you of your right to a second breath test analysis. I am satisfied that you were advised of your right to a second analysis, but that you declined to take advantage of this opportunity.

Was the second analysis provided by the officer?

In your written submission, you said Constable Pierotti called another member to do an ASD test and “he did two but used the same ASD for both.” Constable Pierotti’s evidence indicates that ASDs were brought to the scene by another member, as you said. However, he indicated that he administered only one ASD test, he informed you of your right to a second test, and that you declined to take advantage of the second analysis. In the Narrative, he said you refused the second analysis and said, “You guys know how to do [your] jobs.”

You focused on other aspects of the officer’s evidence, but I find it odd that you did not comment on his statements that you were offered, but declined to take the second test.

Based on all the evidence before me, I am satisfied that it is more likely than not that the second analysis was not provided by the officer, because you did not request a second test.

Was the second analysis performed on a different ASD?

This issue is not relevant, because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that the ASD used to analyze your breath registered “FAIL”. I am satisfied that the Notice was served on the basis of the lowest available result, which was “FAIL”.

Was the ASD reliable?

The evidence provided by the police in the Certificate of a Qualified ASD Calibrator regarding the ASD used in your case indicates that the device was found to be functioning correctly and was found to be within the recommended limits.

You said that ASDs are not reliable, but you did not provide any evidence explaining how the device used in your case malfunctioned. It is not sufficient for an applicant to make 'suggestions' about what might have happened. Evidence to support the suggestion is required in an administrative review

Based on all the evidence before me, I am satisfied that the ASD was reliable.

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

In your written submission, you said you told the officer you had not been drinking. You noticed that his evidence in the RTS is that you told him your last drink was "in the morning". However, in the Narrative, he said you told him you had not consumed anything. I acknowledge this inconsistency in the officer's evidence.

You also said that you knew you were "not impaired because [you] had not been drinking." You explained that the odour of liquor could have come from the shirt in the back seat, which was soaked in beer, and you denied slurring your words. It raises questions in mind as to why you commented on these two symptoms of alcohol consumption, but you did not comment on the officer's evidence that you had difficulty stating your address.

Based on all the evidence before me, I am not persuaded on a balance of probabilities to doubt the "FAIL" reading on the ASD. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%.

I am satisfied that it is more likely than not that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 17, 2013

s.22

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

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied on the grounds “I did not refuse or fail to comply with the officer’s demand, and my 7-day or 30- day prohibition should be reduced. However, these grounds are not applicable to your circumstance because of the basis for which the Notice was served: an ASD “FAIL” result; and, you were not prohibited for 7 or 30 days.

Your review was scheduled for October 8, 2013 at 9:30a.m. To date I have not received any written submissions from you. As such, I have proceeded with this review on the evidence before me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 1543 hours on September 29, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 1545 and 1547 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded the serial numbers for the ASDs used as 101549 and 065850 respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 10, 2013

s.22

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

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Ms. Leamon argued that to admit or rely on the ASD test results amounts to a violation of your constitutional rights under the *Canadian Charter of Rights and Freedoms* (the “Charter”),

specifically, your right to counsel under section 10(b). Ms. Leamon referred me to *Regina v. Brigitte Schultz* in support of her submission.

I have no authority under the Act to consider whether or not being issued an IRP based on an ASD “FAIL” result is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge under section 144(1)(b) under the Act. The decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

Under section 117 of the Act, I have been delegated authority by the Superintendent to conduct this review of your driving prohibition pursuant to section 215.41 of the Act. The scope of the review is limited to the grounds as specified in the Act. I have conducted my review accordingly.

Ms. Leamon also cited *Spencer v. British Columbia* and referred to the principles of fundamental justice and procedural fairness set out in this decision, of which I am mindful and have applied in conducting this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “RTS”), Constable Hillier indicated that he witnessed you driving or in care or control of the vehicle at 2258 hours, on September 21, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, Constable Hillier said you provided breath samples into two ASDs and that the devices both registered “FAIL”, as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered “FAIL” at 2303 and 2307 hours, respectively, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Hillier indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

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

In your affidavit, you said you consumed four beers in the evening of September 21, 2013, starting at about 8 pm. You had your last sip of beer just before leaving your house at approximately 11 pm.

You explained that during the evening, you received the news that a friend of yours had died. You indicated calling and texting a number of friends to find out what happened and then you decided to go to your friend, s.22 house, which is about a five minute drive from where you live.

In paragraph 9 of your affidavit, you said you started preparing to leave and you still had your fourth and final beer in your hand as you were walking out the door. You said you quickly finished it and placed it on the floor just beside the door, because you did not want to bring it in the vehicle with you.

In an unsworn, unsigned statement, your spouse, s.22 provided corroborating evidence. She noted that you finished the last few sips of beer at the front door where she was standing and that you put the empty can down. If s.22 was standing there, I find it odd that you would put it on the ground and not just hand it to her. Also, given what you were going through that evening, I find it odd that you both remembered details like the number of beers you consumed and exactly when and where you had your last sips of beer.

In paragraph ten of your affidavit, you said you were driving toward s.22 house when you encountered the roadblock. You said this happened after “approximately forty-five seconds of driving.”

In paragraph 11, you said you were “completely out of it and emotional because of the news that [you] had just received about s.22 You explained that this was why you gave the officer a response that “made absolutely no sense.”

In paragraph 12 you gave details of your conversation with Constable Hillier, although you said you “do not remember many of the details because [your] mind was spinning and [you] could not stop thinking about s.22

In paragraph 18, you said you may have told the officer that your last drink was about an hour ago. You said you cannot recall being questioned about the time of your last drink, but you acknowledge that this answer is false, since you had just finished a drink.

Despite your statements in paragraphs 11, 12 and 18 about your mental and emotional state, your last paragraph in the affidavit is: “My memory of the event in question is very clear.” This statement contradicts your other evidence. I find that your statements in paragraphs 11 and 12 are understandable and consistent with normal human behaviour in such a situation.

Further, once you learned the disturbing news about your friend, you said you were calling and texting people to find out more of what had happened. The pages of exhibits you attached to your affidavit emphasize this point. I find it would be difficult for most people to do these things while still holding a beer can.

You attached as Exhibit “C” a map indicating the distance between your home and the roadblock location. In paragraph 10 you said you drove for approximately 45 seconds before encountering the roadblock. In paragraph 16 you said two minutes passed between your last sip of beer and encountering the roadblock.

I do not question the amount of time it took you to drive from your home to the roadblock. You could have measured this distance at some point since you received the IRP. However, when considering your evidence overall, I am not persuaded to accept that you clearly remember your

last sip of beer before the roadblock. Your lawyer argued that the ASD results were caused by mouth alcohol from your last sip, rather than your BAC. I am sympathetic to your loss, but I find it more likely than not that your mental state was as you indicated in paragraphs 11, 12 and 18, not paragraphs 9 and 23.

Ms. Leamon submitted seven previous decisions of adjudicators in my office that she argued are precedents I should follow in your review. I have read and considered each of the decisions Ms. Leamon submitted, but I find they are all distinguishable from your set of circumstances.

The following list includes the date of the decision and the reason it is distinguishable from your situation:

- March 9, 2011 -officer provided with evidence of recent consumption;
- Dec. 12, 2012 -no facts provided, so I cannot compare it to your situation;
- July 18, 2013 -officer provided with evidence of recent consumption;
- Oct. 2, 2012 -officer provided with evidence of recent consumption;
- Nov. 16, 2012 -officer provided with evidence of recent consumption;
- Sep. 7, 2012 -no facts provided, so I cannot compare it to your situation;
- Dec. 10, 2010 -no facts provided, so I cannot compare it to your situation.

You told the officer your last drink was an hour prior, so there was no reason for Constable Hillier to delay the ASD tests.

Based on all the evidence before me, I am not persuaded on a balance of probabilities to agree with your lawyer's argument that mouth alcohol was a factor in the ASD results. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc. Sarah Leamon
604-370-2505 (fax)

November 18, 2013

s.22

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

Introduction

On October 26, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Were you advised of your right to a second analysis?

After considering all of the evidence before me, I am not satisfied that you were advised of your right to a second breath test analysis.

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

Decision

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

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

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

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

s.15
Adjudicator

cc: Jeremy G. Carr
by fax (250) 388-7327

November 15, 2013

s.22

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

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied for this review on eight grounds, three of which are not applicable to your situation because of the reason you were prohibited. For you benefit, I have considered all of the grounds applicable to your situation.

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

In your written submission, you indicated that you are on a fixed income and that the costs associated with this prohibition, will cause you great hardship.

I understand and appreciate that receiving a 90-day driving prohibition can have serious consequences in a person's life. 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.

Additionally, you raised some concerns about police conduct, including the way you were treated while in police custody. I am unable to resolve issues of this nature in this review. Your concerns can be raised with the appropriate police authority.

You also provided evidence on a number of other issues; however, some of the evidence you provided is not relevant to the issues I must make a finding on. As such, I will only address the evidence that is directly related the issues noted below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 00:10 hours on October 26, 2013. In the Narrative Text Hardcopy (the "Narrative"), the officer said he observed a registered to you travelling Northbound on Boucherie Road to the road check. He stated that the vehicle was swerving in its lane and having difficulty maintaining its lane.

You stated that you were not having difficulty maintaining your lane. You confirmed you were pulled over by police.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 00:22 and 00:39 hours, respectively.

You said that when you were at the police station, you demanded a “blow test” and were refused. I infer this to mean that you wanted the opportunity to provide a breath sample on a different machine at the police station; however, under the IRP legislation, I am not aware of any requirement for police to provide you with such an opportunity.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer’s evidence in the Report and the Narrative is that you were informed of your right to a second test. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer’s evidence is that a second analysis was provided. There is no evidence to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer indicated that the second analysis was performed on a different ASD. There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The police evidence indicates that the result of both ASD tests was a “FAIL”. In the absence of evidence to the contrary, I am satisfied that the Notice was served on the basis of the lowest available result, which was “FAIL”.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator (the “Certificates”) in which James Stanviloff certified that he is a qualified ASD Calibrator (the “Calibrator”).

For the first ASD with serial number 101078, the Calibrator certified that on October 1, 2013, he checked the calibration of the ASD and found it to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as April 25, 2014.

For the second ASD with serial number 101054, the Calibrator certified that on October 1, 2013, he checked the calibration of the ASD and found it to be within the recommended limits and functioning correctly. He also recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as October 30, 2013. Both Certificates indicate that the ASDs were calibrated in accordance with the training received by the Calibrator.

Based on the evidence before me, I am satisfied that the ASDs were reliable.

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

You provided a list of your ailments and medications and said that your ailment can be mistaken as “intoxications”. I acknowledge that you suffer from various ailments and take a variety of medications in turn. I also agree that some medications may make a person appear impaired; however, there is no evidence before me that ASDs measure the level of other substances in your blood stream, such as prescription medications. For this reason, I cannot make a finding that you registered a “FAIL” result on two different ASDs because of your use of prescription medication.

Additionally, you provided documents that show you attended Kelowna General Hospital by ambulance and were assessed by medical personnel. You also provided results of test that were conducted while you were at the hospital; however, you did not explain how this evidence is relevant to your IRP. Consequently, I did not find it helpful and therefore did not give it any weight in making my determinations.

With respect to your drinking pattern, you said you told the officer you consumed “a beer a couple of minnits (sic) earlier”, and the officer said you told him you had one beer 20 minutes earlier. While there is a discrepancy between your evidence and the officer’s, the undisputed evidence is that your breath samples were provided 12 and 29 minutes, respectively, after the time of driving. In the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. With this in mind and given that your response to the officer’s question with regard to the time of your last drink is not exact, I am satisfied on a balance of probabilities that the results were not due to mouth alcohol from recent consumption.

Given that I have already made a finding that both ASDs were functioning correctly at the time of your tests, I am not persuaded that the one beer you admitted to consuming is all of the alcohol you consumed prior to driving. Section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

October 9, 2013

s.22

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

Introduction

On September 18, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

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

Mr. Patey submitted *Spencer v Superintendent of Motor Vehicles* to state that the burden is on the peace officer to prove on a balance of probabilities all elements required to confirm a driving prohibition.

I am aware of the *Spencer* decision, and I have conducted this review accordingly.

Mr. Patey submits that a demand to provide a sample of breath into an ASD must be made pursuant to section 254(2)(b) of the *Criminal Code*. Mr. Patey states that there is no evidence in the officer's submission that the wording and language of section 254(2)(b) was used to make the demand, was conveyed in the demand, or that the officer turned his mind to the requirements prior to making the demand. Mr. Patey states that the officer must have a reasonable suspicion that a driver has alcohol in their system prior to making the ASD demand and your admission that you had consumed a beer five minutes prior cannot be considered as it was after the demand was made. Mr. Patey states that the officer indicates that he read the demand from a "Charter" card; however, the *Charter of Rights and Freedoms* does not have anything to do with the appropriate sections of the *Criminal Code*.

I acknowledge Mr. Patey's submissions; however, I find that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Patey further submits that the requirements of section 215.41(3.1)(a) and (b) must both be met in order for a peace officer to lawfully issue a driving prohibition. Mr. Patey submits that the officer did not have reasonable reason to believe that your ability to drive was affected by alcohol. Mr. Patey submits that merely checking the appropriate box on the Notice is not evidence on the officer's behalf. Mr. Patey submits that there is no evidence of any indicia of impairment on your part, as there is no evidence of any abnormal driving, motor skill impairment, slurred speech or balance issues. Mr. Patey states that faced with this, it cannot be determined that the officer believed that your ability to drive was affected by alcohol. Mr. Patey states that a failure to establish the requirements under the Act for issuing the prohibition are met as fatal to the prohibition, as established in *Wilson v Superintendent of Motor Vehicles*.

I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2145 hours on September 18, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were identified as the driver via your BC driver's licence.

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

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2158 hours and 2205 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2159 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2205 hours.

I am satisfied that the second analysis [was not] provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 067800 and your second sample of breath into ASD serial number 067784. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 067800 and 067784.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 27, 2013, he checked the calibration of ASD serial number 067800. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 24, 2013, and the service expiry date as August 7, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 27, 2013, he checked the calibration of ASD serial number 067784. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 24, 2013, and the service expiry date as August 7, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In his submission, Mr. Patey states that in accordance with *Buhr v Superintendent of Motor Vehicles*, I may only consider evidence submitted to me on this review. Mr. Patey states that it is a prerequisite that section 215.5(1)(b)(iii) of the Act be satisfied, and the "FAIL" reading on the ASD was "as a result of" the concentration of alcohol in your blood being 80mg% or greater. Mr. Patey states that there is no evidence before me regarding blood alcohol concentration. Mr. Patey states that 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." Mr. Patey states that I must be satisfied that the "FAIL" reading was the actual result of your blood concentration, and not merely an indication of such a concentration. Mr. Patey states that if section 215.41(2) of the Act made it presumptive that all "FAIL" readings were as a result of a BAC greater than 80mg%, then all the words in section 215.5(1)(b)(iii) would be superfluous and unnecessary, and this cannot be the case. Mr. Patey states, "Section 215.5(1)(b)(iii) imposes an evidentiary burden on the peace officer to submit evidence establishing that when an approved screening device "indicates" a person's blood alcohol concentration is more than 80mg in 100ml, it does so as a result of that person's blood alcohol concentration actually being within that range. No such evidence is before you."

I acknowledge Mr. Patey's submission; however, as it is his interpretation of the language in the Act, I have not given it much weight. I note that in section 215.5(4)(b)(iii) the Act states that a prohibition shall be revoked if, "the approved screening device did not register a fail or the approved screening device did not register the fail as a result of the concentration of alcohol in the person's blood being not less than 80 milligrams of alcohol in 100 millilitres of blood." You have not provided any compelling evidence to suggest that the results of the ASD are not reliable. Aside from Mr. Patey's interpretations of the Act, I do not find that I have any evidence before me to cause me to question the ASD results. You have not provided any evidence regarding your drinking pattern whatsoever. The fact remains that you provided two samples of your breath on two different, calibrated ASDs, which both resulted in "FAIL" readings.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 18, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Hovan Patey
fax: 604 688-8350

October 21, 2013

s.22

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

Introduction

On September 28, 2013, 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;
- an approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Two of the grounds you applied on do not apply to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a “warn”. For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

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

I have received the letter from Clayton Burrill, Articled Student, dated October 8, 2013, to Vivienne Spooner at the ICBC. I acknowledge that Mr. Burrill wrote to Ms. Spooner to explain the circumstances leading up to you being served with the driving prohibition. Mr. Burrill said

that you feel this situation is very unfair because Constable Kim knew you intended to drive and then confronted you about it minutes later. Constable Kim also did not explain to you that you had seven days in which to apply for a review of the driving prohibition. Please be aware that while I can acknowledge that you feel the circumstances surrounding your driving prohibition may seem unfair, it is not something I can take into consideration in this review hearing. The issues that I can consider in this review are set out in section 215.5(1) of the Act as set out below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report is that on September 28, 2013, at 22:30 hours, Officer Kim (the “officer”) established you as driving or having care or control of a vehicle. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did an ASD register a “warn”?

The police evidence in the Report is that at 22:32 hours and at 22:35 hours, the officer used ASD serial number 51756 and ASD serial number 100946 respectively to take breath samples from you. The result of both of your breath tests was a “warn”. There is no evidence to the contrary before me.

I am satisfied that the ASD did register a “warn”.

Were you advised of your right to a second analysis?

The police evidence in section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second ASD test.

Was the second analysis provided by the officer?

As noted above, the officer conducted a second breath test at 22:35 hours on ASD serial number 100946.

I am satisfied that the officer did provide the second analysis.

Was the Notice served on the basis of the lower analysis result?

The officer noted the result of your first and second ASD tests as a “warn”. You were served with a three day driving prohibition based on the “warn” result.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD number 51756 was checked for calibration on September 6, 2013 and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 4, 2013, and a service expiry date of August 2, 2014.
- ASD number 100946 was checked for calibration on September 6, 2013 and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 4, 2013, and a service expiry date of October 24, 2013.

I am satisfied that both ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on September 28, 2013.

s.15
Adjudicator

September 26, 2013

s.22

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

Introduction

On September 13, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

At the outset of your oral hearing, your lawyer, David Dickson, confirmed that he received full disclosure.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

Decision

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

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

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

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

s.15

Adjudicator

cc: David Dickinson
250-842-5987

October 4, 2013

s.22

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

Introduction

On September 14, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

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

In his written submission Mr. Carr cited *Spencer v Superintendent of Motor Vehicles* and *Gillies v Superintendent of Motor Vehicles*, and argued that adjudicators must follow the courts'

directives in these cases when conducting hearings. I am mindful of these decisions and have applied the principles of natural justice and administrative fairness, as required by these cases.

Mr. Carr submitted that the legal burden of proof rests with the officer. I concur and I have conducted this review accordingly.

Mr. Carr also submitted that the officer did not have reasonable suspicion upon which to base the ASD demand. Mr. Carr notes that in response to the time of your last drink, the officer notes, "driver did not respond directly to question." Mr. Carr states that the *Criminal Code* only authorizes police officer to make an ASD demand if they have formed a reasonable suspicion that a person has alcohol in his or her body and has operated a motor vehicle within the preceding three hours. Mr. Carr further submitted that in accordance to *Wilson v Superintendent of Motor Vehicles*, there is no evidence to indicate that your ability to drive was affected by alcohol.

I acknowledge Mr. Carr's submissions; however, I find that the validity of the demand is not an issue in this review. Further, I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand and whether an officer had reasonable grounds to issue the Notice are not stated grounds in section 215.5(4) of the Act, meaning that they are not grounds of review. Therefore, I have no statutory authority to revoke a prohibition on either of these grounds.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0200 hours on September 14, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver's licence.

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

Did an ASD register a "FAIL"?

The officer indicates in the Report and in the Narrative that you provided a sample of your breath at 0210 hours which resulted in a "FAIL" reading. I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, you were informed that the lower ASD result would prevail, and that you did not request to provide a second sample of your breath. In the Narrative the officer indicates that you were read your right to request a second test from the "ASD purple card" at 0211 hours, and that "(you) understood and then declined the second test."

Mr. Carr submits that you advised him that contrary to the allegations by the officer, you did not decline the second test; rather the officer simply denied you the opportunity. Mr. Carr notes that the officer recorded the serial number of the second ASD and has provided calibration information, yet according the Paragraph 8 of the Report, there is no indication that this request was withdrawn. Mr. Carr states that it is incomprehensible that the officer would record the ASD information with respect to an analysis which you allege was never requested.

I acknowledge Mr. Carr's submission; however, I respectfully disagree. I find that it is not incomprehensible that an officer would record the second ASD information; rather I find it indicates that the officer had a second ASD available and was prepared to offer it to you, should you have requested a second test.

Further, I note that you have not provided any sworn evidence before me, rather you provided a statement via Mr. Carr. As such, I find the sworn evidence of the officer to be more persuasive and therefore, I prefer it.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As stated above, I am satisfied that you did not request a second ASD analysis.

Was the second analysis performed on a different ASD?

As I am satisfied that you did not request a second ASD analysis, the officer was not obligated to provide a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that your ASD analysis resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

Mr. Carr submits that your right to have the lower test result prevail was violated.

As stated above, I am satisfied that you did not request a second ASD analysis and that you provided a "FAIL" ASD result. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The qualified ASD calibrator certified that on September 6, 2013, he checked the calibration of ASD serial number 054811. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 4, 2013, and the service expiry date as October 31, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Jeremy Carr
fax: 250 388-7327

October 8, 2013

s.22

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

Introduction

On September 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Your IRP Application for Review indicates that your written review was scheduled for September 27, 2013. At the time of the review, I had not received any submissions from you or Mr. Carr on your behalf. I have proceeded with this review with the evidence I have before me.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the officer alleged you were being prohibited from driving because an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

On line 2 in the Report to Superintendent (the “RTS”), I note that the officer indicated the date of driving or care or control as, 19760130 (YYYY/MM/DD). On the Notice, the officer indicated your birth date as, 19760130. The Notice also references the date of care or control and certificate of service as, 20130917, the same date the officer’s Narrative Text Hardcopy (the “Narrative”) was composed. Based on the evidence before me, I infer that the officer mistakenly wrote 19760130 to indicate the date of driving or care or control on the RTS when it should have been written 20130917. I have accepted this as a clerical error and proceeded with this review, accordingly.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Notice, the officer indicated that you were driving or in care or control of a motor vehicle at 0020 hours on September 17, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 0022 hours and 0030 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Narrative, the officer submits that at 0026 hours he read you your right to request a second ASD test and that you understood. Moreover, on line 7 in the RTS, the officer indicated

that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that you requested a second ASD test and that at 0030 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101254 and 055635, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on two unique Certificates of a Qualified ASD Calibrator (the "Certificates") is as follows:

- ASD serial number 101254 was checked for calibration on August 28, 2013, with a service expiry date of October 24, 2013, and calibration expiry date of September 25, 2013;
- ASD serial number 055635 was checked for calibration on August 28, 2013, with a service expiry date of June 18, 2014, and calibration expiry date of September 25, 2013, and;
- Qualified ASD Calibrator, Cst. Bruce James Sakai Brydon, signed the Certificates indicating the ASDs were found to be within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 17, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jeremy Carr (by fax)
250-388-7327

November 12, 2013

s.22

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

Introduction

On October 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Was the ASD reliable?

After considering the evidence before me, I am not satisfied the ASD used for your breath tests was reliable.

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

Decision

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

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

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

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

s.15

Adjudicator

cc. Gordon Dykstra
fax: 1-888-988-3122

October 23, 2013

s.22

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

Introduction

On August 31, 2013, 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);
- an approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

Was the ASD reliable?

Having reviewed the evidence before me, I do not find that the result of the ASD analysis was reliable.

I am satisfied that the ASD was not reliable.

Having made this finding, I do not need to consider any further evidence in this review.

Decision

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

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

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

The corresponding vehicle impoundment is also revoked. Records show that your vehicle was impounded and has since been released. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. **Original receipts and invoices with proof of payment must be attached.** You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You 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.

November 7, 2013

s.22

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

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You checked the boxes next to ten of the grounds on the application form. However, the ground associated with a “WARN” result is not applicable to your situation. I will consider all grounds available to you in this review.

Records before me confirm that disclosure documents were faxed to your lawyer, Andrew Tam. I will proceed with the review based on this confirmation.

Mr. Tam faxed this office a letter dated October 23, 2013, to inform that he will not be sending submissions for this IRP.

Issues

The following are the issues in this review:

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

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

In the Report to Superintendent for the IRP (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 2148 hours on October 19, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that he observed you driving when you approached an impaired driving roadblock.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided a “FAIL” result at 2150 hours and 2208 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer’s evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

In the Report, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied on a balance of probabilities that it is more likely than not that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicate that the devices were found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Andrew Tam
by fax -250 480 0004

September 27, 2013

s.22

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

Introduction

On September 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Your lawyer, Ms. Kyla Lee, provided the case of *Scott* and referred to the case of *Spencer*, to underline the concepts of credibility which apply in this review process. From *Scott*, an assessment of credibility must be legitimate in consideration; similarly, the principles enunciated in *Spencer* are applied herein, with no presumption of credibility.

Ms. Lee also relied on the recent BC Supreme Court decision of *Wilson* to underline her submissions with the basic concept that a person's ability to drive must be shown to be affected by alcohol in order for a prohibition to stand. I rely on the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.4(4) of the *Act* requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is thus no statutory authority for me to revoke a prohibition on this basis.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Brett – indicated that you were driving or in care or control of a vehicle at 1857 hours on September 6, 2013. He provides in his narrative report that the event came to his attention through a witness having observed a single-vehicle accident and reporting the incident. Specifically:

- Witness observed Driver's vehicle leave roadway, go off-road right into the ditch and roll-over.
- Witness offered assistance to occupants inside vehicle, and remained at scene until police arrived.
- Witness confirmed and identified Driver
- Driver admitted to being the driver of the vehicle

Further:

- On police arrival, Driver was inside the overturned vehicle talking on his cellphone.
- . . .
- Driver reported that he hit the ditch in attempt to avoid a coyote or dog or small animal (he was not sure what the animal was).
- Driver's account of the 'cause' of the collision (unknown animal darting across the roadway) was not consistent with witness account.
- Driver was observed continuously from time of driving (collision) by witness until time of police arrival on scene and subsequent ASD Demand.

The time of driving recorded in the Report is 18:57 hours. Concerning this recorded time and the officer's narrative, Ms. Lee submits that the officer has failed to provide a *reliable* time of driving. By her reading, there is no indication this is when the accident occurred, and there is no indication as to how the officer established this as the time of driving. Specifically, there is no evidence of the officer asking for this detail, neither to the driver nor to the witness. Minus this evidence, she submits, I cannot infer that the witness provided this time of driving.

Ms. Lee characterizes the evidence from the witness as 'unsworn hearsay'. Ms. Lee relied on the case of *Joyce* to reiterate a principle enunciated by the court in reviewing an adjudicator's decision: that hearsay evidence from an *unidentified* third party cannot be assessed by an adjudicator. More recently, Savage J. in BC supplied further guidance on this principle and distinguished *Joyce*, in *Jacobs v. OSMV*: he stated that hearsay evidence is admissible, however, in order for this type of evidence to be relied upon, it must be "probative and reliable."

By analyzing the evidence of the witness in this case, I find this hearsay evidence unambiguously serves to prove that you were the driver; moreover, it is reliable evidence in that it was an *identified* witness who directly observed the roll-over – the account from the officer is clear on this point. The officer also made specific note that the witness observed your vehicle leave the roadway, offered assistance and remained on scene, observing you from the act of driving, through the collision, and after when you remained in vehicle. It is reasonable for me to infer the witness had direct contact both with you and the officer, and was the one who initiated contact with the police in reporting the accident. With this evidence in hand, I find a clear origin of the hearsay evidence: a witness to the act of driving, who observed a collision, and remained on scene until officers arrived. There is no other source of information on driving but for this witness; making the account unambiguous, and sufficient to establish that you were a driver in this incident. I am therefore satisfied of that fact.

With the reliability and probative value of the evidence by the witness established, I thus find it reasonable to accept the time of driving as accurately recorded by the officer. It is more likely than not that the witness – initiating the call to report the incident – provided the time by that act alone. I attach considerable weight to the value of the witness evidence and thus make an assured inference that the time provided by the officer is accurate: the witness reported the accident immediately at roadside, and through investigation the officer became aware of an accurate time of driving, proceeding by way of IRP as per the *Act*.

Ms. Lee provided four previous adjudication decisions from this office, each of them successful on the ground that an individual was not a "driver" at the time of the incident. Two of the decisions are similar in that a reliable time cannot be established; having said that, the facts of each prohibition are not evident, and I am unable to determine whether each case dealt with evidence of a direct witness to the incident.

For the above reasons, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*.

Page 4

Did the ASDs register a "FAIL"?

In the Report, the officer indicated that you provided two ASD "FAIL" results at 1929 and 1954 hours.

With no evidence to the contrary on this point, I am satisfied that the ASDs registered a "FAIL" result.

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and the lower test result would prevail. He checked 'YES' to indicate that you requested a second ASD test; the narrative report provides: "Driver understood his right to a second test."

I am satisfied overall that you were advised of your right to a second breath test analysis, and that you requested a second test which the officer provided to you. There is no evidence contradicting that of the officer on this point.

Was the second analysis performed on a different ASD?

The Report notes the detail that ASD serial number 101042 was used for the second test at 1954 hours; this is a separate serial number from that of 101216, for the ASD used in the first test.

You state no evidence to the contrary. I am therefore satisfied that the second analysis was performed on a different ASD from that used in the first analysis.

Was the Notice served on the basis of the lower analysis result?

Both the Report and the narrative report contain the officer's evidence that both ASD test results were "FAIL." With no evidence otherwise, I am satisfied that the Notice was served on the basis of the lowest analysis result, here being "FAIL".

Was the ASD reliable?

The officer provided a Certificate of a Qualified ASD Calibrator (the "Certificates") for each ASD, in which R.L. Claypool certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, R.L. Claypool certified that on August 13, 2013, he checked the calibration of ASD serial number 101216. He found the ASD to be within the recommended limits. He

Page 5

recorded the ASD calibration expiry date as September 10, 2013, and the service expiry date as November 2, 2013.

For the second ASD, R.L. Claypool certified that on August 13, 2013, he checked the calibration of ASD serial number 101042. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 10, 2013, and the service expiry date as November 2, 2013.

Ms. Lee questioned whether the serial number for the second device was '101042' or '101642'; if the latter, the officer did not provide an accompanying calibrator certificate for that device. In looking at the rest of the Report to compare the officer's handwriting on other numbers throughout, I find it more likely that the officer wrote '0' for the fourth digit, and opposed to '6', or even '5' which look unique and consistent elsewhere on the Report. Also, the same officer swore to the contents of this Report and provided the Certificates for each ASD as part of the Report; I am satisfied he provided the correct certificate for the ASD used in performing the second analysis.

I am satisfied, based on the officer's evidence that the ASDs were reliable at the time the samples were taken.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 6, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

November 5, 2013

s.22

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

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

At the outset of your oral hearing your lawyer, Jamie Butler, confirmed that he received full disclosure. Mr. Butler advised that he was recording the review.

Mr. Butler argued that there is no evidence to show that your ability to drive was affected by alcohol. He submitted that your driving prohibition should be revoked on that basis. In support of his submission he provided me with the case of *Wilson v. Superintendent of Motor Vehicles*.

I have read and considered *Wilson* and I acknowledge Mr. Butler's submission with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Mr. Butler submitted that there is a lack of evidence regarding the type of demand given. He argued that as in *Ema v. Superintendent of Motor Vehicles* and *Wilson v. the Superintendent of Motor Vehicles* the demand must be a *Criminal Code* demand.

The grounds upon which I may review your driving prohibition are restricted to those set out in the Act. Despite the submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered 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 officer noted that you were a driver or had care or control of a motor vehicle on September 22, 2013, at 04:10 hours. In the Narrative the officer stated that at approximately 04:08 hours he finished his scheduled shift and was driving a fully marked police vehicle home in duty uniform. The officer stated that while driving home he could see tail lights in front of him a ways up on Highway 93/95. He noted that thick fog was setting in and that he could no longer see the tail lights. The officer stated that within 30 seconds he came upon a vehicle in the ditch still running. The officer indicated that he pulled over and

spoke with you and the passenger. He noted that you were still buckled up and appeared shocked. The officer stated that you told him that you did not know what happened.

Mr. Butler directed me to section 13 on the RTS "Was the driver observed continuously from the time of driving or care or control to the time of administering the first ASD test? and he noted that the officer checked the box "No (explained in Narrative)". Mr. Butler indicated that this might mean that the officer did not observe you at the time of driving, that you were not observed continuously, or that perhaps this could mean the vehicle was inoperable.

I am not entirely clear on the point of Mr. Butler's submission. In considering the officer's evidence, it is clear that he did not observe the accident. However, the officer's evidence does indicate that he was following the vehicle and lost sight of it for 30 seconds when the fog set in. While Mr. Butler suggested that the vehicle may have been inoperable, there is no evidence before me to indicate that was the case.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 22, 2013, at 04:10 hours.

Did the ASD register a "FAIL"?

In the RTS, the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

The officer provided two Certificates of a Qualified ASD Calibrator.

For the first ASD, the qualified ASD calibrator certified that on September 7, 2013, he checked the calibration of ASD serial number 066139. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 5, 2013, and the service expiry date as October 20, 2013.

For the second ASD, the qualified ASD calibrator certified that on September 7, 2013, he checked the calibration of ASD serial number 066138. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 5, 2013, and the service expiry date as October 20, 2013.

In the RTS and the Narrative Occurrence Report the officer noted that in response to the question regarding the time of your last drink you stated approximately one to one and a half hours ago. In the Narrative the officer stated that you looked shaken, very nervous, and you had bloodshot glassy eyes. The officer also noted that your pants were undone and he found this odd. The officer indicated that he asked you about it and you said that you did not know why they were undone.

You stated that you s.22 which finished at 9:43 pm. After the game you met with your parents briefly and then you left the rink at 10:15 pm with s.22 s.22 You went to a social gathering at the beach where you consumed two cans of Twisted Tea evenly spaced from 10:45 pm until 11:30 pm. Then you went to a house party in Windermere and arrived at approximately 12:15 am. While on the way to the house party you consumed another ¾ can of Twisted Tea. You left the remainder of the can in the front seat cup holder. s.22 asked you if you would drive his vehicle home at the end of the night and you agreed. You took another two Twisted Teas with you into the house party. While at the party you consumed two Twisted Teas at a very moderate and even pace from 12:20 until 2:45 am. You stopped drinking at 2:45 am and then at approximately 4:00 am you and s.22 left the party. While you were driving thick fog suddenly set in. You put your foot on the brakes heavily and the vehicle skid and went into the ditch. You stated that you were surprised by the whole accident. You indicated that the passenger started yelling at you that his father would be pissed at you for the damage to s.22 Not thinking you instinctively went to spit out the chewing tobacco from your mouth. You grabbed the Twisted Tea that was left in the cup holder not realizing that it was still about ¼ full. You intended to spit the chewing tobacco in the can, but instead you spat the chewing tobacco out your window. You decided to drink the remaining contents of the Twisted Tea to clean your

mouth. After you consumed the Twisted Tea you saw in your rear view mirror the lights of a police car pulling up behind you. You instinctively threw the can into the back seat area of the vehicle where it was hidden from view. You stated that within a minute after the accident a police officer arrived at the window. You stated that you were nervous and scared as you had been drinking and you had just had a frightening accident. You stated that you do not believe that you had been drinking to excess; but since you

s.22

you know that you should not be consuming any alcohol. You stated that the immediate presence of the police officer after the accident made you nervous. You explained that the officer asked you if you consumed any alcohol and you admitted that you had consumed alcohol “around an hour to an hour and a half ago”. You explained that this was substantially true as the last full can of Twisted Tea was finished at about 2:45 am. You indicated that you did not tell the officer that you had just finished that last Twisted Tea because you thought that might get you in further trouble. You explained that you had just hidden the can in the back of the truck and you did not want to draw any suspicion to you. You provided an explanation for the reason your pants were undone, and why your eyes were bloodshot and glassy. You indicated that you were not able to get a statement from the passenger despite leaving several messages on his cell. You stated that you think he is mad at you for putting his father’s vehicle in the ditch and you are currently not on speaking terms with him. You said that you thought it was odd that you failed, but you were not sure what failing meant. Your parents provided a statement indicating that they have been told that the passenger has been instructed by his father not to speak to you or submit a statement for this appeal.

Mr. Butler raised concerns with regard to the reliability of the ASDs. He provided me with an expert report from N.K. Shajani which suggests that “FAIL” results can occur due to recent consumption of alcohol, burping, belching or regurgitation and he notes that a 15 minute waiting period was not observed prior to the test.

In considering all of the evidence before me, I have credibility concerns with your evidence. It appears that you lied to the officer to best help your situation which causes me to question the truthfulness of your evidence. As a result, I have placed less weight on your affidavit. In considering your evidence, I find it difficult to accept that you did not tell the officer that you had just consumed the last of the Twisted Tea because you thought that it might get you in further trouble. Given the serious situation you were in, I do not understand why you were not honest with the officer. You were being investigated for impaired driving, yet your concern was that you are a minor with a graduated licence. It is interesting to note that there is no indication that you expressed any surprise or shock about the results or make any attempt to explain that the fail results could not possibly be accurate. The fact that you found it odd and that you did not know what failing meant does not make sense.

Your assertion that you drank within 15 minutes of the ASD tests is not very believable. I note that the officer indicated that he lost sight of the vehicle, but that within 30 seconds he came across it in the ditch still running. I note that you stated that the officer arrived “about a minute after the accident”, but then you indicated that the officer’s presence after the accident was immediate. I find your statement that the officer’s presence after the accident was immediate consistent with the officer’s evidence. In considering your evidence, I find it unlikely that the passenger would start yelling at you for the damage to

s.22

that you instinctively

went to spit out the chewing tobacco from your mouth, that you grabbed the Twisted Tea not realizing it was $\frac{1}{4}$ full, that you spat the chewing tobacco out your window, drank the remaining contents of the Twisted Tea and then threw the can into the back seat area of the vehicle where it was hidden from view all within 30 seconds. I also find it unlikely that you would not realize the Twisted Tea still had a $\frac{1}{4}$ of a can left, when you were the one who drank the other $\frac{3}{4}$ of it and placed it there. I reject your evidence that you consumed $\frac{1}{4}$ can of Twisted Tea after the accident. I accept the officer's more convincing evidence that at roadside you said that your last drink was approximately one to one and a half hours ago. Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of residual mouth alcohol. In considering the evidence before me, I find that mouth alcohol was not an issue in either ASD test, and did not cause the "FAIL" results.

With respect to the argument that a 15 minute waiting period was not observed prior to the test, the evidence before me indicates there would have been no reason for the officer to do so. There is no evidence before me that the ASDs were not functioning on September 22, 2013.

I am satisfied that the ASDs were reliable.

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

You stated that you do not believe that your ability to drive was impaired by alcohol.

Mr. Butler noted that the evidence in the RTS and Narrative indicate that there were two "FAIL" results. However, he noted there is no other evidence presented in the disclosed material that your BAC reading was over 80 mg%. Mr. Butler submitted that the officer must show what the term "FAIL" means and that without an explanation the digitally displayed result on any ASD is completely meaningless. Mr. Butler provided the decision of *Buhr v. Superintendent of Motor Vehicles*. He stated that according to paragraph 15 the "onus is on the officer to justify the prohibition on a balance of probabilities". Mr. Butler noted that many months ago the police changed their practices regarding the calibration of ASDs. He noted that the devices were recalibrated by police to display a digital "WARN" reading at 50 mg%. Mr. Butler questioned what the devices calibrate a "FAIL" reading at.

Mr. Shajani stated that your BAC at the time of the accident would have been between 23 and 77 mg%.

The issue before me is whether your BAC was less than 80 mg% even though the ASD registered a "fail", not whether you felt you were not impaired. With respect to Mr. Shajani's opinion of your BAC, this is based solely on your stated drinking pattern. As noted above, I have found your evidence to not be very credible. Further, I have already found mouth alcohol to not be a factor.

I have read and considered the *Buhr* decision. I disagree with Mr. Butler's argument that the officer must show what the term "FAIL" means and that without an explanation the result is meaningless. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD

that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood. Given this, I can reasonable infer that the ASDs registered a "FAIL" because your BAC was not less than 80 mg%. There is no authority before me stating that the officer must interpret for the Superintendent what the actual BAC of the driver was at the relevant time or that the officer must provide evidence of such in his report. Consequently, the requirement is that after considering the evidence before me, I must be satisfied that your BAC was not less than 80 mg%.

There is no persuasive evidence before me that convinces me your BAC was lower at the time of the tests. As well, I have already made a finding that the ASDs used in your case were reliable at the time of your tests.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013 and was stayed on October 15, 2013. Your prohibition will recommence on November 6, 2013. As you have already served 22 days of your prohibition, you have 68 days left to serve.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Jamie Butler
604-739-9888

October 10, 2013

s.22

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

Introduction

On September 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records indicate you received full disclosure. You applied on one ground. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 19, 2013, 19:39 hours. In the Narrative the officer stated that at 19:36 hours a witness called police to report a driver leaving the pub. The officer stated that the witness indicated that the driver appeared intoxicated, could barely stand, had urinated herself and was leaving in a s.22 The officer located the vehicle a short distance from the pub. The officer noted that the vehicle was drifting from the centre line to the shoulder. The officer identified you as the driver of the vehicle. He noted that your speech was slurred, your balance was unsure, you had urinated yourself, you had difficulties locating your driver's licence, you admitted to having a drink at the pub and there was a strong odour of liquor coming from you. The officer further indicated that you were not following directions and you kept walking toward the traffic side of the vehicles. The officer restrained you and secured you in the police vehicle for your safety.

In your written submission you stated that you were pulled over immediately after leaving the parking lot. You indicated that you were put in the back of the police vehicle and handcuffed. You stated that you were in the vehicle for a ½ an hour or so. You told the officer that you had to go to the washroom, but you were not given the opportunity. You did not have a choice except to urinate yourself.

I note that your evidence with respect to when you urinated conflicts with the officer's evidence. However, I note that you do not deny the officer's evidence that you were driving.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 19, 2013, 19:39 hours.

Did the ASD register a “FAIL”?

In the RTS the officer noted that there were two tests and he recorded both results as “FAIL”. Further, he indicated that he showed you the results of both tests.

You stated that you were told that you failed, but you did not know what the reading was.

An ASD does not display a numerical reading. Although the officer is not required to, the evidence indicates that he showed you both "FAIL" results.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

I am satisfied that the ASDs were reliable.

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

You stated that you had one beer and you did not think that was enough to blow over. You explained that you do not think you would have been served if you were visibly staggering.

You also stated you believe they would have offered you a ride in their shuttle bus if they thought you were drunk.

While you explained that you would not have been served if you were visibly staggering and that you would have been offered a ride home if they thought you were drunk, you did not dispute the officer's observations that your vehicle drifted from the center line to the shoulder, that your speech was slurred, that you had difficulties locating your driver's licence, and that you had a strong odour of liquor on your breath. I find these observations inconsistent with your claim that you had one beer. In considering the evidence before me, I find there is no compelling evidence before me that would lead me to question the ASD results on this occasion. There is no compelling evidence before me to indicate that two separate ASDs malfunctioned and produced results that did not accurately reflect your BAC.

As noted above, the ASDs were reliable. Therefore, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

November 19, 2013

s.22

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

Introduction

On November 2, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

In the hearing you stated that you are a senior, living alone and everything is out of reach for you. You stated that you need to s.22 and this is located in Victoria. You stated that you s.22 and it is difficult for you to walk to the grocery store. You asked for leniency, and if anything can be done to shorten the length of your prohibition. You stated that you were impaired, and you apologized for your error in judgment.

While I understand and appreciate your situation, I am not authorized to consider hardship, personal circumstances or transportation needs in this review. The scope of this review is limited to the grounds as defined by the Act. I have considered all grounds available to you.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0112 hours on November 2, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that a witness observed an intoxicated male to depart from the Legion in a burgundy sedan. The officer notes that the witness followed the vehicle to a residence where it parked, and the driver remained in the vehicle. The officer states that he attended the residence and observed the driver to be in the vehicle with the brake lights and headlights still illuminated. The officer indicates that you were identified as the driver via your BC driver's licence.

In the hearing you stated that you have often heard that you cannot be charged if you are at home in your driveway. You stated that you were parked at the time of your interaction with the officer.

I acknowledge that you were in your driveway at the time that you were approached by the officer; however, the evidence before me indicates that a witness observed you to drive from the Legion to your residence, and when the officer arrived you were still in the vehicle. I have no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0134 hours and 0150 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0137 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0150 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 061139 and your second sample of breath into ASD serial number 054592. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 061139 and 054592.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

The officer provided two Certificates, in which the qualified calibrator certified that the ASDs used in your case were found to be within the recommended limits when checked for calibration. The calibrator also certified that to the best of their knowledge the ASDs were functioning correctly.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on November 2, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

September 27, 2013

s.22

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

Introduction

On September 8, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

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

In your IRP Application for Review, you indicate two grounds for review. All grounds for review that apply to your case will be considered in this review.

In your written submission (the “Submission”), you assert that you desperately need your licence for work and to sustain yourself and your family in an isolated community. Further, you indicate that currently you may not be able to afford the impound fees for your vehicle. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment, transportation needs or personal circumstances. The scope of this review is limited to the grounds as defined in the Act.

In your Submission, you indicate that the investigating officer retrieved your vehicle registration without your permission and drove your vehicle down the road. I acknowledge your submission, however, these issues are beyond the scope of this review. Any complaints you may have regarding officer conduct, during the investigation, must be made to the appropriate police authority.

You indicate that you are a safe and responsible driver. I have authority to consider a person's driving record in a limited capacity. The facts of your case do not fall within this capacity, therefore, I have not considered your driving record in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Therrien, indicates that you were driving or in care or control of a motor vehicle at 0915 hours on September 8, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Therrien submits that he set up an impaired driver road block on Xit'olacw Road near Lillooet Lake Road. You were observed sitting in the driver's seat, with your hands on the wheel, the keys were in the ignition, and the vehicle was running. Your identity was confirmed with a British Columbia driver's licence.

You assert that you were driving around a blind corner when a vehicle flashed its lights at your vehicle. You submit that the furthest thing from your mind was a road block, as the officer had no visy vest, flares or other visible requirements for a road block.

In the Narrative, Cst. Therrien submits that he was working with the Stl'atl'imx Tribal Police Service, dressed in full uniform, and driving a marked police vehicle. As a peace officer, he is provided a certain measure of authority to ensure that motorists are conducting themselves safely on roadways. This includes the authority to check for impaired drivers. Based on the evidence before me, I am satisfied that Cst. Therrien was well within his rights as a peace officer to stop your vehicle and check if you were under the influence of alcohol.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

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

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

Evidence in the RTS indicates that at 0920 hours, Cst. Therrien formed reasonable suspicion that you were driving or in care or control of a motor vehicle with alcohol in your body. Specifically, in the Narrative, he submits that he could smell a very strong odour of liquor coming from your breath and person. Your eyes were also observed to be glassy and bloodshot. When asked if you had had anything to drink recently, Cst. Therrien submits that you responded, "Yes , I had a beer an hour ago." You advised him that you had been fishing all night. When asked how much you had drank through the night you replied, "4 to 5 beer." Upon exiting your vehicle, Cst. Therrien noted that a very strong smell of liquor was evident on your breath and person. An ASD demand was made on you at 0925 hours.

In your Submission, you state that you, "partied late the night before", and had picked up your vehicle that morning to fix a flat tire. You submit that your passenger had been drinking all night, hence the smell of alcohol in the vehicle. Further, you assert that you asked Cst. Therrien for probable cause for stopping your vehicle including if you were driving erratically or appeared drunk. You indicate that he didn't respond but asked why your eyes appeared glossy and red and that you explained you had been up late the night before.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle with alcohol in their body. I acknowledge your submission that your passenger had been drinking. However, I note that police evidence indicates that the, "very strong smell of liquor could be smelled coming from [your] breath and person once [you were] outside of the vehicle and standing in front of Cst. Therrien." You do not refute this evidence. Moreover, you submit that you asked your passenger if he was, "OK, he said yes"; however, I note that you do not refute that you were the driver. You also assert that you asked Cst. Therrien for probable cause, however, a peace officer does not have to provide a driver with the reason for stopping their vehicle. Peace officers have authority to conduct a traffic stop if it benefits public safety. I also acknowledge your submission that your eyes were glossy and red because you had been up late the night before, however, I am satisfied that this observation was not the sole indicia Cst. Therrien used to form his reasonable suspicion. Aforementioned, he smelled a very strong odour of liquor on your breath and person. You also advised him that you had had a beer an hour earlier and that through the night consumed four to five beer.

I am satisfied that the peace officer made a valid ASD demand.

Cst. Therrien submits that following the ASD demand at 0925 hours, you stated the following:

"I'm not going to blow"
"I will blow over"
"I'm over the limit"

At 0926 hours, Cst. Therrien submits that you refused to blow into the ASD. You were warned if you refused to blow that it would be the same as blowing a "FAIL" result and that the same actions as a "FAIL" result would be taken. You were asked again if you would blow into the ASD and stated, "I know I will blow over", followed by, "No I'm not going to blow." Consequently, Cst. Therrien deemed a refusal at 0926 hours.

Cst. Therrien provides evidence that you advised him twice that you were not going to blow and that you would blow over [the legal limit]. Police evidence also indicates that you understood the consequences of refusing to provide a suitable sample. I have no evidence before me to the contrary.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative, Cst. Therrien submits that prior to making an ASD demand on you that he asked you if you had any medical conditions, were on any medication or were diabetic. You responded, “no”, to all three queries.

I have no persuasive evidence before me that you provided Cst. Therrien with a reasonable excuse for failing or refusing to comply with the ASD demand.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 8, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

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

Introduction

On August 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your IRP Application for Review, you indicate eight grounds for review. All grounds for review that apply to your case will be considered in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the “RTS”), the investigating officer, Cst. Russell, indicates that you were driving or in care or control of a motor vehicle at 2204 hours on August 30, 2013. Further, in the Narrative Text Hardcopy (the “Narrative”), Cst. Russell submits that he observed your vehicle driving quickly down Campbell Way, fail to stop at a stop sign, and not signal as it turned into a parking lot at CIBC (the “Bank”). Cst. Russell submits that he conducted a traffic stop and that a, “single male occupant came out of the drivers seat.” Your identity was confirmed with a British Columbia driver’s licence.

In his written submission, Mr. Mulligan asserts that pursuant to section 215.5 (1) of the Act, I must be satisfied that you were a driver at the time you provided samples into the ASDs. I acknowledge this submission, however, I note that one cannot be driving or in care or control of a motor vehicle concurrent to providing a sample of breath into an ASD. Moreover, Mr. Mulligan asserts that the definition of a driver does not include someone who had care or control of a motor vehicle at some time in the past. Related to the case before me, Mr. Mulligan submits that you had parked your vehicle, entered the Bank, and used the automated teller machine (the “ATM”) before you ever had any contact with Cst. Russell. He asserts that Cst. Russell’s Narrative is significantly misleading as he submits that he observed your vehicle driving quickly, fail to stop at a stop sign, not signal as it turned into the parking lot at the Bank, and indicates that he, “conducted traffic stop of the vehicle – single male occupant came out of the drivers seat.” Mr. Mulligan asserts that at no point in the Narrative does Cst. Russell acknowledge that his dealings with you commenced only after you exited the Bank. Accordingly, he submits that the prohibition be revoked because once you had parked, entered the Bank, used the ATM, and exited the Bank you were no longer a driver within the meaning of section 215.41 (1) of the Act.

Cst. Russell submits that he observed your vehicle speeding, fail to stop at a stop sign, and enter the parking lot at the Bank without signaling; you do not deny this in your Affidavit. Accepting this evidence, I am satisfied that you were a driver prior to exiting your vehicle and entering the Bank. In Paragraph 8 of your Affidavit, you state that you, “parked [your] car, walked in to the bank, and utilized the bank machine [you] did not observe Cst. Russell.” I acknowledge your submission that you made a withdrawal from the ATM at 2204 hours; the same time Cst. Russell indicates that you were driving or in care or control. I also note that

Cst. Russell's Narrative submits that a single male occupant came out of the driver's seat and that he kept a visual on you. I feel that a reasonable inference can be made that because Cst. Russell witnessed you perform two driving offences leading up to you parking at the Bank, that he followed you to the vicinity of the parking lot and observed you, "[come] out of the drivers seat", prior to entering the Bank. I feel it is also reasonable to infer that Cst. Russell observed you enter the Bank and use the ATM, apparent by his evidence that he, "kept a visual on [you], and [you] alone." In your Affidavit, you assert that you did not observe Cst. Russell while entering the Bank and using the ATM, however, I have no persuasive evidence before me that he was not in the vicinity while you were inside the Bank, only that you did not see him. You also assert that it took several minutes for you to walk into the Bank and complete your transaction. The evidence I have before me indicates that you completed your transaction at 2204 hours. You did not provide evidence that articulates how long "several minutes" is or that you were aware of the time when you exited your vehicle to walk into the Bank.

You indicate that you encountered Cst. Russell as you were walking back to your vehicle and that you did not drive or operate your vehicle after leaving the Bank. I acknowledge your submission, however, I note that you do not provide any evidence that after exiting the Bank you did not intend to resume driving. Specifically, I have no evidence before me that you had arranged an alternate means of transportation or had abandoned your intention to drive after exiting the Bank. Moreover, I have already determined that Cst. Russell maintained a visual on you, that you exited the Bank to return to your vehicle, and that you provided no persuasive evidence that you intended to abandon driving prior to encountering Cst. Russell.

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

Did the ASD register a "FAIL"?

Evidence in the RTS indicates that at 2207 hours, Cst. Russell made an ASD demand on you. At 2213 hours you provided a breath sample for analysis on ASD serial number 66889. The test result was a "FAIL". Further, at 2220 hours you provided a second breath sample for analysis on ASD serial number 101354. The test result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Narrative, Cst. Russell submits that at 2218 hours he read you your right to request a second ASD test and that you understood what this right offered. Evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

Police evidence indicates that you requested a second ASD test and that at 2220 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result by Cst. Russell.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Russell indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 66889, with a temperature of 22 degrees Celsius and ASD serial number 101354, with a temperature of 21 degrees Celsius were used. These unique ASD serial numbers are corroborated by a Certificate of a Qualified ASD Calibrator for each of the two devices.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 066889 was checked for calibration on August 8, 2013, with a service expiry date of October 31, 2013 and calibration expiry date of September 5, 2013;
- Qualified ASD Calibrator, Cst. Mitchell Ernest Gordon, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 101354 was checked for calibration on August 8, 2013, with a service expiry date of October 16, 2013 and calibration expiry date of September 5, 2013 and;
- Qualified ASD Calibrator, Cst. Mitchell Ernest Gordon, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Russell. These signatures confirm that any ASD tests referred to in the investigation were conducted by a qualified ASD operator and that the ASD units used were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Michael T. Mulligan (by fax)
250-480-0004

September 30, 2013

s.22

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

Introduction

On September 9, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

Were you advised of your right to a second analysis?

Having reviewed the evidence before me, I do not find that there is sufficient evidence to indicate that you were advised of your right to a second analysis.

Having made this finding, I do not need to consider any further grounds in this review.

Decision

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

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

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

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 30, 2013. 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: Cory Armour
Tessmer Law Offices
fax: 250-762-3163



October 31, 2013

s.22

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

Introduction

On August 22, 2013, 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);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

Records before me confirm that your lawyer has received all of the disclosure documents. I have proceeded with the review based on this confirmation.

In your application for review, you applied on one ground which is not applicable to your situation because of the reason for which you were prohibited. I have considered all grounds available to you in this review.

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

In the affirmed Report to Superintendent (the "Report"), the investigating officer indicated that you were driving or in care or control at 19:57 hours on August 22, 2013.

In the Occurrence Report - Detailed Narrative (the "Narrative"), the officer provides further detail on this indicated time of 19:57 hours: he answered a call based on a witness report, and conducted a traffic stop of the vehicle. You were identified as the driver with your British Columbia Driver's License.

Your lawyer Greg Cranston takes no issue with the officer's provision of this evidence; in his submissions dated August 30, 2013, he states: "He did have care and control of the vehicle. . ."

I am satisfied that you were a driver within s. 215.41(1) of the Act.

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

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

In the Report, the officer indicated that he formed his suspicion at 20:05 hours, and read the ASD demand at 20:06 hours. He checked the box next to "Odor of liquor on breath" and "Admission by driver", and indicated the time of your last drink was "30 minutes ago". He also indicated there was no delay in making the demand.

In the Narrative, the officer provides:

Male admitted to consuming at least 3 beers with the last one 30 minutes prior to the traffic stop. There was an empty 15 pack of beer (no cans present) and an empty 375 ml bottle of whiskey in the back seat. Strong odour of liquor on the male's breath.

Mr. Cranston, on your behalf, acknowledges the evidence of the officer's smelling alcohol on your breath, and your admission of 2 or 3 beer: "I admit those are sufficient grounds to make the screening device demands."

I therefore find it was reasonable for the officer to suspect that you had alcohol in your body, and that a valid demand was issued "forthwith" in that regard.

In determining whether you failed or refused to comply with the demand, I first turn again to the Report. The officer checked the box to indicate that you failed or refused to provide a sample, and he recorded the time of the refusal as 20:10 hours.

In the Narrative, the officer recorded that: “the driver failed to provide an adequate sample into the ASD. He was shown several times how to blow however failed to do it properly.” He lists two consecutive patterns of display on the ASD: NoGo, NoGo, VOID. This pattern occurred twice, with a new mouthpiece inserted in between each series.

On this point, Mr. Cranston confirms the above series of displays, and provides the following:

- you were shown how to blow, yet no instructions are detailed by the officer in his evidence;
- no necessary explanation of a “long steady blow” is provided by the officer;
- the officer did not determine if the mouthpiece was faulty;
- there was no check to see if the ASD was properly functioning.

As well, he submits there is no explanation of the terms ‘NoGo’ and ‘VOID’; interpretations can include: that the investigator did something wrong; or the ASD failed to accept the sample you did provide. Mr. Cranston submits that these interpretations provide “the only rationale conclusion” because “the sample did not go into the screening device.”

Given that the officer included detail on his showing you how to blow, and that you “failed to do it properly”, I find in all likelihood that the lack of a sample being obtained - indicated by ‘NoGo’ and ‘VOID’ - was due to the attempts you made, and not the two explanations Mr. Cranston proposes.

I also consider other evidence provided by the officer:

- the affirmed Report on line 14 notes: “Any ASD tests referred to in this report were conducted by a qualified ASD operator and the ASD units were functioning correctly.” - this evidence minimizes the likelihood that the officer “did something wrong” in administering the test;
- line 14 of the Report also satisfies me of the officer’s awareness of the need for adequate instructions to you - in the Narrative he provided evidence of a demonstration, and I am satisfied this constitutes ‘instruction’ on how to blow, an explanation that included both a verbal and physical demonstration;
- the ASD at the time of the interaction was properly calibrated and in service; this is confirmed by the Certificate of a Qualified ASD Calibrator for ASD serial number 101519 — this evidence minimizes the likelihood that the lack of a result was because of an ASD malfunction.

Mr. Cranston places emphasis on the need to ascertain the functionality of the mouthpieces used. There is no requirement for the officer to provide specific evidence on the mouthpieces; they are an accessory to the ASD, and I find the officer has provided evidence to demonstrate the functionality of the device itself used here. I again look to the Report affirming him as a “qualified ASD operator”; it is more likely than not that he could identify a faulty mouthpiece.

Based on the officer’s specific evidence which shows his demonstration, and your failed attempts, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Report, the officer included the detail of your stated s.22
Towards the end
of the Narrative, the constable answered 'NO' to answer the prompt 'Did the driver convey any
reasons why a sample was not provided?'

Mr. Cranston also draws attention to this condition, describing your symptoms s.22
He does not indicate that this condition prevented you from providing a
sample into the ASD however.

There is no conclusive evidence to establish that your medical condition prevented you from
providing a sample. I am therefore satisfied you did not have a reasonable excuse to fail or
refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, and monetary penalty, as required
by s. 215.5(1) of the Act. You are prohibited from driving for 90 days; however, as you have
already served **19 20 days** of your prohibition, you must serve the remaining **71 70** days which
commences on November 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to
participate in the Responsible Driver Program and the Ignition Interlock Program. This driving
prohibition may be considered by the Superintendent of Motor Vehicles in a review of your
driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Greg Cranston
fax: 604-688-5588

October 11, 2013

s.22

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

Introduction

On September 29, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

Was the ASD reliable?

I do not have any evidence before me to indicate that ASD serial number 101713 was properly calibrated on the date of your prohibition.

I am satisfied that the ASD was not reliable.

Having made this finding, I do not need to consider any further evidence in this review.

Decision

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

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

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

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

October 23, 2013

s.22

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

Introduction

On August 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on two grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review.

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

In your written submission you stated that in your entire driving career you have only received two or three violation tickets that were for speeding, and you have never before received a driving prohibition or had any alcohol violations. However, under the Act I do not have the authority to consider your driving record or whether or not this is your first alcohol related violation. The scope of the review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “Report”), the officer indicated that you were driving or in care or control of a motor vehicle at 21:24 hours on August 27, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASD registered a “FAIL” at 21:30 hours.

In your submission you acknowledged that the officer showed you the “FAIL” result.

I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second analysis on a different ASD, and that the lower result would prevail. In the Narrative, the officer stated that the right to request a second ASD test was read to you from a “purple OSMV card verbatim.” With respect to your understanding of this right the officer stated, “YES – it was explained to her in detail that it was in her best interest to provide a second sample.” The officer stated that you replied, “No, I guess I won’t because it won’t make any difference.”

You stated that the officer told you that you could provide a second sample, but you did not understand that he had another instrument in his vehicle. You stated that you said, “why doesn’t this one work?” and “[what’s] the use”.

Mr. Short indicated that the officer did not explain a second ASD would be used, and that you did not understand why the officer would volunteer a second ASD unless there was something wrong with the first one.

Under the Act, the officer is required to advise you of your right to a second analysis, and you acknowledged that he told you that you could provide a second sample. Although the officer has provided evidence that he advised you that the second analysis would be on a different ASD and that the lowest result will prevail, he is not required to give you this information under the Act.

Further though, I note that some of your evidence and your lawyer's relating to a second test, contradicts that of the officer's. However, you did not specifically deny that he advised you that you had a right to a second analysis on a different ASD and that the lower result would prevail, as indicated in the Report. Nor did you specifically deny that the officer explained to you in detail that it was in your best interest to provide a second sample, as indicated in the Narrative. Your evidence is that you did not understand "that he had another instrument in his vehicle." Last, if you did in fact say to the officer, "why doesn't this one work?", I am left wondering what his response was, as you did not provide me with that information.

As such, I find I am more persuaded by the officer's evidence that he advised you of your right to a second analysis on a different ASD, that the lower result would prevail, that it was in your best interest to provide a second sample, and that you understood this information. Therefore, if you truly only consumed 1 ounce of alcohol that evening, I find it odd that you did not request a second analysis.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As you did not request a second analysis, this issue is not applicable to your case.

Was the second analysis performed on a different ASD?

As you did not request a second analysis, this issue is not applicable to your case.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of the ASD test as a "FAIL".

As only one ASD test was administered, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided a Certificate of Qualified ASD Calibrator (the "Certificate") for the ASD bearing the serial number 101315, which is the same serial number recorded in section 6 of the

Report. Constable Obodzinski certified that the ASD was found to be within the recommended limits when he checked the calibration on July 31, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly.

Mr. Short questioned for which ASD the officer has submitted a Certificate. However, as stated above, the ASD serial number recorded in the Certificate is the same as was recorded for your first and only ASD test in the Report. As such, I am satisfied that the Certificate is for the ASD that was used for your breath test analysis.

I am satisfied that the ASD was reliable.

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

In the Narrative, the officer indicated that you had slowed reactions, you grabbed another card when trying to locate your driver's licence, and he smelled liquor in the cab of the vehicle. The officer stated that you denied drinking liquor, and that you had a trunk full of empty beer bottles. The officer indicated that he asked you to blow into his hand to eliminate liquor on your breath. He stated that you blew into his ear and then into his hand, and liquor was detected on your breath. The officer also stated that your response to the time of your last drink was 20 to 30 minutes ago.

You stated that at about 9:00 p.m. a female friend arrived at your home and gave you a bottle of cinnamon liqueur called Fireball. After the incident you stated that you obtained the purchase receipt from your friend showing that her purchases were made at 8:04 p.m. that evening, and you submitted that receipt as evidence for this review. You said that you drank about 1 ounce of the liqueur from the time she arrived until the time your daughter telephoned you from the nearby gas station. You indicated that you drove to the gas station to pick up your daughter because it was dark outside. You indicated that at most it is a one minute drive from your house to where you were stopped by the officer, and you submitted a map to support this. You said that you admit you were very flustered when dealing with the officer and when he asked if you had a very recent drink, you untruthfully said "no". Referring to your response of 20 to 30 minutes as noted in the Narrative, you indicated you did not realize that by stretching out the time of consumption it could have affected the accuracy of the reading on the ASD. You indicated that no more than 10 minutes could have elapsed between the phone call and the ASD test.

Mr. Short indicated that you did not show any physical symptoms of impairment and that you could not have had a drink 20 minutes ago, based on the times you have provided. He also indicated that you were

s.22

Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol.

The evidence you have given me is that your friend arrived at "about" 9:00 p.m., that your daughter called and you drove to pick her up, and you were stopped about 1 minute away from

your house. Therefore, it appears that sometime between “about” 9:00 p.m. and 1 minute prior to the stop at 9:24 p.m., you submit that you consumed one ounce of Fireball. You state that no more than 10 minutes could have elapsed from the time of the phone call to the time of the ASD test at 9:30 p.m.; however, you did not tell me the time of the phone call, nor did you tell me that you immediately left your house after the call, and I only have an approximate time with respect to when your friend arrived at your house. Further though, if your female friend and your male passenger were with you and could confirm your stated drinking pattern, I am left wondering why there is no evidence before me from either of them. I do not find that a receipt from a liquor store supports your stated drinking pattern.

Further, I disagree with Mr. Short that you showed no physical symptoms of impairment. The officer’s evidence, which you did not address or deny, is that you had slowed reactions, you grabbed another card when looking for your licence, and that you first blew into the officer’s ear when asked to blow into his hand. You also did not address or deny the officer’s evidence that indicates you initially denied consuming liquor before admitting to consumption 20 to 30 minutes prior.

I do not find your evidence to be very persuasive and I prefer the officer’s evidence. I am not convinced that you consumed alcohol within 15 minutes of the ASD test.

Section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%, and I have already made a finding that the ASDs were reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 21 days of the prohibition, you need only serve the remaining 69 days. Your prohibition commences October 25, 2013. The prohibition ends at 23:59 hours on January 2, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 24, 2013

s.22

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

Introduction

On October 3, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

In your submission you state that you asked the officer if he thought that you were impaired by alcohol and he said that it was not up to him. You state that you told the officer that the law had just stated that a “warning” on an ASD was not sufficient to penalize anyone for impaired driving. You state that you again asked the officer if he thought that your ability to drive was impaired and he stated that it was not up to him to decide. You also state that the odour of

liquor detected by the officer was due to the bag of empty beer cans that you had in your vehicle at the time.

From your submission I infer that you are referring to *Wilson v Superintendent of Motor Vehicles* regarding your ability to drive being affected by alcohol. I have read and considered the *Wilson* case and I acknowledge your submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

In addition to your initial statement dated October 9, 2013, I received a subsequent submission from you on October 21, 2013 in which you state that a Judge has found that the "WARN" range IRP is in conflict with existing federal criminal law. You state that the IRP program is a violation of the *Charter of Rights and Freedoms* because it gives too much power to the officers at roadside. You state that the ASDs used by the officers at the roadside were initially meant to be a screening test to determine if a driver should be taken to the station for a more accurate reading. You also state that the legislation governing driving offences is contained in the *Criminal Code* and all charges must be dealt with by the courts. You state that if you are to be penalized in any way for the amount of alcohol that you had in your system you have the right under the *Charter* to have a properly trained breathalyzer technician using an approved evidence quality instrument tell you what your BAC was.

You state that a Judge has found that the "WARN" IRP is in conflict with federal criminal law, but you have not provided an excerpt from the decision, or reference to the decision for my review. I am not aware of any decision stating that the "WARN" IRP program is in violation of the *Charter*. While the demand for a sample of your breath is made under the *Criminal Code*, the IRP is an administrative sanction, and as such, you are not facing any criminal charges. Similarly, under the IRP legislation, the officer is not required to provide you with the opportunity to provide a sample on a breathalyzer at the police station. I have considered all of the grounds available to you in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 1915 hours on October 3, 2013. In the Narrative Text Hardcopy (the

“Narrative”) the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver’s licence.

In your submission you confirm that you were flagged over and stopped by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “WARN”?

The officer indicates in the Report that you provided two samples of your breath, at 1920 hours and 1934 hours, both resulting in “WARN” readings.

In your submission you state that you provided two samples of your breath, both resulting in a “warning.”

I am satisfied that an ASD registered a “WARN”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 1930 hours.

In your submission you state that your response, “Ok, I got nothing to lose,” was in response to the officer telling you that you were going to get a suspension either way.

Regardless of your understanding of the officer’s statement, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1934 hours.

In your submission you confirm that you provided two samples of your breath for analysis.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 061497 and your second sample of breath into ASD serial number 101313. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 061497 and 101313.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “WARN” reading. The lowest analysis result was “WARN”.

In your submission you confirm that both ASD analyses resulted in a “warning.”

I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 30, 2013, he checked the calibration of ASD serial number 061497. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 28, 2013, and the service expiry date as January 29, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 30, 2013, he checked the calibration of ASD serial number 101313. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 28, 2013, and the service expiry date as November 23, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 50 mg% even though the ASD registered a “WARN”?

In your submission you state that you had done everything right to ensure that you weren’t impaired. You state that your Serving it Right course taught you that the body can deal with one drink an hour, and therefore, two beers between 3:00 and 4:00pm would not be illegal at 7:00pm. You state that you informed the officer that you had alcohol in your system from 4:00pm. You state that you informed the officer that you had not consumed any alcohol within the last half hour, and as such, the officer should not have indicated in paragraph 12 of the Report, that there was a delay in making the demand or administering the test.

I acknowledge your submission that you did not feel as though you were affected by alcohol; however, I do not have any compelling evidence before me to suggest that the results of the ASD analyses were not reliable. With regard to the delay, the officer indicates in the Narrative that the delay was due to a discussion between you and the officer regarding the reliability of the device, and that the test commenced shortly thereafter. The evidence before me indicates that you provided two samples of your breath, both resulting in “WARN” readings. Section 215.41(2) of the Act indicates that a “WARN” result on an ASD indicates that the concentration of alcohol in a person’s blood is not less than 50mg%.

I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on October 3, 2013.

October 25, 2013

s.22

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

Introduction

On October 5, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Mr. Skogstad submits that after the *Sivia v. Superintendent of Motor Vehicles* decision, one of the concerns raised was that the evidence provided by officers to the adjudicator needed to be subject to a verification process. Mr. Skogstad submits that now, the Report to Superintendent (the "Report") is sworn by the officer, and signed by a Commissioner for taking affidavits. Mr. Skogstad submits that the time of driving indicated on the Report is 1957 hours. Mr. Skogstad

notes that the suspicion was formed 57 minutes earlier, and the test results were provided at 1915 hours. Mr. Skogstad states, "The legislation is clear. The accused must produce an unfavorable reading within three hours of driving. Clearly this is an illogical result, the fact that he may have driven after the results cannot be the meaning of those Sections and the Report to Superintendent Form No. MV2724 cannot support a suspension and it must be cancelled." Mr. Skogstad submits that the Narrative Text Hardcopy (the "Narrative"), which appears to provide contradictory information, is un-sworn, along with all other documents in the officer's evidence.

Mr. Skogstad states, "It would make a mockery of the Supreme Court Justice's mandate to have sworn evidence used to implicate an individual in Immediate Roadside Prohibitions, to ignore that sworn evidence and to prefer unsworn evidence. In effect, this would defeat the whole purpose of the *Sivia* decision, and the adjudication of a Senior Judge of the Courts of this Province."

I have considered Mr. Skogstad's submission; however, I respectfully disagree. With regard to the Narrative forming part of the sworn Report, I note that in paragraph 14 of the Report, it states, "The attached narrative report and other attachments consist of 9 pages and forms part of this sworn document." Therefore, I accept the Narrative evidence as sworn.

I concur with Mr. Skogstad that the Report indicates that the time of driving was 1957 hours. I do not, however, agree that this implies that the prohibition must be revoked. I note that the officer states in the Narrative, which I have found to form part of the sworn Report, that a vehicle was observed at 1857 hours, and you were identified as the driver of the vehicle. On a balance of probabilities, I am satisfied that time indicated on the Report was a clerical error by the officer. I also note that you have not provided any evidence regarding your version of events. I do not have any compelling evidence before me to the contrary.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 1957 hours on October 5, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were observed to be a driver at 1857 hours. As stated above, I am satisfied that the time indicated on the Report is a clerical error and that you were a driver at 1857 hours on October 5, 2013. The officer states that you arrived at the roadblock and were identified as the driver via your BC driver's licence.

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

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 1915 hours and 1918 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test and you understood.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1918 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 077534 and your second sample of breath into ASD serial number 073158. The officer also provided the Certificate of a Qualified ASD Calibrator (the “Certificate”) for ASD serial numbers 077534 and 073158.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “FAIL” reading. The lowest analysis result was “FAIL”.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on September 22, 2013, he checked the calibration of ASD serial number 077534. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 20, 2013, and the service expiry date as August 16, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on

September 22, 2013, he checked the calibration of ASD serial number 073158. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 20, 2013, and the service expiry date as November 12, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASDs were not reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 5, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Don Skogstad
fax: 250 487-4309

October 24, 2013

s.22

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

Introduction

On August 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

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

Having considered all of the evidence before me, I am not satisfied that the ASD registered a “FAIL” as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Records show that your vehicle was impounded and has since been released. Upon receipt of your original receipts, invoices and proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. You must also enclose a copy of this letter to ensure the correct charges are refunded to you.

Adjudicator

cc: Jeremy Carr
Fax: 250-388-7327

October 18, 2013

s.22

c/o Nixon Wenger, LLP, Darren Kautz
301 – 2706 30th Avenue
Vernon, BC V1T 2B6

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

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records before me confirm that you and your counsel, Dennis Kautz, received all of the disclosure documents. I have proceeded with the review based on this confirmation.

Facts, Evidence and Analysis

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

Was the ASD reliable?

I am not satisfied that the ASD used for the attempts in obtaining a sample of your breath was reliable.

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

Decision

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

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

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

You may go directly to the location where the vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 18, 2013, the date the vehicle was eligible for release. You are responsible for any storage costs beyond that date, and 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. Dennis Kautz
Nixon Wenger
fax: 250-542-5353

October 4, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

At the outset of your oral hearing you confirmed that you received full disclosure. You applied on one ground. For your benefit, I have considered all the grounds available to you.

You explained that you will be starting school in January and that you need your driver's licence to get there. While I acknowledge and appreciate your situation, I am not authorized by the Act to consider an individual's personal circumstances. The scope of the review is limited to the grounds as defined in section 215.5 the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 15, 2013, at 02:04 hours. In the Narrative the officer stated “vehicle was backing out of a parking spot at the local pub”. The officer noted that you were seated in the driver’s seat and that there were five occupants in the vehicle (including you). The officer further noted that you were attempting to light a cigarette when you he spotted you.

You explained that you were not backing up and that did not attempt to light a cigarette. You stated that you were sitting in the vehicle and you were already smoking. You stated that the engine was running because you had the air conditioner on and you were playing music. While you admitted that you should have been more cautious, you would never jeopardize your driver’s licence.

The evidence you have provided is contradictory to the police evidence; therefore, I must determine which evidence is more credible. In considering your evidence, I find it odd that you were simply sitting in the driver’s seat of your vehicle in a pub parking lot at 02:04 hours with the engine running listening to music and the air conditioner on. I note that there is no evidence that you told the officer that you were simply sitting in the vehicle. I would expect that you would have made this clear given the fact that you were being investigated for impaired driving. I also note that you did not explain what your plans were or how you were going to get home. Additionally, I note that you did not provide any evidence from your friends to corroborate your version of events. Ultimately, I do not find your evidence credible. I accept the officer’s evidence that you were backing out of a parking spot.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 15, 2013, at 02:04 hours.

Did the ASD register a “FAIL”?

The officer recorded the ASD result as “FAIL” and indicated that he showed you the result.

There is no evidence to the contrary. I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer indicated that he informed you of your right to a second test which you declined.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As indicated above you declined a second analysis. Therefore, this issue is not applicable.

Was the second analysis performed on a different ASD?

As indicated above you declined a second analysis. Therefore, this issue is not applicable.

Was the Notice served on the basis of the lower analysis result?

The Notice was served on the basis of your first and only ASD test that registered a "FAIL". I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificate of Qualified ASD Calibrator regarding the ASD used in your case indicates that the device was within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 31, 2013

s.22

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

Introduction

On August 2, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your written submission, you said you are not trying to slight or downplay the seriousness of driving under the influence of drugs or alcohol. You said you are not shirking responsibility or denying that you do not deserve a penalty. However, you said the penalties you face with this

IRP are not what you consider to be just or fair. You said your submission set out your reasons why you did not deserve the “FAIL” result that registered on the ASDs.

You stated that the prohibition of your driver’s licence and the vehicle impoundment has taken a serious toll on your family. You found it devastating to have to explain the circumstances of the IRP to your wife and children. You had to abandon your plans to go on vacation with the vehicle because of what happened. You were unable to take the s.22 that was scheduled for August 6, 2013.

I understand and appreciate that receiving an IRP can have serious consequences in a person’s life. However, under the Act, I am not authorized to consider personal circumstances or transportation needs in this review. I can consider only those grounds that are directly related to the issues outlined below.

In addition, I am authorized to vary a prohibition under section 215.5(2) of the Act if I determine that you were prohibited from driving for a longer time period than the Act requires. Section 215.5(2) does not apply in your situation, so I am not authorized to vary the length of the prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “RTS”), Constable Nelson indicated that he witnessed you driving or in care or control of the vehicle at 2320 hours, on August 2, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, Constable Nelson said you provided breath samples into two ASDs and that the devices both registered “FAIL”, as a result of the analyses.

As you observed, the officer wrote that the time of the first ASD test was “2225” hours, which is

impossible. However, given the chronological progression of time in the rest of Constable Nelson's undisputed evidence, I infer that it is reasonable to find that it is more likely than not that the first ASD test occurred at 2325 hours.

You questioned whether this obvious error rendered the RTS, the test and the prohibition legal. I do not have the authority to revoke the prohibition on the basis of this error. Further, your evidence corresponds to the other times provided by the officer, which supports the inference I made about the actual time of the first ASD test. Given this error, however, I have scrutinized the rest of the officer's evidence very closely in order to detect similar flaws, and I have decreased the weight I give to the officer's evidence.

I am satisfied that it is more likely than not that the ASDs registered "FAIL" at 2325 and 2333 hours, respectively.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Nelson indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the

recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

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

In your written submission, you said you had not consumed any alcohol on August 2, 2013 until 2230 hours. You argued that your BAC could not have been more than 80 mg% when stopped at the roadblock, given the amount of time in which you consumed the limited amount of alcohol.

You gave evidence of buying beer to take home at the Prairie Inn liquor store at 2222 hours. You said you put the beer in the vehicle and entered the Inn for drinks, to play pool and to eat with your friends. You said you sat at the bar and ordered food before the kitchen closed. You had a pint of beer when the food came and you finished the first beer after finishing your food. I infer from your evidence that you started consuming your first pint of beer at approximately 2230 hours. You did not specify when you finished the beer, but you ordered a second prior to paying your bill at 2251 hours. I infer you had not finished the first beer at this point, since your second beer did not arrive for approximately 20 minutes.

I note that the bill you provided in Document 4, Article C does not itemize what you consumed, in contrast to the receipt in Document 4, Article A. Further, although you were not required to submit any specific type of evidence in this review, you said your friend, s.22 "will be witness to all I attest in this explanation." This raises questions in my mind as to why you did not submit any statements from s.22 to corroborate your evidence.

You said your second drink did not arrive until approximately 2310 hours. Everyone else was done, so you drank the second beer quickly and then immediately left the pub. You said you were in the vehicle heading north on E. Saanich Road at approximately 2315 – 2317 hours. I infer from your evidence that you started and finished the second beer at approximately 2310. You did not say how long it took to consume, but you said you drank it rather quickly. I infer you finished the second pint in a few minutes.

Your evidence corresponds to that of the officer in that you arrived at the roadblock at approximately 2320 hours. In the Narrative, Constable Nelson said he noticed the vehicle you were driving round a corner "half in the opposing lane." He also said he observed the vehicle was travelling at a high rate of speed when approaching the roadblock. You said you estimated your speed at 60 to 65 km/hr, based on the length of time it took you to drive from the Prairie Inn to the roadblock. I infer from the officer's undisputed evidence that he commented on your driving behaviour as an indication that you may have been affected by alcohol.

You said when you arrived at the roadblock you panicked and were nervous, because you had just finished your drink three minutes prior. As a result, you acknowledged having lied to the officer by saying your last drink was two hours earlier. You were apologetic about this in your submission and expressed your regret. You said you expected the officer to hand back your licence so that you could be on your way.

I understand that police scrutiny of any kind can be unnerving, but since you did not feel “impaired” and if you had only consumed two pints of beer, it raises questions in my mind about the basis for your nervousness. Further, if you had just finished a beer three minutes earlier, I find it odd that you would not expect to have an odour of liquor on your breath. This is inconsistent with saying you finished your last beer two hours prior. However, as noted initially, a reasonable person might be nervous with the police, regardless of the situation, so I will give my concern in this regard little weight.

You provided times when certain events happened, which I summarized in the following table:

Line	Page in your submission	You Said	Time
#1	Page 2+	1 st drink at about. . .	2230 hours
#2	Page 4	2 nd drink started & finished	2310 to 2311+ hours
#3	Page 4	Driving on E. Saanich Road	2315 to 2317 hours
#4	Page 4	Based on estimated speed, 2-3 minutes from Inn	2320 – 3 min = 2317 hours left Inn
#5	Page 5	Just finished beer 3 minutes prior to first test	2320 – 3 = 2317 hours last sip of beer
#6	Page 6	First ASD test	2225 (2325) hours
#7	Page 6	At 2325, told officer last drink less than 20 minutes ago	-last drink > 2305 hours
#8	Page 7	1 st test 8 minutes after last drink	2325 – 8 = 2317 hours last drink
#9	Page 7	2 nd test was 16 minutes from last drink	2333 – 16 = 2317 hours last sip of beer

I have noticed the following inconsistencies in your evidence:

<u>On Line</u>	<u>Your last drink was at</u>	<u>Means the time of last drink:</u>
#2	about +/-2311 hrs	= +/-14 minutes before first test
#5	2316 hrs	= 9 minutes before first test
#7	2305+	= < 20 minutes before first test
#8, 9	2317 hrs	= 8 minutes before first test

According to your evidence, the time of your last drink ranged from 8 to +/-19 minutes before your first ASD test. This inconsistency causes me to question the reliability of your evidence of when you actually took your last sip of beer in terms of the first ASD test. Your evidence about the second ASD test consistently indicated that it was more than 15 minutes after the last sip of beer.

On page 10 of your submission, you said you received the Superintendent’s Report on Approved Screening Devices (the “Report on ASDs”), from the Sidney Driver Services Center; you referred to the Report on ASDs in your evidence. Given the decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, I am relying on the Report on

ASDs only to the extent that you have relied upon it. That is, for the statement that “breath samples are taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol.”

Based on the Report on ASDs, you argued that the officer should have waited at least 15 minutes before administering the ASD tests. However, whether a peace officer is required to wait before administering an ASD test is determined on a case-by-case basis. If a test is administered without waiting 15 minutes, an adjudicator must focus on the officer's belief about the accuracy of the test results and the reasonableness of that belief. Your evidence confirms that you told Constable Nelson that your last drink was two hours prior to being stopped at the roadblock, not within the previous 15 minutes. As a result, it was reasonable for him to administer the test right away.

In addition, you were consistent in saying the second test was more than 15 minutes after your last sip of beer, so this would not have been affected by mouth alcohol. The second test on a separate ASD registered a “FAIL” upon analyzing your breath sample. This supports a finding that your BAC was greater than 80 mg% and that the first test was not affected by mouth alcohol.

On page 6, you said you still had alcohol in your mouth 16 minutes after your last sip of beer. You also said you were burping up the beer you had consumed prior to the roadblock. I infer you are arguing that the burping introduced alcohol from your stomach into your mouth and that this affected the ASD result. Given my general knowledge of how ASD tests are conducted, I am satisfied that it is more likely than not that the officer is aware of the precautions he must take in administering an ASD test, such as the need to watch for burping or belching on the part of the driver.

When I consider all the evidence before me, I note the weaknesses in Constable Nelson's evidence as well as those in your evidence. The only error I noticed on the part of the officer was his evidence of the time of the first test, which was impossible.

In contrast, I had the following concerns with your submissions:

- An absence of evidence from s.22 despite your statement that he could attest to the validity of your evidence;
- Inconsistency in your evidence about the time of your last drink; and
- Driving behaviour that is more consistent with a higher BAC than a lower BAC.

While you may not have felt “impaired” when you encountered the roadblock, you did not provide persuasive evidence that would cause me to doubt the “FAIL” readings on ASDs I have found to be reliable.

Section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 2, 2013. You have already served 20 days of the prohibition and you need to serve the remaining 70 days, which commences November 1, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.



October 15, 2013

s.22

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

Introduction

On September 23, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records before me confirm that you and your lawyer Albert King received all of the disclosure documents. I have proceeded with the review based on this confirmation.

You applied for all grounds in this review; some of them are not applicable for the type of prohibition that you were served by way of Notice. For your benefit, I have considered all relevant grounds in this review.

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer -- Cst. Hutt -- indicated that you were driving or in care or control of a vehicle at 1812 hours on September 23, 2013. Cst. Hutt provides in the occurrence report that: a witness reported a single vehicle collision; when Cst. Hutt and another officer arrived, they observed your vehicle with significant damage and in the ditch off the main roadway. Your statement to the officer at that time was that you were avoiding a deer that had leaped out on to the road, you panicked and drove off-road.

In your statement sent October 4, 2013, you provide that your vehicle had left the road, avoiding a collision with an animal.

I accept this as your agreement to the fact that you were driving at the time and date placed in to evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register "FAIL"?

In the Report, the officer indicated that you provided an ASD "FAIL" result at 1838 hours.

In your statement sent October 4, 2013, you state: "I agreed to and provided a breath sample." This is your description of providing the first breath sample into an ASD. You do not re-state the result of that breath test; however you do not object nor provide an alternate version of events.

I am satisfied that the ASD registered a "FAIL" result.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test.

On this point, you state: "I was then asked to provide a second breath sample." And in your further statement sent October 7, 2013:

s.22

I am satisfied that the officer advised you of your right to a second analysis. Both of your statements confirm this.

Was the second analysis provided by the officer?

The officer's evidence on the Report is that the request was withdrawn. In the occurrence report, after describing his reading of your right to a second analysis, and the preparation of a second ASD to accept your breath sample, Cst. Hutt notes:

At this time s.22 indicated to Cst. HUTT that he now was not feeling good. He was not in any pain but was feeling sick and did not want to attempt a second breath sample. Cst. HUTT informed s.22 that at anytime before he was served his notice of driving prohibition he could continue to request the second test.

As noted above, in your statement sent October 7, 2013, you stated: “. . . s.22

This is fact pattern is confirmed in the “Occurrence Report. . .Immediate Roadside Prohib Narrative” of Cst. Hutt:

The driver did request a second ASD test. However before the second ASD test could be administered the driver indicated he did not feel well and no longer wished to provide a second breath sample. . . Cst. Hutt informed the driver that at any time before his notice of prohibition was served he could still request to provide another breath sample and the driver indicated he understood that.

The evidence establishes the fact that you had initially requested a second test, but then withdrew that request due to an immediate medical concern. Cst. Hutt informed you of that right, and the evidence establishes that you understood that you could request that test up until the service of the Notice. The evidence presented by the officer satisfies me of the fact that you were aware of the opportunity, and your right to request that second test, as well as the time limit in which to do so.

Was the Notice served on the basis of the lower analysis result?

Cst. Hutt recorded the single test result as “FAIL”. You present no evidence to the contrary. With this being the single test result obtained, I am satisfied that the Notice was served on the basis of a “FAIL” result.

Was the ASD reliable?

The officer provided a ‘Certificate of a Qualified ASD Calibrator’ (the “Certificate”) for the ASD serial number 072487 which he used to test a sample of your breath. This Certificate forms part of the sworn Report.

For this ASD, the qualified ASD Calibrator, Alex Hutt, certified that on September 3, 2013, he checked the calibration of ASD serial number 072487. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 1, 2013 and the service expiry date as April 4, 2014.

In your statement sent October 4, you state, in regards to the test taken at roadside at 1838 hours: “If the ASD used in the test was not properly calibrated or used in designated temperatures for operation these and other factors could result in an inaccurate reading.” You do not provide any evidence to verify any conclusion that the ASD was not calibrated properly or malfunctioning at the time of the test.

The officer has provided a Certificate to establish the fact that the ASD was properly calibrated, and I am therefore satisfied of its reliability.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

SEPTEMBER 26, 2013

s.22

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

Introduction

On September 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

In the Report to Superintendent (the “RTS”), Constable Ziemer indicated that a witness saw you driving or in care or control of the vehicle at 1745 hours, on September 6, 2013. After hearing your particular submissions in the oral hearing, I am not convinced that the officer’s evidence is reliable.

Based on the evidence before me, I am not satisfied on a balance of probabilities that you were a driver within the meaning of section 215.41(1) of the Act at 1745 hours on September 6, 2013.

Decision

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

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

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

October 17, 2013

s.22

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

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Paul Pearson. I have proceeded with the review based on this confirmation.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control at 1955 hours on September 27, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that he responded to a third party witness who reported that you were observed driving all over the travel lane, crossing the centre line, all the way over to and across the adjacent bike lane, almost striking mail boxes along the shoulder. Further, the witness stated that you were observed making erratic corrections and sudden braking.

Mr. Pearson provides the definition of a driver:

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

Mr. Pearson adds that the definition does not include a person who had, at some time in the past, had care and control of a motor vehicle. To support his position, Mr. Pearson provided *R v McIntosh*, [1955] 1 S.C.R. 686 and *Rogalsky v. Regina*, 2006 BCSC 975 for my determination.

Mr. Pearson submits that when one reads the IRP sections, particularly s. 215.5, there is no mention of a delayed analysis. On the contrary, the entire regime is called the "Immediate Roadside Suspension." Mr. Pearson submitted that if an IRP could be confirmed at some unconnected time to the person being the "driver" the police could hand IRP's to individuals who became intoxicated hours, days, weeks, or months after being in care or control.

Mr. Pearson made several comparisons to the Administrative Driving Prohibition (ADP) regime where there are clearly defined time limits Mr. Pearson cited *Denis v. the Superintendent*, *Neill v. the Superintendent* and *Matous v. the Superintendent* for my consideration.

In paragraph 3 of your affidavit you admit that you were driving; however, you deny that you were swerving. You stated that you are unsure whether the person was actually watching you or someone else drive.

In paragraph 10-11 of your affidavit you stated that it was your intention to stay at the arena until 11:00 p.m. and then your friend, s.22 would drive after the game.

The issue before me is whether or not you were a driver. You have not disputed that point. You do however question whether or not it was you that the witness observed.

I will address the issue of whether or not I am satisfied that you were the person who the witness observed driving erratically at 1942 hours. I acknowledge that the officer did not observe you driving and I am relying on hearsay evidence. Therefore I will weigh the evidence accordingly.

In considering this issue I have considered the officer's evidence that:

- The witness followed you from the road to the rec centre.
- The time of the initial complaint was 1942 hours.
- The witness observed you park and walk away from the vehicle.
- The witness followed you into the rec centre, and observed you until the police arrived.
- The witness stated that you did not consume anything since arriving at the centre.

In your affidavit you stated that:

- The parking lot was busy when you arrived.
- You purchased a ticket, and were sitting in the upper bleachers for approximately 10-15 minutes.
- There were hundreds of people in the bleachers.
- You went to the washroom and you did not observe anyone following you.

I acknowledge that the recorded time of 1955 hours in the Report is more likely than not the time the police arrived at the centre rather than the time of driving as recorded in the officer's Report. I have also applied more weight to the time recorded in the Narrative of 1942 hours with regard to the time of driving because the officer reported in his Narrative that this was the time of the initial complaint.

Based on the evidence I infer that you believe that given the number of drivers in the parking lot, and the number of spectators inside the arena it is reasonable that the witness was wrong in identifying you as the driver. However, I am not convinced of this. The evidence indicates that the witness observed erratic driving and maintained visual contact with you until you exited the vehicle, and entered the rec centre. Further, the witnesses' statement with regard to you not consuming anything between driving and police arrival is consistent with someone who is in their sight during that entire time. I acknowledge that the police did not see you driving; however, I find that given the continuity of the events that transpired between 1942 hours and 1955 hours; that you were the driver within the meaning of section 215.41(1) of the Act.

I am satisfied that on September 27, 2013, that you were a driver within the meaning of section 215.41(1) of the Act at approximately 1942 hours.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 2010 hours and 2040 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

The officer provided two Certificates of Qualified ASD Calibrator, in which R. Figueiredo certified that the ASDs used in your case were found to be within the recommended limits when the calibration was checked on September 23, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Paul Pearson by fax: 250 480 0004

November 5, 2013

s.22

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

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result;
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”); and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served. Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

You rely on a recent BC Supreme Court decision, *Wilson*, to outline the principle that a person’s ability to drive must be shown to be affected by alcohol in order for a prohibition to stand. I rely

on the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.5(4) of the Act requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

You submit an email as part of your evidence on this review. It refers to an incident on September 27. I do not consider this evidence as it appears to refer to a separate incident from the one on review.

You have also outline your work and business needs for a vehicle. I make no reference to these needs, and have no authority to consider the hardship this IRP may impose on you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Should your 7-day or 30-day prohibition be reduced because you did not have the required number of previous IRP's?

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer – Cpl. Rosset – indicated that you were driving or in care or control of a vehicle at 1240 hours on October 6, 2013. Cpl. Rosset provides in his narrative that your vehicle was driving "noticeably faster" and then used radar to establish your vehicle's speed at 117 km/h. Upon stopping your vehicle, he identified you positively in the driver's seat; he verified your identity with your driver's licence.

In your written statement you confirm driving: "I was pulled over for speeding at approx 12:20pm." I am therefore satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASDs register "WARN"?

In the Report, the officer indicated that you provided ASD "WARN" results at 1243 and 1245 hours.

In your statement, you describe the initial "WARN" result, and your shock. You do not describe a second "WARN" result, however you do not dispute the evidence on this specific point.

With no evidence to the contrary, I am satisfied that the ASDs registered "WARN" results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In regards to his informing you of the right, he included: "Cpl ROSSET advised s.22 that he had the right to request a second test from a different instrument and that the lower result would prevail. s.22 chose to take the second test."

In your statement, you describe your subsequent phone conversation with Cpl. Rosset, and provide: "I believe he did his job and followed the appropriate procedure." With this statement provided in your evidence, and no evidence placing Cpl. Rosset's advising you of your right to a second test in dispute, I am satisfied that he advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer, and was it performed on a different ASD?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'WARN' at 1245 hours. He carried out this analysis on ASD serial number 053893, a separate unique identifying serial number from that of ASD used in the first analysis.

With no evidence to the contrary, I am satisfied that Cpl. Rosset provided the second analysis on your request, and performed that second analysis on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "WARN". You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "WARN" result.

Were the ASDs reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator Paul Brailey certified that on September 18, 2013, he checked the calibration of ASD serial number 101245. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 16, 2013 and the service expiry date as November 7, 2013.

For the second ASD, the qualified ASD Calibrator Paul Brailey certified that on September 18, 2013, he checked the calibration of ASD serial number 053893. She found the ASD to be within the recommended limits. She recorded the ASD calibration expiry date as October 16, 2013 and the service expiry date as July 24, 2014.

You present no evidence to call the reliability of the ASDs into question. I am therefore satisfied of their reliability at the time they were used by Cpl. Rosset to obtain sample of your breath for analysis.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

In your statement sent to this office on October 15, 2013, you describe previous IRPs. These have no bearing on this current review for the Notice which was served on you on October 6, 2013.

You state that on the evening of October 5, 2013, you did not drive, getting back home "shortly after midnight." You detail 8 drinks with dinner, though you do not provide the receipt you refer to, and also that you had consumed "beer and wine" and were "definitely impaired but not to the point of staggering or being out of control."

A statement from s.22 is included as part of your submissions; I infer with reason that this is s.22 and that he is referring to October 5 and 6, 2013. He notes your return home at 12:00, and provides evidence that you did not drink the next morning, and that you "did not smell of it either."

You acknowledge being stopped for speeding by Cpl. Rosset the next day, "approx 12.20pm" and state: "The one thing that I am absolutely sure of is that at no time while driving on Sunday October 6, 2013 was I impaired."

You do provide the important detail of having eight drinks the evening prior; this is not an insignificant amount. I accept that you submit this statement with a certain degree of candour; however, you do not present verification of this amount. You mention a receipt, yet have not provided that receipt. I also consider your statement that you were "definitely impaired but not to the point of staggering or being out of control" – also a frank admission of your alcohol consumption the previous evening.

Your ability to function in a normal manner the following day, even to the point where you believe you were "definitely not impaired" is not synonymous with having no alcohol in your system. You submit evidence on the amount of sleep you had, as well as your food consumption both the evening prior and the following morning, however you provide no authority for your "impression" that "one drink per hour especially when having a meal" is the rate at which alcohol processes. Therefore, your functionality with alcohol yet remaining in your system is not the question to be addressed; rather, your BAC over a certain threshold while in control of a vehicle is what is being sanctioned administratively.

The officer presents evidence that is not placed into question by your statements which are based on your judgment and physical abilities: two ASDs provided "WARN" results. There is no evidence to place the procedure followed by the officer, nor the functionality of the ASDs, into question. That being the case, on a balance of probabilities I am not satisfied that your BAC was less than 50 mg%.

Should your 7-day or 30-day prohibition be reduced because you did not have the required number of previous IRP's?

In the Notice, the officer ticked the box to indicate that the reason for the 7-day prohibition was because a sample of your breath on an ASD registered a “WARN”, and that this is your second prohibition due to a “WARN” reading within a five year period.

I am not satisfied that your 7-day or 30-day prohibition should be reduced.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. You were prohibited from driving for 7 days. Your prohibition took effect on October 6, 2013.

s.15

Adjudicator

November 7, 2013

s.22

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

Introduction

On October 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your IRP Application for Review, you indicated four grounds for review, two of which are not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

I recognize your submission that you have a clean driving record; however, I do not have authority to consider a person's driving record in this review.

You submit that you have no criminal record and consider yourself a law-abiding citizen who always strives to obey the law; however, an IRP is an administrative sanction and not a criminal process.

You indicated that you had no thoughts of leaving the scene as the investigating officer submits, rather that you were only moving away from the street onto the sidewalk where it was safer. Further, that you were uncomfortable with the conflicting information that you had received from the officer and simply wanted to exercise your right to a lawyer. On this point, you submit that you have never been in trouble with the law and as such, did not indicate that Martin Johnson was your lawyer.

You also provided a position description that outlines your duties as

s.22

I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment or transportation needs.

While I acknowledge your submissions, the scope of this review is limited to the grounds as defined in the Act and as such, I have authority to only consider the issues below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2240 hours on October 22, 2013. Further, in the Narrative Text Hardcopy - Occurrence Report - 2 (the "Occurrence Report - 2),

the officer indicates that she observed a van approach from Voght Street. She noted that the vehicle's headlights and taillights were not on while it travelled down a dark alleyway and turned onto Garcia Street. Accordingly, the officer activated her emergency lights and initiated a vehicle stop. She approached the female driver and asked her if she could see as her vehicle's dash lights and headlights were not on. She then asked the driver to turn on her lights, however, submits that the driver started playing with the, "up and down dial", for the vehicle's interior lights. Accordingly, the officer submits that she had to show the driver where the clearly marked headlight dial was. When the driver was asked for her licence, she could not produce it. However, the officer indicates that your identity was confirmed as s.22 by an attending officer.

In your written submission, you indicate that when the officer approached your vehicle that she asked you to look at your dashboard. Accordingly, you submit that there are two switches which control your vehicle's lighting and that you were looking at the one that controlled the brightness/dimness of the headlights. You also submit that there is no switch in the vehicle that, "slides up and down." Moreover, you indicate that you had just left a well lit parking lot and street and travelled into the laneway and therefore, had mere seconds to realize that your headlights were not fully engaged.

While I acknowledge your evidence and that of the officer's conflict with regard to your behaviour, the reason why you were stopped is not an issue I must consider in this review. Further, you do not refute driving when the officer stopped your vehicle.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 2314 hours and 2317 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that she advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that she provided you with a second analysis. There is no evidence before me to the contrary.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 037628 and 101270, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Brock Daryl Hedrick certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 16, 2013. He also certified that to the best of her knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

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

In the Occurrence Report - 2, the officer indicates that after approaching your vehicle and requesting your driver's licence, she noted an odour of liquor on your breath and asked if you had been drinking. Further, she submits that your eyes were watery and that your responses were with slurred speech. The officer submits you indicated that you had had, "1, no 2 ciders a while ago", and that when you were asked to clarify what "a while ago" meant that you responded, "a half hour." Moreover, upon being detained the officer searched your person and found two, unopened 50 ml sample bottles of Banff Ice Vodka in your jacket pockets.

You submit that you were totally unaware and upset to recently discover the consequences of

s.22

I have reviewed the product information that you provided for Benadryl Liquid Elixir and note that a non-medicinal ingredient listed is alcohol. However, I note that in your submission, you indicate that you had not taken Benadryl on the day that you encountered the officer. I

acknowledge that you are submitting that Benadryl has cumulative effects and therefore, would have compounded s.22 influence on your ability to metabolize alcohol. However, I have no evidence before me that indicates Benadryl does have cumulative effects when it is ingested, "when necessary", as you have claimed.

I acknowledge that your prescription pill bottle label indicates that you have been prescribed,

s.22

I also have reviewed the excerpts referencing the effects s.22 can cause when a person consumes alcohol while taking this medication, as well as the three articles you provided that indicate s.22 has cumulative effects during alcohol consumption. Accordingly, I infer that when alcohol interacts with s.22 it leads to an increase in blood alcohol levels and as such, a person becomes inebriated at a more rapid rate.

While I acknowledge your and s.22 submissions that you were not aware that minimal drinks of alcohol would raise your BAC due to alcohol's interaction with s.22 here I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not whether combining s.22 with alcohol would cause your blood alcohol levels to rise.

Further, I have considered your submission that you had been crying shortly before being stopped by the officer because s.22 Specifically, that the officer was aware of this fact but did not mention it in her report, instead attributing your watery eyes solely in connection with drinking. However, how indicia observed by the officer can be attributed to factors independent of being under the influence of alcohol is not an issue I must consider in this review.

I have also considered your submission that your difficulties blowing were directly related to the s.22 in the days prior. Specifically, that you have

However, the evidence before me indicates that two "FAIL" results were obtained. Therefore, while I have reviewed the "Attending Physician's Statement of Disability" describing this condition, I am satisfied that it did not interfere with your ability to provide a suitable sample of breath into two, different ASDs.

Although you are of the belief that your ability to drive was not impaired judging strictly by the amount of alcohol that you had consumed, you did not provide any compelling evidence that would cause me to doubt the "FAIL" reading on the ASDs that I have found to be reliable. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg %.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

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

Introduction

On August 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an ASD test resulted in a “FAIL”.

You applied on the ground that, “My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s).” However, this ground is not applicable to your situation because you were served with a 90-day prohibition. All grounds for review that apply to your case will be considered in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the “RTS”), the investigating officer, Cst. Lee, indicates that you were driving or in care or control of a motor vehicle at 2231 hours on August 30, 2013. Further, in the Narrative Text Hardcopy (the “Narrative”), Cst. Lee submits that she observed a female driver operating a motor vehicle from Day Lot 2 to Day Lot 3 and then parking. She then observed the same driver restart the vehicle, perform a u-turn, and travel back toward Day Lot 2. The vehicle was then observed making another u-turn and exit onto Blackcomb Way. Cst. Lee initiated a traffic stop, observed you as the sole occupant and driver, and confirmed your identity with a valid British Columbia driver’s licence.

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

Did the ASD register a “FAIL”?

Evidence in the RTS indicates that at 2231 hours, Cst. Lee made an ASD demand on you. At 2239 hours you provided a breath sample for analysis on ASD serial number 101610. The test result was a “FAIL”. Further, at 2241 hours you provided a second breath sample for analysis on ASD serial number 101607. The test result was a “FAIL”.

I have no evidence before me to the contrary. I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Narrative, Cst. Lee submits that at 2239 hours she informed you of your right to request a second ASD test and that you understood what this right offered. Evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

Police evidence indicates that you requested a second ASD test and that at 2241 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result by Cst. Lee.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Lee indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 101610, with a temperature of 22 degrees Celsius and ASD serial number 101607, with a temperature of 20 degrees Celsius were used. These unique ASD serial numbers are corroborated by a Certificate of a Qualified ASD Calibrator for each of the two devices.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 101610 was checked for calibration on August 29, 2013, with a service expiry date of August 16, 2014 and calibration expiry date of September 25, 2013;
- Qualified ASD Calibrator, Cst. Cheryl Dawn Lee, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 101607 was checked for calibration on August 15, 2013, with a service expiry date of November 28, 2013 and calibration expiry date of September 12, 2013 and;
- Qualified ASD Calibrator, Cst. Cheryl Dawn Lee, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Lee. These signatures confirm that any ASD tests referred to in the investigation were conducted by a qualified ASD operator and that the ASD units used were functioning correctly.

I note that the Certificate of a Qualified ASD Calibrator (the "Certificate") for ASD serial number 101610 indicates that on August 29, 2013, Cheryl Dawn Lee checked the calibration of the ASD by means of a dry gas Alcohol Standard, yet the bottom of the Certificate is dated August 28, 2013. I acknowledge this discrepancy, however, I am satisfied that this information is not vital in determining if the ASD was reliable. I am satisfied that this was a clerical error and that this error does not compromise the reliability of the other information provided in the Certificate. This is the conclusion I draw from the evidence before me.

Based on the evidence before me, I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc: Greg Diamond (by fax)
604-938-0870

October 22, 2013

s.22

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

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You checked the boxes next to 6 grounds on the application form. However, the grounds associated with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition, so that ground is also not applicable. I will consider all grounds available to you in this review.

At the beginning of the oral hearing I confirmed with you that you had received full disclosure. I have proceeded with the review based on that confirmation.

During the hearing you stated that you require your driver's licence for work.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0219 hours on September 1, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 0223 hours and 0227 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

In the hearing you stated that you had conducted some online research and found that the ASDs are unreliable. You pointed out that the ASDs calibration expiry dates are within 5 weeks of expiring. Further, you were concerned about the device that registered a temperature of 30 degrees. You question whether the device may have been overheating.

With regard to the expiry dates I find that they are within the recommended limits. Further, in a recent decision of *Buhr v. the Superintendent of Motor Vehicles* at paragraphs 29 & 30, the judge refers to the ASD operator's manual that was in evidence, which states that "a test could not be initiated if the temperature was below 10 degrees or above 40 degrees".

For the first ASD, the qualified ASD calibrator certified that on August 7, 2013, he checked the calibration of ASD serial number 101579. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 4, 2013, and the service expiry date as March 26, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 7, 2013, he checked the calibration of ASD serial number 101585. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 4, 2013, and the service expiry date as December 4, 2013.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In the hearing, you stated that you were the designated driver for that evening and you did not consume any alcohol. You did have however a red bull and you did some research and found that it does not contain alcohol. You added that you are certain no one "spiked" your drink.

I note that you did admit to using mouth wash two hours earlier. Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol.

In your case you denied drinking and you admitted to using mouthwash 2 hours earlier. I have also considered the officer's evidence with respect to your indicia and an odour of liquor on your breath. On this basis I do not find your evidence credible.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013. You have already served 8 days; therefore, you have 82 days remaining. Your prohibition is effective on October 23, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

November 12, 2013

s.22

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

Introduction

On October 20, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

Preliminary

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice that the peace officer served on you.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that on October 20, 2013, at 00:38 hours, Officer Campbell (the “officer”) established you as a driver or having care or control of a vehicle.

The police evidence in the Narrative Text Hardcopy (the “Narrative”) is that officer observed you and your brother get into your vehicle. He said the vehicle engine and the lights were turned on, and the vehicle rocked a little while still parked. The officer pulled his vehicle in behind yours to prevent it from driving away. When he engaged with you, the officer said he smelled a strong odour of liquor on your breath and said you were giddy. He asked you to exit the vehicle and could still smell a strong odour of liquor on your breath. The officer formed a reasonable suspicion that you had alcohol in your body. He said he read the ASD demand to you verbatim at 00:41 hours and you said you understood the demand. After your first “fail” ASD test, the officer said he informed you that you were now detained for an impaired driving investigation. He read the breath demand to you at 00:44 hours and you said you understood. He chartered and warned you from an approved *Charter* card. You said you understood your rights and did not want to speak with a lawyer. The officer said he searched you and secured you in the back seat of the police car. After your second ASD test resulted in a “fail”, the officer said he served you with the vehicle impound and driving prohibition documents. He said you left the scene on foot with your brother and this was at approximately 01:15 hours.

You said that you and your brother went out for dinner and then to JJ’s Bar to meet some of his friends. You said you phoned for a cab at 12:32 to take you home to your mother’s place. You asked for the taxi to be sent to the small parking lot instead of the main entrance where most people are picked up. You and your brother went to your truck to wait for your friends, to get your coat and to stay warm. You and your brother got into your truck and you started it up to turn on the heater while you waited for the cab. You said you had no intention to drive that night and the cab was on its way. Shortly after entering your vehicle, you said police officers pulled up behind you. When the officer asked if you were okay, you said “yes just waiting for someone.” You said you explained that you were not driving, and the officer informed you that you were “in care or control”.

I acknowledge that you said it was not your intention to drive home, and I note that you have provided me with a snapshot of calls made from your phone to the taxi company on October 20, 2013. However, I find it odd that you asked the dispatcher to have the cab pull into the small

parking lot instead of at the main entrance where most people are picked up. Also, if it was your intention to merely stay warm in your truck until the taxi arrived, I question why:

- you turned on your vehicle's lights, and
- the officer observed your truck to rock while still parked.

I find it noteworthy that at no time during the officer's investigation did you tell him you were waiting for a taxi. As I mentioned earlier, you informed me that the officer asked you if you were okay. You replied that you were "just waiting for someone." There is no evidence before me that you told the officer you were waiting for a taxi.

You said that you kept looking out the vehicle window, watching for your cab, when the officer was talking to you. Your phone log indicates that a taxi company was called at 12:32 a.m. and I note that the officer's investigation ended at 1:15 a.m. I find it noteworthy that although you said you called for a taxi, one had not arrived by the time the officer's investigation ended and you left the scene on foot. If you had indeed called a taxi, it does not make sense that you did not wait for its arrival rather than leaving on foot. Ultimately, I am not persuaded that you called a taxi and that you had no intention of driving.

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

Did the ASD register a "fail"?

The police evidence in the Report is that at 00:42 hours and at 01:00 hours, the officer used ASD serial numbers 051211 and 055651 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 055651 at 01:00 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were “fail”; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator indicates that ASD serial number 051211 and ASD serial number 055651 were checked for calibration and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

SEPTEMBER 19, 2013

s.22

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

Introduction

On February 9, 2013, 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. I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand

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

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, William J. Heflin. I have proceeded with this review based on that confirmation. Your lawyer submitted written information on September 16, 2013. In reaching my decision in this written review, I have considered all of the relevant information available to me.

Your lawyer submits that you asked about your rights and the officer should have advised you of your rights under the Canadian Charter of Rights and Freedoms (the “Charter”) such as your right to consult counsel and other rights. The right to counsel is not invoked when a driver is stopped at roadside and asked to provide a breath sample into an ASD. Although you were briefly detained, this minimal detention is demonstrably justified in a free and democratic society. Even if your Charter rights were breached I cannot provide a remedy. Nothing in this review turns on the question of whether your rights to counsel and other associated Charter rights were breached

You checked off all of the grounds for review on the Application for Review form. Some of those grounds do not apply to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply to your situation.

Issues

The following are the issues considered in this review:

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

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

The officer's evidence is that on February 9, 2013 at 0221 hours a vehicle which was observed leaving the parking lot of a licensed liquor establishment was stopped. You were its driver and identified yourself with your driver's licence.

There is no evidence to the contrary.

Your lawyer submits that the time of driving is not clearly stated.

The officer's evidence clearly states that the vehicle which was stopped was observed being driven out of the parking lot. The vehicle was stopped at 0221 hours. You were in the driver's seat of the vehicle. I am satisfied that you were the person driving the vehicle and in care and control of it when it was stopped by the officer.

I am satisfied that at 0221 hours on February 9, 2013 you were a driver within the meaning of section 215.41(1) of the Act.

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

Two issues must be considered. I must determine whether a valid ASD demand was made and whether you failed or refused to comply with that demand.

Was a valid demand made on you?

The officer's evidence is that you were asked how much you had to drink. You stated that you had a few beers and that your last drink had been about one hour earlier. There was an odour of liquor on your breath. The officer formed his suspicion that you had alcohol in your body at 0222 hours. At 0224 hours he read the ASD demand to you from the Charter card. After the breath demand was made, a discussion between the officer and you occurred during which you said you were not sure of your rights. The officer advised you that the demand had been read to you and that your options were to provide a breath sample or to refuse to provide a sample.

There is no evidence to the contrary.

Your lawyer submits that there is insufficient evidence regarding the time you drove your vehicle. Without being able to determine this, I cannot determine if the ASD demand under the Criminal Code was made within three hours of driving which is required for a valid demand. Your lawyer questions the reasons for the stop and says that there was nothing about your driving which justified the officer stopping you. Your lawyer submits that there is no evidence

that you were advised of the reason for your vehicle being stopped or of your rights to counsel. He also suggests that when you asked about your rights, the officer was required to advise you of your right to request a second ASD test on a different instrument if you provided a "FAIL" reading.

I have determined that you were driving at 0221 hours. The ASD demand was made at 0224 hours. I am satisfied that the ASD demand was made within a reasonably prompt time and within three hours of you driving a vehicle.

I am satisfied that the officer was entitled to stop a vehicle such as yours which was observed leaving the parking lot of a licensed establishment in the early morning hours to check for driver sobriety. The *Motor Vehicle Act* does not require an officer to advise you the reason for your vehicle being stopped. Nothing in this review turns on the question of whether the officer did or did not advise you his reason for stopping your vehicle.

I have already noted that your Charter rights and any alleged breaches of them is not an issue I can address in this review. It may, however, be that your counsel is confusing your right to consult counsel and other rights available under the Canadian Charter of Rights and Freedoms, with rights that you may have under the Act.

Until you have provided a breath sample which registered a "FAIL" you do not have the right under Section 215.42 to be advised of your right to forthwith request and be provided with a second analysis. You did not provide a breath sample which registered a "FAIL." You were not then entitled to be advised of your right to a second analysis. I am satisfied that the only right you were entitled to was the right to be advised of your options to either provide or refuse to provide a breath sample.

An officer must be satisfied that you have been driving and must have a reasonably based suspicion that there is alcohol in your body before demanding that you provide a sample of your breath into an ASD. The amount of evidence required to support a reasonable suspicion is low. The demand to provide a sample must be made immediately after the officer forms the suspicion that you have alcohol in your body.

I am satisfied that the odour of liquor on your breath combined with your admission that you had consumed a few beer with your last drink occurring one hour before you were stopped provided the officer with grounds to demand a sample of breath from you. The officer formed his suspicion that you had alcohol in your body at 0222 hours and made his demand that you provide a breath sample at 0224 hours

I am satisfied that a valid ASD demand was made on you.

Did you fail or refuse to comply with that demand?

The officer's evidence is that after the ASD demand was read you replied "I understand that, I would rather not do that." You were asked if you were going to provide a breath sample or if you were refusing and you said "I have never been in this situation before. I feel I am quite confident to go to my home now." You then said that you felt okay to drive and would like to go home. After further discussion you again said that you felt competent to drive home. You continued to say that you were competent and capable. You said that you had paced yourself, given yourself enough time, and did not need to provide a breath sample. You were advised that

the officer would treat your actions as a refusal. You became argumentative. You then said that you were not sure of your rights and were told that if you did not provide a breath sample that you would be charged with refusing to provide a breath sample. You said "I guess you will have to do that then." The officer confirmed that you were not going to provide a breath sample and you said "yes."

Your counsel argues that you did not clearly refuse to provide a breath sample, stating on one occasion when a breath sample was demanded of you that you would rather not do that and, on another, after the officer re-iterated the demand that "you were not sure what that means." In the absence of a clear and unequivocal refusal from you, I should conclude that you did not refuse to comply with a valid demand and revoke your driving prohibition.

A conclusion that you refused to provide a sample is a finding of fact based on all of the circumstances. Refusal can be express, given verbally, or constructive and demonstrated through conduct. It must be clear and unequivocal.

I begin by considering the words your counsel says show equivocation in your response to the breath demand. While the words "I would rather not do that" made when initially responding to the breath demand suggest equivocation, I am satisfied upon a review of your actions and comments made after that statement that you carried forward your intention not to provide a sample until it became a constructive refusal. I am satisfied that your comment that you "were not sure what that means" was made after you were asked by the officer if you were going to provide a sample or if you were not going to provide a sample. The officer, after you made that statement, then again explained to you your options to either provide a sample or to be considered as having refused to provide a sample.

When I consider the totality of your words and actions I am satisfied that you understood your obligation to provide a breath sample and the consequences of a refusal, and that you demonstrated clearly and unequivocally that you would not comply with the officer's demand.

I am satisfied that you refused to comply with the valid ASD demand to provide a sample of your breath.

Did you have a reasonable excuse?

There is no evidence which could support a conclusion that you had a reasonable excuse for refusing to provide a breath sample pursuant to a lawful breath demand.

I am satisfied that you did not have a reasonable excuse for failing or refusing to provide a sample of your breath.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 90 days. Your prohibition took effect on February 9, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your

IRP s.22 Review Decision
Page 5

driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: William J. Heflin (by fax)
(250) 360-1780

September 20, 2013

s.22

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

Introduction

On August 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied on three grounds, one of which was not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

You explained that you have a clean driving record.

The scope of the review is limited to the grounds as defined in section 215.5 the Act. While I acknowledge that you may have a clean driving record, I am not authorized by the Act to take that into consideration. In this review, I can only consider and make decisions on the issues noted below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on August 30, 2013, at 02:10 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on August 30, 2013, at 02:10 hours.

Did the ASD register a "FAIL"?

In the RTS the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

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

You stated that you only had one beer.

I note that although you stated that you only had one beer, you did not provide any evidence to indicate what your BAC would have been. I find it unlikely that two separate ASDs malfunctioned and produced results that did not accurately reflect your BAC. Further, I note that you did not dispute the officer's observations that your speech was slurred, that your eyes were watery, that you had slow deliberate movements and that there was an overwhelming odour of alcohol coming from your vehicle. I find these observations inconsistent with your claim that you had one beer.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

October 4, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “WARN”, and was it as a result of your BAC exceeding 50 mg%?

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2024 hours on September 15, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that he responded to a complainant who indicated that s.22 had cut him off on Highway 1. The complainant stated that he followed the vehicle into the businesses lot and spoke to the driver whose breath smelled of liquor. The officer states that the complainant maintained continuity of the driver until he arrived. The officer states that you admitted to being the driver, and were identified via your BC driver's licence.

In your submission you state that you were not driving at the moment the police officer approached you. You state that your truck was parked in the yard.

I recognize that you may not have been driving the vehicle at the same moment the officer approached you; however, the evidence before me indicates that a witness observed you driving and reported it to the police, and the witness maintained continuity of you from the time of driving until the officer arrived. The officer noted that you identified yourself as the driver, and there is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "WARN"?

The officer indicates in the Report that you provided two samples of your breath, at 2048 hours and 2113 hours, both resulting in "WARN" readings.

In your submission you state, "the ASD machine generated a warning sign, I don't know why."

I am satisfied that an ASD registered a "WARN".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2049 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2113 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 106326 and your second sample of breath into ASD serial number 101787. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 106326 and 101787.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "WARN" reading. The lowest analysis result was "WARN".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 106326. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 18, 2013, and the service expiry date as February 27, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 26, 2013, he checked the calibration of ASD serial number 101787. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 23, 2013, and the service expiry date as July 18, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

In your submission you state that you had not consumed alcohol of any kind for 16 hours prior to the ASD analysis.

I acknowledge your submission; however, you provided two samples of breath into two different ASDs which both resulted in "WARN" readings. The officer also indicates that you had the odour of liquor on your breath. Section 215.41(2) of the Act indicates that a "WARN" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 50mg%. There is no evidence before me to indicate that the "WARN" readings on the ASD are not reliable.

I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on September 15, 2013.

September 23, 2013

s.22

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

Introduction

On August 31, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

At the beginning of the oral review, I confirmed with your lawyer, Sarah Leamon, that she had received full disclosure of the documents before me. I have proceeded with this review based on that confirmation.

Ms. Leamon submitted that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She stated that I should exclude the officer’s evidence of the ASD results. In support of her argument Ms. Leamon referred to the case of *R. v. Schultz* (2009) BCSC 1521.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD "FAIL" result, is a contravention of your *Charter* rights. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

Ms. Leamon also referred to case of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* and noted the following four criteria I must bear in mind when assessing the evidence:

- Police are not deemed to have a credibility advantage and the case must be determined impartially on the evidence.
- The evidence is not to be unfairly parsed to create standards that are unknown to and unknowable by you.
- Such parsing as takes place, recognizes the deficiencies or gaps in the police record as well as those in your evidence.
- If there is insufficient evidence to decide the case, it must be resolved in favour of you, in line with the proper allocation of the burden of proof and the concept of a balance of probabilities.

I have read and considered the case of *Spencer* and I concur with Ms. Leamon on the above points, and have proceeded with the review on this basis.

Ms. Leamon provided the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* and referred to page five (5) at paragraph 19 where the court provided that there are specific pre-conditions that must be satisfied before a Notice may be issued:

1. A peace officer must make a demand under the *Criminal Code* for a sample of the driver's breath into an ASD;
2. The result of the screening device's analysis must register a WARN; and
3. The peace officer must have reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol.

Ms. Leamon submitted that in your case the officer has not provided any evidence which illustrates that your ability to drive was affected by alcohol. As a result, Ms. Leamon further noted that there is no required evidence from the officer to show that the officer was of the opinion that your ability to drive was affected by alcohol. Ms. Leamon noted that evidence before me indicates that the officer did not have the required opinion to serve you the Notice; therefore your IRP must be revoked.

I have read and considered the case of *Wilson* and I acknowledge Ms. Leamon's submission with respect to the Court's ruling in the case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

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

The officer provided a Report to Superintendent (the “RTS”), in which he recorded the date and time of driving or care or control as August 31, 2013, at 04:15 hours.

In the oral review, Ms. Leamon directed me to the evidence provided by the officer with respect to your IRP and stated that in the Narrative Text Hardcopy (the “Narrative”), the time of 04:15 hours is not the time of driving or care or control, but rather, the time that you called 911 to report your accident. Ms. Leamon stated that there is no evidence before me as to when you drove the vehicle only when you reported the accident, and as a result there is no reliable time of driving or care or control. Ms. Leamon referred to paragraph eleven (11) of the decision in *Modhgill v. British Columbia (Superintendent of Motor Vehicles)*, and provided four (4) decisions from my colleagues. She indicated that while I am not bound by their decisions, I must distinguish them from your case and that I must treat like cases similarly.

I have read and considered the decisions of my fellow Adjudicators. I am not bound by previous review decisions which, in any event, are fact specific. I must, however add that the determination of the time of driving or care or control is fact specific and dependent of specific findings of facts made by the Adjudicator conducting each specific review.

I have reviewed the Narrative and note that the officer stated that on August 31, 2013, you called 911 to report that you had been drinking and driving and crashed your car near the intersection of Nottmann St and Cherry Avenue in Mission. The officer further indicated in the Narrative that the vehicle had been travelling north on Nottmann St when it left the road to the right, sheared off a power pole, and came to rest against a mud berm. The officer indicated you were standing next to the vehicle when he arrived a few minutes after you called 911.

While I recognize this does not establish the exact time of driving, it does confirm that you were the driver. In the absence of any evidence to the contrary, I am satisfied that you were driving at the time of the accident.

With respect to the time of driving or care or control, there is no evidence before me that would lead me to conclude that after you crashed your vehicle you were injured, or delayed for any reason before you called 911. I find that it is reasonable for me to infer that you called 911 to report the accident relatively soon after the accident occurred. As it does not make sense to me that a reasonable person would wait a significant amount of time before calling for assistance via 911 after they had just crashed their vehicle, especially when there was nothing preventing

them from doing so. Based on the evidence before me, on a balance of probabilities, I find that that the time of driving or care or control occurred at, or only moments prior to the time you called 911 at 04:15 hours.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, at approximately 04:15 hours, on August 31, 2013.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 04:26 hours and 04:47 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that you were advised of your right to a second ASD test, on a different ASD and that the lower ASD test result would prevail. The officer also noted that you requested the second ASD test.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 04:47 hours.

There is no evidence before me to indicate that a second analysis was not completed by the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 101884 and the serial number for the second ASD as 051028.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that the result of both ASD tests was a "FAIL".

I am satisfied that the Notice was served on the lowest result which was "FAIL".

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of Qualified ASD Calibrator for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on August 20, 2013, he checked the calibration of ASD serial number 101884. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 17, 2013, and the service expiry date as August 8, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 20, 2013, he checked the calibration of ASD serial number 051028. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 17, 2013, and the service expiry date as August 8, 2014.

There is no evidence before me to suggest that the specific ASDs used in your case were not functioning properly on August 31, 2013, at the time of your ASD tests.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 31, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

Adjudicator

cc: Sarah Leamon, Acumen Law Corporation
Fax: 604-370-2505



October 10, 2013

s.22

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

Introduction

On September 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

I am not satisfied that the ASDs were reliable.

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

Decision

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

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

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

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

review is limited to the grounds as defined in the Act. In addition, subject to section 215.5(3), the Act does not grant me any discretion to alter the terms of a driving prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 2300 hours on October 9, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that responded to a complaint of a possible impaired driver. The officer reported that he followed your vehicle for approximately 1 kilometer before pulling you over. You were identified as the driver.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 2305 hours and 2308 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 16, 2013, he checked the calibration of ASD serial number 103670. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 14, 2013, and the service expiry date as July 9, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 16, 2013, he checked the calibration of ASD serial number 065837. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 14, 2013, and the service expiry date as February 26, 2014.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 9, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 24, 2013

s.22

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

Introduction

On August 4, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

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

I acknowledge receipt of Ms. Lee's submissions which include your Affidavit, a report and CV from Nizar Shajani, and a Memorandum from the RCMP entitled Proper Operation of the Approved Screening Device. Ms. Lee has also provided me with copies of *Scott v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 767, and *Hathaway v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 938. I have read and considered these cases and I am mindful of what I must consider in conducting this review.

In addition, Ms. Lee provided supplemental submissions consisting of the recent case *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. Ms. Lee states that it is

appropriate in your case to revoke your driving prohibition because the investigating officer has not provided evidence to establish that your ability to drive was affected by alcohol.

I have read and considered the *Wilson* case and I acknowledge your lawyer's submissions with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the General Occurrence Hardcopy (the "Narrative") is that on August 4, 2013, at approximately 0033 hours Officer Ohashi (the "officer") conducted a traffic stop with a s.22 in the 3200 block of St. Johns Street in Port Moody. You were identified by your valid BC driver's licence. The Report to Superintendent (the "Report") indicates that the officer established you as a driver or having care or control of a vehicle at 0034 hours on August 4, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 0041 hours, the officer used ASD serial number 101496 to take a breath sample from you and the result of your ASD test was a "fail". There is no evidence before me to the contrary.

I am satisfied that the ASD registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at paragraph 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis and also explained that the lower of the two test results would prevail.

The Narrative indicates that at 0044 hours, the officer read you your right to request a second test direct from the OSMV form. She documents her conversation with you in quotation marks. After reading from the OSMV form, she asks “do you understand”. Your response in quotes is “yes”. The officer asks “do you want to provide a second breath sample?” Your response in quotes is “no.”

You claim on your Application for Review that you were not advised of your right to a second test on an ASD.

I turn to paragraph 20 of your Affidavit. You state “Constable Ohashi then asked if I wanted to blow again.” In paragraph 21 you state that the officer did not tell you your second test would be on a new device. You then state “I told Constable Ohashi that I did not want a second test.”

Pursuant to section 215.42 (1) of the Act, if an analysis of the breath of a person by means of an approved screening device registers a warn or a fail, the person has a right to forthwith request and be provided with a second analysis, and a peace officer must inform the person of that right before the peace officer serves on the person a notice of driving prohibition. There is nothing in the Act that requires a peace officer to advise the person that the second test will be on a different ASD.

The issue before me is whether you were advised of your right to a second analysis. Based on the evidence provided by police in both the Narrative and the Report, I am satisfied that you were so advised.

Was the second analysis provided by the officer?

You declined your right to a second breath test and, as such, I am satisfied that the officer was not required to provide a second analysis.

Was the Notice served on the basis of the lower analysis result?

I am satisfied that the Notice was served on the basis of the lower analysis result because only one ASD test was performed and it resulted in a “fail”.

Was the ASD reliable?

The evidence in the Certificate of a Qualified ASD Calibrator (the “Certificate”) indicates the following:

- ASD serial number 101496 was checked for calibration on July 19, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of August 16, 2013, and a service expiry date of November 21, 2013.

The evidence in the Narrative is that after you attempted to provide four inadequate breath samples [not blowing properly/sealing lips around mouthpiece], the officer removed the mouthpiece used and inserted a new mouthpiece. The officer then demonstrated how to

provide a proper breath sample with a resultant reading “000”. On your next attempt you blew a “fail”.

Your lawyer submits there is no evidence the ASD was functioning correctly, and has provided me with the RCMP memo on ASDs. I have read and considered the information contained in this memo. On page 2, it states that a “void” reading will occur if either the one minute sample acceptance window has timed out, regardless of the number of breath attempts, or if there have been three unsuccessful attempts during the one minute window, whichever occurs first.

The officer removed the mouthpiece and reinserted a new mouthpiece after you provided four inadequate breath samples. When the officer demonstrated how to provide a proper breath sample, the device read “000”. In the hearing, Ms. Lee argued that the ASD wasn’t working properly because on the third attempt the device would have read “void” and the mouthpiece must be ejected. She argued that it is not possible to get four inadequate breath samples. While Ms. Lee speculates the device was not working properly because the officer did not indicate that the third sample result was a “void”, I note that the officer did not describe everything she did with the device. Therefore, I do not find it problematic that she did not specifically mention changing or ejecting the mouthpiece after your third attempt. The officer did not mention that she changed the mouthpiece after she blew into the device, before you were given your fifth attempt, but that does not mean it did not occur. In addition, the Certificate attests to the fact that ASD number 101496 was functioning properly at the relevant time. I also have the officer’s sworn statement that any ASD tests referred to in the Report were conducted by a qualified ASD operator and the ASD units were functioning correctly.

For the above-noted reasons, I am satisfied that the ASD was reliable.

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

You provide evidence with regard to the amount of alcohol you consumed on the night in question. You said you drank two five ounce glasses of Church and State Meritage, and then one five ounce glass of Burrowing Owl Shiraz. You consumed the three glasses of wine between 9:45 p.m. and 11:45 p.m. You left the house shortly after midnight to go pick up your daughter.

In paragraph 13 of your Affidavit, you said you were honest with the officer about your consumption. When she asked you when your last drink was, you told her it was forty-five minutes earlier. You said the officer’s evidence is not correct in that you did not tell her you had one glass of wine three hours earlier. However, I note that in paragraph 11 of your Affidavit, you said that the officer asked if you had anything to drink that night. You said you told her that you had “a couple glasses of wine”.

I have considered Mr. Shajani’s August 18, 2013 report. Mr. Shajani opined that, based on your stated drinking pattern, your BAC would have been between 37 and 67 mg% at the time you were stopped. The RCMP memo provided to me by your lawyer indicates that ASDs are calibrated to display a “fail” reading at a BAC of 100mg% or over.

The officer’s evidence is that she noted a strong odour of liquor on your breath, your eyes appeared glassy and your face was flushed. When she asked about your alcohol consumption, you admitted to consuming one glass of wine approximately three hours ago, but later recanted this statement advising you last consumed liquor approximately forty-five minutes ago.

The information you have given with respect to your drinking pattern is contradictory. In paragraphs 5 and 6 of your Affidavit, you said you consumed three glasses of wine. In paragraph 11, you said you told the officer that you had “a couple glasses of wine”. However, in paragraph 13, you said you told the officer that your last drink was forty-five minutes ago and that she is mistaken about you saying you drank one glass of wine three hours earlier. In my view, “a couple” means two. Because the information you have given about how much you consumed is contradictory, I do not find your stated drinking pattern to be very credible.

You state you were “baffled” and “speechless” when the officer told you you had failed the ASD test. You said you felt fine to drive and did not feel impaired by alcohol. However, the issue before me is not whether you were, or you felt, impaired. The issue before me is whether you blew a “fail” even though your BAC was less than 80 mg%. I cannot connect the feelings you say you experienced with your decision not to provide a second breath sample for analysis, especially since you said you were worried you might lose your job. You were offered a second test but you declined the opportunity. I am aware that a second test is offered solely for the benefit of the driver, to verify the result of the first test. I am puzzled, therefore, as to why you declined the test, particularly since you stated that you were baffled by the first test result.

After a careful consideration of all the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days.

Your prohibition took effect on August 4, 2013. I note that as you have already served 21 days of the prohibition, you need only serve the remaining 69 days. Your prohibition commences November 1, 2013. The prohibition ends on January 9, 2014. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Kyla Lee
By Fax 604-685-8308

October 15, 2013

s.22

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

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

For your benefit in this review I have considered all of the grounds of review which apply to your situation.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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.

Decision

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

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

Adjudicator s.15

cc: Allison Jackson by fax: 604 687-5596

SEPTEMBER 19, 2013

s.22

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

Introduction

On September 5, 2013, 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. I am delegated the authority to conduct this review.

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

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

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

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Stephen Huthinson, prior to the review date. I have proceeded with this review based on that confirmation. As of the time set for the review no information or submissions on your behalf have been received. In reaching my decision in this written review I have considered all of the relevant information available to me.

For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

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

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

The officer's evidence is that on September 5, 2013 at 0017 hours a vehicle exiting the parking lot of a pub was stopped because it incorrectly merged, drove with its driver's side wheels six inches over the centre line, and drifted in its lane of travel. The vehicle was stopped. You were its driver, identifying yourself with your driver's licence.

There is no evidence to the contrary.

I am satisfied that on September 5, 2013 at 0017 hours you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "FAIL"?

The officer's evidence is that at 0033 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0040 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a "FAIL."

There is no evidence to the contrary.

I am satisfied that each of the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to provide a second sample of your breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

There is no evidence to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second breath sample into an ASD for analysis.

There is no evidence to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 103668. The second sample of your breath was analyzed by an ASD with serial number 103670.

There is no evidence to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Two samples of your breath for analysis were provided into two different ASDs. The result of the analysis of each of the two samples was a "FAIL." The lowest analysis result was a "FAIL."

There is no evidence to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The first analysis of your breath was performed on an ASD with the serial number 103668. Constable Ohashi provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 19, 2013. This ASD had a Calibration Expiry Date of September 16, 2013 and a Service Expiry Date of July 9, 2014.

The second analysis of your breath was performed on an ASD with the serial number 103670. Constable Ohashi provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 19, 2013. This ASD had a Calibration Expiry Date of September 16, 2013 and a Service Expiry Date of July 9, 2014.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable Ohashi swore that your ASD tests were performed by a qualified ASD Operator and that the ASDs were functioning correctly.

There is no evidence to the contrary.

I am satisfied that the ASDs were reliable.

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

The officer's evidence is that she advised you about the importance of recalling the time of your last alcoholic drink. You advised her that you had likely consumed an alcoholic beverage within 15 minutes of being stopped. The officer waited 15 minutes to allow any recently consumed alcohol to dissipate from your mouth before obtaining your first breath sample.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I accept the "FAIL" result from an ASD I have found reliable and which was certified to be correctly functioning. There is no persuasive evidence to the contrary. I am satisfied that the alcohol in your blood which caused this result negatively affected your ability to operate a motor vehicle.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 5, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that, as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Stephen Hutchinson (by fax)
(604) 581-0809

September 20, 2013

s.22

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

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on two grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review.

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

Mr. Bethell submits that the demand made to you for a sample of your breath was illegal, and that I must make my decision in this review within the context of the *Charter of Rights and Freedoms* (the “Charter”). He provided numerous supportive submissions on these points.

With respect to Mr. Bethell's argument that the demand was illegal which relates to the validity of the demand, I conclude that this is not an issue before me. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

With respect to Mr. Bethell's argument regarding the Charter, the scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to apply remedies under the Charter.

You indicated that you need your licence for work as well as for personal requirements. You also indicated that to your knowledge, you have no recent record on your driving abstract. 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 Act does not grant me any authority to consider your driving record.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In his Synopsis, the officer indicated that he observed a s.22 pull over and stop in the 2400 block of St. Johns Street, just prior to a police drinking and driving roadblock. The officer stated that a traffic stop was initiated as the driver exited the vehicle and began walking away. In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 02:48 hours on September 1, 2013.

You have provided evidence that there was no roadblock in sight, and that you were picking up your friend, s.22 after receiving a phone call from her at about 2:30 a.m. You submitted various photographs of the area to support your assertion that had there been a roadblock you would have seen it. You said that you did not avoid any roadblock, and that you parked your vehicle properly at the curb and got out of your truck and walked towards s.22 You said that immediately, two police cars with lights on pulled up from the east and stopped behind you. In s.22 affidavit, she stated that she had called you for a ride after the taxi she had called at 2:00 a.m. did not show up. s.22 indicated that while she was waiting for the taxi and then for you, she did not see anything that might be called a police roadblock.

I acknowledge that some of the evidence before me here is conflicting; however, the circumstances around the traffic stop are not issues before me. The issue I must decide is whether or not you were a driver as defined in the Act, and you acknowledged that you were driving the vehicle just prior to being approached by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 02:52 hours and 02:58 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that you were advised of your right to a second analysis on a different ASD and that the lower result would prevail. In the Narrative, the officer provided evidence that your right to a second test "was read from the purple OSMV Card."

Mr. Bethell stated that the officer did not follow the dictates of the Act in relation to requesting an ASD test. He stated that there was no preamble about two tests being available and that the lowest score would prevail. He stated that it was only after you expressed concern over the accuracy of the first test that the officer offered a second, and then in terms that were not "couched in the language of the Act." He stated that you had no idea at the time that you were entitled to a second test.

You indicated that after the first test you told the officer that you did not believe it was accurate. You said that the officer then stated "If you want, you are more than welcome to take a second test". You stated that the officer had not told you before starting the process that anything other than the first test would be offered, nor did he explain that it was your right to ask for a second test and that the "reading would be deemed to be the lowest of the two." When he offered you the choice of a second test, you thought he was just being a nice guy. You said that you took up the officer's invitation for a second test.

Section 215.42 of the Act states that if the analysis of a person's breath on an ASD registers a warn or a fail, the person has the right to forthwith request and be provided with a second analysis, and the officer must inform that person of this right prior to serving them with the Notice. There is no requirement under the Act for officers to provide drivers with a preamble about two tests being available, nor is there any requirement for officer's to use specific wording when they advise drivers of the right to a second analysis. Further, even though your evidence conflicts with that of the officer with respect to being advised that the lower of the two readings would prevail, there is also no requirement under the Act for officers to provide that information to drivers.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that you were provided with a second analysis. You acknowledged that you were provided with a second analysis.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded the serial number for the ASDs used as 101494 and 103668, respectively. The officer also provided two Certificates of Qualified ASD Calibrator (the "Certificates"), which bear the same serial numbers as those noted in the Report.

You stated that to your observation, both tests were taken on the same machine and you did not see the officer retrieve a second machine from either police car. You indicated that you saw the officer change the mouthpiece on the ASD before the second test.

However, at paragraph 8 in your affidavit you also stated "Attached to this Affidavit as Exhibit No. 7 are copies of an unsworn CERTIFICATE OF QUALIFIED ASD CALIBRATOR for each machine used in this matter as to the fitness of the two ASD machines for use."

It appears that you want me to believe that the officer used the same ASD twice; however, if that was the case I do not understand why you would refer to the Certificates and state that they were "for each machine used in this matter". When I weigh all of the evidence before me, I find it more likely than not that two different ASDs were used.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

In the Certificates, Constable Eric Ludeman certified that the ASDs were found to be within the recommended limits when he checked their calibration on August 19, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly. In the sworn Report, the officer indicated that any ASD tests referred to were conducted by a qualified ASD operator and the ASDs were functioning correctly.

Mr. Bethell submits that the Certificates are unsworn by the person calibrating the ASDs, yet the officer has sworn they were properly calibrated and in working order. He submits that the information from the calibrator is simply a bald statement of what was done without any indication that he was qualified to calibrate the machines at the time. He stated that such qualifications are time dated and need refreshing. Mr. Bethell submits that because the officer swore that the ASDs had been calibrated and were in working order when he was obviously relying on the unsworn statement of the other officer, this nullifies its efficacy.

You referred to the Report and related disclosure documents and stated, "There is no indication in the disclosure as to the status of the officer's credentials in relation to the qualifications to take the tests past an assertion that they were qualified." I infer by this that you are questioning the officer's credentials to administer the ASD tests.

You also stated that there is no specific naming of the officer who administered the tests, and that "...there is no officer named in terms of the conduct of any one part of this event beyond the fact that an identifiable officer swore that the Certificates of Notice were served." You indicated that the officer identification number in the Certificates is different than the officer identification number in the Report.

With respect to what information the officer must submit in relation to the ASDs, section 215.47(e) of the Act states the following:

"in the case of a driving prohibition resulting from the analysis of a sample of breath, information relating to the calibration of the approved screening device on the basis of which the notice of driving prohibition was served."

I am satisfied that I have this information before me in the Certificates, which are not required to be sworn by the calibrator. Further, Constable Eric Ludeman certified that he is an ASD Calibrator and that he is qualified to calibrate the Alco-Sensor IV DWF. There is no requirement under the Act for officers to submit documentation relating to the qualifications of the calibrator. I find Mr. Bethell's submission that such qualifications are time dated and need refreshing to be simply a suggestion, not evidence, that the calibrator in your case was not properly qualified. Further, there is no requirement under the Act for officers to submit documentation relating to their own qualifications with respect to administering the ASD tests and determining that the devices are functioning correctly. I am satisfied by the officer's evidence that the ASDs were properly calibrated by a qualified ASD calibrator, that the tests were properly administered, and that the ASDs were functioning correctly at the time of your tests.

Last, I note that peace officer Travis Carroll signed the Notice, the Report, the Notice of Impoundment and related Report to Superintendent, and authored the Synopsis and the Occurrence Report. Without any evidence before me to the contrary, I am satisfied that peace officer Travis Carroll administered the ASD tests and was the investigating officer in this matter. With respect to the officer identification numbers, I am satisfied they are different because one belongs to Constable Eric Ludeman, the qualified ASD calibrator, and the other belongs to Travis Carroll, the investigating officer.

I am satisfied that the ASDs were reliable.

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

In the Occurrence Report, the officer stated that you appeared unbalanced and stumbled while exiting the truck, your eyes were glassy, your speech was slurred, you had slow concentrated movements, and a mild smell of liquor on your breath. The officer stated that you denied consumption and that when asked the time of your last drink you stated, "yesterday". In the Synopsis, the officer indicated that your eyes were slow to respond to stimulus.

You stated that the previous evening you had been at a restaurant from 9:30 p.m. to midnight. You were in bed sleeping when s.22 called you for a ride at about 2:30 a.m. You said that you weigh 175 pounds and you consumed one martini followed by three bottles of beer, all evenly over the time you were at the restaurant. You had nothing else to drink after midnight. You stated that in your experience, that drinking pattern would not lead to a fail at 2:28 the next morning. You acknowledged that you advised the officer your last drink was "yesterday". You denied that you had any problems with your coordination or walking, and you said that you were not slurring your words.

You said you do not know what glassy eyes mean but to your knowledge your eyes were not tested in any way. In her affidavit, s.22 stated that she did not hear you slur or have difficulty with your words or your co-ordination, or anything else to suggest you were impaired.

Although your ASD tests were administered closer to 3:00 a.m. (not at 2:28 a.m.), or about three hours after you last allegedly consumed alcohol, I find it very odd that you would tell the officer your last drink was "yesterday". In my view, a more accurate answer would have been "last night" or "a few hours ago" because I think that most people would interpret the word "yesterday" as being the day before, during the day. As such, your response to the officer causes me to conclude that you were attempting to mislead him.

As well, you did not explain what your "experience" was, which would cause you to believe that your stated drinking pattern along with your weight, would not lead to a fail result on an ASD.

Section 215.41(2) of the Act states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. As I have already made a finding that the ASDs are reliable, I do not find your stated drinking pattern to be very credible.

I am satisfied that your BAC was not less than 80 mg.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: John Bethell
Fax: 604-437-0342

October 21, 2013

s.22

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

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records at this office confirm that your lawyer, Ryan Drury, received full disclosure of all the documents before me. I have proceeded with the review based on this confirmation.

In support of his arguments Mr. Drury referenced, but did not provide, the cases of *Spencer v. Superintendent of Motor Vehicles*, *Gillies v. Superintendent of Motor Vehicles*, and *Costain v. Superintendent of Motor Vehicles*. Mr. Drury submitted that Cst. Ligget is not presumed to have a credibility advantage over you, and this case must be determined impartially on the evidence. He noted that credibility is a finding of fact which must be reviewed on a standard of reasonableness. Mr. Drury also noted that to reach a conclusion an adjudicator must carefully and conscientiously weigh evidence and provide a reasonable justification for their choice.

While Mr. Drury did not provide me with the cases of *Spencer*, *Gillies*, and *Costain*, I note that I have read them and am familiar with the principles set out in each case, and I am mindful of and have applied them in conducting this review.

Mr. Drury made submissions based on the constable's formation of a 'reasonable suspicion' that you had alcohol in your body while operating a vehicle, and the officer's ASD demand. However, under section 215.5(4) of the Act the validity of the demand is not an issue I must consider in circumstances, such as yours, where an IRP is issued as a result of a "FAIL" reading having registered on an ASD. As a result, the factors that led the constable to make an ASD demand are also not relevant to my considerations.

Mr. Drury further submitted that there is no evidence that your ability to drive was affected by alcohol. Mr. Drury referred to the case of *Wilson v. Superintendent of Motor Vehicles* 2013 BCSC 1638 to support that Cst. Ligget must provide evidence that he had reasonable grounds to believe that your ability to drive was affected by alcohol.

I have read and considered *Wilson* and I acknowledge Drury's submission with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Narrative text Hardcopy (the "Narrative"), Cst. Ligget noted that dispatch broadcasted that a possible impaired driver in s.22 was leaving a Boston Pizza Restaurant (the "Restaurant") located at 5845 Trans Canada Hwy in Duncan, BC. Cst. Ligget indicated that while sitting at the intersection of the Trans Canada Hwy and York Rd he observed the vehicle making a left hand turn and noted that the rear lights of the vehicle were not on. Cst. Ligget stated that he caught up to the vehicle as it was turning into a parking lot of an apartment complex and that he activated his emergency lights and siren in short blasts to alert the driver to stop. Cst. Ligget indicated that after several blasts of his emergency siren and verbal commands over the police address system that vehicle finally stopped. Cst. Ligget indicated that he approached the driver's side of the vehicle and that he identified you as the driver of the vehicle by way of your BC photo driver's licence. In the Report to Superintendent ("RTS"),

Cst. Ligget recorded that the time and date of driving or care or control of the vehicle was at 21:18 hours, on September 29, 2013.

In his written submission, Mr. Drury stated that the entire Narrative supports that you were driving in a safe and cautious manner. He indicated that there is no suggestion in any of the evidence before me of erratic driving occurring.

I acknowledge Mr. Drury's submission with respect to the manner in which you may or may not have been driving. However, the way in which you were driving the vehicle is not an issue for me to consider in this review. Rather, the issue I must determine is whether you were a driver within the meaning of the Act.

There is no evidence before me that would lead me to conclude that you were not operating the vehicle when it was observed driving by Cst. Ligget.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, at 21:18 hours, on September 29, 2013.

Did the ASD register a "FAIL"?

In the RTS, Cst. Ligget indicated that the ASDs registered a "FAIL" at 21:21 hours and 21:25 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In his evidence, Cst. Ligget indicated that he advised you of your right to a second ASD test, on a different ASD and that the lower ASD test result would prevail. Cst. Ligget also noted that you stated you understood that right and that you requested the second ASD test.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, Cst. Ligget indicated that a second breath test was completed at 21:25 hours.

There is no evidence before me to indicate that a second analysis was not completed by the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS and the Narrative, Cst. Ligget recorded that he advised you of your right to a second ASD test and indicated he advised you that the second ASD test would be on a different ASD, and that the lower ASD test result would prevail. Cst. Ligget recorded the serial number for the first ASD as 045236, and the serial number for the second ASD as 101380.

In your statutory declaration, you indicated that Cst. Ligget offered you an opportunity to take a second ASD test and that you requested that test. You indicated that you witnessed him take the first device and place it on the hood of the police cruiser then go and arrest your passenger, s.22 You noted that when Cst. Ligget returned to you he took the second sample on the same device that had been placed on the hood of the police cruiser after only replacing the mouthpiece.

You provided a statutory declaration from s.22 in which she indicated that on the evening of September 29, 2013, she was on her s.22 balcony and saw you pulled over by the police. s.22 noted that your vehicle and that of the police were both parked beneath her patio. She stated that she had never witnessed a breath sample being taken and was curious to watch the procedure. s.22 indicated that she watch you provide a sample of breath into a machine and that it registered a "FAIL" and then she heard the constable read some paperwork to you and ask you if you wanted a second sample. Ms. Kerr stated she watched the officer place the breath machine on the hood of his vehicle, replace the plastic mouthpiece and then leave to arrest s.22 and place her in the back of the police car. s.22 noted that when the constable returned to you at the hood of the police car for your second sample he used the same breath machine he had already used.

In his submission, Mr. Drury noted that s.22 evidence corroborates yours in that Cst. Ligget did not conduct the second test a different ASD. Mr. Drury noted that s.22 is an uninterested and impartial civilian and her evidence must be accorded significant weight. Mr. Drury stated that police do not have a credibility advantage over civilians.

I acknowledge Mr. Drury's submission and while I agree that police do not have a credibility advantage over civilians, I do not find that simply because s.22 may be an impartial and uninterested civilian that her evidence should be given significant weight. In considering s.22 s.22 evidence while I acknowledge she may have observed this event, I have noted that was observing this event at night time and from a s.22 balcony of an apartment complex.

I have considered and acknowledge your submissions in their entirety; however, while you have indicated that Cst. Ligget did not use a different ASD for the second ASD test, I find that the constable has provided more compelling evidence that a different ASD was used in the second test.

s.22 evidence indicates that she observed Cst. Ligget replace the "plastic" mouthpiece on the ASD prior to placing it on the hood of the vehicle in order to attend to s.22 Whereas in contrast the evidence in your statutory declaration indicates to me that the constable placed the ASD on the police car hood, then attended to s.22 and then upon his return to you and the hood of the police car that he replaced the mouthpiece.

Furthermore, I note that you have not refuted Cst. Ligget's evidence that he advised you of your right to request a second ASD test, and that he informed you the second ASD test would be on a different ASD and the lower test result would prevail. Nor did you deny that you understood your right to a second ASD test. It is noteworthy that I have not been provided with any details as to what that the conversation was between you and the constable; if it was different than Cst. Ligget's evidence with regards to him informing you of your right to a second ASD test.

Cst. Ligget's evidence indicates to me that he was aware of the requirements of the second ASD test, specifically that the second test must be performed on a different ASD than the one used in the first ASD test. Therefore, it does not make sense to me that Cst. Ligget would inform you that the second ASD test is to be administered on a different ASD, but then use the same ASD he used during the first ASD test. Nor does it seem reasonable to me that a person who has just been advised that second ASD test must be conducted on different ASD would not have at the very least questioned the constable's use of the same ASD he used in the first test.

Further, in his evidence, Cst. Ligget has recorded two separate ASD serial numbers, two ASD numbers (ASD #04 and ASD #11), as well as two different ASD temperatures. I also note that Cst. Ligget provided two distinct Certificates of a Qualified ASD Calibrator (the "Certificates"), each bearing a serial number that corresponds with those recorded in the RTS.

Ultimately, based on the evidence before me, on a balance of probabilities, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, Cst. Ligget indicated that the result of both ASD tests was a "FAIL". I am satisfied that the Notice was served on the lowest result which was "FAIL".

Was the ASD reliable?

In the RTS, Cst. Ligget swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. Cst. Ligget provided Certificates for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on September 7, 2013, he checked the calibration of ASD serial number 045236. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 5, 2013, and the service expiry date as June 21, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 7, 2013, he checked the calibration of ASD serial number 101380. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 5, 2013, and the service expiry date as October 17, 2013.

There is no evidence before me to suggest that the specific ASDs used in your case were not functioning properly on September 29, 2013, at the time of your ASD tests. I am satisfied that the ASDs were reliable.

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

In the Narrative, Cst. Ligget indicated that at approximately 21:17 hours on September 29, 2013, a person called dispatch to report that a driver was leaving the Restaurant. Cst. Ligget noted that the caller informed dispatch that she had witnessed the driver and a female passenger drinking and that they both could not walk. Cst. Ligget stated that he asked you how long it had been since you had a drink of alcohol and that you responded by saying that it had

been an hour ago. Cst. Ligget further noted that he enquired as to how many drinks you consumed and that you told him it was “a couple”.

In your statutory declaration, you indicated that you told the constable you had just come from the Restaurant and that you had been there for about an hour and had consumed a couple of beer. You stated that you did not tell the constable your last drink was an hour ago, but rather that you told him you had just consumed beer prior to leaving the Restaurant. You stated that you consumed alcohol within 15 minutes of providing both samples. You noted that the ASD were unreliable and your IRP should be revoked.

In her statutory declaration, s.22 indicated that she was at the Restaurant with you and that you drank beer just prior to leaving. She noted that you both left the Restaurant at approximately 21:15 hours and that you drove directly to your apartment building, as it is only a one or two minute drive, or approximately 1000 feet from the apartment building.

Mr. Drury indicated in his submission that Cst. Ligget failed to properly comprehend and record the time of your last drink. He further stated that the evidence of both you and s.22 is that you consumed beer just prior to leaving the Restaurant. Mr. Drury noted that the presence of mouth alcohol will falsely elevate ASD result. Mr. Drury indicated that Cst. Ligget obtained both breath samples without having observed a delay of 15 minutes after the time of your last drink, and as such your ASD test results are invalid as a result of mouth alcohol. In support of his submission on this issue Mr. Drury referred to but did not provide the case of *R v. Mastromartino*.

While you have asserted that you consumed alcohol with 15 minutes of both ASD tests, I do not find your evidence to support this claim to be very convincing. Both you and s.22 have indicated that you left the Restaurant at approximately 21:15 hours; however neither of you have provided me with any specific or even approximate times as to when your last sip of beer would have been. I find it does not make sense that both of you claim to recall the approximate time you left the Restaurant, but cannot provide any approximate time for when you finished your beer.

It is also noteworthy to point out that the undisputed evidence before me in the Narrative indicates that s.22 was observed to be “heavily intoxicated” on the evening in question. Consequently, that leaves me to question the reliability of her recollection of the events.

I note that you have provided brief sentences in which you simply indicated that you did not advise the constable your last drink was an hour ago, you told him you had been at the Restaurant for an hour, and you just consumed beer before leaving. However, in contrast, Cst. Ligget has provided a more fulsome and detailed rendition of what he recalls both sides of your conversation with him was after you were pulled over with respect to this issue.

For the reasons indicated above I am satisfied that Cst. Ligget turned his mind to the issue of mouth alcohol and that he did properly “comprehend and record” the time of your last drink. Moreover, I do not find your evidence to be very convincing, and I prefer Cst. Ligget’s evidence that when asked about your last drink of alcohol you advised him that it was about an hour ago. Consequently, I find there was no reason for Cst. Ligget to delay the ASD tests.

Based on all the evidence before me, I am not persuaded on a balance of probabilities to agree with Mr. Drury's argument that mouth alcohol was a factor in the ASD results. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

Adjudicator

cc: Ryan Drury
Fax: [250] 381-9240

November 6, 2013

s.22

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

Introduction

On June 23, 2013, 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;
- the approved screening device (ASD) registered a "fail" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

At the beginning of the hearing your lawyer and I confirmed that full disclosure of all documents had been made. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

There is one issue that is determinative of this hearing.

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

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

Decision

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

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

Records show that your vehicle was impounded and has since been released. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. Original receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you.

s.15
Adjudicator

cc: Mitch Foster
by fax 604-687-4299

OCTOBER 7, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

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

In the oral hearing, Mr. Butler argued that there is no evidence of what demand the officer made of you. He noted the officer's evidence is that he read the demand from a "Charter card", but he did not disclose the contents of the card into evidence. Your lawyer also argued that there is insufficient evidence that the officer had reasonable grounds to make the ASD demand.

Despite your lawyer's submissions regarding the validity of the demand, I conclude that it is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Butler argued that the principles set out in the *Wilson* case regarding a "warn" reading on an ASD can be logically extended to the case of a "fail" reading. I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4)(b) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Ellis indicated that he witnessed you driving or in care or control of the vehicle at 0520 hours, on September 15, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Ellis said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 0527 and 0534 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Ellis indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits.

Mr. Butler observed that the serial number in the RTS for the first ASD used is "101561", but the Certificate reads "101361". I disagree with your lawyer in this regard. I am satisfied that the officer provided a Certificate with the serial number "101561". I infer that Mr. Butler's copy of the Certificate has been copied and faxed too many times to read the number clearly.

I am satisfied that the ASDs were reliable.

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

In your affidavit, you said you were out with your friends, s.22 in the hours leading up to the IRP investigation. You said you did not consume any alcohol until approximately 1:35 am, when you decided it would be alright to consume some beer. You said you drank approximately 1½ beers from 1:35 am until almost 3:00 am. You then drove to s.22

s.22 residence to listen to music and talk for awhile. You did not drink any alcohol at s.22 place.

You said you do not drink alcohol regularly, because it makes your face red. You said you felt a bad case of heartburn coming on when you were at s.22 condo. This condition caused you to vomit up small amounts of stomach contents, including the beer that you had consumed, into the back of your throat and your mouth.

At about 4:40 to 4:50 am, you and Mr. In decided to go home to Port Moody. While driving, you said you continued to experience the effects of heartburn, including regurgitation of stomach contents into your mouth. You said this happened every five minutes from when you left s.22 s.22 residence, until after you encountered the roadblock.

Your lawyer submitted an unsworn statement from s.22 on your behalf. s.22 confirmed that you were not drinking that evening, because you were the designated driver and you were driving your s.22 noted that you changed your decision to refrain from drinking and consumed "at most two big mugs of beer at Apgujung." He said you drove your friends in your s.22 place. s.22 last statement is that he thought you would be fine to drive, since you did not consume much alcohol. He said you are not someone who drinks much alcohol, if at all.

Mr. Butler also submitted an unsworn statement of s.22 on your behalf. s.22 said you are not someone to drink alcohol, except on an occasional basis. He said you were supposed to be the designated driver that night. s.22 said you consumed a lot of food while at Hapa, the first restaurant, but you consumed no alcohol there. At the second restaurant, Apgujung, he ordered a couple pitchers of beer and convinced you it would be okay to drink some, because you were going to s.22 condo afterwards. He said he poured you two pints of beer, but you did not finish the second pint.

s.22 said you complained about heartburn. He said there was some discussion of the two of you staying at s.22 condo, but because of your heartburn and your need to be home in the morning, you convinced him to leave with you.

s.22 explained that he was very surprised that you failed the ASD test at the roadblock. He said your ability to drive was "NOT impaired" on September 15. He said your driving was perfectly fine all the way from s.22 condo to the roadblock. He noted that you did not avoid the roadblock like some people would, but drove right up to it.

I have some concerns about inconsistencies in the evidence of your affidavit and your friends' statements. You chose to be the designated driver, until you decided that you and s.22 would stay at s.22 condo. However, even though it was nearby, it seems odd that you would decide it would be okay to drive to s.22 place after drinking, given your initial decision to consume nothing, since you were the designated driver.

You and your friends were consistent in saying you do not consume alcohol very often. Despite this, however, you felt comfortable driving your s.22 condo. Further, I infer that if you had decided not to stay at s.22 condo while you were at Apgujung, you would

not have consumed the beer there. This contradicts your decision to drive home from s.22 despite having consumed alcohol at Apgujung.

I infer from your description that you were suffering from a very uncomfortable condition; you regurgitated or vomited stomach contents into your mouth every five minutes. Based on this condition, the tiredness you said you felt, and the beer you had consumed, I am surprised you decided it was reasonable to drive your s.22. Given these concerns, I question the reliability of the evidence you and your friends submitted.

Mr. Butler said your evidence has “an air of reality”, given the limited symptoms or indicia of alcohol consumption you exhibited. He said there is no evidence that your driving was affected by the alcohol in your body. I note, however, that the officer did not have much opportunity to observe your driving behaviour. Further, I question the reliability of s.22 statement about your driving behaviour and whether he thought you were affected by alcohol or not. It is likely that he consumed alcohol, since he said you were supposed to be the designated driver. I also note that he did not offer to drive home for you, because of the heartburn you experienced. There could be reasons for his not driving other than the amount of alcohol in his blood, but it raises questions in my mind.

The officer’s evidence indicates that he formed the reasonable suspicion to make the ASD demand, because of the odour of liquor on your breath, your admission of having consumed alcohol, and your bloodshot and watery eyes. I find it is common knowledge that the odour of regurgitation or vomit is distinct and unpleasant. I find it odd that the officer did not distinguish between the odour of liquor and the odour of vomit on your breath, given how frequently you said this occurred.

Mr. Butler submitted an opinion letter from forensic consultant, Nizar Shajani, whose opinion I accept as authoritative. Mr. Shajani explained that the intensity of the smell of alcohol is not necessarily directly related to the amount of alcohol consumed, nor of the blood alcohol level. In addition, he said blood shot, watery eyes, if due to alcohol can occur at levels below 80 mg%.

Mr. Shajani’s comments are ambiguous. I infer his statements also mean the intensity of the smell of alcohol can be directly related to the amount of alcohol consumed. I also infer that bloodshot, watery eyes can occur at levels above 80 mg%. However, I accept from his statements that the indicia noted in your case do not unequivocally mean that you had a BAC higher than 80 mg%.

Mr. Butler pointed out that Constable Ellis indicated in the Narrative that there was only one occupant of the vehicle, including the driver. You and your friends said you drove s.22 home. I accept that your evidence is stronger in this regard than the officer’s evidence, although this error is inconsequential, overall.

Based on all the evidence before me, I do not find your statements, including your reported drinking pattern, to be reliable. I am not persuaded to believe that the “FAIL” readings on the ASDs were due to mouth alcohol. Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

In part B of his submission, Mr. Butler argued that there is no evidence that your BAC was over 80 mg%. In the oral hearing, he noted that the officer's evidence does not provide a specific numerical reading from the ASD. Mr. Butler said ASDs can provide a specific BAC number, but they are not used in this manner in BC. The Act does not require the officer to provide evidence other than the "fail" reading that registered on the ASD.

Mr. Butler said the police changed their practices regarding the calibration of ASDs many months ago. The devices were recalibrated from 50 mg% to read "warn" at 60 mg%. He questioned how we are to know the calibration level of devices regarding a "fail" reading. He rhetorically asked: "Is it 70 mg? Is it 81 milligrams? Is it 92 milligrams? We do not know." Your lawyer's conjecture in this regard does not persuade me to revoke the prohibition.

You received a prohibition under section 215.41 of the Act. This required the officer to serve you with a 90-day driving prohibition, because an ASD registered "fail". I am required to confirm the prohibition if, based on all the evidence before me, I am satisfied that you were a driver, that your breath sample registered a "fail" on an ASD, and that the ASD registered "fail" because your BAC was not less than 80 mg% (in addition to the other requirements of section 215.48(1)(b)). Based on the definition of "fail" in the Act and all the evidence before me, I am satisfied on a balance of probabilities that it is more likely than not that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc. Jamie Butler
604-739-9888 (fax)

October 21, 2013

s.22

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

Introduction

On September 28, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

One of the grounds on which you applied for this review is not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

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

You pointed out some errors in the police information. You said that losing a licence is serious and it is extremely upsetting that there were errors on the Notice. I acknowledge that there is an

error in the Notice and that the officer corrected it. I find, however, that this is not prejudicial to you in any way.

You said that Officer Klassen did not see you driving your vehicle as he arrived after you were out of your vehicle. Based on a review of the Narrative Text Hardcopy (the "Narrative"), it appears that Officer Cranmer started the impaired driver investigation and Officer Klassen finished it. In my view, this is not inappropriate and I rely on the fact that information sharing would have occurred. The Narrative would include both of the officers' notes and observations of the investigation.

You explained that you are a single mother and live half an hour out of town. Your s.22 are very active and this requires you to be on the go in your vehicle nonstop. You said you are a very responsible person and you would never put anyone in harm's way by drinking and driving. You said that you could be fired from your job and that you are staying with friends to accommodate current circumstances.

While I understand that it must be difficult to be without your car and driver's licence; under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

You indicated that twice in the past when you have been stopped by police you have been offered field sobriety checks, and one time you were taken to the hospital. You said none of this was offered to you on this occasion. You also said that the officer would not tell you what the "fail" test result meant on the ASD.

I acknowledge your submissions on these points; however, in the case of an IRP there is no requirement for police to take you to the hospital to provide a breath sample on a different type of machine. In addition, in the case of an IRP, I know of no requirement for an officer to provide you with a numerical reading of your BAC.

You expressed concern about the location at which the roadblock was set up. You said that the roadblock is hidden and the officer's car was down the city works driveway. He had two very dim blinkers right on the corner, out of sight. You have heard from several people about almost hitting an officer who jumps out with a flashlight in that area.

I acknowledge your concern regarding the location at which the roadblock was set up; however, where or how police roadblocks are set up is not a relevant issue for the purposes of this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the "Report") is that on September 28, 2013, at 21:18 hours, Officer Klassen (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 21:38 hours, the officer used ASD serial number 100932 to take a breath sample from you. The result of your ASD test was a "fail". There is no evidence to the contrary before me.

I am satisfied that the ASD test registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

The Report indicates at section 7 that you did not request a second ASD test. In the Narrative Text Hardcopy (the "Narrative"), the officer said that he read you your right to a second ASD test from memory. He then included the words he said to you, being the following:

You have the right to provide another sample from a second ASD. You must know that if the second result shows better than a fail that will be the sample that is used.

The officer said you understood but said no, saying "it won't make a difference it will probably just be the same."

You told me that you requested a second test three separate times. You said the officer offered you the second test immediately after the first one. At that time, you were told that he was going to use the same machine and that he would give you a fresh mouthpiece. You asked what difference that will make and he said honestly, not much. At that time your daughter needed attention and you asked the officer if you could deal with her and call your ex to come and get her. The officer said to go ahead. You said you walked to the van, calmed her down, grabbed your phone and called your ex. You said your ex advised you to take the test because

there is no way you were intoxicated because he had been with you over a five hour span. By that time, the officer directed you to the back of the car. When you finished on the phone you asked him for the second test, which you said he ignored. You asked again even louder, and the officer did not acknowledge you. A few minutes went by and your friend showed up to get your daughter and her friend. You asked the officer if you could say good-bye and he let you out of the car. After your daughter left you asked the officer for the third time if you could take the second test and his response was that "the ship had sailed".

Section 215.42(1) of the Act indicates that if a person's first ASD test results in a "fail", that person has a right to forthwith request and be provided with a second ASD test on a different ASD. I have already found that the officer did advise you of your right to a second test. Other procedural steps that the officer followed during the course of his investigation include:

- Ensuring he waited sixteen minutes before conducting the first ASD test because you said you had just finished your glass of wine.
- Making a point to set his stop watch to have an accurate time of waiting period.
- Ensuring you did not have anything in your mouth.
- Ensuring the ASD was operating within the manufacturer's specifications.
- Making a note in the Narrative as to the words he used to inform you of your right to a second ASD test on a second ASD.

You said not much time lapsed between the first ASD test and your first request for the second test. However, after your first test you said you walked to your van, calmed your daughter down and had a conversation with your ex on the phone about whether you should take the second ASD test. Also, after your first ASD test you told the officer that taking the offered second ASD test would not "make a difference it will probably just be the same."

On the date and time in question, the officer was working a drinking and driving counter-attack. Part of their duties as trained police officers is to ascertain all information necessary and pertinent to their investigation, and to observe and record the timing of events as they occur. The evidence in the Narrative has the officer noting your response when he offered you a second ASD test as being "it won't make a difference it will probably just be the same." The fact that your answer is in quotation marks leads me to believe that this was in fact the answer you gave the officer. In my view, the officer understood you to decline the offer of a second ASD test. In addition, I do not find it very credible that the officer offered to only change the mouthpiece and use the same ASD for your second test. The reason I do not find it very credible is because the officer recorded the words he used in the Narrative, which clearly indicates "you have the right to provide another sample from a second ASD."

Based on a consideration of the evidence before me, I am satisfied that the officer did not provide a second analysis because you did not request one.

Was the Notice served on the basis of the lower analysis result?

As there was only one ASD test conducted, there was only one test result on which to serve the Notice.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificate of a Qualified ASD Calibrator (the "Certificate") indicates the following:

- ASD serial number 100932 was checked for calibration on September 20, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 18, 2013, and a service expiry date of June 5, 2014.

As there is no evidence to the contrary before me, I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

^{s.22}

You said you doubt you smelled of alcohol as you only had half a glass of wine that night. You said your eyes were glassy because you had been crying quite hard.

The officer's evidence is that he stopped your vehicle as part of a roadblock. He said you smelled of liquor and had glassy eyes, were cooperative but somewhat emotional. The officer said there was a sixteen minute delay before conducting the first ASD test because you admitted to just finishing one glass of wine. During the initial stage of this waiting period, Constable Klassen arrived on scene and took over the investigation. When Constable Klassen first arrived on location he set his stop watch so he could have an accurate time of waiting period.

The Narrative goes on to indicate that Constable Klassen ensured you did not have anything in your mouth, nor had you anything in your mouth during the sixteen minute waiting period. Constable Klassen then prepared ASD serial number 100932. The officer instructed you to blow into the device and you complied, providing a valid sample with the resultant reading of "fail".

I realize you told the officer that you

^{s.22}

However, I note that when the officer instructed you to blow into the ASD you were able to provide an accurate sample of your breath on the first attempt.

As well, you said evidence before me to suggest that in a falsely high reading.

^{s.22}

However, I have no would affect an ASD test result or result

You explained your glassy eyes by saying that you had been crying quite hard. While I can understand that you may be having an emotional time recently, on the night in question you told me that you spent the evening having dinner with your family. I am unsure at what point you had been crying such that your eyes appeared glassy when you were stopped at roadside.

I understand that you might have felt unimpaired by alcohol at the time you were stopped; however, I rely on the fact that your ASD test resulted in a "fail". I have already found that the

ASD was functioning properly at the time in question. In addition, I note that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%, and I have already made a finding that the ASDs are reliable.

Based on a consideration of the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 28, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

^{s.15}
Adjudicator

October 18, 2013

s.22

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

Introduction

On September 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Ms. Lee provided *Spencer v Superintendent of Motor Vehicles* and *Scott v Superintendent of Motor Vehicles* to affirm the necessary principles when determining credibility, and determining that the onus is on the officer to justify the prohibition.

I am aware of and have read the *Scott* and *Spencer* decisions and have conducted my determinations of credibility accordingly.

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2244 hours on September 29, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver's licence.

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

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

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

In the Report, the officer indicates that you had the odor of liquor on your breath, and you admitted to consuming alcohol. In the Narrative, the officer states that he detected the odor of liquor on your breath and you stated that you had one beer an hour prior. The officer states that he read the ASD demand to you from memory, and has provided the exact wording.

In her submission, Ms. Lee states that the officer has not provided a Certificate of Qualified ASD Calibrator (the "Certificate") for the device used in your prohibition. Ms. Lee submits that the missing Certificate is highly relevant in assessing the reliability of the device, and without it, it is impossible to determine that the device was functioning properly. Ms. Lee further states that there is no evidence before me from which it is possible to conclude that an approved screening device was used. Ms. Lee also provided a list of the devices which are approved for use in Canada and British Columbia. Ms. Lee stated that the onus is on the officer to prove that the device used is one of the three approved devices listed under section 215.41 of the Act. Ms. Lee stated that it is not sufficient for the officer to simply state that a device was an ASD, but must prove that it is approved. Ms. Lee further stated that in compliance with *Modhigill v Superintendent of Motor Vehicles*, an inference cannot be drawn that it would, "make no sense" for the officer to use an expired, or non approved device, as the courts have found that the evidence cannot be skewed in the favor of the officer.

I concur with Ms. Lee that the officer has not provided a Certificate for the device used at roadside. However, I disagree that the prohibition must be revoked on this ground. In the Narrative, the officer indicates, "CRANMER prepared approved screening device number 100814." I acknowledge Ms. Lee's submission that the mere fact that the officer writes "approved screening device" is insufficient to indicate that such a device was used. I note that on the Report, in paragraph 6, the officer has checked the box indicating "Alco-Sensor IV DWF." I am mindful that the officer has crossed out paragraphs 6, 7 and 8, indicating that you did not provide a sample; however, on a balance of probabilities, I am satisfied that the ASD referred to by the officer in the Narrative, was in fact an "Alco-Sensor IV DWF." There is no evidence before me to indicate that another device was present. With regard to the functionality of the device, I again respectfully disagree with Ms. Lee. I note that the officer states, "CRANMER ejected the mouthpiece and took a new one. CRANMER showed s.22 how to provide a sample into the device by blowing into it himself (CRANMER provided a suitable sample into the device with the resultant reading of "000")." I am satisfied that the officer has provided evidence

to indicate that the ASD was functioning correctly, and was capable of accepting a sample of breath.

I am satisfied that the peace officer made a valid ASD demand.

In the Narrative, the officer states, "CRANMER encouraged s.22 to blow but she would not." On a subsequent attempt, the officer notes, s.22 formed a seal with her lips on the device and provided (sic) approximately half a second of air into the device. This caused the device to show a single "+" sign but then a "no go." The officer indicates that you were given five opportunities to provide a sample and I do not have any evidence before me to indicate that you provided a sample of your breath, suitable for analysis into the ASD.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

Ms. Lee submits that the officer's opinion that you were capable of providing a sample is not sufficient to uphold the prohibition. Ms. Lee has provided a copy of a doctor's note dated October 3, 2013, indicating that s.22

I do not have any evidence before me to indicate that you are physically unable to provide a sample of breath. I accept that you have provided evidence indicating that you have been s.22 but I do not find that I have any evidence relating this illness to an inability to provide a sample of breath.

I also note that the officer states, "After each attempt at a sample, s.22 was able to immediately talk and was not out of breath. She was not gasping for air. She appeared to not be putting any effort whatsoever into providing breath samples."

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Kyla Lee
fax: 604 685-8308

October 21, 2013

s.22

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

Introduction

On September 29, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that on September 29, 2013, at 16:00 hours, Officer Cranmer (the “officer”) established you as a driver or having care or control of a vehicle.

The evidence in the Narrative Text Hardcopy (the “Narrative”) is that the officer was conducting stationary speed enforcement when he stopped your vehicle.

As there is no evidence to the contrary before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 16:10 hours, the officer used ASD serial number 100932 to take a breath sample from you. The result of your ASD test was a “fail”. There is no evidence to the contrary before me.

I am satisfied that the ASD test registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail.

In the Narrative the officer said that at 16:13 hours, he read the right to a second test verbatim from the purple card supplied by the OSMV. He said you were asked if you understood and you indicated that you did. The officer asked “do you want to provide a second sample?” and you replied “not right now no.”

You said that the second ASD test was not provided. You pointed out that the officer scratched out the “yes” answer at section 7 of the Report and instead checked the box for “no”, that you did not request a second ASD test. You also pointed out that the officer scratched through

section 8 of the Report which is the section to record information and results relating to the second ASD test.

I do not disagree that the officer has made these corrections to the Report. However, I also note that in the Narrative he made a specific notation of the time that he read you your right to a second test. I also note that the officer has put the conversation about whether you wanted to provide a second breath sample in quotation marks. The fact that the officer put his question and your response specifically in quotation marks leads me to believe that those were in fact the words you used at the time. For this reason I give more weight to the officer's evidence.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

I am satisfied that the second analysis was not provided by the officer because you did not request one.

Was the Notice served on the basis of the lower analysis result?

As there was only one ASD test conducted, the result of which was a "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificate of a Qualified ASD Calibrator (the "Certificate") indicates the following:

- ASD serial number 100932 was checked for calibration on September 20, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 18, 2013, and a service expiry date of June 5, 2014.

You provided me with a sheet from the Alco-Sensor manufacturer stating that if the machine is less than a month old or used frequently it should be calibrated weekly. I have no evidence before me to indicate whether the ASD used in your case is less than a month old. I have before me the Certificate to attest to the fact that the ASD was checked for calibration and was working reliably on the night in question.

Based on the evidence provided in the Certificates, and that the officer swore in his Report that the ASD was functioning correctly, I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You said that the officer noticed you were chewing gum and this can set off the Alco-Sensor IV DWF. You said the officer pulled you over at 16:00 hours and at 16:04 he asked you to take the first ASD test. You said that within one minute of spitting out your gum he made you blow into the ASD. You admitted to having one beer about an hour or so prior with your meal.

The Report outlines the timing of events as follows: the officer established you as a driver at 16:00 hours and made the ASD demand at 16:04 hours. The officer notes that it took him approximately four minutes from the time of first contact with you until he formed his suspicion that you had alcohol in your body. Although the ASD demand was made at 16:04 hours, the ASD test actually took place at 16:10 hours. The officer explains the six minute delay by saying that he “had to wait 5 minutes from 1604 hrs for gum and cigarette [sic].” The officer also said that he ensured you did not have anything in your mouth and ensured that you had not put anything in your mouth in the last five minutes. He observed you continuously from the time of driving until the ASD test and did not observe you to burp, vomit or put anything in your mouth.

Based on the above, the officer was aware that you were chewing gum and did allow for enough time to elapse before administering the first ASD test so that it would not be affected by anything in your mouth.

In addition, I note that your ASD test was done on an ASD that I have already found to be functioning reliably and that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. I have already found that the ASD was tested and found to be in reliable working order.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

November 7, 2013

s.22

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

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

I acknowledge your submission that you have been driving for s.22 and have maintained a clean driving record with no prior convictions, speeding charges or driving related interactions with police, however, I do not have authority to consider a person’s driving record in this review.

Issues

The following are the issues in this review:

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

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

In the sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2340 hours on October 18, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASD registered a "FAIL" at 2345 hours. There is no evidence before me to the contrary.

I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In section 7 of the sworn RTS, the officer indicated that you requested a second ASD test. Moreover, in section 8 of the RTS, handwritten below the "RESULT SHOWN TO DRIVER" and "RESULT" headings, the officer recorded, "SEE NARRATIVE", and placed a check mark in the box beside "REQUEST WITHDRAWN". Further, in the Narrative Text Hardcopy – Occurrence Report – 1 (the "Occurrence Report"), the officer indicates that he asked you if you wanted to provide a second sample and that you replied, "um sure why not." Accordingly, he submits that you were:

- provided three opportunities to blow into the device;
- each time you did not provide enough air into the device;
- he observed the digital display show a single "+" sign and then "NOGO" and;
- this meant to him that you had initially provided some breath into the device but had stopped or did not provide enough breath.

The officer goes on to indicate that it was evident to him that you were able to provide a valid sample for the following reasons:

- although you kept referring to s.22 as a reason for not providing a sample, you did not appear to exhibit any outward symptoms of poor health;
- you were very talkative and;
- you did not appear to be short of breath.

Accordingly, he indicates that when you were blowing into the device that you appeared to be providing very little air on purpose. Specifically, that your cheeks were not filling and you did not appear to be exerting any effort. He goes on to indicate that he has seen people have difficulty providing samples due to health reasons and this was not the case in your situation. Rather, he submits that you were simply not putting any effort into the blowing into the device. Accordingly, he submits that your request to provide a second sample was withdrawn after you were provided three opportunities to do so and failed to provide a sample. On this point, he indicates that he could not justify detaining you any longer just for you to, "pretend to blow into the ASD."

In your written submission, you indicate that when you proceeded to take the second test that the following occurred:

- you took a deep breath and blew as instructed;
- the officer said that it did not work and you were told to try again;
- you took another big, deep breath and blew hard;
- the officer was intimidating you and saying that you were purposely not blowing hard enough and to blow again;
- you reminded him that you s.22 wanted to complete the second test, and were trying the best that you could;
- you then took two big, deep breaths and blew as hard as you could;
- the officer then said, "ok we are done" and;
- you were not shown or told the results of the second test.

Accordingly, you submit that you wanted to take and complete the second test and that you were honestly trying to the very best of your ability. Moreover, that you were willing to keep trying until the test was completed. You also submit that you have s.22 for the past year, which causes you to have s.22

In his written submission, Mr. Armour indicates that the crux of this review comes down to the fact that you were denied your request to provide a second sample of your breath, with the real issue being "why". Specifically, he submits that given your age, the initial invalid "NOGO" readings, and the fact that there was another sober driver in your vehicle, I should be concerned with regard to the officer's belief that you were purposely not providing a sample of your breath. As such, he submits that you were physically struggling to provide a sample rather than engaging in an intentional act to "thwart" the officer's investigation.

I acknowledge your submission that you are

s.22
However, after reviewing the
"HealthWATCH Pharma Track" document provided by Mr. Armour on your behalf, I note that
"reduced lung capacity" is not listed as a possible side effect of this medication. Moreover, I have no

compelling evidence before me that you were coughing or exhibiting the effects of s.22 during your attempt to provide a second sample. Further still, in your submission, you did not indicate that you advised the officer that you were having troubles blowing due to a s.22 or that you were coughing or having troubles breathing. Rather, your evidence and that of the officer's is that you advised him that s.22 may be affecting your ability to blow.

On this point, although the officer indicates in the Occurrence Report that you repeatedly informed him of s.22 he submits that you exhibited no outwards symptoms of poor health and articulates this belief by indicating that you did not appear to be short of breath. Moreover, he indicates that you were very talkative which leads me to question if you were indeed "physically struggling", as I infer that a person who is having breathing issues would not likely be excessively verbal. Further, the officer provides evidence that describes your blowing behaviour (i.e. cheeks not filling and lack of exertion); behaviour that I infer would be consistent with a person providing little air into a device that requires them to wrap their lips around a mouthpiece and blow. Moreover, while I acknowledge your submission that you were willing to keep trying until the test was completed, I have no evidence before me that you requested to keep trying to provide a sample or that you advised the officer that you were having problems breathing and required a few moments to stabilize your breathing.

I acknowledge Mr. Armour's submission that the ability to provide a second sample is a right and that you were not given that right. However, based on the evidence before me, I prefer the officer's evidence over yours and as such, find that you intentionally impeded your ability to provide a sample. Therefore, I am satisfied that after giving you three attempts to provide a second sample and observing that you were providing very little air on purpose that the officer deemed that your request for a second analysis had been withdrawn.

Based on the evidence before me, I am satisfied that a second analysis was provided by the officer and that the request was withdrawn when you did not provide a sample.

Was the second analysis performed on a different ASD?

I have already made a finding that a second analysis was provided by the officer, however, that the request was withdrawn when you did not provide a sample.

Was the Notice served on the basis of the lower analysis result?

The officer's evidence is that one ASD test was completed, the result of which was a "FAIL".

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted a Certificate of a Qualified ASD Calibrator (the "Certificate") in which Courtney Dyan Cross certified that the ASD used to conduct your first breath test was found to be within the recommended limits when she checked its calibration on October 16, 2013. She also certified that to the best of her knowledge the ASD was functioning correctly. Further, the officer submitted a Certificate in which Ms. Cross certified that the ASD used to conduct your second breath test, prior to the request being withdrawn, was found to be within the recommended limits when she checked its calibration on October 16, 2013. She also certified that to the best of her knowledge the ASD was functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

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

In the Occurrence Report, the officer indicates that you had a very difficult time retrieving your driver's licence and that you were polite and cooperative but very nervous. Further, while speaking with you, he submits that he detected an odour of liquor on your breath. When you were asked how much you had had to drink in the evening, he indicates that you responded you had had one or two a few hours prior. He then advised you that he needed to know the time of your last sip of alcoholic beverage. Specifically, he explained if you had consumed any alcohol in the last 15 minutes that you should tell him as this could cause the ASD to show a falsely high reading. Subsequently, he asked you, "when was your last sip of alcoholic beverage", to which you replied, "an hour and a half." Following the ASD demand, the officer submits that there was a delay in administering the ASD test because you had numerous questions about the test. Specifically, he indicates that you were very talkative and that you told him you were a good driver and would happily accept a 24 hour suspension in lieu of a greater penalty. Moreover, he submits that you told him that you felt that you would blow over because you do not drink regularly.

In your written statement, you indicate that on a rare occasion on Friday, October 18, 2013, you and your husband went for dinner and then to the casino. While at the restaurant from approximately 8:00 pm to 10:00 pm, you consumed two glasses of red wine and did not have any alcohol before or after that time. On this point, you indicate that you have a low tolerance to alcohol because you do not drink regularly. After leaving the restaurant, you walked to the casino staying there for approximately an hour before leaving to go home. Because s.22 and he was very tired, you drove. After encountering the officer on Maple Drive, he asked where you had been and if you had consumed any alcohol. You submit that you, "answered all of his questions truthfully", and that he told you he was going to give you a breathalyzer. After blowing into the breathalyzer, you were shocked when the device showed "FAIL" because you were very confident that you would pass the test. Accordingly, you submit that you told the officer that maybe you blew over because you do not drink regularly and must have a lower tolerance.

While I acknowledge the conflicting evidence with regard to the time in the investigation that you indicated to the officer that you do not drink regularly, here I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL". Further, I acknowledge your submission and your husband's statement that indicate you answered all of the officer's questions truthfully. On this point, the officer's evidence is that you initially told him you had had "one or two drinks a few hours prior." However, when he advised you that any alcohol consumed in the last 15 minutes could result in a falsely high reading on the ASD and he asked when your last sip of alcoholic beverage was, he indicates that you replied "an hour and a half." Consequently, your initial and subsequent admission regarding the time of your last drink conflict. Accordingly, I find that you were not honest with the officer at the outset regarding your drinking pattern as you and Mr. Armour submit.

Further, Mr. Armour submits that if you truly believed that you would have blown over, that you could have simply asked your husband to drive as he had not been drinking. While I acknowledge you and your husband's submissions that he was tired so you elected to drive, I find myself wondering why you would drive if you have a, "low tolerance to alcohol", as you only drink on, "rare occasions."

While Mr. Armour submits that there was an absence of motive to not provide a sample based on your claimed drinking pattern, I disagree with his submission. In the Occurrence Report, the officer indicates that prior to the first ASD test being conducted that you indicated that you would, "happily accept a 24 hour suspension in lieu of a greater penalty." You do not refute making this comment and as such, I find that it indicates that you did have a motive in intentionally not providing a sample as you understood that there would be a penalty if your BAC registered over the legal limit. I also find it very odd that you advised the officer that you would, "happily accept a 24 hour suspension", and question why you would accept any form of driving suspension if there was, "no doubt in [your] mind", that you would pass the test.

Although you were shocked by the "FAIL" reading and your husband submits that it is his true and honest opinion that you were in no way inebriated, you did not provide any compelling evidence that would cause me to doubt the "FAIL" reading on the ASD that I have found to be reliable. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg %. As such, I am satisfied that your BAC was not less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc: Cory P. Armour (by fax)
250-762-3163

October 9, 2013

s.22

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

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Ms. Lee submitted that reasonable grounds to believe that an individual's ability to drive is affected by alcohol require both a subjective and objective element. She said that the officer must have a subjective belief that the driver's ability to drive is affected by alcohol and the subjective belief must be objectively reasonable. She provided the case of *R. v. Andree* in support of her argument.

Ms. Lee also made submissions with respect to the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*. I have read and considered *Wilson* and *Andree* and I acknowledge your lawyer's submission with respect to the Court's ruling in these cases. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 21:54 hours on September 20, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 21:58 hours and 22:02 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report and the Narrative Text Hardcopy (the "Narrative"), the officer indicated that you were advised of your right to a second analysis and that you request one. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that you were advised of your right to a second analysis and you requested one.

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

In the Report, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied on a balance of probabilities that it is more likely than not that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report and the Narrative, the officer indicated that both ASD tests registered a "FAIL" result. I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicate that the devices were found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

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

October 10, 2013

s.22

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

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records indicate you received full disclosure. You applied on three grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

IRP Review Decision
Page 2

In your written submission you explained that you run a s.22 and you need to drive almost every day. You indicated that not having your licence will seriously affect your ability to earn a living. You requested a reduction of your driving prohibition and vehicle impoundment. You stated that you have an almost perfect s.22 driving record.

The scope of this review is limited to the grounds as defined in section 215.5 the Act. In this review, I can only consider and make decisions on the issues noted below. While I acknowledge and appreciate your situation, I am not authorized by the Act to consider hardship, personal circumstances, employment or transportation needs in this review. I am also unable to reduce the prohibition, vehicle impoundment or consider your driving record.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 21, 2013, 20:51 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 21, 2013, 20:51 hours.

Did the ASD register a "FAIL"?

In the RTS the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer stated that when he spoke to you he could smell liquor on your breath. The officer asked you if you had been drinking and you said that you had some beer at hockey. The officer indicated that he asked you to spit out your gum and you complied. The officer noted that he read you an ASD demand at 21:04 hours and you immediately blew a fail a 21:07 hours. The officer indicated that after you blew the fail you advised him that your last drink may have been 10-15 minutes ago. The officer informed you that a new test would be issued after a clear 15 minutes had passed from the time he first spoke to you to ensure a true reading could be obtained. The officer provided Certificates of a Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

You stated that one of the highway attendants gave you a stick of gum that was unusually sweet. You indicated that it tasted like eating a teaspoon of raw sugar. You stated that since alcohol and sugar are very closely chemically related, you suspect that it may have had a very serious effect on the test result.

While you claim that the gum in your mouth may have affected the ASD result, there is no evidence before me to suggest that chewing gum could cause a "FAIL" result on an ASD. Further, I note that the officer's evidence is that he had you spit the gum out at 21:04 hours and that he waited 15 minutes from the time he first spoke to you to ensure a true reading.

I am satisfied that the ASDs were reliable.

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

You stated that you had two beers in the dressing room after hockey and another one in the lounge with food. You explained that you went through a road check a few years ago while having consumed the same amount of alcohol and food and you passed the ASD.

While you may have had a situation in the past with similar circumstances, I find there is no compelling evidence before me that would lead me to question the ASD results on this occasion. There is no compelling evidence before me to indicate that two separate ASDs malfunctioned and produced results that did not accurately reflect your BAC.

As noted above, the ASDs were reliable. Therefore, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 7, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records before me confirm that you received all of the disclosure documents. I have proceeded with the review based on this confirmation. The application for this review states that you retained Sarah Leamon as your lawyer, but there is no submission from Ms. Leamon on this file.

The hardship and impact on your work this prohibition has brought are not issues I consider in this review; there is no authority under the Act to make considerations of this nature.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “Report”), the investigating officer -- Cst. Burton -- indicated that you were driving or in care or control of a vehicle at 0245 hours on September 15, 2013. Cst. Burton provides in the occurrence report that: your vehicle was reported to police for erratic driving and high speed; he then stopped your vehicle in Burnaby. Upon stopping your vehicle, he identified you as the driver of the vehicle.

Your undated written statement, sent on October 1, 2013, contains your account of being followed by someone younger, causing you fear. You stopped your vehicle in a gas station, where the police began their investigation. This submission describes you as the driver of the vehicle, confirming the police evidence.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided ASD “FAIL” results at 0353 and 0355 hours.

There is no evidence to the contrary on this point. In your statement acknowledge seeing “FAIL” results on two ASDs.

I am satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked ‘YES’ to indicate that you requested a second test. In regards to providing you with notice of that right verbally, he added the wording used:

You have the right to a second test with a different screening device. The result of that second test will prevail. Would you like to take a second test?

On this point, you state: “. . . he then asked me if I wanted to provide a second sample. . .”

Based on this, I am satisfied that the officer advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'FAIL' at 0355 hours.

With no evidence to the contrary, and your statements describing two "FAIL" readings, I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

The officer records a separate ASD serial number for the second analysis that took place at 0355.

You state: "... he then asked me if I wanted to provide a second sample to which I replied ok and he changed the mouthpiece on the SAME device and again I blew into the same device and he showed me the FAIL response."

You provide the following statement: "i only knew about this after reading the back of the IRP notice the officer gave me." I question your accurate recall on this point. According to the officer's evidence, you were informed of the detail of a different ASD at that instant when he informed you of that right. I provided the officer's exact-worded evidence on this point above. This contrasts with your statement that you only learned of a second ASD after the Notice was served and you read that information on the back of it. You do not address this evidence provided by the officer, that you were initially informed of this detail. I find your credibility lacking in this evidence, based on your recollection.

By contrast the officer's evidence contains no inconsistency, and he has provided two distinct ASD serial numbers, as well as a 'Certificate of a Qualified ASD Calibrator' for each ASD.

I am therefore satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Was the ASD reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator N.F. Roemer certified that on August 28, 2013, he checked the calibration of ASD serial number 101892. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 25, 2013 and the service expiry date as July 16, 2014.

For the second ASD, the qualified ASD Calibrator N.F. Roemer certified that on August 29, 2013, he checked the calibration of ASD serial number 031112. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 26, 2013 and the service expiry date as July 16, 2014.

You make no submissions and provide no evidence on this point; I therefore find the ASDs reliable at the time the samples were taken.

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

You checked this as a ground for review on your application; however, you provide no evidence on this point specifically.

I therefore accept as fact that two ASDs registered "FAIL" results; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Sarah E. Leamon
Acumen Law Corporation
fax: 604-370-2505

November 18, 2013

s.22

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

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Acquired

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

Preliminary Matters

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

You applied on two review grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Narrative Text Hardcopy (the “Narrative”), Constable Hilditch (the “constable”) noted that he stopped a vehicle after observing it speeding excessively. The constable stated that you were identified as the driver and were observed in the driver’s seat immediately upon the stop of the vehicle. In the Report to Superintendent (“RTS”), the constable indicated that you were driving or in care or control of the vehicle at 23:39 hours on October 26, 2013.

There is no evidence before me contrary to that of the constable.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the constable indicated that you provided a sample of your breath into an ASD at 23:41 hours and 23:45 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the Constable on this point.

I am satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

The constable stated in the Narrative that you were read your right to a second test from a purple IRP card. Further, in the RTS, the constable indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the constable’s with regard to this issue.

I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the Constable?

In the RTS, the constable indicated that a second breath test was completed at 23:45 hours.

There is no evidence before me disputing that of the Constable.

I am satisfied that the second test was provided by the Constable.

Was the second analysis performed on a different ASD?

In the RTS, the constable recorded the serial number for the first ASD as 052917, and the serial number for the second ASD as 061114.

There is no evidence before me contrary to the constable's on this issue.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The constable recorded in the RTS and Narrative that both results registered as "FAIL" results.

There is no evidence before me that refutes the constable's evidence on this point.

I am satisfied that the Notice was served on the basis of the "FAIL" result, since each result was the same.

Were the ASDs reliable?

In the RTS, the constable swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The constable provided a Certificate of a Qualified ASD Calibrator (the "Certificates") for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on October 16, 2013, he checked the calibration of ASD serial number 052917. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 13, 2013, and the service expiry date as June 14, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 16, 2013, he checked the calibration of ASD serial number 061114. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 13, 2013, and the service expiry date as March 27, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 26, 2013.

I am satisfied that the ASDs were reliable.

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

In the RTS, the constable indicated that when asked the time of your last drink you indicated that it was "1 hour prior to stop". In his Narrative, the constable stated that you told him you had two glasses of wine about an hour prior to being stopped.

In your written submission, you stated that the police report is inaccurate and noted that you told the constable you had three beers and that two of them you had less than one hour prior to the ASD tests. You stated that you feel the ASD was not accurate given the time frame. You indicated that you asked the constable and he told you that the second test would occur once 15 minutes had passed, but the second ASD test was completed only four minutes after the first. You stated you feel you would have blown a warning if you had had the extra time.

With regards to your submission that the constable did not wait 15 minutes before administering the second test, I note that there is no requirement that the constable wait 15 minutes before conducting an ASD test purely as a matter of course. Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. In your case, while I acknowledge that there is a discrepancy in the evidence with respect to the type of alcohol you consumed, I note that there is no convincing evidence before me that you consumed any alcohol within 15 minutes of either ASD test. As a result, it would not have been necessary or required that the constable delay the ASD tests.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I find that there is no persuasive evidence before me that your BAC was less than 80 mg%. I also note that I have already found both ASDs to have been functioning correctly at the time of your ASD tests.

In summary, I am satisfied that your BAC was not less than 80 mg%

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

September 30, 2013

s.22

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

Introduction

On September 10, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that on September 10, 2013, at 00:30 hours Officer Stables (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 00:35 hours and at 00:37 hours, the officer used ASD serial numbers 052917 and 101561 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASDs registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101561 at 00:37 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail” I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 052917 was checked for calibration on August 19, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 16, 2013, and a service expiry date of June 14, 2014.
- ASD serial number 101561 was checked for calibration on August 19, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 16, 2013, and a service expiry date of October 2, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

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

You told me that you left your office at 6:00 p.m. and had plans to see a concert. You first went to the gym and said you did a strenuous workout. You had eaten two bananas prior to the workout, and an apple afterwards. You said you met a friend at the bar and had your first drink. You pointed out that the officer incorrectly noted the time of your last drink as 8:00 p.m. when, in fact, 8:00 p.m. was the time of your first drink. You then went to the show, dropped off your friend and subsequently were pulled over by police.

You said that the ASD test results are unreliable due to the fructose from the fruit you had consumed and because you had done a strenuous workout. You said that fructose is known to increase the rate of metabolism and that a strenuous workout results in a strain on the liver. You told me that people should not have blood tests for three to four hours after a strenuous workout because the results could be indeterminate.

I acknowledge your submission on this point; however, there is no forensic evidence before me from which I can conclude that what you submit is in fact verifiable. In addition, I note that more than four hours had elapsed between your workout and the ASD tests. Consequently, I have given this information little weight in making my determinations.

I have already made a finding that both ASDs were functioning correctly at the time of your tests and as such I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days.

Your prohibition took effect on September 10, 2013. Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

November 6, 2013

s.22

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

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

At the beginning of the oral review, I confirmed with your lawyer, Dudley Edwards, that he had received full disclosure of the documents before me. I have proceeded with this review based on that confirmation.

You checked the boxes next to four of the grounds on the application form. However, the grounds associated with a refusal or failure to comply with a demand are not applicable to your situation.

Mr. Edwards submitted that you are s.22 You have
been a s.22 without a criminal code
incident.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider an individual's driving record in this review. The scope of the review is limited to the grounds as defined in the Act.

Mr. Edwards stated that there is no evidence to support that “FAIL” result of the ASD is associated with your ability to drive. He submitted that there is no evidence of bad driving. Last, there is no evidence your ability to drive was affected by alcohol.

Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Mr. Edwards submitted that the officer had no reasonable suspicion to suspect that you had alcohol in your body under section 254(2) of the *Criminal Code*. Mr. Edwards stated that there is no evidence as to what you drank two hours earlier. It could have easily been coffee, beer, or wine.

In section 10 of his Report to Superintendent for the IRP (the “Report”), the officer checked the box for odor of liquor on your breath. Regardless, despite your submission the validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report, the investigating officer indicated that you were driving or in care or control of a vehicle at 2308 hours on October 19, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that he responded to a report of a single collision on Highway #1 westbound by Gagliardi Way in Burnaby. You were identified as the driver involved in the collision. i

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided a “FAIL” result at 2319 hours and 2322 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on October 16, 2013, he checked the calibration of ASD serial number 103029. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 13, 2013, and the service expiry date as October 9, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 16, 2013, he checked the calibration of ASD serial number 055111. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 13, 2013, and the service expiry date as October 9, 2014.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Dudley Edwards by fax 604 433-8209

October 4, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on one ground which is not applicable to this review because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review.

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

You submit that your prohibition should be revoked based on the recent decision in the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. You provided a copy of this case for my review.

I have read and considered the *Wilson* case and I acknowledge your submission with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Synopsis, the officer indicated that he initiated a traffic stop after observing a vehicle registered to you turn onto Nanaimo Avenue from the 100 block of Abbott Street. You were later confirmed to be the driver through "tombstone information provided." In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 01:06 hours on September 15, 2013.

In your submission you admit that you were operating the vehicle.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 01:25 hours and 01:26 hours, respectively.

In your submission you stated that you take no issue with the two "fails" that resulted from your breath samples.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that you were advised of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

IRP Review Decision
Page 3

Was the second analysis provided by the officer?

In the Report, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded different serial numbers for the ASDs used to obtain samples of your breath. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, both ASD tests resulted in a "FAIL" reading.

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator, in which Gary Ronald Moritz certified that the ASDs bearing the serial numbers 047028 and 101117 were found to be within the recommended limits when he checked their calibration. He also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

SEPTEMBER 30, 2013

s.22

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

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

When you applied for this review, you checked eleven grounds listed on the application form; however, not all of these grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

At the beginning of the hearing your lawyer, Kevin Filkow, confirmed that he had received all of

the disclosure documents before me. I proceeded with the review based on that confirmation. In the oral hearing, Mr. Filkow said he requested in-car video evidence from the Tofino RCMP. He also faxed a copy of the letter he sent to the police with this request, which was dated September 20, 2013. Mr. Filkow said he was told he would have to get a court order for release of the requested evidence. I note the RCMP faxed the letter back to your lawyer with a handwritten note and a stamp from Corporal Waddell indicating the officer was sending complete disclosure of three pages, barring a court order.

Mr. Filkow did not ask to adjourn the hearing in order to make further attempts to obtain the in-car video evidence. I told him I have viewed such evidence that other applicants have submitted, but I was not sure how they obtained it from the respective police detachments; however, I did not believe it was through a court order. I suggested that it might have been through a request under the *Freedom of Information and Protection of Privacy Act*.

Mr. Filkow suggested that if I feel I do not have enough evidence before me to make a decision, that I should call him and he would pursue the video evidence further. I asked him if what he really meant was that I should contact him if I find I cannot revoke the IRP, based on the evidence before me. I suggested that the appropriate route would have been to request an adjournment at the beginning of the hearing, but your lawyer chose not to do that.

At the end of the hearing, I told Mr. Filkow that I would carefully review his submissions on your behalf, as well as the police evidence that is before me.

In your affidavit, you said you conducted fishing trips on Friday September 7, 2013, and you gave details of your activities that evening. I note, however, that September 7, 2013 is a Saturday. I infer you meant that your fishing trips happened on Friday, September 6, 2013, which would correlate to your having received the IRP early in the morning of September 7, 2013. This is an inconsequential clerical error that is relevant only in terms of date references.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Moore indicated that he witnessed you

driving or in care or control of the vehicle at 0008 hours, on September 7, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Moore said you provided a breath sample into an ASD and that the device registered "FAIL", as a result of the analysis. There is nothing before me to the contrary. I am satisfied that the ASD registered "FAIL" at 0015 hours, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Occurrence Report-2 ("OR2"), Constable Moore indicated that he informed you of your right to a second breath test analysis. Your evidence is that he did not discuss the right to a second test with you.

Based on your affidavit evidence, the officer appeared to do everything properly, except for advising you of your right to a second analysis. You said he explained how to provide a breath sample and told you that you were not blowing hard enough on your first two attempts. He said you were required to provide a suitable breath sample and that if you did not, he may conclude you were not cooperating. You said when your third attempt did not register, Constable Moore asked another officer for a different mouth piece. Your next breath sample registered a "fail" on the ASD. The officer explained that the device does not provide a numerical reading.

Your lawyer pointed out an inconsistency in the officer's evidence. Mr. Filkow said in the RTS, the officer checked boxes to indicate that he informed of your right to a second analysis; however, in the Narrative Text Hardcopy (I infer he was referring to the Occurrence Report-1 ("OR1"), Constable Moore only said you did not request a second test. Mr. Filkow questioned the absence of his advising you of your right to a second analysis in OR1. I note, however, that your lawyer did not comment on the officer's evidence OR2, in which the officer supplements his RTS evidence by saying he read you the right to request the second test from an IRP information card. I agree that the information in OR1 is not complete, which brings the credibility of the officer's evidence into question.

Mr. Filkow submitted and relied on a copy of the *Scott* decision. In *Scott* the court considers credibility assessment by adjudicators. The court noted that administrative reviews such as this are based on affidavit evidence and that adjudicators are entitled to make findings of fact on conflicting evidence, including findings of credibility. Given the *Spencer* decision, which Mr. Filkow also submitted, I am cognizant that I should give no presumptive preference to the evidence of the investigating police officer over the evidence in your affidavit.

You said you remember your exchange with the officer very clearly, as indicated by your detailed account of the events. In fact, your evidence mirrors the officer's evidence, with the exception of his advising you of your right to the second test.

You said your ability to drive was not affected by alcohol. When Constable Moore asked if you had consumed any liquor, you said you became nervous and denied drinking anything. I appreciate that being stopped by the police may be unsettling, but according to your drinking pattern and how you felt, you had no reason to lie.

If you only consumed two beers over three hours, it seems odd that the officer would say he detected a strong odour of liquor on your breath. He also said he noticed that your eyes were watery and glossy looking, your face was flushed, and your speech was slightly slurred. In order to accept your evidence, I would have to find that the officer fabricated this evidence.

I note that there is nothing before me to indicate that you expressed any surprise about the “fail” result on the ASD. I infer you inquired about your specific BAC level, but I find that a reasonable person in your situation would have expressed disbelief and insisted that something must be wrong with the device. You were not required to provide any specific evidence, but I am surprised that you did not indicate having made an issue of the result with the officer.

The “conflict” in the officer’s evidence between the RTS and OR1 strikes me as reflecting incompleteness, rather than conflict or contradiction with the rest of his evidence. In comparison, the inconsistencies in your evidence include:

- Lying to a peace officer about drinking, despite your report of feeling unaffected by alcohol and having consumed a limited amount;
- An absence of surprise at blowing a “fail”, despite feeling unaffected by alcohol and having consumed a limited amount; and
- Unchallenged symptoms of alcohol consumption, which were inconsistent with your reported drinking pattern.

Mr. Filkow argued that your clear memory of event meshes with common sense and ordinary human experience. However, I note that you said you conducted two fishing trips s.22 on the day leading up to the IRP. You were out in the fresh air and in the sun, and it seems that common sense and ordinary human experience suggests that you would be tired by midnight, which could affect your memory. In addition, you said you were nervous with the officer. This, too, could have affected your memory.

Mr. Filkow submitted seven decisions of other adjudicators, in which the prohibitions were revoked. I have reviewed all the decisions and I find I cannot rely on any of them as a precedent. The cases are either silent on the circumstances or the facts are markedly different from yours. In one decision, the applicant’s evidence is that he or she expressed shock and disbelief at the result of the first ASD analysis. When an applicant’s evidence is directly contradictory to that of a peace officer, an adjudicator must analyze the facts of that specific situation to assess credibility. Mr. Filkow did not specifically address any of the previous decisions he submitted to illustrate how they compared to your situation. I am not compelled to follow any of these decisions.

Based on all the evidence before me, I find on a balance of probabilities that I prefer the officer’s

version of events to yours. I am satisfied that you were advised of your right to a second breath test analysis, but that you declined to take advantage of this opportunity.

Was the second analysis provided by the officer?

I am satisfied that the second analysis was not provided by the officer, because you did not request a second test.

Was the second analysis performed on a different ASD?

This issue is not relevant, because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that the ASD used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificate of a Qualified ASD Calibrator regarding the ASD used in your case indicates that the device was found to be functioning correctly and was found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASD was reliable.

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

You said you arrived at Jack's pub at approximately 9 pm on Friday evening. In paragraph nine of your affidavit, you said you consumed two standard size bottles of beer with 4.8% alcohol over the course of about three hours.

The officer said he detected a strong odour of liquor on your breath. He said he also noticed that your eyes were watery and glossy looking, your face was flushed, and your speech was slightly slurred. As noted above, after considering all the evidence before me, I prefer that of the officer. Your evidence did not compel me to doubt the "fail" reading on the ASD, which I found to be reliable. Section 215.41(2) of the *Motor Vehicle Act* states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 7, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc. Kevin Filkow
604-270-3787 (fax)

November 12, 2013

s.22

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

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

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

Preliminary Matters

Your lawyer, Ian Donaldson, carried this oral review on your behalf on October 31, 2013. He pointed to his efforts on October 29, 2013, to obtain additional materials both through this office and RCMP Tofino. He requested accuracy check logs, the officer’s notes, video/audio, “supervisor checklists”, and copies of ASD service records.

He received an answer from RCMP Tofino telling him that a court order was needed for these materials, an impossibility within three days of this hearing.

He cites the case of *Spencer* to illustrate that the court has made clear that where video evidence exists, it must be disclosed. Respectfully, that is a case where the officer's evidence made reference to video; I find no evidence of such reference to a video in this IRP.

The sections governing IRP had changed after the *Spencer* decision; the Act is now explicit on what officers must provide to this office. Section 215.47 specifies what an officer must forward to the Superintendent; it makes no provision for this office obtaining documents outside of that provision. I am satisfied that the officer in this IRP provided the documents which satisfy the requirements of section 215.47.

In the alternative, Mr. Donaldson points to *Conway* as giving this office the jurisdiction to so order disclosure from the officer. This office maintains the position that it is not a court of 'competent jurisdiction' (the standard enunciated in *Conway*); that decision therefore does not apply to this review. I maintain we have no jurisdiction to order, or compel, the officer's provision of these extra materials.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Moore – indicated that you were driving or in care or control of a vehicle at 2354 hours on October 18, 2013. Cst. Moore provides in the occurrence report that he observed your vehicle weaving in its lane, and pulled your vehicle over to stop. Cst. Moore identified you as the driver of the vehicle, using your BC driver's license for positive identification.

You make no submissions specific to this issue.

I am therefore satisfied that you were driving at the time and date placed in to evidence by the officer. I am satisfied you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register "FAIL"?

In the Report, the officer indicated that you provided an ASD "FAIL" results at 0005 hours.

Neither you, nor your lawyer provides specific evidence to demonstrate that the ASD registered anything other than a "FAIL" result. I am satisfied that the ASD registered a "FAIL" result.

Were you advised of your right to a second analysis?

In the Report, Cst. Moore indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'NO' to indicate that you did not request a second test. In the occurrence report, he notes this occurred at 0012 hours, and he explained this right "from IRP information card." He provides that you stated that you understood; it was explained three times.

You make no submission on this issue; there is no evidence contrary to that of the officer on this point. Based on the officer's sworn evidence, I am satisfied that he advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed on a different ASD?

The officer's evidence in the Report is that he did not provide a second analysis. I am satisfied that the second analysis was not provided by the officer because you did not request it.

Was the Notice served on the basis of the lower analysis result?

Cst. Moore recorded the single test result as "FAIL". With one "FAIL" result being the only test result obtained on a single ASD, I am satisfied that the Notice was served on the basis of the lowest available result which was "FAIL".

Were the ASDs reliable?

Cst. Moore provided a single Certificate of a Qualified ASD Calibrator in which Jonathan McKinney certified that he is qualified to perform this operation. He recorded the ASD calibration expiry date as October 19, 2013 and the service expiry date as June 24, 2014.

On the basis of your sworn written statement, Mr. Donaldson provides:

- Cst. Moore did not observe a fifteen-minute waiting period prior to obtaining a sample of your breath into an ASD;
- a mouthful of Irish coffee, together with digestive trouble, accounts for the ASD "FAIL" result;
- mouth alcohol interfered with the reliability of the ASD result;
- the officer did not initially detect an odour of liquor from your breath, it was rather "after speaking with Dawson for several minutes";
- you only had a single drink with dinner between 9 and 10pm, in addition you had a single mouthful of Irish coffee;
- a forensic chemist has provided an opinion, and it supports your account;
- your consumption that evening is verified by s.22 an employee of the establishment where you had dinner that evening.

Your statement provides detail on the points above. You note the composition of the Caesar cocktail you had with dinner, and your stomach problems. Specifically, you detail a history of s.22

s.22 in addition to the food and single drink you had consumed that evening.

You provide more detail on your immediate consumption before leaving the establishment: a mouthful of “approximately 2 ounces” of coffee containing whiskey. The time of driving before the officer stopped you was “only 2-3 minutes” with the “total time from the coffee to being pulled over . . . 5 minutes at most.”

You state your shock at the “FAIL” result being presented to you by the officer, and assert that “Any alcohol in my mouth, or air expelled from my mouth, was from what was in the coffee that remained in my digestive tract.”

Carolyn Kirkwood, a forensic chemist, notes that the calibration on an ASD is good until midnight; Mr. Donaldson acknowledged in the review this is “within protocol” for the ASD to be used on the same day that its calibration would expire.

I examine all of the evidence presented on a balance of probabilities; assigning weight to evidence by an assessment of credibility.

Your statement provides ample detail on your stomach problems. You describe s.22

You do not provide the time of your meal, though note “after dinner I started to feel queasy.” Your single drink was consumed with dinner, and you note that this cocktail lasted between 9 and 10 pm. Cst. Moore provides a time of driving of 2354 hours. That is close to one hour after you finished your meal. While you do not describe the timing of the onset of these symptoms, I am left wondering why, with such severe symptoms presenting themselves; you chose to remain at the establishment for close to another hour.

Further, you note “food and drink from dinner was still in my digestive tract until long after I finished dealing with the officer that evening.” I reasonably infer that these symptoms continued to bother you during the time of your interaction with the officer at roadside. However, the officer makes no note of you being in a pained condition during the “several minutes” he spoke with you; I also infer with reason that he would be talking to you face-to-face, in close proximity to you while you were seated in your vehicle. This is in contrast to pain which s.22 a phrase you use to describe the pain, though not explicitly stated to be that severe on the evening in question.

In regards to the obviousness about this condition, you state “it is my habit to be quiet about my condition” because it can be “boring”; this is at odds with an officer asking you about possible reasons for questionable driving behaviour. You did claim to the officer your driving pattern was because of potholes; if your health was affecting you severely at this stage, you don’t explain in adequate detail why you could not explain this to the officer. I don’t find this to be a reasonable explanation as to why you would not share this information with the officer if it was the case, and at the severity you describe. This is also at odds with you stating your reaction of shock at the ASD “FAIL” result. You provide no evidence as to why you remained silent on these severe conditions to

the officer at roadside, though in paragraph 12 you do state you did not know that your condition could affect an ASD result. From this I can only conclude that the stomach problems, if present, were not as severe as you attest to, and certainly not present to the degree that they would falsely elevate a result on an ASD.

In regards to the mouthful of coffee, you provide that it contained whiskey. This fact was not known to you prior to your taking this drink of coffee, yet upon discussion with a server at the establishment, you found this to be information you believe to be true, to determine the amount of alcohol present in that drink. You had tasted the alcohol initially upon drinking the coffee, also making your statement to the officer at roadside not true.

There is no verification of the evidence you provide on the coffee. A statement, written by the server s.22 two days after your statement was sworn, does not address this coffee; your statement is not explicit in stating that she was the one who prepared that coffee, and I cannot reasonably infer that to be the case when it is not stated so in her letter. In addition, the person from whom you took this coffee is unnamed; in isolation this omission would not make me question the credibility of your statements; however it exists in combination with your lack of verification from the server. I also look to other evidence you provide on your stomach problems that evening, and you do not explain the necessity for coffee when faced with severe symptoms of acid reflux.

The opinion prepared by Ms. Kirkwood notes, as a result of the Caesar you drank, that your BAC would be 0 mg% by the time of the sample taken by Cst. Moore. In regards to the coffee, she calculates "8 mg of alcohol in 100 mL of blood". She notes s.22 Blood Alcohol Concentration [is] based on his stated drinking pattern as described in his Affidavit dated October 28, 2013."

I note discrepancy between the officer's Report and her 'Facts and Assumptions' with respect to time: the Report is clear on the time of 2354 hours as the time of driving. She however provides a time of "12:00 am – 00:05 am" as the time you consumed "1/2 ounce of Jameson Irish Whiskey". this is during the time your interaction with the officer would have been ongoing for at least five minutes; in this analysis, I find no reason to question the time of driving provided by the officer, your own statement is not explicit in setting out a timeline of that evening.

Based on an assessment of credibility, I place little weight on the statement of the server at the establishment. As noted, she does not verify that you had a discussion about the coffee with her as you state. This unverified consumption being part of the basis for an opinion report then of a forensic chemist, I then place comparatively little weight on the opinion of Ms. Kirkwood on this portion of your submissions.

In addition, the degree to which your stomach problems were impacting you that evening is not explained fully: as stated above, I am left wondering why you would remain at the establishment when faced with these stomach problems. s.22 occurring, you remain silent to the officer about these problems, even when faced with an ASD "FAIL" result which you strictly state, upon review, could not be the case.

The evidence you provide to question the ASD result is not compelling for these reasons. I am not satisfied the ASD provided an unreliable result, either as a result of recent mouth alcohol, or of your stomach problems that evening.

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

At the very end of your statement, you provide: "My blood alcohol was not over 0.05%."

Your statement concerning the cocktail you drank, a single Caesar, is consistent with what you told the officer at roadside. The statement from the server also corroborates this evidence you provide.

I have not accepted, however, that the ASD "FAIL" resulted from either your stomach problems or your recent mouthful of liquor in coffee. With these explanations receiving no weight in my assessment, I am left simply with an ASD "FAIL" result as recorded by the officer. You have submitted no compelling evidence to call this result of the ASD into question. Likewise, you have not provided any evidence to otherwise call the officer's testing procedure into question, and you do not provide evidence in regards to the second test. As above, you do not mention the second test offered by Cst. Moore, either to acknowledge that he explained your right to you, or to provide a reason why you didn't take a second test. Your submission on this point is silent.

The officer's evidence provides that you became belligerent at the scene, and of special significance is the evidence that he explained the test to you three times. This is not addressed in your evidence.

You have provided no compelling evidence, overall, to illustrate that your BAC was less than 80 mg% despite an ASD "FAIL" reading. After having ruled your explanations as to the "FAIL" result above as not credible, there is no other explanation present based on the evidence you submit.

There is no compelling evidence before me that leads me to question the ASD result. I accept as fact that the ASD registered "FAIL"; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Ian Donaldson, Q.C.
fax: 604-681-1331

October 30, 2013

s.22

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

Introduction

On October 9, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device ("ASD"); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

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

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

Preliminary Matters

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

While I have considered *R. v. Seivewright*, *R. v. Bensmiller*, and *R. v. Patchett*, with regard to reasonable grounds to make the ASD demand when alcohol is present at a scene and there is evidence of mouth alcohol, the evidence before me is that you did not provide a sample of your breath for analysis. Therefore, I find that Mr. Arndt's submission that the investigating officer was obligated to wait prior to attempting to obtain a sample of your breath, due to the possibility that you had recently consumed alcohol, is not an issue I must consider in this review. The issues I must consider are listed below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 2304 hours on October 9, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

In the General Occurrence Hardcopy - Synopsis - 1 (the "Synopsis"), the officer indicates Duncan RCMP received a call from a complainant reporting that an intoxicated female was behind the wheel of a s.22 After locating the vehicle in the area of Tzouhalem Road and Cowichan Bay Road, the officer observed you as the driver, noting that your eyes were glassy and lethargic. An overwhelming smell of liquor was also detected coming from the vehicle, with two male passengers indicating that they had been drinking. You denied drinking anything; however, the officer noted that your speech was slow and slurred when responding to his query regarding the time of your last drink. Moreover, in section 10 of the RTS the officer indicated that you had an, "Odor of liquor on breath."

Your sworn evidence is that when the officer asked you if you had been drinking, you told him the truth. Specifically, that during that day, evening, and the day prior, you had not consumed any alcohol. As such, you do not think it is possible that the officer detected an odour of liquor on your breath and you have no idea why he indicates that you had slow, slurred speech.

Further, you indicated that you were diagnosed with s.22 years ago. Accordingly, you submit that this disorder causes you to freeze up and your mind to go blank when you are placed in a stressful situation. Therefore, because the officer displayed intense aggression towards you, it caused you to "freak out" and have a panic attack. Consequently, you submit that you were unable to remember the ASD demand being made on you or understand anything the officer was telling you.

Additionally, s.22 swore that on October 9, 2013, at approximately 9:45 pm, you gave him and a male friend a ride after they had celebrated the purchase of a house with a bottle of wine and beer. s.22 indicated that while in your company he did not witness you consume any liquor and did not note a smell of liquor about you. Further, he indicated that he has known you for seven years and that you definitely have s.22

s.22
as a result of this disorder, s.22 Accordingly, because you s.22 indicated that the officer's rude and aggressive behaviour towards you caused you to lose your "sense of reality" and hyperventilate.

Mr. Arndt provided *R. v. Gulliman* for consideration with respect to the officer having objectively reasonable and probable grounds to make the ASD demand. In *Gulliman*, the judge found that the officer had no lawful authority to make the demand because indicia indicative of impairment were observed after the demand was made. However, I find the facts of your case differ from *Gulliman* because in the Synopsis the officer in your investigation indicates that he observed indicia including glossy, lethargic eyes and slow, slurred speech prior to making the ASD demand on you. On this point, while you indicated that you had no idea why the officer would say that your speech was slow and slurred, you did not provide any evidence that indicated your speech was not as the officer had observed.

Further, referencing *R. v. Mehlhorn*, Mr. Arndt indicates that the officer did not have sufficient evidence to form reasonable suspicion to make the ASD demand. In your case, the officer provides evidence that he was responding to a complaint of an intoxicated female driver and aforementioned, indicates indicia indicative of being under the influence of alcohol. Unlike the facts in *Mehlhorn*, the officer in your investigation had reasonable suspicion to believe that you were driving while under the influence of alcohol and supported his suspicion with objective evidence. On the same issue, Mr. Arndt provided *R. v. Khunkhun* where the judge found that the officer made the demand prematurely because he was not mindful to observe characteristics associated with impairment; however, I find no evidence of this in your case.

Additionally, referencing *R. v. McGauley*, Mr. Arndt indicates that because there was no evidence that you had been drinking the officer erred in crossing off the box indicating, "Odor of liquor on breath", in section 10 of the RTS. While I have considered Mr. Arndt's submission, I have sworn police evidence before me that includes a crossed off box in section 10 of the RTS indicating that the officer detected an odour of liquor on your breath. As such, I find Mr. Arndt's submission that this box was crossed off in error to be speculative at best.

I acknowledge your evidence that you have been diagnosed with s.22 and have reviewed the note from, s.22 in support of this submission. However, during the hearing you provided me with no details as to what occurred during the investigation with respect to the officer displaying intense aggression towards you. I find myself asking what the officer did or said that caused you to "freak out" and expected that you would have provided me with evidence to articulate what specifically transpired to cause you not to remember the ASD demand being made on you. Further, while s.22 provided evidence that the officer was being rude and aggressive towards you, he did not take the opportunity during the hearing to articulate what exactly occurred during your interaction with the officer that caused you to hyperventilate and lose your "sense of reality". I find it noteworthy that s.22 indicated that he took it upon himself to ask the officer to allow you several breaths to relax, yet he did not provide any details as to what occurred to cause you to enter into this state.

The hearing was a forum for you to provide evidence to convince me that the officer's intense aggression caused you to s.22 and not remember the demand being made on you, as a result. However, you have not convinced me with the evidence that you and s.22 provided that your ability to understand the demand was hindered due to the alleged aggression displayed by the officer. Moreover, you provided no evidence as to what behaviours and words this aggression included. As such, I find both your and s.22 evidence lacks credibility because it did not include detail necessary for me to be convinced that the officer's alleged behaviour caused you to freeze up. I also find it noteworthy that there is nothing in the officer's evidence that indicates you were s.22 were hyperventilating or that you did not understand the ASD demand. Therefore, I am satisfied that it is more likely than not that you did not suffer s.22 that caused your mind to go blank and not remember the demand being made on you and as such, I am satisfied that you understood the ASD demand.

Based on the evidence before me, I am satisfied that the peace officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Occurrence Report. After the ASD demand was made on you, the officer indicates that you stated that you did not want to provide a sample. When it was explained to you that a refusal carried the same penalty as a "FAIL" result, you indicated that you understood and still refused to provide a sample.

Mr. Arndt submits that while you may have technically indicated to the officer that you would not provide a sample that you did not intend this act.

There is no evidence before me that you provided a sample of your breath. Further, while I have considered *R. v. Pringle* with regard to the necessity for the Crown to prove the mental element of the offence, I find that the facts of *Pringle* can be distinguished from the facts of your case because *Pringle* made attempts to provide a breath sample whereas you did not.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

I infer from Mr. Arndt's submissions as well as your evidence, that you would like me to find that you had a reasonable excuse not to comply with the ASD demand because the officer's intense aggression caused you to have a panic attack and not remember or understand his instructions. Further, while I have considered *R. v. Pottie*, *R. v. Joly*, and *R. v. Hogue*, with regard to this issue, I have already made a finding that you understood the ASD demand because you did not s.22 that caused your mind to go blank. Therefore, I am not satisfied that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 9, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Jeffrey R. Arndt

Fax: 778-455-3999

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 28, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Timothy Summers, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2110 hours on September 28, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were involved in a single vehicle incident, and when the officer arrived you were identified as the driver via your BC driver’s licence.

In your submission you state that you were heading home from dinner with your wife and brother-in-law when you saw some deer on the road and swerved to avoid them, resulting in your vehicle going into a ditch.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report and in the Narrative that you provided a sample of your breath at 2118 hours which resulted in a “FAIL” reading.

In your evidence you state that the “FAIL” reading was not immediate as noted in the officer’s evidence, but that you provided an insufficient amount of air on your first attempt.

I acknowledge your submission; however, I do not have any evidence before me to indicate that you did not provide a sample of your breath which resulted in a “FAIL” reading.

I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2120 hours.

In your evidence you state that the officer’s Report and Narrative lie in that you were not informed of your right to a second ASD analysis. You state that at no time did the officer offer you such a sample, and it is your belief that the officer included this in his Narrative after the fact to justify checking the appropriate box on the Report.

In the hearing, Mr. Summers submitted that your evidence is clear that you were not offered the right to request a second analysis.

I note that you have denied aspects of the officer's evidence, but you have not provided any further details regarding your conversation with the officer. I acknowledge your claim that the officer did not offer you the opportunity for a second test; however I note that the officer states that he read the right to request to you verbatim from a standard card at precisely 2120 hours, and that you replied, "No." Based on the evidence before me, I find the officer's more detailed version of events to be more compelling.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As stated above, I am satisfied that you did not request to provide a second sample of your breath for analysis.

Was the second analysis performed on a different ASD?

As you did not request a second sample of your breath for analysis, the officer was not obligated to provide you with a second ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that your ASD analysis resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The qualified ASD calibrator certified that on September 7, 2013, he checked the calibration of ASD serial number 043873. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 5, 2013, and the service expiry date as June 21, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In the hearing, Mr. Summers submitted that the officer indicates that you refused to disclose your drinking pattern. Mr. Summers stated that you informed him that you had three beers with dinner. Mr. Summers stated that three beers in a s.22 man would be unlikely to cause a "FAIL" result. Mr. Summers submitted that if I find the officer's version of events to be more credible in terms of the second test, I must also accept the officer's version of events with regard to the fact that he did not determine the time of your last drink. Mr. Summers stated that the officer clearly did not obtain a time of last drink, but administered the ASD no more than eight minutes after arriving at the scene. Mr. Summers stated that if the officer did not know anything about the drinking pattern, he should have been diligent enough to wait 15 minutes to allow for the dissipation of mouth alcohol. Mr. Summers also provided a statement from W.K

Jeffery, an alcohol expert, which states, "Alcohol present in the subject's mouth as a result of recent consumption of alcoholic beverages, belching, or burping, can cause inaccurate test results due to mouth alcohol. If the peace officer honestly believes that the motorist has engaged in the above activity within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity." Mr. Summers stated that it is clear that the officer did not do so, and therefore the officer failed to establish that the "FAIL" reading was reliable.

I have considered the submissions by Mr. Summers; however, I respectfully disagree. I note that the expert report from Mr. Jeffery also states, "The 1st ASD test was completed eight (8) minutes after the demand. If alcohol was consumed within the previous 15 minutes, the presence of mouth alcohol may have affected the test." I note that the first ASD test was completed eight minutes after the time of driving, and not after the demand as stated by Mr. Jeffery. I acknowledge your submission that the officer did not ask you about the time of your last drink; however, there is no evidence before me to suggest that your last drink was within 15 minutes of the analysis. I do not find the suggestion that the results could have theoretically been affected by mouth alcohol to be sufficient. In your evidence you state, "I frankly informed (the officer) that I had three drinks that evening with dinner." I do not find this statement to indicate that your last drink was within 15 minutes of the test. Based on the evidence before me I find that the "FAIL" result on the ASD was not caused by mouth alcohol.

Further, I do not find Mr. Summers' suggestion about the effects of three beers on a s.22 individual to be compelling evidence. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 28, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Timothy Summers
fax: 250 746-7182

October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Jeremy Carr.

Mr. Carr argued that the indicia noted were insufficient to warrant an ASD demand. He submitted that the ASD demand was invalid, as were the subsequent tests. Mr. Carr also argued that the officer failed to ascertain the time of your last within the statutory requirements to support an ASD demand under the *Criminal Code*. He referenced, but did not provide me with the following cases in support of his submission:

- *R. v. Geraghty*
- *R. v. Ference*
- *R. v. Hemery*
- *R. v. Smith*

The grounds upon which I may review your driving prohibition are restricted to those set out in the Act. Despite the submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Carr noted that Justice McEwan held in *Spencer v. British Columbia (Superintendent of Motor Vehicles)* that the police are not deemed to have a credibility advantage and that the case must be determined impartially on the evidence. He further noted that as in *Gillies v. British Columbia (Superintendent of Motor Vehicles)* “credibility is a finding of fact which must be reviewed on a standard of reasonableness”. Mr. Carr also referenced paragraph 30 in *Costain v. British Columbia (Superintendent of Motor Vehicles)* with respect to how an adjudicator decides between conflicting evidence.

Although Mr. Carr did not provide me with either decision, I acknowledge these points and I have proceeded with the review with these in mind.

Mr. Carr argued that there is no evidence that your ability to drive was affected by alcohol. He cited *Wilson v. British Columbia (Superintendent of Motor Vehicles)* and submitted that your IRP should be revoked accordingly.

I have read and considered the *Wilson* case and I acknowledge your lawyer’s submission with respect to the Court’s ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Mr. Carr submitted that this is a quasi-criminal administrative matter and that the burden must be strictly enforced against the Crown. He stated that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be “clerical” in nature, can only be resolved in favour of you. He also stated that you have no burden of disproof in this hearing and that there is no evidence before me which satisfies the burden of proof.

I acknowledge Mr. Carr’s submission; however, I am mindful that this is an administrative process and as such, issues are weighed on a balance of probabilities, not beyond a reasonable doubt as they are in the criminal courts. Moreover, I will weigh any errors appropriately.

Mr. Carr also indicated that you took issue with the material presented by Constable Power, particularly its truthfulness and accuracy. Mr. Carr stated that you believe that the minimal evidence provided by Constable Power is a significant exaggeration and distortion of the facts alleged.

While I understand Mr. Carr's submission, I note that other than the issues, which I have dealt with throughout this review under the appropriate sections, neither you nor Mr. Carr have provided me with any further information as to what other specific issues you have with the evidence provided by the officer.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered 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 officer noted that you were a driver or had care or control of a motor vehicle on September 14, 2013, at 02:00 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 14, 2013, at 02:00 hours.

Did the ASD register a "FAIL"?

In the RTS, the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

Mr. Carr stated that you advised that the officer did not show you the ASD results.

There is no requirement in the Act that an officer must show a driver the results of an ASD test. In any event, in considering the evidence before me, I prefer the officer's sworn evidence over Mr. Carr's unsworn hearsay evidence.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test on a different ASD. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

I find there is no compelling evidence before me that would lead me to question the ASD results. I am satisfied that the ASDs registered a "FAIL" as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Jeremy Carr
250-388-7327

October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 16, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Jeffrey R. Arndt confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

Having reviewed the evidence before me, I am not satisfied that you were a driver at a relevant time.

I am satisfied that you were not a driver within the meaning of section 215.41(1), of the Act.

Having made this finding, I do not need to consider any further grounds in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.



October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on all of the grounds available, some of which are not available to; the Notice was not served on the basis of your refusing or failing to provide a sample of breath upon demand. I have considered all grounds relevant to the basis upon which the Notice was served.

Records before me confirm that you received all of the disclosure documents, and your counsel, Kyla Lee, confirmed she had received all documents at the time of review. I have proceeded with the review based on this confirmation.

Your lawyer, Ms. Kyla Lee, provided the case of *Scott* and referred to the principles enunciated by the court in *Spencer*, to underline the concepts of credibility which apply in this review process. From *Scott*, evidence must be assessed for consistency and credibility, with legitimacy; from *Spencer*, contemporaneous evidence prepared by an officer is not *prima facie* more credible for that reason. I am mindful of the principles as stated by the court, and apply them herein.

Ms. Lee relies on a recent BC Supreme Court decision, *Wilson*, to outline the principle that a person's ability to drive must be shown to be affected by alcohol in order for a prohibition to stand. I rely on the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.5(4) of the *Act* requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis. Ms. Lee also submitted *R. v. Andree* to set forth the proposition that a "subjective belief must be objectively reasonable"; my reading of this case material however, is that it concerns an officer's grounds for making a demand, and the validity of the demand is not at issue in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Act*?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

In the Report to Superintendent (the "Report"), the investigating officer --- Cst. Faulkner --- indicated that you were driving or in care or control of a vehicle at 0201 hours on September 22, 2013. He provides in his narrative report that he stopped a vehicle after it had left the "area of liquor establishments". He observed what he decided was questionable driving behaviour and conducted a stop of the Toyota vehicle. You were then directly witnessed driving, and identified by your BC Driver's license.

In paragraphs 5 through 8 of your affidavit, you outline the details of your driving at that time. Your statement confirms the evidence of the officer on this point.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided an ASD "FAIL" result at 0217 hours.

In your affidavit at paragraph 12, you describe your action of blow into the machine when asked to do so by Cst. Faulkner, and the machine reading "FAIL".

I am satisfied that the ASD registered a "FAIL" result.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the occurrence report, he provided detail that this occurred at 0218 hours, and that this “was read from the purple OSMV Card.” He also provides that he asked “Do you understand?” to you; you stated “I do.”

In your affidavit, you state at paragraph 14 that “Constable Faulkner explained that I had the option of taking a second test, on a different device.” Ms. Lee provides details in her submissions as well: “Constable Faulkner asked him if he wanted to take a second test. Constable Faulkner informed him that the second test would be conducted on a different device.”

I am satisfied that Cst. Faulkner advised you of your right to a second analysis. You take issue with not knowing fully about the second test, where a lower result, if obtained, could reduce the severity of the prohibition. You state: “Knowing what I know now, I would have taken a second test.”

Ms. Lee draws attention to the officer referring to a “purple OSMV card” which was not disclosed. Without it, she submits there is no evidence showing the wording used when informing you of your right to a second test; this leaves only checkboxes on the Report to indicate that he covered those key points when reading the information to you. She sets out the principle from *Gillies*, that drivers do not have the same expertise as police, and in addition compared the right to a second test with the right to counsel, a criminal tenet, as set forth in *R v. Bartle*. In addition, she looks to the intent of legislature in passing the IRP law: “legislature must intend that the information be conveyed meaningfully and accurately.”

I am satisfied, based on a reasonable inference, that the card referred to would reflect the requirements needed by the sworn Report, which is in the “form established by the Superintendent.” This is a more likely scenario than the officer relying on memory to inform you of the key points of your right to a second test -- which, if it were the case here, would lead me to question the officer’s evidence on this point more closely. Though the purple card was not disclosed, I rely on the officer’s evidence here to establish that a scripted informational component was read to you at roadside -- the officer has specified this point succinctly in the occurrence report -- and that by necessity that informational component would reflect the requirements necessitated by the use of a Report. The submission by Ms. Lee on this point somewhat concedes on this where she notes on page 9: “the . . . Report includes a series of check boxes prompting the officer to provide particular information.” I therefore find it more likely than not that a card used by the officer would contain all of the details surrounding the second test, and that Cst. Faulkner relayed that information to you. Your own affidavit is silent on the officer’s use of a card; nor does it contain any evidence that you could not understand what the officer read to you at roadside for any reason.

I attach no weight to the speculation that Cst. Faulkner was confused on amendments to IRP legislation. In regards to the comparison with a criminal procedure and right to counsel, in effect, a breach of that right would constitute the need for a *Charter* remedy. I have no authority to consider contraventions of *Charter* rights; the right to counsel is a criminal matter, and has no import in this review that is limited to the grounds specified in the Act.

That you were misinformed about the law and about your rights at roadside is not established by the evidence. I am satisfied that the officer conveyed all of the scripted information regarding the second test to you at roadside; your direct evidence makes no provision that you did not understand that at the time.

Was the second analysis provided by the officer?

Cst. Faulkner checked 'NO' in the Report to indicate that you did not request a second ASD test; the narrative report provides: "Cst. FAULKNER then asked "Would you like to provide a breath sample?" DUTHIE stated "No that is fine.""

I am satisfied that the second analysis was not provided by the officer. You likewise provide no evidence that a second test took place.

Was the second analysis performed on a different ASD?

As above, there was no second test provided by the officer.

Was the Notice served on the basis of the lower analysis result?

The officer recorded the single test result as "FAIL". There is no evidence before me to the contrary; the penalty applied is compatible with the lowest test result.

Was the ASD reliable?

The officer provided a single Certificate of Qualified ASD Calibrator in which an ASD Calibrator certified that he is a qualified to perform this operation. This Certificate forms part of the sworn Report.

For the ASD, the qualified ASD Calibrator E. Ludeman certified that on September 16, 2013, he checked the calibration of ASD serial number 101494. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 14, 2013 and the service expiry date as November 21, 2013.

On line 11 of the Report, Cst. Faulkner provides your response "like right now" in answer to the prompt of time of last drink. In the occurrence report, he provides details on his informing you of mouth alcohol, and that "there would have to be a 15 minute wait period." He then read the demand after a waiting period, at 0216 hours, and the ASD test occurred at 0217 hours.

In paragraph 4 of your affidavit, you state: "It was close to 1:40 a.m. when I ordered my second beer; I consumed this beer very quickly." You then detail a "small amount of beer left in my glass" and you finished this immediately before leaving the pub. You told the officer "like right now" as he provided in his evidence; you confirm also his informing you of a fifteen-minute waiting period.

Ms. Lee also lists the same evidence in her submissions. Because your affidavit states a different amount than what you admitted to the officer at roadside -- one beer versus two, in actuality -- she submits this necessitates a credibility assessment. You believe that the last most recent drink could have impacted the ASD result. To underline the credibility of your statements made on this point in your affidavit, she enunciates principles on credibility from *Hathaway*, where personal information may have relevance in such an assessment, and also *Spencer*, where a burden cannot be imposed on you that you should know material facts. Also, she presents your evidence as consistent and logical with respect to the timeline you describe.

There is acknowledgement on your part and on your behalf by Ms. Lee that Cst. Faulkner had waited fifteen minutes before initiating the ASD test cycle. You are not disagreeing with the officer's evidence on this point or establishing a different fact pattern -- as such, I do not see an assessment of credibility as being necessary. Your drinking pattern as recalled in an affidavit, versus what you

stated to the officer at roadside is immaterial -- you had indicated very recent consumption to the officer at roadside, and he initiated a waiting period based on what you told him.

Ms. Lee calls in to question the authorship of a document provided by Cst. Faulkner, 'Technical Information on the Operation and Calibration of ASDs in British Columbia.' The document prescribes "at least 15 minutes. . . to allow for elimination of mouth alcohol", the practice adopted by Cst. Faulkner at roadside. She points out that there is no indication of who authored this document, and describes it as unsourced hearsay, to which no weight should be given. As per the case of *Joyce*, an unsourced document needs an assessment of its' reliability by an adjudicator.

I am satisfied that Cst. Faulkner provided this document, and it comprises part of the 18 pages he provided as part of the sworn Report. That satisfies me of its reliability, and in specific regards to its authorship, I am not satisfied it is 'unsourced' -- it is of very recent preparation, September 2013, and prepared by the BC Association of Chiefs of Police, and verified by the Breath Test Advisory Committee.

In regards to a prescribed fifteen-minute waiting period, Ms. Lee provides as part of her submission the case of *Seivewright*, prescribing a twenty-minute waiting period for delay, and a case study from Norway, which provides data that alcohol can remain in the mouth "for up to ninety minutes". On reading *Seivewright*, I note that Metzger J., only refers to a twenty-minute waiting period as a general guideline; his authority for this assertion is not sourced, and I cannot therefore accept this as the training principle accepted by officers across the province. The document provided by Cst. Faulkner, in contrast, contains more authoritative data and a source of verification. The case study from Norway, which hints at the existence of mouth alcohol for up to ninety minutes after ingestion, is premised on a test subject in laboratory conditions where that subject is not swallowing --

I am therefore satisfied, based on the officer's evidence, that the ASD was reliable at the time the samples were taken.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

You provided that you had two beer on the evening in question prior to Cst. Faulkner obtaining a sample of your breath. This is different information that what you told Cst. Faulkner at roadside. You stress: "I felt fine to drive. I did not feel impaired by alcohol, and I knew that I was not over the limit. I thought there must be something wrong with the test."

The amount of consumption that you indicated to the officer at roadside is tangentially related to the result of an ASD being "FAIL"; the officer assured clear results by initiating a fifteen-minute waiting period, and I am satisfied the evidence establishes that as fact. On the point of your consumption, however, you provided no evidence to verify your statements on what you had consumed, your statement only attests to two beer that evening. In paragraph 12 of your affidavit, you acknowledge: "After I waited a few seconds, the machine read "FAIL".

I accept as fact that the ASD registered a "FAIL" result; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

November 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (ASD); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on two grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

At the outset of your oral hearing your lawyer, Philip Cote, confirmed that he received full disclosure.

Issues

There are three issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. If so, did you fail or refuse to comply with a demand?
3. If so, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 26, 2013, at 18:53 hours. In the Occurrence Report, the officer indicated that a complaint was received from a motorist who observed a vehicle driving erratically and swerving out of its lane. The officer stated that he observed you drive your vehicle on Westminster Highway. He noted that you were sitting in the driver's seat and that you pulled in your driveway and got out of your vehicle from the driver's seat. The officer indicated that you had slurred speech, that you were unsteady of your feet, that you were not replying to most of the police's questions, and that you were constantly interrupting him. The officer also indicated that you claimed that the police had no authority to stop you on your private property, that you did not get into a collision and that one person calling the police about your driving did not mean that you were impaired.

In the Synopsis, the officer stated that at approximately 18:26 hours s.22 called police to report an s.22 male driving a s.22 erratically on Highway 91 in Delta, BC. The officer stated that he attended the address of the owner of the vehicle and he observed the vehicle drive east bound on Westminster Highway next to him and pull in his driveway. The officer stated that you were the lone driver and that you had an overwhelming smell of liquor on your breath. The officer made the ASD demand and you kept interrupting him talking about your connections with the mayor and the chief of police. The officer noted that you claimed that he had no right to come stop you on your private property. The officer further noted that your s.22

In your affidavit you stated that you arrived home from work and took off your jacket and had an alcoholic beverage as you had no plans for leaving your home that evening. You stated that while you were at home, a police vehicle parked at the end of your driveway with the emergency lights flashing. You indicated that your driveway is approximately 300 feet and the police vehicle was parked at the end of the driveway which was approximately 150 feet from your house. You stated that you went outside to see why a police vehicle was in your driveway. You said that the officer asked you if the s.22 parked in the driveway was your vehicle and you confirmed that it was. You said that the officer asked for your driver's licence. You indicated that your driver's licence was inside your house, but that the officer would not allow you to go back inside to get it. You stated that the officer asked you to provide a breath sample. You told the officer that he was not allowed to come on your property and demand a breath sample.

Your son, s.22 stated in his affidavit that he was preparing to go to the gym. He stated that he came downstairs and noticed that you were home. He stated that he gathered his stuff and as he was heading out the door he noticed you were outside the house speaking to a police officer. He said that he went over to see what was going on. He noted that you asked him to go back in the house and retrieve your driver's licence. He said that he grabbed your driver's licence and gave it to you and that you told him to carry on with what he was doing so he left for the gym.

Your other son, s.22 stated that he was home and saw you sitting in the living room having a drink. He stated that he was in the family room at the time watching television. He stated that he left the family room and could see flashing lights outside. He went outside and saw you talking to a police officer. He noted that you asked him to get the keys to the vehicle from your overcoat in the house so that he could retrieve his parking pass from the vehicle.

Mr. Cote submitted that your IRP should be overturned on the grounds that you were not driving or in care or control of the motor vehicle at the time the officer observed you outside of your residence. Mr. Cote noted that your vehicle was turned off and it was parked at your residence. He argued that there is insufficient evidence to conclude that you were in care or control of your motor vehicle and he provided me with the case of *R. v. McLachlan* in support of this argument. Mr. Cote directed me to the RTS where the officer noted the time of driving or care or control as 18:53 hours. He argued that there is no evidence to support the conclusion that time of driving or care or control was 18:53 hours in either the Narrative or the Synopsis. Mr. Cote noted that the Synopsis indicated that a call was received at 18:36 hours and that there is no mention of any time that would support the conclusion that the time of driving or time of care or control was in fact 18:53 hours.

Mr. Cote further noted that the report was of

s.22
Mr. Cote stated that the evidence is further complicated by the fact that in the RTS the officer wrote N/A in response to the question "was the driver observed continuously from the time of driving or care or control to the time of administering the first test?" Mr. Cote stated that had the officer continuously observed you he would have answered yes to this question and that the only reasonable conclusion to draw is that the officer did not continuously observe you.

Mr. Cote noted that the officer left gaps of information and time unexplained in his evidence. He noted that the officer never stated that he made a vehicle stop. He explained that while the officer stated that he observed you sitting in the driver's seat, pull into your driveway and get out of the vehicle, the officer does not indicate when he made this observation. He questioned why the officer did not pull you over, why his lights were not on, and why he did not stop you. Mr. Cote stated that it seems clear that there is a period of time that the officer lost sight of you when he spotted your vehicle on Westminster Highway.

In considering the evidence before me, I have concerns with your credibility. I note that you have not disputed the officer's evidence that you were not replying to most of the police questions and that you were constantly interrupting him. Nor have you disputed the officer's evidence that you said that you did not get in a collision, that one person calling the police about

your driving did not mean you were impaired, that you were talking about your connections with the mayor and the chief of police and that you said the police had not authority to stop you on your private property. It is also interesting to note that your sons did not deny the officer's evidence that they told the officer that s.22

Additionally, I note that you did not indicate what time you arrived home from work and both of your sons omitted this critical factor. You have also not disputed the officer's evidence that your speech was slurred and that you were unsteady on your feet. This is not consistent with your claim that you had an alcoholic beverage when you got home from work. Lastly, I note that there is no evidence before me that you denied driving or that you made such comments to police. Ultimately, I am not convinced that you were at home as you claim.

With regard to Mr. Cote's suggestion that the time of driving as noted in the RTS is unsupported, I do not find any evidence before me to suggest that time of driving it is incorrect. While Mr. Cote submitted that it is clear that there is a period of time that the officer lost sight of you, I cannot come to the same conclusion. I note that a call was received at approximately 18:36 hours of s.22 erratically on Highway 91 in Delta, BC. I note that the Notice indicates the location as Westminster Highway in Richmond. In my view it seems reasonable that it would take 17 minutes from the time of the call in Delta to the officer locating your vehicle s.22

I disagree with Mr. Cote's suggestion that the fact that in the RTS the officer wrote N/A in response to the question "was the driver observed continuously from the time of driving or care or control to the time of administering the first test?" supports that the officer did not continuously observe you. In my view, I find it reasonable to conclude that the officer wrote N/A because you refused to provide a sample.

I disagree with Mr. Cote's submission that the officer did not indicate when he observed you sitting in the driver's seat, pull into your driveway and get out. In my view it is quite clear that the officer made this observation at 18:53 hours. I find Mr. Cote's questioning of why the officer did not pull you over, why his lights were not on and why he did not stop you calls for speculation and is irrelevant considering the officer's evidence that he attended your address and observed you pull into your driveway. I acknowledge that the call received indicated that s.22 male was driving your vehicle. However, I find it more likely than not you were the male the witness referred to given that the description of the vehicle and licence plate match.

I accept the officer's evidence that you were the driver. Therefore, Mr. Cote's arguments regarding whether you were in care or control of a motor vehicle are irrelevant.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 26, 2013, at 18:53 hours.

Did you fail or refuse to comply with a demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

With respect to the first issue, in the RTS, the officer indicated that he formed his suspicion at 18:55 hours and read the ASD demand at 18:55 hours. In the Occurrence Report, the officer indicated that you had slurred speech, that you were unsteady on your feet, and that you admitted to consuming alcohol a couple of hours ago. In the Synopsis the officer noted that you had an overwhelming smell of alcohol on your breath.

Based on the evidence before me, I am satisfied that the officer made a valid ASD demand.

On the second issue, in the Occurrence Report and Synopsis the officer noted that you refused to provide a breath sample. The officer noted that you were not replying to most of the police's questions, that you were constantly interrupting him, that you claimed that the police had no authority to stop you on your private property, that you did not get into a collision and that one person calling the police about your driving did not mean that you were impaired. In addition, the officer further noted that you were talking about your connections with the mayor and the chief of police and that you stated "I refuse to provide a breath sample".

Based on the evidence before me, I am satisfied that you failed or refused to comply with the officer's demand.

Did you have a reasonable excuse?

There is no evidence before me that you had an excuse for failing or refusing to comply with the ASD demand. Consequently, I am satisfied that you did not have a reasonable excuse for refusing to provide a breath sample at the time.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 23, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Philip Cote
778-395-6226

October 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records indicate that your lawyer, Philip Cote, received full disclosure.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?

- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was the ASD reliable?

Having considered the Certificate of a Qualified ASD Calibrator, I find that the ASDs used were unreliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 28, 2013. 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: Philip Cote
778-395-6226

November 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

On November 5, 2013, an oral review in this matter was scheduled for 11:00 am. I called your lawyer, Jamie Butler, at that time and left two voice messages informing him that he would have to re-schedule this review time; there was no answer on his phone. I have no other notification

that he cancelled the review on your behalf. I have proceeded on this file based on the evidence before me, reverting to a written review for which I have no submissions.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Fauchon -- indicated that you were driving or in care or control of a vehicle at 0059 hours on October 21, 2013. Cst. Fauchon provides in the IRP Narrative that he followed your vehicle as it reached excessive speed, thereby causing a collision. Upon investigation, he identified you as the driver of the vehicle, and verified your identity with your BC driver's license.

There is no evidence before me to the contrary. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0110 and 0112 hours.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered "FAIL" results as they appear in the evidence of Cst. Fauchon.

Were you advised of your right to a second analysis?

In the Report, Cst. Fauchon indicates that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the IRP Narrative, he notes this occurred at 0111 hours.

Based on the evidence before me, I am satisfied that you were advised of your right to request a second analysis, and that you requested one.

Was the second analysis provided by the officer, and was it performed using a different ASD?

The officer's evidence in the Report is that he provided the second analysis on your request. He indicates that this was on ASD serial number 061116, which is a separate ASD from that used on the first test.

I am satisfied that he provided the second analysis, and further that it was performed using a different ASD.

Was the Notice served on the basis of the lower analysis result?

Cst. Fauchon recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

Cst. Wilson provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASD serial numbers 055115 and 061116, which he used to test the samples of your breath. These Certificates, completed by Mark Booth, form part of the sworn Report.

For the ASDs he certified that on October 3, 2013, he checked the calibration. He found the ASDs to be within the recommended limits. He recorded the ASD calibration expiry dates as October 31, 2013 and the service expiry dates as August 30, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 21, 2013. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 21, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Jamie Butler fax: 604-739-9888

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Jamie Butler confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Was the Notice served on the basis of the lower analysis result?

The evidence before me is that you were advised of your right to a second test and you requested a second test. However, I note that I do not have before me a valid Certificate of Qualified ASD Calibrator for the ASD used for your first test, 043730. In the absence of this evidence, I cannot be satisfied that the ASD was functioning correctly and cannot rely on the result. Because you requested two tests, and there is only one valid result, I am satisfied that the Notice was not served on the basis of the lower of the two analyses.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc. Jamie Butler
Butler & Company
604-739-9888

November 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 25, 2013, 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;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Ms. Lee submits that there is no evidence to indicate that your ability to drive was affected by alcohol. Ms. Lee states that in the absence of any evidence that your ability to operate a vehicle was affected by alcohol, the prohibition must be revoked as a nullity. Ms. Lee provided *Wilson v*

Superintendent of Motor Vehicles and Andree v Superintendent of Motor Vehicles in support of her position.

Ms. Lee states, “Although this tribunal has, in the past, taken the position that it cannot revoke a prohibition despite an absence of reasonable grounds to believe a driver’s ability to drive is affected by alcohol, this is not a correct interpretation of the law.” Ms. Lee states that there is no difference between an IRP which is revoked on the basis on an unsworn Report to Superintendent, which is also not a ground for review in section 215.5(4).

I have read and considered the *Wilson* and *Andree* cases and I acknowledge your lawyer’s submission with respect to the Court’s ruling in these cases. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. I acknowledge Ms. Lee’s submissions; however, I note that whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Ms. Lee also provided *Spencer v Superintendent of Motor Vehicles* and *Scott v Superintendent of Motor Vehicles* to affirm the necessary principles when determining credibility, and determining that the onus is on the officer to justify the prohibition.

I am aware of and have read the *Scott* and *Spencer* decisions and have conducted my determinations of credibility accordingly.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2218 hours on October 25, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver’s licence.

In your submission you confirm that you arrived at a roadblock and you were the driver.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2219 hours and 2226 hours, both resulting in "FAIL" readings.

In your submission you confirm that you provided two samples of your breath, both resulting in "FAIL" readings.

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2220 hours.

In your submission you confirm that you were advised of your right to request a second analysis.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2226 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 055115 and your second sample of breath into ASD serial number 061116. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 055115 and 061116.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on October 3, 2013, he checked the calibration of ASD serial number 055115. He found the ASD to be within

the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as August 30, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 3, 2013, he checked the calibration of ASD serial number 061116. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as August 30, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In the Narrative, the officer states:

- You were hesitant to answer questions and your passenger was attempting to answer all questions for you.
- When asked if you had consumed alcohol, you initially responded, "I was just picking her up," and pointed to your passenger.
- The officer noted a moderate odour of liquor within the vehicle and detected a moderate odour of liquor on your breath.
- When asked about the time of your last drink you stated, "about 7pm."

In your submission you state:

- You arrived at the Flying Beaver Pub (the "Pub") around 6:30pm.
- While at the Pub you had three pints of beer.
- You stayed at the pub until 10:15pm when you decided to leave. You paid your bill and immediately before leaving the Pub you finished the rest of your beer.
- You were stopped shortly down the road at a roadblock.
- The officer asked you for your licence, which you provided. The officer then asked you to exit the vehicle. At this time, your friend was not interrupting the conversation.
- The officer asked you to spit out your gum, and you did.
- The officer asked if you had anything to drink, and you replied that you did, and that you had one beer at 7:00pm
 - o You realize that you were untruthful with the officer, as you were relying on advice from friends who had told you to never tell the police that you have had a recent drink.
 - o You did not think your last mouthful was important, and your friends made you believe that disclosing your recent drink would be detrimental to your situation.
 - o If you had known at the time that your last sip of alcohol was important, you would have told the officer that it was less than three minutes prior.
- After you provided your first "FAIL" result the officer asked if you would tell the truth about what you had to drink, and you told her that you did not think that it mattered at this point.
- You have since learned about the effects of mouth alcohol. Your last drink was just after 10:15pm. No more than 11 minutes passed between your last drink and the time you blew into the second machine.

Ms. Lee submits:

- There is a concern with the evidence of the officer with respect to the ASD.
 - o While the officer appears to indicate that there was no concern about mouth alcohol, an analysis of the evidence indicates that she did not follow her training properly.

- In the Narrative, the officer indicates that you were chewing gum at the time of the traffic stop. You were asked to remove the gum prior to the analysis, but the officer did not delay the analysis to account for the mouth alcohol.
- Ms. Lee provides a study dated November 8th, 2005, which states:
 - o “After the gum and alcohol are spit out it takes 15 minutes for residual mouth alcohol to dissipate. After 10 minutes there is still residual alcohol affecting the breath test result which is expected for 40% v/v liquor.”
- The first ASD analysis was completed with no time allowed for the dissipation of mouth alcohol, and the second analysis occurred only eight minutes after you were asked to spit out the gum.
- Given this, it does not appear that the officer turned her mind to the possibility of mouth alcohol caused by the gum.
- In your affidavit you have provided evidence that your last drink was only minutes prior to encountering the officer.
- Your evidence indicates that both of your ASD samples were taken within 15 minutes of your last drink.
- If I accept Cst. Larsen’s evidence as credible, I am still bound to revoke the prohibition, as the evidence clearly establishes that she had no reasonable basis to rely on the test results, having failed to ensure that she accounted for residual mouth alcohol from the gum.
 - o You admitted to consuming alcohol, the officer smelled alcohol (despite the gum), the officer believed that you had consumed alcohol, but still failed to follow proper procedures.
- There is absolutely no evidence that the officer ever turned her mind to the issue of mouth alcohol, and as such, she has not satisfied the burden of proof that the ASD results are reliable.
- If I reject the chewing gum evidence, then I must make a credibility determination.
- It was not reasonable for the officer to have relied on your response, “7pm” because in the circumstances she knew, or ought to know, that you had been at a pub.
 - o Given your response that you had just picked up your passenger, the proximity of the pub, and other indicia of consumption, the officer ought to have considered whether you had been at the pub.
- The onus is on the officer to provide evidence with respect to the reliability of testing that is sufficient to satisfy the burden of proof
- The officer knew, or ought to have known based on the information in front of her, that you had just left a pub.
- *R v Kirton*, *R v Bensmiller*, and *R v Seivewright* establish that officers must turn their minds to whether or not they are obtaining a reliable reading by administering a test without delay.

Ms. Lee also provides an RCMP document which states:

“if the peace officer honestly believes that the motorist has engaged in the above activity (recent consumption of alcohol) within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity.”

I also note that Ms. Lee provided a previous decision to illustrate that prohibitions with similar fact patterns are often revoked. Ms. Lee noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

I note that in the previous decision provided by Ms. Lee, the officer failed to make any inquiries into the time of last drink. I do not find that this is the case in your situation, and therefore, I do not find the decision to be relevant.

I do not find that I am compelled by your submission that gum caused your ASD results to be falsely elevated. I note the RCMP document provided by Ms. Lee indicates that it is accepted police procedure to allow for 15 minutes to pass after recent consumption of alcohol to allow for mouth alcohol to dissipate. However, I do not have any authority before me to indicate that the officer is required, as a course of conduct, to delay the ASD analysis due to the presence of gum. With regard to the study provided by Ms. Lee, I note that there are a number of factors which cause me to question its relevance. First, the tests appear to have been conducted on a Datamaster C, and not an Alco Sensor IV DWF, which was used by the officer. Second, I note that the tests involve swishing gum and Vodka in the mouth, and then spitting both out. I do not find that the study differentiates between mouth alcohol due to the Vodka or the gum, as both are swished, and removed at the same time. Finally, even if I were to accept the results of the study, I do not have any evidence before me to indicate that you were chewing gum at the time that you drank your last sip of alcohol.

I acknowledge the evidence that you have provided regarding your drinking pattern and the distance from the Pub to the location of the roadblock. I accept that the drive from the location of the Pub to the roadblock was approximately two minutes.

In the Narrative, the officer indicates that when stopped at the roadblock you stated that you had just picked up your friend and that your last drink was at 7:00pm. In your evidence you confirm that you told the officer that you had one beer at 7:00pm. In your evidence you clarify your version of events and state that you arrived at the Pub at approximately 6:30pm and consumed three pints of beer prior to departing at 10:15pm. I find that there is a significant discrepancy between the version of events you told the officer, and the version of events you have provided in your evidence.

I find it odd that if you were not impaired and knew that you were not impaired, as you state in your submission, that you would choose to be deceitful with the officer. I acknowledge that your friends told you to never tell the officer that you have had a recent drink; however, I find that you were not only untruthful with the officer regarding the time of your last drink, but also the amount that you drank.

I acknowledge Ms. Lee's submission that the officer ought to have considered whether or not you had been at the pub and ought not to have believed you when you stated that your last drink was at 7:00pm. However, I do not find that your responses to the officer at the scene implied that you were at the Pub, or that you had recently consumed alcohol. I note that you informed the officer that you had just picked someone up. I do not find that this implies that you were a patron of the Pub, or that your last drink was recently.

Unlike the case law decisions provided by Ms. Lee, I do not have any evidence before me to indicate that the officer observed you exit the Pub, or was made aware that you had recently left the Pub. I do not agree with Ms. Lee that the proximity of the Pub is sufficient for the officer to question your responses. I also note that you state that after you provided your first "FAIL" result, the officer asked you to clarify your drinking pattern, but you did not do so. The time of your last drink, and the amount you drank, is information to which only you have the knowledge. Your choice to withhold this information from the officer, despite multiple opportunities, was your

decision. I do not find that the officer is responsible for information which you actively and consciously withheld.

With regard to Ms. Lee's submission regarding the credibility of your submission, I do not find that it is the internal or external consistency, or the consistency with common sense and ordinary human experience that causes me to question the credibility of your submission, but rather your unwillingness, despite further questioning, to provide accurate information to the officer at the scene. You submit in your evidence that you were deceitful about being at the Pub, about how much you drank at the Pub, and about when your last drink occurred. I am not compelled by your submission that your ASD results were falsely elevated by mouth alcohol. The officer indicates that you provided two samples of your breath on two different, calibrated ASDs, both resulting in "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 25, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Kyla Lee
fax: 604 685-8308

SEPTEMBER 19, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 80 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

At the beginning of the hearing your lawyer, Aman Sidhu confirmed that he had received all of the disclosure documents before me prior to the scheduled hearing. I have proceeded with this review based on that confirmation. Your lawyer provided written material on September 13, 2013 which I have considered in addition to his submissions at the oral hearing.

Your lawyer made a preliminary submission based on the decision *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. He submitted that there is insufficient evidence before me to establish that the officer had reasonable grounds to believe your ability to drive was affected by alcohol. There being insufficient or no evidence before me on this issue your driving prohibition should be overturned.

I have read and considered the *Wilson* decision. I acknowledge your lawyer's submission respecting the Court's ruling. Sub-section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that sub-section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground of review. I have no statutory authority, therefore, to revoke a prohibition on this basis.

Your lawyer made a second preliminary submission. The police evidence is that your driver's licence was seized by the officer when the driving prohibition was imposed. Section 215.47 of the Act states that a peace officer who serves a notice of driving prohibition on a person must promptly forward to the Superintendent the person's licence if the officer took it into possession. Your driver's licence was not forwarded to the Superintendent as required by the Act. Use of the word "must" makes this mandatory on the officer. Your driving prohibition should be revoked because the officer has not complied with his obligations mandated by the Act.

I agree with your lawyer that your driver's licence was seized by the officer and not forwarded to the Superintendent. I disagree with his submission that this requires me to revoke your driving prohibition. Sub-section 215.49(3) of the Act allows me to proceed with a hearing whether or not I have received, by the time of the hearing, all documents required to be forwarded under section 215.47. In exercising my discretion I have considered whether the fairness of the hearing is impacted by the officer's failure to forward your seized licence. I am satisfied that you are not prejudiced by this failure. The issues in this hearing can be fully and fairly addressed notwithstanding the officer's failure to forward the driver's licence which he seized. I cannot agree to your lawyer's request that I revoke the driving prohibition as a result of the officer's omission to forward your licence. It is appropriate to proceed with this review.

Your lawyer noted that the documents disclosed include documents unrelated to your driving prohibition or vehicle impoundment, but relating to vehicles of others, and that multiple copies of the same documents were provided by the officer. He submits that this reflects a lack of attention to detail on the officer's part which brings into question the accuracy of his evidence. I agree that superfluous and unrelated documents were disclosed. When I examine these documents, it appears from fax machine information on them that these documents were not provided by the officer and may have been inadvertently disclosed by this office in error. I have not considered these documents in this review and draw no inferences from their presence in the file.

For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL"?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The officer's evidence is that on September 1, 2013 at 0446 hours a vehicle was stopped at a roadblock. You were seated in the driver's seat and identified yourself with your driver's licence.

There is no evidence to the contrary.

I am satisfied that at 0446 hours on September 1, 2013 you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "FAIL"?

The officer's evidence is that at 0454 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0500 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a "FAIL."

There is no evidence to the contrary.

I am satisfied that each of the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to provide a second sample of your breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

There is no evidence to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second breath sample into an ASD for analysis.

There is no evidence to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 101551. The second sample of your breath was analyzed by an ASD with serial number 101552.

There is no evidence to the contrary

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Two samples of your breath for analysis were provided into two different ASDs. The result of the analysis of each of the two samples was a "FAIL." The lowest analysis result was a "FAIL." There is no evidence to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The first analysis of your breath was performed on an ASD with the serial number 101551. Constable Qureshi provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 14, 2013. This ASD had a Calibration Expiry Date of September 11, 2013 and a Service Expiry Date of November 29, 2013.

The second analysis of your breath was performed on an ASD with the serial number 101552. Constable Qureshi provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 14, 2013. This ASD had a Calibration Expiry Date of September 11, 2013 and a Service Expiry Date of November 29, 2013.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable Qureshi solemnly affirmed that your ASD tests were performed by a qualified ASD Operator and that the ASDs were functioning correctly.

There is no evidence to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I accept the "FAIL" results from two ASDs I have found reliable and which were certified to be correctly functioning. There is no persuasive evidence to the contrary.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that, as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving

IRP s.22 Review Decision
Page 5

prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

Cc: Aman Sidhu (by fax)
(604) 859-1375

November 14, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

In your IRP Application for Review, you indicated one ground for review. All grounds for review that apply to your case will be considered in this review.

Ms. Lee provided the case of *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 676. During the hearing, she emphasized the concepts that police do not have a credibility advantage and that there is no presumed baseline of police competence and reliability. I am familiar with this case and have kept it in mind when reviewing the facts of your case.

Ms. Lee provided the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1638. During the hearing, she acknowledged J. Dley's ruling that a peace officer must have reasonable grounds to believe, as a result of the analysis, that a driver's ability to drive was affected by alcohol in order to serve the Notice. Further, as an Adjudicator on a government tribunal, Ms. Lee submits that I have the authority as well as a responsibility to the public to ensure that overreaching conduct by peace officers is detected. Accordingly, she submits that I should revoke your driving prohibition because the investigating officer lacked jurisdiction to issue the Notice. I have read and considered the *Wilson* case and I acknowledge Ms. Lee's submissions with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the solemnly affirmed Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 0301 hours on October 26, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 0309 hours and 0313 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the General Occurrence Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer indicates that you understood the right to a second test. Accordingly, he submits that at 0313 hours the ASD was presented to you, with a fresh, new mouthpiece, and that you had no difficulty providing a second breath sample. In the solemnly affirmed RTS, he recorded information for two distinct ASDs. Specifically, section 6 in the RTS contains information related to the first ASD test including the serial number of the device: 104840. Moreover, section 8 contains information related to the second ASD test including the serial number of the device: 104833. He also provided Certificates of a Qualified ASD Calibrator (the "Certificates") that bear the identical serial numbers recorded in sections 6 and 8 of the RTS, respectively.

Conversely, you submit that after a "FAIL" reading was displayed on the ASD used to conduct your first test that the officer dropped his arm to his side and the machine stayed in his hand. You submit that no other officer took the device or changed it with another machine. The officer then told you that you had the right to blow a second time and that if you blew lower that he would go with the lower reading. After you agreed to take the second test, he took the same machine and held it up. You watched him take out the small, white mouthpiece from the machine and reinsert it. As such, you submit that you are absolutely certain that you blew into the same machine used for your first test. Accordingly, you question why the officer recorded a different serial number for the second device because you know for a fact that he used the same machine twice.

Ms. Lee submits that I cannot rely on the evidence in the RTS indicating that two ASDs were used when the evidence on a whole indicates that two different devices were not used. On this point, she submits that in the General Occurrence Hardcopy - Synopsis - 1 (the "Synopsis"), the officer fails to establish that two different ASDs were used. Moreover, she submits that in the Occurrence Report, the officer "copied and pasted" the exact same information he recorded for the first test under the heading referencing the second test. Consequently, referencing *Scott*, Ms. Lee submits that because the officer "copied and pasted" his evidence it is unreliable and internally inconsistent. Further, she submits that although the officer provides evidence in the Occurrence Report that a, "fresh new mouthpiece", was used in both tests, he does not provide any evidence that a different ASD was used. As such, she submits that perhaps he was confused and thought that he only had to use two different mouthpieces, not two different devices.

Ms. Lee submitted the case of *Modhgill v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1971, along with two previous decisions from our office where the Adjudicators made a finding that a different ASD was not used to conduct the second test, and the prohibitions were revoked. I have read and considered the decisions of my fellow Adjudicators. However, I am not bound by previous review decisions which, in any event, are fact specific. As well, I must add that the determination of whether or not an officer used a second ASD is fact specific and dependent on specific findings made by the Adjudicator conducting each specific review.

After reviewing the evidence before me there are a number of details that have caused me to question your credibility. I acknowledge your submission that no other officer took the first ASD or changed the device with another machine. However, I note that your vehicle was stopped at a roadblock and as such, I infer that there would have been multiple officers present. Moreover, I think it is reasonable to infer that at a roadblock there would be more than one ASD available. On this point, in section 7 of the solemnly affirmed RTS, the officer indicated that he informed you a second test would be performed on a different ASD. Moreover, in the Occurrence Report, he indicates that he read you the right to a second test from the, "Office of the Superintendent of Motor Vehicles information card." While I do not know exactly what is written on this card, I infer that it is likely information pertaining to an IRP investigation and as such, would accurately reflect the Act which states in section 215.42(2) that a second analysis must be performed with a different ASD than was used in the first analysis.

I acknowledge Ms. Lee's submission that the officer is silent with regard to a second device in the Synopsis; however, I find that this is not the case in the Occurrence Report. I also have no compelling evidence before me that the officer "copied" the wording used to describe the first test and "pasted" it under the heading referencing the second test. Specifically, I note that the subject matter under this heading is altogether different (i.e. a second test) and the wording used is not identical.

I also acknowledge your evidence that the officer reinserted the same mouthpiece into the device used for your first test. Moreover, referencing the officer's evidence that he used a, "fresh new mouthpiece", Ms. Lee submits that perhaps he was confused and thought that he only had to use two different mouthpieces, not two different machines. However, I note that your evidence and Ms. Lee's conflicts.

While I acknowledge your submission that you know for a fact that the officer used the same ASD for both tests, the evidence before me causes me to question your credibility with regard to this issue. Therefore, I prefer the officer's evidence over yours and as such, I am satisfied that a different ASD was used to conduct your second breath test.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

In the Occurrence Report, the officer's evidence is that you had no difficulty providing the first and second breath samples. Further, he submitted Certificates in which Cpl. Mark James Booth certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 2, 2013. Cpl. Booth also certified that to the best of his knowledge the ASDs were functioning correctly.

Conversely, you submit that during the first breath test that the machine did not seem to work properly and it did not accept your breath. You tried again and blew several times before the machine finally accepted your breath; however, you submit that you do not know why the machine did not work properly. Accordingly, after being completely shocked by the first "FAIL" result, you submit that you informed the officer that something must not be right with his machine. Moreover, you indicate that during the second test that you had difficulty blowing. Specifically, that it took three tries before you were able to make the machine work and register a second "FAIL" reading.

Ms. Lee submits that in the Occurrence Report the officer omits evidence with regard to your difficulty in providing a sample during both tests. Accordingly, she submits that this puts into question the officer's credibility as you have no reason to lie about this issue and would not benefit by falsifying evidence.

I have already made a finding that a different ASD was used to conduct your second analysis. Therefore, when making my finding on whether the ASDs were reliable, I have referred to two ASDs.

While I acknowledge Ms. Lee's submission that the officer omits evidence to support your claim that one ASD was not working properly for both tests, I have no compelling evidence before me that either device was not functioning correctly. Aforementioned, by signing the Certificates, Cpl. Booth indicated that to the best of this knowledge the ASDs were within the recommended limits and functioning correctly.

I also acknowledge Ms. Lee's submission that you would not benefit by falsifying evidence on this issue. However, I have already made a finding that I do not find your evidence credible. Therefore, I find it more likely than not that the officer did not indicate that either ASD had issues accepting your breath because this did not occur and as such, I am satisfied that the devices used for your tests were reliable.

Based on the evidence before me, I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Occurrence Report, the officer indicates that he observed your movements to be slow, that your speech was slow and sleepy, and that your eyes were bloodshot and watery. He also detected a strong odour of liquor emanating from inside your vehicle and as such, requested that you exit the vehicle. He observed you walk to the rear of your vehicle without difficulty, yet noted that the indicia that he had observed while you were seated in your vehicle remained. Moreover, as you stood approximately three feet from him, he noted a strong odour of liquor emanating from your breath. When asked the time of your last drink, he indicates that you responded that you had consumed one drink, one hour ago.

You submit that on October 26, 2013, you were returning from dinner with friends in Vancouver. As you were driving, you encountered a roadblock. An officer approached your vehicle and asked you if you had been drinking. You submit that you told him that you had one drink earlier; however, that you did not tell him that you had your last drink an hour earlier. Particularly, that you never gave him a specific time of your last drink nor did he ask.

While I acknowledge that your evidence and that of the officer's conflict with regard the time your last drink, the evidence before me indicates that you admitted to consumption. Moreover, your alleged

admission of consumption one hour prior to being stopped is indicated in the RTS and Occurrence Report; two documents that form part of the officer's solemnly affirmed RTS. Additionally, your alleged admission appears in quotations in the Occurrence Report and in first person in section 14 of the RTS, which I infer indicates that the officer recorded your exact words.

You submit that you were tired so your movements were slower than normal. Moreover, Ms. Lee added that your slow/sleepy speech and bloodshot eyes were indicative of the time of day you were stopped (i.e. 3:00 am). She also added that in the Occurrence Report, the officer indicates that you were able to read aloud both "FAIL" results without any difficulty. While I acknowledge these submissions, how indicia observed by the officer can be attributed to factors independent of being under the influence of alcohol is not an issue I must consider in this review.

Although you may believe that you were not impaired by alcohol or over the limit, you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs that I have found to be reliable. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

you were a driver within the meaning of section 215.41(1);
the approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
you were advised of your right to request a second analysis;
if requested, it was provided and performed with a different ASD;
the Notice was served on the basis of the lower analysis result; and,
the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “WARN”, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Were the ASDs reliable?

After considering the evidence before me, I am not satisfied the ASDs used for your breath tests were reliable.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. This IRP is removed from your driving record.

s.15

Adjudicator

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result;
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”); and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

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.

Preliminary Matters

Records at this office confirm that disclosure documents were provided to you, I have proceeded with the hearing based on this confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Should your 7-day or 30-day prohibition be reduced because you did not have the required number of previous IRP's?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a vehicle at 0406 hours on October 13, 2013.

In your submission dated October 17, 2013, you provide the same version of events on this point. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "WARN"?

In the Report, the officer indicated that you provided two ASD "WARN" results at 0408 hours and 0411 hours.

There is no evidence to the contrary on this point.

I am satisfied that the ASD registered a "WARN."

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence to the contrary on this point

I am satisfied overall that you were advised of your right to a second breath test analysis, and that the officer provided the second test to you on your request.

Was the second analysis performed on a different ASD?

In your submission you stated that while the officer changed the mouthpiece he used the same instrument for both tests.

The Report notes that ASD serial number 104840 was used for the first test at 0408 hours, and 104833 is used on the second test at 0411 hours. The officer provided two different temperatures and two Certificates that correspond with the serial numbers record in the Report.

In considering this statement I find that the officer provided very convincing evidence that two devices were used. Consequently, I prefer the officer's evidence regarding this point.

Was the Notice served on the basis of the lower analysis result?

Both the Report and the narrative report contain the officer's evidence that both ASD test results were "WARN." You confirm this detail in your written statement.

I am satisfied that the Notice was served on the basis of the lower analysis result, here being "WARN".

Were the ASDs reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicate that the devices were found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on October 13, 2013.

Adjudicator s.15

NOVEMBER 12, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr. I proceeded with this review based on that confirmation.

In his written submission, Mr. Carr cited the *Spencer*, *Gillies* and *Costain* decisions and argued that adjudicators must follow the courts’ directives in these cases when conducting hearings. I agree with your lawyer in this regard; in conducting this review, I am mindful of and have applied

the principles of natural justice and administrative fairness, as required by these cases. Further, I have carefully and conscientiously weighed the evidence before me, and provided a reasonable justification for my choices.

In point three of his submission, your lawyer argued that the ASD demand was invalid. Despite this submission, I conclude that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review.

Mr. Carr also made arguments based on the *Wilson* case. I have read and considered *Wilson* and I acknowledge your lawyer's submissions in this regard. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Winslow indicated that he witnessed you driving or in care or control of the vehicle at 2131 hours, on October 21, 2013. You disputed the accuracy of the officer's description of your driving behaviour, but there is nothing contrary to the officer's evidence that he observed you driving. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Winslow said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. I am satisfied that the ASDs registered "FAIL" at 2138 and 2143 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Winslow indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". In point four of his submission, your lawyer argued that because neither ASD test was reliable, your right to have the lower of the two tests prevail was violated. I have addressed the reliability of the ASDs below.

I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

Constable Winslow submitted two Certificates of Qualified ASD Calibrator (the Certificates) stating that Mark James Booth certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF (the "Calibrator"). The Calibrator stated that on the 2nd day of October, 2013, he checked the calibration of the ASDs with serial number 104840 and 104833 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG312901, Expiry: 2015-05-09. The ASDs were found to be within the recommended limits. They both had a calibration expiry date of October 30, 2013 and a service expiry date of May 22, 2014. I note that the ASD serial numbers on the Certificates match the serial numbers of the ASDs referenced on the RTS.

Mr. Carr included two pages of a document entitled: "Technical Information on the Operation and Calibration of ASDs in British Columbia" (the "Technical Information on ASDs"). He quoted the paragraph with the heading: "'NOGO' and 'VOID' Messages". This indicates that when a

mouthpiece is inserted into this ASD it will allow as many as three attempts to provide a breath sample within the following minute. After the third unsuccessful attempt, the mouthpiece must be ejected to end the last sequence. Mr. Carr continued by quoting Constable Winslow's evidence about your attempts to provide a breath sample.

The officer's evidence in the Narrative is that after you made three unsuccessful attempts to provide a breath sample, he went to obtain a fresh mouthpiece, but determined he did not have any. As a result, he said he radioed for another officer to bring more mouthpieces. This undisputed evidence indicates that the officer followed the protocol your lawyer quoted from Technical Information on ASDs. Further, rather than merely ejecting and re-inserting the mouthpiece, as was required, the officer's undisputed evidence indicates that he sought a new mouthpiece; I infer this was done in case there was anything wrong with the one in the unit.

As your lawyer noted, the officer's evidence is that he searched his duty bag and found extra mouthpieces. Mr. Carr's submissions are that you told him you dispute that the officer obtained new mouthpieces from his duty bag or from another officer. You dispute that the officer ever ejected and re-inserted the original mouthpiece or inserted a new mouthpiece.

On page three of his submission, Mr. Carr said that you told him "Cst. WINSLOW only attempted to provide instructions/demonstration *after* [you] had engaged in three [3] unsuccessful attempts." I infer from this statement that you do not dispute that the officer demonstrated how to provide a proper breath sample after your three unsuccessful attempts. Further, I infer from your lawyer's submissions that you acknowledge providing a suitable breath sample after the demonstration; otherwise, you would not dispute the validity of the 'FAIL' that registered on the ASD when you provided a suitable sample.

I find it unlikely that the officer would have conducted the demonstration using the same mouthpiece you had used. Further, I find it equally unlikely that you would be willing to provide breath samples into the device that the officer had used in the demonstration. Consequently, based on all the evidence before me, I am satisfied that the officer did, in fact, change the mouthpiece during the IRP investigation, contrary to your denial of this fact. This inconsistency in your evidence causes me to question the reliability of the submissions made on your behalf.

Further, the evidence provided on your behalf is unsworn hearsay. While I accept it as evidence before me, I must give it less weight than the officer's solemnly affirmed evidence. Given these factors, I prefer the reliability of the officer's evidence over yours.

Based on all the evidence before me, I am satisfied on a balance of probabilities that both ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Mr. Carr indicated that you told him "at no time did [you] consume alcohol on the day in question." He also said you told him that at no time were you driving erratically, contrary to the officer's evidence. Mr. Carr said s.22 advises that the poor conditions/weather explains

the officer's allegations that [you were] observed, 'driving on the lane divider line'." I infer from these submissions that your lawyer is saying the officer may have seen the driving behaviour, but it was because of the weather conditions, not the way you were driving.

In contrast, Constable Winslow's evidence was that at the time of the incident, "it was foggy and dark, with full illumination in the area from street lights. Traffic was very light." His description of your driving behaviour is very specific: "[you were] driving on top of the dividing line between the two eastbound lanes. [Your] left wheels stayed on the line for some time and then [your] vehicle began to drift back and forth over the line." I find that your explanation for why the officer observed this behaviour does not make sense. I prefer the reliability of the officer's evidence in this regard.

Further, Constable Winslow said he noted an odour of liquor on your breath and in the cabin of the vehicle. In contrast, you denied having consumed any alcohol on the day in question. I have found your evidence to be unreliable throughout this decision letter. The driving behaviour and the alleged odour of liquor are consistent with the "FAIL" results on two separate ASDs, which I found to be reliable. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 21, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc. Jeremy Carr
250-388-7327 (fax)

October 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 19, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the grounds that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" and, "The ASD, which formed the basis for the prohibition, did not register a WARN reading;" however, these grounds are not applicable to your situation because you did not receive a refusal IRP, nor did an ASD register a "WARN". I have considered all the grounds available to you.

At the beginning of the hearing your lawyer, Sarah Leamon, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Ms. Leamon submitted that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She based her argument on the case of *R. v. Schultz* (2009), saying that I should exclude the officer's evidence of the ASD results.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD "FAIL" result, is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge, section 144(1)(b) under the Act. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

Ms. Leamon also referred to the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, and the principles of administrative fairness. I am mindful of these considerations in my review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0006 hours on September 19, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were observed to swerve in your lane, and were subsequently pulled over. The officer notes that you were identified as the driver via your BC driver's licence.

In your submission you state that you were driving for approximately ten or fifteen minutes when you saw the lights of a police vehicle in your rear view mirror. You state that you pulled over to the side of the road.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0011 hours and 0040 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0021 hours.

In your submission you state, "At that point, Constable Winslow told me that I could perform a second breath test, using a different device. Due to the fact that I did not agree with the result, I told the officer that I wanted to do the second test."

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0040 hours.

In your submission you confirm that you provided a second sample of your breath. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101552 and your second sample of breath into ASD serial number 101551. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101552 and 101551.

I have no evidence before me to the contrary. I am satisfied that the second analysis [was not] performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 12, 2013, he checked the calibration of ASD serial number 101552. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 10, 2013, and the service expiry date as December 31, 2013.

For the second ASD, the qualified ASD calibrator certified that on September 12, 2013, he checked the calibration of ASD serial number 101551. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 10, 2013, and the service expiry date as December 31, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state that you went for dinner with a friend around 7:00 pm and you drank two standard glasses of wine. You state that you finished dinner around 8:30 pm and that at approximately 9:00pm you arrived back at your friend's house where you had another glass of wine. You state that around 11:50 pm you finished your glass of wine and left your friend's house. You state that after driving for approximately 10 to 15 minutes you were pulled over by the officer. You state that the officer asked if you had consumed alcohol and you stated that you had, and presented your receipt from the restaurant. You state that the officer asked you if your last drink was around 8:30 pm, and you told him that it was. You state that you did not think to tell the officer about the wine you had at your friend's house.

In your submission you also state that you have a pre-existing medical condition s.22 and you have provided a letter from your doctor to confirm this. You state that your condition, combined with the food you consumed earlier, caused you to burp and belch repeatedly. You submit that after your first test the officer asked if you had been belching a lot, and you replied that you had. You submit that the officer asked you to try not to belch, and after a while the officer presented you with the ASD again and asked you to blow. You state that even though you had burped just moments prior you agreed to provide a sample. You further submit that you cannot recall exactly when you had last belched prior to encountering the officer, but you believe that it was approximately five minutes prior.

In the hearing, Ms. Leamon submitted that you have provided evidence to indicate that you suffer from a medical condition which causes s.22 Ms. Leamon stated that your and the officer's evidence agree that you were burping during your interaction with the officer and that the officer delayed the second test to account for this. Ms Leamon stated that it does not appear from the officer's, or your evidence that the officer was paying close attention to the time of belching in order to ensure that 15 minutes passed prior to your second ASD analysis. Ms. Leamon stated that your statement that you cannot remember exactly when you last burped prior to encountering the officer is an honest answer, as no one would remember exactly when their last burp was.

Ms. Leamon also provided a document from the RCMP entitled, "Resource Reading – Operators Approved Screening Devices" which states, "if the peace officer honestly believes that the motorist has engaged in the above activity (belching, burping, recent consumption) within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence

of the activity. The officer should explain the reason for and the necessity of the delay to the motorist.” Ms. Leamon also brought my attention to a second passage in the document which states, “occasionally mouth alcohol can be present and affect test results. This can occur if the subject burps shortly before the test. Such action may bring alcohol to the mouth from the stomach.”

I have considered the evidence before me, and I accept the evidence from Ms. Leamon that belching can cause an elevated result on the ASD.

Ms. Leamon also provided a number of previous decisions to illustrate prohibitions with similar fact patterns are often revoked. Ms. Leamon noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

In the Narrative, the officer states that you showed him the receipt from dinner and indicated that your last drink was around 8:30pm. The officer states he delayed administering the second test until the prohibition was ready to be served because you were belching repeatedly, to allow for any mouth alcohol from the belching to dissipate. The officer states that you informed him that the belching was the result of a medical condition combined with some food you ate earlier in the evening.

I do not find your claim that you belched moments before the second analysis to be credible. I find that there are a number of instances in your interaction with the officer where you withheld information that was important to the investigation and to ensuring that you provided a proper sample. You state that you did not think to tell the officer about your recent drink at your friend's house, despite your statement in your affidavit that you finished your drink immediately prior to leaving. I do not understand why the drinks you consumed at dinner were at the forefront of your mind, when you claim you just finished a glass of wine prior to driving. With regard to your belch prior to the second test, I do not find it likely that the officer would delay the analysis due to belching and then not ensure that you did not belch prior to the second analysis. I do not find it to be reasonable for the officer to delay the second test due to belching, and then administer the second test moments after another belch. Further, the timeline evidence before me indicates that the officer allowed 19 minutes to pass from the time of your belching, to the time of the second ASD analysis.

I am satisfied that the officer took precautions to ensure that you provided a valid sample, and I accept the “FAIL” results as valid. Section 215.41(2) of the Act indicates that a “FAIL” result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

As I am not compelled by your submission that belching caused an elevated result on your ASD analysis, I do not find the previous decisions provided by Ms. Leamon to be relevant.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 19, 2013.

IRP Review Decision
Page 6

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Sarah Leamon
fax: 604 370-2505

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 20, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review based on all of the grounds available to you; however, some of these are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 20, 2013, at 03:11 hours, Officer Winslow (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 03:13 hours and at 03:23 hours, the officer used ASD serial numbers 101556 and 101555 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101555 at 03:23 hours.

You said that the second ASD test was not provided forthwith as required under the Act and the Report to Superintendent indicates that there was a ten minute delay between the first and second ASD tests.

I acknowledge your submission and point out that the language at sections 215.42 (1) (a) and (b) of the Act states that a peace officer must inform a person of their right to forthwith request a second analysis before the Notice is served on that person. Essentially that means that before serving you with the Notice, the officer was required to inform you of your right to a second analysis and your request was required to be made immediately thereafter.

While the initial ASD demand is made pursuant to the *Criminal Code* and the requirement is that the demand be made and the test be provided forthwith, the second test is optional and therefore no demand exists. For this reason, there is no requirement for the police officer to provide you with a second test immediately.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD tests resulted in a “fail”. As such, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 101556 and ASD serial number 101555 were checked for calibration on September 12, 2013, and found to be functioning correctly and within the recommended limits. Both ASDs have a calibration expiry date of October 10, 2013, and a service expiry date of November 29, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records indicate you received full disclosure. You applied on five grounds, two of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

Having considered the evidence before me, I am not satisfied that the ASD registered a “FAIL” as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 17, 2013. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Dudley Edwards, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Mr. Edwards submits that the officer’s evidence in the Narrative Text Hardcopy – Occurrence Report - 2 (the “Occurrence Report”), indicates that he formed the reasonable suspicion for an ASD demand based on an odour of liquor in your vehicle and on your breath. However, he

submits that the officer does not provide any evidence that he had formed the opinion that you had alcohol in your body at the time he observed you operating the vehicle. On this point, Mr. Edwards submits that when you were asked the time of your last drink the officer indicated in his Occurrence Report that you denied consuming liquor.

Referencing Paragraphs 6 to 8 of *R. v. Fetterley*, 2004 BCPC 0321, Mr. Edwards submits that the details of *Fetterley* are similar to your situation. Specifically, with regard to the indicia the officer observed to form reasonable suspicion that Fetterley had consumed alcohol and making the ASD demand as a result. Further, referencing Paragraphs 22 to 25 of *Fetterley*, Mr. Edwards submits that it is not sufficient for an officer to conclude that a driver had been consuming alcohol sometime in the past. Rather the officer must be of the opinion that a driver had alcohol in his or her body at the time they were observed operating a vehicle.

While I have read and considered *Fetterley* which is a criminal case, I am mindful that this is an administrative review and not a criminal proceeding. In criminal proceedings an ASD is used to form reasonable grounds for making a breath demand; that is not the case in your situation. Further, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to make an ASD demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 0201 hours on September 28, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 0206 hours and 0213 hours, respectively. There is no evidence before me to the contrary.
I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101556 and 101555, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Cpl. Peter J. Somerville certified that the ASDs were found to be within the recommended limits when he checked their calibration on September 12, 2013. Cpl. Somerville also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 28, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Dudley Edwards (by fax)
604-433-8209

November 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 13, 2013, 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;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Your lawyer, Jennifer Currie, submits that section 215.41(3.1) of the Act states:

- If, at any time or place on a highway or industrial road,
- (a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, **and**
 - (b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,
- (emphasis added)**

Ms. Currie states that the recent case, *Wilson v. Superintendent of Motor Vehicles* confirmed that both of these preconditions must be satisfied before a Notice may be issued. Ms. Currie notes that the officer indicates that the only physical observation the officer made of you was the odour of liquor on your breath. Ms. Currie submits that the odour of liquor on your breath is an indication of alcohol consumption, but not of alcohol impairment. Ms. Currie notes that the fact pattern of your prohibition is very similar to that of *Wilson*.

I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground. I have considered all grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0219 hours on October 13, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver's licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0220 hours and 0228 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative, the officer indicates that you were read your right to request a second test at 0225 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0228 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 104833 and your second sample of breath into ASD serial number 104840. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 104833 and 104840.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

[Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on October 2, 2013, he checked the calibration of ASD serial number 104833. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 30, 2013, and the service expiry date as May 22, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 2, 2013, he checked the calibration of ASD serial number 104840. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 30, 2013, and the service expiry date as May 22, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jennifer Currie
fax: 604 590-5626

OCTOBER 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 8, 2013, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 80 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you prior to the review date. I have proceeded with this review based on that confirmation. You submitted written information on September 16, 2013. The date for making a decision in this review was extended on September 17, 2013 to October 16, 2013. In reaching my decision in this written review I have considered all of the relevant information available to me.

You made a preliminary submission based on the decision *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. You submitted that there is insufficient evidence before me to establish that the officer had reasonable grounds to believe your ability to drive was affected by alcohol and to issue your Notice of Prohibition. There being insufficient or no evidence before me on this issue your driving prohibition should be overturned.

I have read and considered the *Wilson* decision. I acknowledge your submission respecting the

Court's ruling. Sub-section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that sub-section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground of review. I have no statutory authority, therefore, to revoke a prohibition on this basis.

You also submitted that the officer did not have sufficient grounds to make a demand that you provide a breath sample. The validity of the demand is not an issue in this review. Sub-section 215.5(4) of the *Motor Vehicle Act* states the grounds of review I must consider. The validity of the demand is not a stated ground and is not an issue for consideration in this review. It is only an issue when a driver fails or refuses to comply with an ASD demand.

One of the grounds on which you applied for a review is that the ASD registered a "WARN" but your BAC was less than .05. That ground is not applicable to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL"?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer's evidence is that on September 8, 2013 at 0435 hours a vehicle was stopped at a roadblock. You were its driver and identified yourself with your driver's licence.

Your evidence is that on September 8, 2013 at 4:35 a.m. you ran into a roadblock

I am satisfied that on September 8, 2013 at 0435 hours you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "FAIL"?

The officer's evidence is that at 0439 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0444 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a "FAIL."

There is no evidence to the contrary.

I am satisfied that each of the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to provide a second sample of your breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

There is no evidence to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second breath sample into an ASD for analysis.

There is no evidence to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 101554. The second sample of your breath was analyzed by an ASD with serial number 101560.

There is no evidence to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Two samples of your breath for analysis were provided into two different ASDs. The result of the analysis of each of the two samples was a "FAIL." The lowest analysis result was a "FAIL."

There is no evidence to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The first analysis of your breath was performed on an ASD with the serial number 101554. Constable Qureshi provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 19, 2013. This ASD had a Calibration Expiry Date of September 16, 2013 and a Service Expiry Date of November 29, 2013.

The second analysis of your breath was performed on an ASD with the serial number 101560. Constable Qureshi provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 19, 2013. This ASD had a Calibration Expiry Date of September 16, 2013 and a Service Expiry Date of November 29, 2013.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable Qureshi solemnly affirmed that your ASD tests were performed by a qualified ASD Operator and that the ASDs were functioning correctly.

There is no evidence to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

The officer's evidence is that you were cooperative. A strong odour of liquor emanated from inside the vehicle so you were asked to exit your vehicle and, after doing so, you exhibited symptoms of having consumed alcohol. There was an odour of liquor on your breath and you had bloodshot eyes. When asked the time of your last drink, you replied "I haven't had anything."

Your evidence is that you finished drinking a beer at 4:30 a.m. and ran into the roadblock at 4:35 a.m. You were not asked by the police officer about the time of your last drink until after the first ASD test had taken place and, at that time, you stated that you had a beer ten minutes ago. The officer gave you a second test on a second ASD although you did not request it. You provided an affidavit from a friend, s.22 stating that he witnessed you finish a beer at 4:25-4:30 a.m. He states that the officer never asked you about any drinks being consumed while you were being stopped at the roadblock and he was not present for any discussions between you and the officer. You also provided photographs of a beer can in your vehicle.

You submit that the ASD results were affected, and registered false "FAIL" results, because of the presence of mouth alcohol. You were drinking beer minutes before you were stopped. The strong odour of alcohol, in the absence of any physical symptoms suggesting alcohol consumption, supports your evidence that you had recently consumed alcohol. There was open liquor in the vehicle, contributing to the strong odour noted by the officer, which should have alerted the officer to the possibility of recent consumption. Recent consumption also explains the odour of liquor on your breath without any physical symptoms of impairment. The officer seemed in a rush and was busy dealing with other vehicles at the roadblock. You also suggested, in your argument regarding the validity of the breath demand, that the officer did not have grounds to make the demand until after your first ASD test, the demand was invalid and the officer decided to manipulate his report. When considering this submission I note that it is not referred to in your affidavit but appears only in your submission. You noted the Superintendent's Report on ASDs which states that breath samples are to be taken at least 15 minutes after the last drink was consumed to allow for the elimination of mouth alcohol. Based on the officer's timeline, the first ASD test occurred within 9-14 minutes of alcohol consumption and the second within 14-19 minutes. At least the first, if not the second test, was taken too soon after you had consumed alcohol. The officer could not reasonably have believed that he could rely on the results of the ASD tests. You were not provided two valid tests; it cannot be said that the Notice was served on the basis of the lowest result. Your driving prohibition should be revoked.

In determining this issue I concentrate on the officer's knowledge when he made the breath demand. If I accept your evidence, then the officer should have allowed an elimination period; if I accept the officer's evidence, then he correctly proceeded without providing an elimination

period. That you may, in fact, have consumed alcohol just before the roadblock is not relevant if the officer, acting reasonably, was unaware of this.

The evidence of s.22 does not assist me. He says that you were never asked about any drinks being consumed while you were stopped at the roadblock, but notes he “looked back” and saw you “requested to take the ASD quickly” and that he was “not there” for any of the dialogue that took place at that time. From this evidence, I infer that you were asked to get out of your vehicle, as the officer’s evidence states, and that you and the officer had a conversation outside of and behind the vehicle which Mr. Sidhu did not hear. I conclude that you were asked to get out of your vehicle and that it was after you were out of the vehicle, separated from any odour in it, that the officer could smell, liquor on your breath and asked you further questions to determine if he should make a breath demand.

I consider the following evidence most useful in determining whether I should accept your evidence or the officer’s:

1. The timeline provided by the officer follows a logical sequence of stopping your vehicle (at 0435 hours), ascertaining whether there were grounds to make a breath demand by asking you about your alcohol consumption (at 0437 hours), and then making the breath demand (at 0438 hours). The two minute delay between the time of the stop and asking you about alcohol consumption is consistent with the time required for you to exit your vehicle and be separated from the smell of liquor in it. The sequence of events set out in your evidence, and particularly your evidence that the officer asked you about your alcohol consumption after the first ASD test, is illogical when I consider that this investigation was conducted by a qualified ASD operator;
2. Your evidence that the officer made you provide a second breath sample in circumstances where it appeared to you that he was very busy does not accord with common sense. A busy officer would not take the additional time to obtain a second breath sample if one was not requested of you; and
3. The officer asked you about the time of your last drink and, in so doing, was addressing the issue of whether a reliable ASD result could be obtained. This complies with proper procedure.

Having considered all of the evidence including these three particular parts in detail, I have decided that the officer’s evidence is preferable to yours. It is more reliable and accurate and, where your evidence conflicts with the officer’s, I accept the officer’s as being more likely.

Accordingly, I conclude that after you were stopped and asked to exit your vehicle, and before the first ASD test, you were asked the time of your last drink and you replied “I haven’t had anything.” Although the ASD tests may have been taken within 15 minutes of you consuming alcohol, based on the information that was available to the officer at the time, he acted reasonably in making the demand, requiring you to provide breath samples, and relying on the results of the first test to conclude as he did and to advise you of your right to a second test without the need for an elimination period to address the possibility of residual mouth alcohol.

Sub-section 215.41(2) of the Act states that ““fail” means 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.” The Act provides certain consequences for a person who provides a breath sample resulting in a “FAIL” indication on an ASD. The Act refers to “FAIL”

results on ASDs and not BAC levels. In your case, I have concluded that both breath samples you provided resulted in "FAIL" results on each of two ASDs. Sub-paragraph 215.5(4)(b)(iii) of the Act states that a driving prohibition must be revoked if I am satisfied that the ASD did not register the "FAIL" as a result of your BAC being not less than 80 mg%. There is no evidence in this review on which I could conclude that your BAC was less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(1) of the Act. I note that as you have already served 8 days of the prohibition, you need only serve the remaining 82 days of the prohibition which commences October 17, 2013. The prohibition ends January 6, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result;
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”); and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

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.

Preliminary Matters

I note on your Application for Review that you applied for this review on October 9, 2013. At that time you were informed of the date and time of your hearing; and, you were provided full disclosure.

In your written submission you stated that your companion consumed 3-4 alcoholic drinks and his result was “000” on the same device that you blew into. You stated that the officer did not mention this in his Report. Further, you state that you believe your file has been compromised as page 6 of your disclosure documents makes reference to another person.

IRP Review Decision
Page 2

The issues I must decide on pertain to a Notice served on you on October 5, 2013. The result of your companion and the reference on page 6 do not have any bearing on what I must decide.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Should your 7-day or 30-day prohibition be reduced because you did not have the required number of previous IRP's?

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that at 2229 hours on October 5, 2013, the investigating officer, Corporal Qureshi witnessed you driving or having care or control of a motor vehicle.

In the General Occurrence Hardcopy (the "Narrative") the Corporal reported that he observed you speeding. There is no evidence to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did an ASD register a "WARN"?

The police evidence in the Report is that at 2240 hours, the officer used ASD serial number 104860 to take a breath sample from you and the result of your breath test was a "WARN". There is no evidence before me to the contrary.

I am satisfied that the ASD registered a "WARN".

Were you advised of your right to a second analysis?

The police evidence in section 7 of the Report is that after the first ASD test, the officer read you your right to a second analysis and that you did request a second ASD test.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The police evidence in the Report is that at 2248 hours, the officer conducted a second breath test. The result of this breath test was a "WARN".

I am satisfied that the officer did provide the second analysis.

Was the second analysis performed on a different ASD?

The police evidence in the Report is that the first ASD test was conducted on ASD serial number 104860 with a temperature of 23 degrees and the second test was conducted on a device bearing serial number 104842 with an ASD temperature recorded as 21 degrees.

Further, in section 7 of the Report there is evidence that the officer informed you:

- 1) of your right to a second test on a different ASD.
- 2) and that the lower test would prevail.

In the Narrative the officer stated that, “the driver understood the right to a 2nd Test.” Based on this statement I would suspect that if the officer did not use a different device you would have said something. Notably, the evidence before me is compelling that two devices were used. Consequently, I prefer the evidence of the officer.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Your first ASD test result was a “WARN” and your second ASD test result was a “WARN”. The officer served you with the Notice indicating you were prohibited from driving for three days.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

ASD number 104860 and ASD number 104842 were checked for calibration on October 2, 2013, and found to be functioning correctly and within the recommended limits. Both ASDs have a calibration expiry date of October 30, 2013, and a service expiry date of May 22, 2014.

I am satisfied that both ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, and monetary penalty. Your prohibition took effect on October 5, 2013.

Adjudicator s.15

October 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 6, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sarah Leamon. I have proceeded with this review based on that confirmation.

Ms. Leamon raised a number of similar issues which I shall address as preliminary matters.

Ms. Leamon submits that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She based her argument on the case of *R. v. Schultz* (2009), saying that I should exclude the officer's evidence of the ASD results.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD “FAIL” result, is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge, section 144(1)(b) under the Act. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

In her written submission, Ms. Leamon raised the issue of a violation of your rights pursuant to sections 8 and 10(b) of the *Charter*. Ms. Leamon attached copies of *R v. Conway*, *R v. Suberu*, *R v. Grant*, *R. v. Schultz*, *R v. Collins*, and *Hunter v. Southham Inc.* for my consideration. It is my position, however, that the Superintendent when conducting an IRP review does not decide questions of law and is not a court of competent jurisdiction. Therefore, the *Conway* decision does not apply to this review and the Superintendent cannot grant any *Charter* remedies in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 0301 hours on October 6, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver’s licence.

I have no evidence before me to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 0307 hours and 0311 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary, I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test and you understood.

I have no evidence before me to the contrary, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0311 hours.

I have no evidence before me to the contrary, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 104860 and your second sample of breath into ASD serial number 104842. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 104860 and 104842.

I have no evidence before me to the contrary, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading.

I have no evidence before me to the contrary, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on October 2, 2013, he checked the calibration of ASD serial number 104860. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 30, 2013, and the service expiry date as May 22, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 2, 2013, he checked the calibration of ASD serial number 104842. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 30, 2013, and the service expiry date as May 22, 2014.

I have no evidence before me to the contrary, I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 6, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Sarah Leamon
fax: 604 370-2505

November 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 12, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Two of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing, you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

You pointed out that there is an error in the Report to Superintendent for the Vehicle Impoundment. The officer wrote the year 2012 for the Date of Report. I acknowledge that this

is the case; however, I find that it does not detract from the integrity of the officer's evidence in its entirety.

You also said that the ASD does not provide a numerical readout of a person's BAC. In your opinion, because you told the officer that you were going to work and you ^{s.22} he should have taken you to the police station to conduct further tests. However, there is no requirement within the Act for an officer to make anything other than an ASD test available to a person who is undergoing an impaired driving investigation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The Report to Superintendent (the "Report") indicates that at 04:35 hours on October 12, 2013, Officer Qureshi (the "officer") established you as a driver or having care or control of a motor vehicle. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 04:42 hours and at 04:47 hours, the officer used ASD serial numbers 101554 and 101560 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the evidence in the Report is that the second ASD test was conducted at 04:47 hours on ASD serial number 101560.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The police evidence in the Report is that the officer used ASD Serial number 101554, with a temperature of 23 degrees Celsius, to conduct your first ASD test, and ASD serial number 101560, with a temperature of 22 degrees Celsius, to conduct your second ASD test. This information is also found in the Narrative Text Hardcopy (the "Narrative"). I also have before me two Certificates of a Qualified ASD Calibrator (the "Certificates"), each of which has a serial number for an ASD that matches the serial numbers of the ASDs the officer said he used for your breath tests.

You said that after your first ASD test the officer offered you the opportunity to do a second ASD test. When you said yes, he reached into his pocket but then used the same mouthpiece with the same ASD he used for your first test.

I have considered all the evidence before me on this issue and I find the evidence found in the Report, the Narrative and the Certificates supports the officer's assertion that two different ASDs were used to conduct your analyses. I find the totality of his evidence more credible than your claim that the officer used the same mouthpiece and the same ASD.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Because both of your ASD tests resulted in a "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates indicates the following:

- ASD serial number 101554 and ASD serial number 101560 were checked for calibration on September 23, 2013, and found to be functioning correctly and within the recommended limits. Both of these ASDs have a calibration expiry date of October 21, 2013, and a service expiry date of November 29, 2013.

You question the reliability of the ASDs because they were calibrated nineteen days prior to being used to conduct your tests. However, you did not explain in what way the ASDs might be unreliable, nor did you provide any evidence to show the ASDs were unreliable at the time of your tests.

The evidence before me in the form of the Certificates indicates that the ASDs were checked for calibration on September 23, 2013, and found to be functioning correctly. Their expiry date is October 21, 2013. In addition, the officer affirms that any ASD tests were conducted by a qualified ASD operator and the ASD units were functioning correctly. Based on a consideration of the evidence found in the Certificates and the Report, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

You claim that the officer did not follow proper procedure because he did not wait fifteen minutes before administering the ASD tests. You said you were at a friend’s house and drank six Coors Lite between 7:00 p.m. and 11:30 p.m. on October 11, 2013, the evening prior to receiving your driving prohibition. You said you stopped drinking at 11:30 p.m. because you were called in to work the next day. You are the s.22 and you start work early and s.22 You left your friend’s house, drove home and slept for three to four hours. You said you got up and showered at about 4:00 a.m., and then brushed your teeth and used mouthwash prior to leaving for work. You said it was about twenty minutes later that you were pulled over by police. You also said that prior to the ASD test, you had burped.

The officer’s evidence is that you passed his unmarked police vehicle at a high rate of speed just past the Westminster Highway interchange. When engaged with you, the officer said your speech and movements were slow and accentuated. He said there was a strong odour of liquor that emanated from inside the vehicle and additionally a strong odour of liquor emanated from your breath. The officer said you exhibited bloodshot watery eyes and a flushed face. The officer said you told him that your “last drink was probably around midnight”.

I am satisfied that the officer turned his mind to the possibility of the existence of mouth alcohol when he asked you what time your last drink was. You told him it was probably around midnight. I am familiar with the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506. In *Giesbrecht*, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. In my view, the officer had no reason to wait for fifteen minutes prior to administering the ASD test and proceeded based on the information you provided to him.

You said you used mouthwash about twenty minutes prior to being stopped by police. You were stopped at approximately 4:35 a.m. which would put your use of mouthwash at essentially 4:15 a.m. The ASD tests were conducted at 4:42 and 4:47 a.m. I am satisfied that sufficient time had passed between the time you used mouthwash and the time of your ASD tests to reduce the possibility of a falsely elevated ASD test result. In addition, there is no evidence before me that the mouthwash you used contains alcohol.

You said that you burped, however you were not specific about when that was in relation to your ASD tests. There is nothing before me to suggest that there was alcohol still present in your stomach to burp up into your mouth. I am satisfied that your burp did not affect the outcome of the ASD test.

I note that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. Your BAC was tested on two different ASDs, both of which I have already found to be functioning properly.

Based on a consideration of the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 27, 2013, a peace Corporal served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that you have been provided with full disclosure of the documents before me. I have proceeded with the review based on this confirmation.

In your written submission, you stated that you have been taught the ramifications people have had to endure due to negligent actions. You stated that as a s.22 you aspire to be a police Corporal and not put yourself in a position to take that dream away. You indicated that this IRP will not only put a stain on your record, but also prevent you from working and taking care of your family. You explained that your s.22 and soon after your s.22 You noted that neither of your parents is working, as they are at home sick and you require your licence to drive them to doctor’s appointments.

I acknowledge your submission and recognize the hardship that this IRP may be causing you and your family. However, in the context of this review the Act does not authorize me to consider an individual's driving record, personal circumstances and employment needs. The issues that I must determine in this review are outlined in detail below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the Corporal and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the General Occurrence Hardcopy (the "Synopsis-1"), Corporal Qureshi (the "Corporal") indicated that he was participating in a stationary roadblock when he stopped a vehicle being driven by you. In the Report to Superintendent ("RTS"), the Corporal indicated that you were driving or in care or control of the vehicle at 04:48 hours on October 27, 2013.

There is no evidence before me contrary to that of the Corporal. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "WARN"?

In the RTS, the Corporal indicated that the first ASD test was administered at 04:54 hours and it resulted in a "WARN" reading. The RTS further indicates that a second ASD test was administered at 04:58 hours, and that it also resulted in a "WARN" reading.

In your written submission, you stated that you had no hesitation in telling the officer that you had one beer at 8:00 PM because you knew you were not impaired. You stated that you were told that you blew a "warning" which was not a "DUI" but was enough grounds to impound your vehicle. You stated that you asked the officer "how much the test indicated", but were told by the officer that he did not know.

I acknowledge your submission; however, under the Act there is no requirement that from the ASD tests that you be provided with the numerical value of your BAC. Section 215.41(2) of the Act states that a "WARN" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood. I note that the consistent evidence before me is that the ASDs registered "WARN" results.

There is no evidence before me that indicates the ASDs did not register a "WARN" result. I am satisfied that the ASDs registered a "WARN".

Were you advised of your right to a second analysis?

In the RTS, the Corporal indicated that he informed you of your right to a second test on a different ASD and that the lower ASD test result would prevail. He noted that you requested the second ASD test.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the Corporal?

In the RTS, the Corporal indicated that a second ASD test was completed at 04:58 hours.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the constable.

Was the second analysis performed on a different ASD?

In the RTS, the Corporal indicated that two ASDs were used, as he recorded the serial number for the first ASD as 055115, and the serial number for the second ASD as 052909.

There is no evidence before me contrary to that of the Corporal. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The Corporal recorded in the RTS that both results registered as "WARN" results.

There is no evidence before me that refutes the Corporal's evidence on this point. I am satisfied that the Notice was served on the basis of the "WARN" result, since each result was the same.

Was the ASD reliable?

The Corporal also provided two Certificates of an ASD Calibrator.

For the first ASD, the qualified ASD calibrator certified that on October 3, 2013, he checked the calibration of ASD serial number 055115. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as August 30, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 11, 2013, he checked the calibration of ASD serial number 052909. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 8, 2013, and the service expiry date as August 30, 2014.

In your written submission, you indicated that you asked the Corporal when the last time the ASD was updated because you have known many times the unreliability of these machines. You stated that "anything over a month of no updated is a grounds for inaccurate results" and that "the test was not administered after twenty minutes which by law is protocol".

I recognize that your claim to have knowledge of the accuracy of ASDs when they have not been “updated”; however, the compelling evidence before is that both ASDs used during your tests were conducted on ASDs which were within their calibration period. Further, in the RTS, the Corporal solemnly affirmed that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. I also find it noteworthy to point out that your ASD tests were administered on October 27, 2013, and the Certificates indicate to me that both ASD’s calibration had been checked for accuracy less than a month prior, on October 3, 2013, and October 11, 2013, respectively.

There is no evidence before me that the ASDs used were not functioning correctly at the time of your ASD tests on October 27, 2013.

With regards to your submission that the officer did not wait twenty minutes before administering the test, I note that there is no requirement that the Corporal wait twenty minutes before conducting an ASD purely as a matter of course. Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait fifteen minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. In your case, I note that I have not been provide with any evidence that would lead me to conclude that would have been necessary or required that the Corporal have delayed the ASD tests.

Based on the evidence before me, I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on October 27, 2013.

Adjudicator

October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the officer alleged you were being prohibited from driving because an ASD test

resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

In your written submission (the “Submission”), you indicate that the automatic IRP presumes that you are guilty. Accordingly, you submit that the only evidence that you are guilty is the roadside screening device, which has been proven to not be nearly as reliable. Therefore, you assert that the evidence from the roadside test is not reliable enough for conviction under the *Criminal Code*. The Act provides a person who has been served with an IRP the right to apply for a review within seven days of the prohibition being served. Accordingly, I do not agree with your submission that an IRP presumes you are guilty. Further, IRP legislation draws its authority from the Act which is a provincial statute and the prohibition you received is an administrative sanction, not a charge under the *Criminal Code*.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the solemnly affirmed Report to Superintendent (the “RTS”), the investigating officer, Cst. Hay, indicated that you were driving or in care or control of a motor vehicle at 1344 hours on September 15, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

On September 17, 2013, I received a Change Report Notification (the “Notification”) from Cpl. Mark Booth of the Deas Island Traffic Services, RCMP. The Notification indicated that on lines 6 and 8 in the RTS, Cst. Hay overlooked checking the Alco-Sensor IV DWF boxes for ASD serial numbers 052920 and 066721, respectively. Cpl. Booth submits that I can verify that the ASDs used in the investigation were definitely Alco-Sensor IV DWFs by reviewing the Certificate of a Qualified ASD Calibrator for each of the two devices attached in Cst. Hay’s initial submission. I am satisfied that the ASD identification for both of the ASDs used in the investigation are Alco-Sensor IV DWF. I have proceeded with this review based on that confirmation.

In the RTS, Cst. Hay indicated that the ASDs registered a "FAIL" at 1401 hours and 1409 hours, respectively.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

Evidence in the Narrative Text Hardcopy Occurrence Report - 1 (the "Occurrence Report") indicates that at 1408 hours Cst. Hay read you your right to request a second ASD test and that you understood. Moreover, on line 7 in the RTS, Cst. Hay indicated that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, Cst. Hay indicated that you requested a second ASD test and that at 1409 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Hay recorded the serial numbers of the ASDs used for your tests as 052920 and 066721, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS, Occurrence Report, and Narrative Text Hardcopy Synopsis – 1 (the "Synopsis") indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

I am satisfied that the Notice was served on the basis the "FAIL" result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator (the "Certificates") is as follows:

- ASD serial number 052920 was checked for calibration on September 5, 2013, with a service expiry date of October 19, 2013, and calibration expiry date of October 3, 2013;

- ASD serial number 066721 was checked for calibration on September 5, 2013, with a service expiry date of October 19, 2013, and calibration expiry date of October 3, 2013, and;

In your Submission, you indicate that roadside screening devices have been proven to not be nearly as reliable. However, I have no evidence before me as to what you are comparing this reliability to nor has a source for this claim been provided. The RTS is solemnly affirmed and signed by a Commissioner for taking affidavits, as well as Cst. Hay. Moreover, line 14 in the RTS indicates that any ASD tests referred to in Cst. Hay's report were conducted by a qualified ASD operator and that the ASD units used were functioning correctly. I have no evidence before me that suggests the ASDs were not functioning correctly, particularly when you were providing a sample of breath into each device. Further, the calibration details in the Certificates for each of the two devices has been confirmed by, Cpl. Peter J. Somerville. By signing the Certificates Cpl. Somerville has indicated that to the best of his knowledge the ASDs were found to be within the recommended limits and functioning correctly. Further, the Certificates indicate that the ASDs were calibrated in accordance with the training received by a qualified ASD Calibrator.

Based on the evidence before me, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Synopsis, Cst. Hay submits that after speaking with you, he detected a slight odour of liquor emanating from the vehicle. Further, on line 10 in the RTS, Cst. Hay indicated that he detected an odour of liquor on your breath. In the Occurrence Report, he submits that you were averting your eyes, answering questions with as few words as possible, and had slightly red eyes. When asked the time of your last drink, Cst. Hay submits that you indicated, "around 2 last night."

In your Submission, you indicate that on the night of September 14, 2013, you were drinking and drank into the early morning hours leading into September 15, 2013. You submit that your sister witnessed you smoke on your balcony and go to bed at approximately 5:00 am. You did not wake up until approximately 12:30 pm on September 15, 2013. From the time you woke up, got dressed, and left your house you submit that you did not have any more alcoholic drinks. Accordingly, you indicate that eight hours had passed since you had had your last alcoholic drink. You also admit that due to "morning breath" alcohol may have been on your breath from drinking the night before, however that you were not drunk and felt sober.

You submit that your morning breath must have had traces of alcohol from the drinking that you had done eight hours prior to doing the roadside ASD tests. However, I have no persuasive evidence before me to support this submission. I also note that you advised Cst. Hay you had consumed your last drink at approximately 2:00 am. However, in your Submission, you claim that based on the fact that your sister witnessed you have a smoke and go to bed at approximately 5:00 am that it is evident your last drink was at or before 5:00 am. This evidence conflicts. Yet whether you consumed your last alcoholic drink eight hours or twelve hours prior to failing an ASD test is of no consequence here. Section 215.41(2) of the Act indicates that an ASD "FAIL" result means that the concentration of alcohol in a person's blood is not less than

80 milligrams of alcohol in 100 milligrams of blood and I have already made a finding that the ASDs used in your investigation were reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 26, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 6, 2013, a peace officer served you with a Notice of Driving Prohibition ("Notice"). You applied to the Superintendent of Motor Vehicles for a review of your prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (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*;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

One of the grounds on which you applied for this review is not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

You explained that driving is how you make your living. Having your car and licence is very important to you as you s.22 I understand that it must be difficult to be without your car and driver's licence; however, under the *Act* I am not authorized to consider hardship, personal circumstances, employment or transportation needs

in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Act*?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

The police evidence in the Report to Superintendent (the “Report”) is that on September 6, 2013, at 22:20 hours Officer Flikweert (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the *Act*.

Did the ASD register a “fail”?

The police evidence in the Report is that at 22:24 and at 22:28 hours, the officer used ASD serial numbers 055127 and 100936 respectively to take a breath sample from you. The result of both of your breath tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASDs registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 100936 at 22:28 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail” I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 055127 was checked for calibration on September 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 3, 2013, and a service expiry date of July 3, 2014.
- ASD serial number 100936 was checked for calibration on September 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 3, 2013, and a service expiry date of August 27, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

You told me that you are not sure how you could have blown a “fail” on the ASD test. You had stopped at a friend’s house in Fort St. John and had one drink. You questioned whether your friend mixed the drink extra strong. You said you had not been eating much and admit your driving was not perfect because you were feeling so drowsy.

The officer said that after he activated the police lights and siren, it took several kilometers before you pulled over. In addition, he said that you fumbled when you were asked to step out of the car and were confused on how to exit your vehicle. He said your speech was slurred and there was an odour of alcohol coming from your breath. In addition, you blew a “fail” ASD test result on two different ASDs which I have already found to be functioning correctly. I note that Section 215.41(2) of the *Act* states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. Consequently, I do not find your stated drinking pattern to be very credible.

Based on a consideration of the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 6, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 31, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I had a reasonable excuse for refusing or failing to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from

driving because an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

In your written submission (the “Submission”), you ask me to review

s.22

This is an administrative review on your IRP only. I am by statute not permitted to consider criminal proceedings regarding other matters.

You submit that you are, “very willing to take further drug testing to prove that [you] have not and do not consume drugs of any kind at anytime.” Service of a 90-day “FAIL” Notice indicates that the concentration of alcohol in a person’s blood is not less than 80 mg%. Your prohibition is based on the results of an ASD that measures your BAC. Accordingly, drug testing cannot not alter the terms of this prohibition.

You indicate that you have obtained a new position and will be

s.22

You assert that if you are charged you could be let go, ruining other goals in your life. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment or personal circumstances. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the “RTS”), the investigating officer, Cst. Tiessen, indicates that you were driving or in care or control of a motor vehicle at 0300 hours on August 31, 2013. Further, in the Narrative Text Hardcopy (the “Narrative”), Cst. Tiessen submits that while making patrols he observed you exit your truck, with your keys in hand. He noted a male slumped over in the passenger seat and that your vehicle’s hood was warm to the touch. He submits that he recognized you from previous police interaction.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

Evidence in the RTS indicates that at 0307 hours, Cst. Tiessen made an ASD demand on you. At 0311 hours you provided a breath sample for analysis on ASD serial number 065845. The test result was a "FAIL".

I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Narrative, Cst. Tiessen submits that at 0312 hours he advised you of your right to a second test.

You assert that you were not asked and did not know that you had the right to a second test, with a different screening device.

On line 7, in the RTS, Cst. Tiessen indicates after the first ASD test was completed that he informed you of your right to a second test on a different ASD and that the lower ASD test result would prevail. Additionally, evidence in the Narrative indicates that you were informed this request had to be made prior to the service of the Notice. I acknowledge your submission that you did not know you had the right to request a second ASD test, however, I have no persuasive evidence before me that you were not advised of this right. Further, Cst. Tiessen's Narrative provides the time that you were advised of this right and additional information regarding the request (i.e. that the test had to be requested prior to the service of the Notice). Based on the evidence before me, I am satisfied that you were advised of your right to a second ASD test, on a different ASD, and that you chose to decline this offer.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the Narrative, Cst. Tiessen submits after you were informed of your right to a second test that you declined. Further, on line 7 in the RTS, in response to the question, "Did the driver request a second ASD test?", Cst. Tiessen indicates "NO".

I am satisfied that the second analysis was not provided by the officer because you declined the right to request a second analysis.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that the sole ASD test result was a "FAIL".

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificate of a Qualified ASD Calibrator is as follows:

- ASD serial number 065845 was checked for calibration on August 8, 2013, with a service expiry date of July 3, 2014 and calibration expiry date of September 6, 2013 and;
- Qualified ASD Calibrator, Matthew GD. Anderson, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Tiessen. These signatures confirm that any ASD test referred to in the investigation was conducted by a qualified ASD operator and that the ASD unit used was functioning correctly.

I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the RTS, Cst. Tiessen indicates that at 0306 hours he formed reasonable suspicion that you were driving or in care or control of a motor vehicle with alcohol in your body. Upon approaching your vehicle, he submits that he immediately detected an odour of liquor emanating from your mouth and that you stated that you had a, "couple of drinks an hour ago."

In your Submission, you assert that it was your passenger that made the statement of a, "couple of drinks an hour ago", about himself.

I acknowledge your submission that it was your passenger that advised Cst. Tiessen that he had had a couple of drinks an hour ago. I note that Cst. Tiessen included your admission of consumption in three separate documents, namely the RTS, Report to Superintendent Vehicle Impoundment, and the Narrative. In the Narrative, Cst. Tiessen also submits that your passenger was, "slumped over in the passenger seat", and that after noting an odour of liquor on your breath and making an ASD demand on you, an IRP investigation commenced. I also note that you do not provide evidence as to what you said to Cst. Tiessen with regard to consumption. Moreover, you do not deny that you had an odour of liquor on your breath or that Cst. Tiessen did not inquire about your drinking pattern. I find it more probable that upon detecting an odour of liquor emanating from your breath, Cst. Tiessen inquired as to the time of your last drink and you responded, "a couple of drinks an hour ago." The fact that this admission is noted in three separate documents shows me that Cst. Tiessen was confident that this was your response and not that of your passenger.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80 mg%. I have an ASD "FAIL" result before me and have already determined that you were advised of your right to a second analysis and that the ASD used was reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 31, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. However, to date I have not received any submissions from you to support your review. As such, I have proceeded with the review on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the officer indicated that you were driving or in care or control of a motor vehicle at 03:16 hours on October 27, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASDs registered a “FAIL” at 03:32 hours and 03:34 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that you were advised of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded different serial numbers for the ASDs used to obtain samples of your breath. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, both ASD tests resulted in a "FAIL" reading.

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator, in which the qualified calibrators certified that the ASDs used in your case were found to be within the recommended limits when they checked the calibration. The calibrators also certified that to the best of their knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

During the hearing, you questioned why the investigating officer, Cst. McCormack, left the scene if he had witnessed a drunken man insisting to drive. Accordingly, in your written submission (the “Submission”), you indicate that this shows Cst. McCormack was failing to do his job and showed no concern about what could happen if by chance you had started to drive.

You also submit that you find it odd that after stopping your vehicle, Cst. McCormack asked for identification that he had returned to you 5-10 minutes earlier. You suggest that this shows Cst. McCormack either had a memory problem or was trying to harass you because of your earlier interaction with him. Further, you write that your brother provided a 0.00 reading on a breathalyzer and question why Cst. McCormack did not include this in his report. I acknowledge your submissions, however, your initial interaction with Cst. McCormack, as well as any interaction he may have had with your brother is not related to your IRP.

During the hearing, you questioned why your business has to be affected because your vehicle was towed. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), Cst. McCormack indicated that you were driving or in care or control of a motor vehicle at 0245 hours on September 22, 2013. Further, in the Narrative Text Hardcopy - Occurrence Report (the "Occurrence Report"), Cst. McCormack writes that he attended a disturbance at Myst nightclub (the "Club") that you were involved in. Prior to departing the incident, he observed you trying to get into the driver's seat of a s.22 and that several family members were pulling on you to prevent you from getting into the driver's seat. Cst. McCormack approached you, returned your identification, and left the immediate area.

At approximately 0244 hours, he observed the same s.22 drive past his police vehicle northbound on Taylor Way. Cst. McCormack submits that he, "clearly observed and recognized s.22 to be the driver of the s.22 vehicle as it passed." He initiated a traffic stop at 400 Taylor Way. A second vehicle was also stopped, which contained members of your family who began to exit the vehicle. A police cover unit was requested. When Cst. McCormack approached the s.22 he submits that you had rolled down the window and were smoking a freshly lit cigarette. You were asked to exit the vehicle in order for him to determine the source of the odour of liquor he detected coming from inside the vehicle.

During the hearing, you advised me that following an altercation at the Club you were urged by police to get into your vehicle and go home. Accordingly, you submit that you, your party, and Cst. McCormack were the only people in a parking lot near the Club, along with two family cars including a s.22. You indicated that you were insisting on driving because you were drunk, angry, and being told by Cst. McCormack to leave the parking lot. However, your companions pulled you away from the vehicle and prevented you from getting into the driver's seat. Accordingly, you assert that a female friend, s.22 sat in the driver's seat and that you were thrown and pushed into the passenger seat of the s.22.

You submit that the two vehicles exited the parking lot and were stopped by Cst. McCormack less than two blocks away. Cst. McCormack walked over to the other vehicle first and instructed your brother to exit the vehicle. He then walked over to the s.22 and asked you to get out of the passenger side. He asked you if you had been drinking and you said, "yes", and advised him that he should have already known this because of your earlier interaction with him. You assert that you were given a breathalyzer despite telling him that you were not driving. On this point, you submit that when the tow truck arrived Cst. McCormack asked s.22 the driver, to step out of the vehicle and join your family in the other vehicle.

I acknowledge that Cst. McCormack writes you, "exited the vehicle, a female passenger in the driver's seat remained seated inside." However, throughout the Occurrence Report, Cst. McCormack refers to you as the driver. Aforementioned, he indicates that he pulled your vehicle over because he clearly observed and recognized you to be the driver and had observed you to be intoxicated earlier. He also provides evidence that he witnessed you attempting to get into the driver's seat prior to stopping your vehicle on Taylor Way. Further, in section 9 of the RTS, he indicated that he witnessed you as a driver. Additionally, in the Report to Superintendent Vehicle Impoundment under, "3. Details – All other Impoundments", he writes that you were observed intoxicated in the Club and, "45 min later driver observed driving. Traffic stop conducted."

I also find it odd that s.22 has not provided any evidence to support your claim that she was the driver. Further, I question why Cst. McCormack would ask you to submit to an ASD test if you were a passenger in a vehicle. Based on the evidence before me, I am satisfied that Cst. McCormack's reference to a female passenger in the driver's seat was a clerical error. You did not provide any compelling evidence to support your claim that you were not driving at the time Cst. McCormack stopped your vehicle.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Cst. McCormack indicated that the ASDs registered a "FAIL" at 0252 hours and 0254 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, Cst. McCormack indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, Cst. McCormack indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. McCormack recorded the serial numbers of the ASDs used for your tests as 106335 and 106336, respectively. In the Occurrence Report, he also indicates that after you were advised of your right to a second test that he was immediately joined by Cst. Greiff who provided a second, different ASD device.

In your Submission, you write that both you and your brother observed Cst. McCormack use the same breathalyzer for your second test with just a new white tip that he took out of a wrapper. Further, in the hearing you advised me that following the second "FAIL" result, Cst. McCormack called for back-up. You questioned if Cst. Greiff was on scene prior to the second test being administered, why Cst. McCormack includes evidence in his Occurrence Report that he had to repeatedly ask your family members to return to their vehicle and stop interrupting his investigation. You also indicated that you find it odd that two different officers would each provide an ASD whose serial numbers differ by one digit.

During the hearing, you told me that Cst. Greiff arrived just after the second "FAIL" result, yet in your Submission you indicate that he arrived on scene as your vehicle was being towed. This evidence conflicts. In the Occurrence Report, Cst. McCormack writes that at 0252 hours you were advised of your right to a second test and that Cst. Greiff arrived on scene and provided a second, different ASD. Further, the Occurrence Report includes evidence that Cst. McCormack's interaction with your family occurred well before the first ASD test was administered. While I acknowledge your submission that the ASDs have serial numbers that differ by one digit, I have no compelling evidence before me that these devices could not have come from two different officers. On this point, you advised me that your brother asked Cst. McCormack several times to show him the two different devices to no avail. There is no requirement in the Act for an officer to show a person an ASD after testing has been completed. Further, Cst. McCormack submitted Certificates of a Qualified ASD Calibrator (the "Certificates") for each of the two devices which bear the same ASD serial numbers as indicated in the RTS.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, Cst. McCormack indicated that both ASD test results were a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Cst. McCormack submitted Certificates in which Trevor Stuart James certified that the ASDs were found to be within the recommended limits when he checked their calibration on September 19, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 1, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Diego Solimano. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

Having considered all of the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Having made this finding I do not need to consider any further grounds in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including [the date of this letter/ the date your vehicle was eligible for release]. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

OCTOBER 22, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 4, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr. I proceeded with this review based on that confirmation.

In his written submission, Mr. Carr cited the *Spencer*, *Gillies* and *Costain* decisions and argued that adjudicators must follow the courts' directives in these cases when conducting hearings. I agree with your lawyer in this regard; in conducting this review, I am mindful of and have applied the principles of natural justice and administrative fairness, as required by these cases. I have also carefully and conscientiously weighed the evidence before me in providing a reasonable justification for my decision.

On page three of his submission your lawyer argued that the investigating officer had no evidence that your ability to drive was affected by alcohol. Mr. Carr referred to the *Wilson* case as authority for his argument that the prohibition should be revoked on this basis. I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

On page four of his submission, Mr. Carr argued that the ASD demand was invalid. Despite his submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Colgan indicated that he witnessed you driving or in care or control of the vehicle at 0139 hours, on October 4, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, Constable Colgan said you provided breath samples into two ASDs and that the devices both registered “FAIL”, as a result of the analyses.

On page five of his submission your lawyer said you were not shown the results of the ASD tests, contrary to the officer’s evidence in this regard in the RTS. I recognize that Constable Colgan checked boxes in parts six and eight of the RTS indicating that he showed you the results of the test. However, a peace officer is not required by the Act to show a driver the results of an ASD test, so this is not a matter on which I can revoke a prohibition.

As there is nothing before me to the contrary, I am satisfied that the ASDs registered “FAIL” at 0140 and 0143 hours, respectively, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Occurrence Report-1 (the “OR”), Constable Colgan indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary.

Mr. Carr focused on Constable Colgan’s evidence, where he said he explained your right to a second test from his memory. Your lawyer argued that the officer’s recitation of your right from memory cannot satisfy the requirements of relaying the necessary information set out in the Act; however, Mr. Carr did not explain why that is the case or provide any authority supporting his assertion. Accordingly, I reject this argument. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the OR and in the Certificates of a Qualified ASD Calibrator (the “Certificates”), the officer provided evidence that two distinct ASDs were used for two analyses. In contrast, your lawyer said that you told him that a second ASD was not used to administer the second analysis. While I accept your lawyer’s submissions as evidence before me, I must give more weight to the officer’s evidence because it is sworn. Further, the officer provided multiple pieces of varied evidence to support this submission. As a result, I am satisfied on a balance of probabilities that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

On page five of his submission, Mr. Carr quoted a press release from the Ministry of Justice dated June 14, 2012. The portion of the press release he cited states that the grounds for review include the reliability of the ASD results, whether the police advised the driver of his or her right to a second test, whether the police conducted a second breath test on a second ASD, and whether the IRP was issued on the basis of the lowest reading. Mr. Carr stated that the grounds noted in the press release reflect the expanded requirements of police officers at roadside. He argued that based on this, your right to have the lower of the first and second test results govern was violated. First, a peace officer's duties in an IRP investigation come from the Act, not a press release. Second, Mr. Carr's submissions in this regard are inconsistent with the undisputed evidence before me.

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". There is no persuasive evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

Constable Colgan submitted two Certificates stating that Trevor Stuart James certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF (the "Calibrator"). The Calibrator stated that on the 19th day of September, 2013, he checked the calibration of ASDs with serial numbers 106336 and 106335 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG204502, Expiry: 2014-02-14. The ASDs were found to be within the recommended limits. They both had a calibration expiry date of October 17, 2013 and a service expiry date of February 26, 2014. I note that the ASD serial numbers on the Certificates match the serial numbers of the ASD referenced on the RTS.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

On page two of his submission, Mr. Carr noted that according to the officer's evidence, you initially said you had two drinks an hour earlier, and then told the officer that you had consumed one drink 30 minutes prior. In contrast, your lawyer said you told him you had not made these statements. Mr. Carr said you advised him that you told the officer you consumed one drink within five minutes of being stopped. He also asserted that Constable Colgan could not objectively rely on the ASD result without considering the possibility of contamination by mouth alcohol. He argued that the officer should have waited 15 to 20 minutes to avoid this possibility.

Your lawyer argued that the officer said he noted a "strong" odour of alcohol several times in his evidence; Mr. Carr suggested that this is consistent with your evidence of recent consumption. I agree that the officer said he noted a strong odour of liquor emanating from the interior of the vehicle and from your breath and person, once you were removed from the vehicle. However, I

must make a credibility determination to resolve the conflicting evidence of what you told the officer regarding the time of your last drink. First, the officer hand-wrote detailed notes in the limited space on the sworn RTS about the time of your last drink. He also typed the same information in his other documents, which formed part of the sworn RTS. In contrast, the evidence your lawyer provided on your behalf consisted of one sentence of unsworn hearsay indicating that you had your last drink five minutes prior to encountering the roadblock. I find the officer's sworn evidence of what you told him to be more reliable than your lawyer's unsworn hearsay evidence in this regard. I am satisfied on a balance of probabilities that mouth alcohol did not affect the ASD results.

There is no persuasive evidence before me to that causes me to doubt the "FAIL" readings on the ASDs that I found to be reliable. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 4, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 11, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on all grounds, many of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your written statement, you submitted that the officer's evidence was not sufficient to give him the reasonable grounds to believe your ability to drive was affected by alcohol and you referenced *Wilson v. British Columbia (Superintendent of Motor Vehicles)* in support of your case. You also directed me to the case of *British Columbia (Worker's Compensation Board) v. Figliola*, which you said stands for the proposition that administrative tribunals are bound by the decisions of higher courts on points of law relating to matters that they are to adjudicate; however, you did not provide it for my consideration.

I have read and considered *Wilson* and I acknowledge your submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 22:32 hours on October 11, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 22:33 hours and 22:37 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report and the Narrative Text Hardcopy (the "Narrative"), the officer indicated that you were advised of your right to a second analysis and that you request one. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis and you requested one.

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

In the Report, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report and the Narrative, the officer indicated that both ASD tests registered a "FAIL" result. I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 11, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Issues

Mr. Daust has questioned the officer’s formation of a demand; it appears from the evidence that the officer did not detect an odour directly from you until after your removal from the car. In Mr.

Daust's estimation, the reasonable inference is that the officer did not smell liquor from you until after he formed a suspicion. As well, Mr. Daust has drawn attention to the evidence provided by the officer that the "ASD demand was read from PC COLGAN's memory."

Despite this submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Colgan – indicated that you were driving or in care or control of a vehicle at 0409 hours on October 12, 2013. Cst. Colgan provides in the occurrence report that he observed your vehicle travelling at a high rate of speed, then proceeding through a red light. Upon his arrival, Cst. Colgan identified you as the driver of the vehicle, using your BC driver's licence for positive identification.

In the submissions prepared by your lawyer Mr. Daust, he makes no submissions specific to this issue.

I am therefore satisfied that you were driving at the time and date placed in to evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0410 and 0412 hours.

Mr. DAUST provided no evidence on your behalf on this issue; I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, Cst. Colgan indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the occurrence report, he notes this occurred at 0410 hours, and he explained this right from memory. He provides that you stated that you understood, and stated you wanted to provide a second sample.

There is no evidence to the contrary. Based on sworn evidence, I am satisfied that the officer advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it provided on a different ASD?

The officer's evidence in the Report is that he provided the second analysis on your request. In the occurrence report, after describing his reading of your right to a second analysis, he proceeded with this test at 0412. He used ASD serial number 106336, a different ASD from that of the initial sample.

In his submissions, Mr. Daust does not question the existence, or the result, of a second analysis. I therefore find this analysis occurring at 0412 to be the second analysis provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Cst. Colgan recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASDs serial numbers 106334 and 106336 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

For both ASDs, the qualified ASD Calibrator, T.S. James, certified that on September 19, 2013, he checked the calibration. He found the ASDs to be within the recommended limits. He recorded the ASD calibration expiry dates as October 17, 2013 and the service expiry dates as February 26, 2014.

Mr. Daust made no submissions on this issue on your behalf. I am therefore satisfied of the reliability of each ASD.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

CC. Tom Daust
fax: 604-601-2146

OCTOBER 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 3, 2013, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 80 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr, prior to the review date. I have proceeded with this review based on that confirmation. Your lawyer submitted written information on August 16, 2013. The date for a decision in this matter was extended to October 16, 2013. In reaching my decision in this written review I have considered all of the relevant information available to me.

In accordance with the BC Supreme Court’s decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the “Superintendent’s Report on Approved Screening Devices” which may have been disclosed to you is not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Your lawyer cited a number of Supreme Court decisions, submitting that adjudicators must follow the courts' directives in these cases when conducting hearings. I agree. In conducting this review, I am mindful of and have applied the principles of natural justice and administrative fairness, as required by these cases. Your lawyer also submitted that the legal burden of proof rests with the officer. I agree, and I have conducted this review accordingly.

You checked off all of the grounds on the Application for Review Form. Some of those grounds do not apply in your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL"?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer's evidence is that on August 3, 2013 at 0135 hours a vehicle was stopped at a roadblock. You were its driver. You identified yourself with your driver's licence.

There is no evidence to the contrary.

I am satisfied that on August 3, 2013 at 0135 hours you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "FAIL"?

The officer's evidence is that at 0140 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL."

There is no evidence to the contrary.

I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to provide a second sample of your

breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

Your lawyer makes a submission based on this evidence. He notes that in the narrative the officer states that after you were shown the “FAIL” reading from the analysis of your first breath sample he explained to you that you could request a second test to be completed if you wished and that the lowest reading of the two tests would prevail.

Your lawyer submits that the officer failed to comply with the Act. His explanation of the right to a second analysis failed to relay the information the Act requires him to provide. The officer did not mention that the second test would be performed on a second ASD. If the officer had explained that the second test would be performed on a second ASD you would have forthwith requested the second test because you believed the result of the first test was inaccurate and unreliable. As a result of the officer failing to properly advise you of your right to a second sample, your rights were violated and your driving prohibition should be revoked.

Sub-section 215.42(1) of the Act states that if an analysis of the breath of a person by means of an approved screening device under section 215.41 (3.1) registers a warn or a fail,

- (a) the person has a right to forthwith request and be provided with a second analysis, and
- (b) a peace officer must inform the person of that right before the peace officer serves on the person a notice of driving prohibition.

The informational component of this section obligates an officer to advise you of the right to forthwith request and be provided with a second analysis.

Sub-sections 215.42 (2) and (3) set out mandatory directions which must be complied with for a driving prohibition to be properly issued as follows:

- (2) A second analysis performed under this section must be performed with a different approved screening device than was used in the first analysis.
- (3) If a person provides a sample of breath for a second analysis in accordance with this section, the lower of the first and second analysis results governs for the purposes of section 215.41 (3.1).

For a driving prohibition to be properly issued, an officer who obtains a second breath sample must comply with sub-sections 215.42(2) and (3). The Act does not, however, require an officer to advise a driver of these sub-sections when providing the mandatory information regarding the right to provide a second breath sample under sub-section (1). Your lawyer's submission does not correctly state the Act's requirements. The officer clearly explained to you that you could request a second test to be completed. The officer was not required to advise you that the lowest reading of the two tests would prevail but did so. You suffered no prejudice by being given this information which was in accordance with the Act.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

A second analysis was not provided because you did not request one.

Was the second analysis performed on a different ASD?

A second analysis was not performed because you did not request one.

Was the Notice served on the basis of the lower analysis result?

The evidence of the officer is that you provided only one sample of your breath for analysis into an ASD which recorded a "FAIL." The Notice was served on the basis of this single result.

Your lawyer submits that your right to have the notice served on the basis of the lower analysis result was violated because the ASD result on which the Notice was served was not valid because of the presence of residual mouth alcohol. There is no result on which the Notice could have been based and, accordingly, your driving prohibition should be revoked.

I am satisfied that the Notice was served on the basis of the single and lower analysis result. Whether this is a valid result, or whether the result is contaminated by residual mouth alcohol, will be addressed later in this decision.

I am satisfied that the Notice was served on the basis of the single and lower analysis result.

Was the ASD reliable?

The analysis of your breath was performed on an ASD with the serial number 028191. Sergeant Yelovatz provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 12, 2013. This ASD had a Calibration Expiry Date of August 9, 2013 and a Service Expiry Date of September 11, 2013.

This Certificate confirms that this ASD was within the recommended limits and was functioning correctly. In the Report to the Superintendent, Constable swore that your ASD test was performed by a qualified ASD Operator and that the ASD was functioning correctly

There is no evidence to the contrary.

I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

The officer's evidence is that when he stopped you he detected a strong odour of liquor around you. You appeared very sleepy, your eyes were half shut, and you had the outward appearance of an intoxicated person. You confirmed that you had consumed alcohol that evening and when asked how long it had been since your last drink you replied "About an hour and a half ago." When you were asked how much you had to drink, you responded with "A lot."

Your lawyer states that you advised him that at no time did you state that the time of your last

drink was “about an hour and a half ago.” or that you had ‘A lot’ to drink. You advised him that Immediately upon being stopped you stated to the officer that you had consumed one drink which you had finished within the last five minutes.

Your counsel submits that your ASD test was unreliable because it was contaminated by mouth alcohol due to your recent consumption of alcohol and the officer’s failure to provide a 15 minute elimination period for this to dissipate. The officer did not consider the possibility that the sample was contaminated by mouth alcohol which would falsely elevate the BAC detected by an ASD and a false “FAIL” result would be obtained.

I consider it unlikely that, without being prompted by a question from the officer regarding alcohol consumption, you would immediately upon being stopped advise the officer that you had consumed one drink which you had finished within the last five minutes. It makes no sense that you would act this way. I am also satisfied that you had consumed alcohol and that your ability to observe, record into memory, and accurately recall your conversation with the officer was adversely impacted by this consumption. I cannot rely on your evidence and reject it in favor of the officer’s evidence. By asking you the time of your last drink the officer turned his mind to the issue of whether you had recently consumed alcohol to determine if an elimination period was required to ensure the ASD results were not affected by residual mouth alcohol. I accept the officer’s evidence that you advised him that your last drink was about an hour and a half prior to being stopped and that, in making this statement, you were telling the truth. The officer was not required to provide an elimination period because there was no risk that the ASD result would be contaminated by residual mouth alcohol. I am satisfied that the single “FAIL” result is reliable.

Sub-section 215.41(2) of the Act states that ““fail” means 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.” The Act provides certain consequences for a person who provides a breath sample resulting in a “FAIL” indication on an ASD. The Act refers to “FAIL” results on ASDs and not BAC levels. In your case, I have concluded that both breath samples you provided resulted in “FAIL” results on each of two ASDs. Sub-paragraph 215.5(4)(b)(iii) of the Act states that a driving prohibition must be revoked if I am satisfied that the ASD did not register the “FAIL” as a result of your BAC being not less than 80 mg%. There is no evidence in this review on which I could conclude that your BAC was less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(1) of the Act. I note that as you have already served 16 days of the prohibition, you need only serve the remaining 74 days of the prohibition which commences October 17, 2013. The prohibition ends December 29, 2013. When your prohibition ends you may resume driving once you have obtained a driver’s licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and Ignition Interlock Program. This driving

prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Jeremy Carr (by fax)
(250) 388-7327

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records at this office indicate that disclosure was provided to your lawyer, Jeremy Carr. I have proceeded with this review based on that confirmation.

Mr. Carr argued that the indicia noted were insufficient to warrant an ASD demand. He submitted that the ASD demand was invalid, as were the subsequent tests. Mr. Carr also argued that the officer failed to ascertain the time of your last within the statutory requirements to support an ASD demand under the *Criminal Code*. He referenced, but did not provide me with the following cases in support of his submission:

- *R. v. Geraghty*
- *R. v. Ference*
- *R. v. Hemery*
- *R. v. Smith*

The grounds upon which I may review your driving prohibition are restricted to those set out in the Act. Despite the submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Carr noted that Justice McEwan held in *Spencer v. British Columbia (Superintendent of Motor Vehicles)* that the police are not deemed to have a credibility advantage and that the case must be determined impartially on the evidence. He further noted that as in *Gillies v. British Columbia (Superintendent of Motor Vehicles)* “credibility is a finding of fact which must be reviewed on a standard of reasonableness”.

Although Mr. Carr did not provide me with either decision, I acknowledge these points and I have proceeded with the review with these in mind.

Mr. Carr submitted that this is a quasi-criminal administrative matter and that the burden must be strictly enforced against the Crown. He stated that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be “clerical” in nature, can only be resolved in favour of you. He also stated that you have no burden of disproof in this hearing and that there is no evidence before me which satisfies the burden of proof.

I acknowledge Mr. Carr’s submission; however, I am mindful that this is an administrative process and as such, issues are weighed on a balance of probabilities, not beyond a reasonable doubt as they are in the criminal courts. Moreover, I will weigh any errors appropriately.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?

- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was the ASD reliable?

Having considered the Certificate of a Qualified ASD Calibrator, I find that the ASD used was unreliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

The corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

Adjudicator

cc: Jeremy Carr
250-388-7327

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 27, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Justin Thind. I have proceeded with this review based on that confirmation.

Your lawyer had one issue of primary concern and that was whether there was an accurate or probable account of the incident provided by Constable McRae to create the evidentiary basis for an ADP based on the documents disclosed. The issue relates to the timeline according to the Report to Superintendent (the "Report") filed by Constable McRae. Mr. Thind points out that the Report indicates that you were established as a driver at 00:16 hours, suspicion is formed at 00:24 hours and the ASD demand is made at 00:26 hours.

I acknowledge that although the Report is sworn by Constable McRae, Constable Feenan was the first officer to engage with you at roadside. Constable Feenan suspected that you may be impaired by alcohol but, because he is not a certified ASD operator, he requested another police unit to attend with an ASD. Constable McRae attended the scene at 00:22 hours and formed his own suspicion at 00:24 hours and made an ASD demand at 00:26 hours. In my view, Constable McRae formed his own suspicion that you may be impaired by alcohol and his evidence provides his account of the incident.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Narrative Text Hardcopy (the “Narrative”) is that on October 27, 2013, at 00:16 hours, Officer Feenan completed a traffic stop of your vehicle for speeding. Officer Feenan identified you as the driver through your BC driver’s licence. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 00:28 and at 00:30 hours, Officer McRae (the “officer”) used ASD serial number 097938 and ASD serial number 059578 to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that the ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence to the contrary before me.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 059578 at 00:30 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were "fail"; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates that ASD serial number 097938 and ASD serial number 059578 were checked for calibration and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Justin Thind
by fax 604 543-3889

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Harpreet Nirwan. I have proceeded with this review based on that confirmation.

For your benefit in this review I have considered all of the grounds of review which apply to your situation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

There is one issue which is determinative of this review.

- Did you fail or refuse to comply with an ASD demand?

Having reviewed the evidence before me, I do not have sufficient evidence to show that you failed or refused to comply with the ASD demand.

I am satisfied that you did not fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked.

Adjudicator s.15

cc: Harpreet S. Nirwan 604 594 8280

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on three grounds, two of which are not applicable to your situation because of the reason you were prohibited. For your benefit, I have considered all the grounds relevant to your situation.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your written submission, you said your s.22 driver’s licence is very important to you as you are s.22 You said you have a clean driving record. You also indicated that you s.22

I understand and appreciate that receiving a 90-day driving prohibition can have serious consequences in a person’s life. However, under the Act I cannot consider personal

circumstances or a person's driving history in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the officer stated that he witnessed you driving or in care or control of a motor vehicle on September 22, 2013, at 22:59 hours.

There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Narrative Text Hardcopy (the "Narrative"), the officer stated that you stumbled as you exited your vehicle, you told him you were coming from an Indo Canadian party, and he observed you to be rocking back and forth while standing. The officer said you admitted to consuming alcohol and he detected an odour of liquor emanating from your breath. At 23:02 hours, the officer said he formed a reasonable suspicion that you had alcohol in your body while operating a motor vehicle. The officer read the ASD demand to you at 23:04 hours.

The reasonable suspicion requirement for a roadside breath demand is of a relatively low standard. Essentially, it is suspicion of alcohol being in the body of the driver, and no more. Based on the officer's evidence that you admitted to consuming alcohol, you had an odour of liquor on your breath, and that you were rocking back and forth while standing, I am satisfied that he made a valid demand at 23:04 hours.

I now turn to the issue of whether or not you failed or refused to comply with the demand. In the Narrative, the officer provided details of your attempts to provide a valid breath sample. He indicated that prior to your first attempt and after your first and second attempts, he explained the procedure and technique for providing a valid sample of breath into an ASD as well as showing you how to provide a breath sample. The officer indicated that each time he did so, you advised him that you understood.

The officer said he administered the first test at 23:05 hours. He said you began blowing short breaths without placing your mouth on the mouth piece of the ASD and you began laughing. The officer said you did not provide a valid sample, the ASD result was "NoGo" and you were

shown the result. On your second attempt, the officer said he observed you “jerking [your] head back and forth while puckering [your] lips and making a motor boat sounds in short but consecutive bursts in an obvious attempt to avoid providing an adequate sample of breath”. On your third attempt, you began to laugh, you closed your teeth together, puckered your lips, and blew in short rapid spurts before placing your mouth on the mouth piece of the ASD. The officer said you then placed your tongue in the center hole of the mouth piece and you blew short, rapid breaths and pulled your mouth away from the mouth piece of the ASD. The ASD displayed “NoGo” and you were shown the result.

The officer said that at 23:15 hours, he explained the results of failing to provide an adequate breath sample. He said that throughout the processing of trying to get you to provide a valid breath sample, “[you] appeared to think the situation was funny”. He said you invited other officers to sit in the rear of the police car and you also invited them come back in a few days to your residence. Additionally, the officer noted that when he provided a sample of his own breath into the ASD to confirm the machine was in working order, the result was “000”.

In your written submission, you said you did not refuse the breath sample test. You said you cooperated with police at all times. You said there is no evidence of alcohol levels in your body as no levels have been indicated. You also said that there is no time of refusal; however, in the Narrative, the officer noted a time of 23:26 as the time he “read the Refusal/Fail to Provide Adequate Sample to s.22 The officer said you understood and replied, “yes you want me to surrender my drivers license and don’t drive”. I infer this to be the time of refusal.

I acknowledge your submissions; however, I am not persuaded that you were “cooperative with police at all times”. While you may never have said that you refused to provide a breath sample, your undisputed actions as described by the officer are not indicative of someone who made a sincere attempt to provide a breath sample. There is no evidence before me that you provided a valid breath sample. I find that you refused by your actions.

As for your submission with respect to alcohol levels in your body, by statute, I am not required to make a finding on such an issue.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You did not provide evidence that would constitute a reasonable excuse. On the basis, I am satisfied that you did not have had a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

s.22

IRP Review Decision

Page 4

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 11, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Claire E. Hatcher, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation. I acknowledge receipt of Ms. Hatcher's October 23, 2013, letter together with all attachments.

Your lawyer has referred me to the case of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311. In that case, the judge held that the police are not deemed to have a credibility advantage and that each case must be determined impartially on the evidence. I wish to point out that I have read the *Spencer* case and am mindful of the principles set out therein.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on October 11, 2013, at 19:44 hours, Officer Levangie (the “officer”) established you as a driver or having care or control of a vehicle.

In the Narrative Text Hardcopy (the “Narrative”), the officer indicates that your truck’s taillights were not on and as you were driving you sped up and slowed down at unusual intervals. You told me about the taillights on your truck being unreliable and that sometimes they do not come on. You said that this has nothing to do with whether or not you turn on the lights. You have also explained that your driving behavior was due to you trying to find your cell phone on the seat beside you in the truck. I acknowledge what you have told me regarding your taillights not being on and your driving behavior. However, although the officer’s reason for pulling you over is not a relevant issue in this review hearing, he states that the emergency lights were activated so that he could “speak with the driver and assess their sobriety due to the unusual driving pattern.”

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 19:47 hours and at 20:00 hours, the officer used ASD serial numbers 097940 and 097938 respectively to take breath samples from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The officer’s evidence at section 7 of the Report is that after your first breath test, he explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 097938 at 20:00 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both of your ASD test results were a "fail", I am satisfied that the Notice was served on the basis of the lowest available result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 097940 was checked for calibration on September 18, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 16, 2013, and a service expiry date of March 5, 2014.
- ASD serial number 097938 was checked for calibration on September 18, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 16, 2013, and a service expiry date of April 23, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You lawyer submits that your driving prohibition should be revoked because the results of the ASD tests were falsely elevated due to the existence of mouth alcohol.

You said that between 4:30 and 6:00 p.m. on October 11th you consumed two cans of Okanagan Springs Pale Ale while you were at s.22 home. At 6:15 p.m., you received a call on your cell phone from s.22 who owns a farm seven to ten minutes away from s.22 residence. You said you drove directly to s.22 farm where you visited for about one hour before you knew you had to get home for dinner. You live only about two minutes away by car. While at s.22 residence, you said you consumed two bottles of India Pale Ale. At around 7:40 p.m., you finished off the last few sips of your second beer and started to drive home to have supper with your wife. You said you were not impaired by alcohol and your ability to drive was unaffected.

About twenty to thirty seconds after you turned on to 64th Street from s.22 driveway, your cell phone started ringing. You were driving but trying to find a place to pull over so that you could see who was calling you. You thought maybe it was your wife wanting to know where you were or needing something at the Safeway. At this point, although your cell phone had stopped ringing you needed to see whose call you had missed. You travelled through an intersection after stopping at a stop sign and then pulled over to the side. This is when you

noticed the police were behind you. You said the time it took you to travel from the end of s.22 driveway to the point you were pulled over was approximately one minute, and certainly less than two minutes.

s.22 statement indicates that you were at his residence to complete some work on October 11th. He said you arrived around 4:30 p.m. and were in a completely sober state. He offered you two beers to have as you finished the job.

s.22 statement indicates that he was with you immediately before you were pulled over by the police on October 11th. He said he phoned you about coming to pick up some fish roe and that you arrived at his place less than ten minutes later, arriving at his farm around 6:45 p.m. He said you stayed to visit for approximately one hour and had two bottles of IPA.

Your lawyer has provided me with an expert opinion from W.K. Jeffery dated October 19, 2013. It is Mr. Jeffery's opinion that based on your stated drinking pattern and assuming it is accurate, your BAC would have been between 10-42 mg% if all of the alcohol was absorbed into your system at the time. If you consumed the last part of your beer immediately prior to leaving the s.22 residence at approximately 7:44 p.m. (four minutes before the police stop) there would still be mouth alcohol present which may account for the ASD Fail at 7:47 p.m.

The officer's evidence is that at 19:45 hours, he suspected that you had consumed liquor and were in care and control of a motor vehicle. The officer said when he engaged with you, your breath smelled of liquor. When he asked you how much liquor you had to drink, you responded "1 beer with the farmers". The officer asked if you were sure and you said you were but you also had one beer before that as well. The officer asked how long it had been since you last consumed liquor and you replied "20 minutes". The first ASD test was conducted at 19:47 hours and resulted in a "fail". Your right to request a second test was explained to you and you indicated that you wanted the second test. There was a thirteen minute delay in administering the second ASD test because a second ASD had to be brought to the scene. Your second ASD test was conducted at 20:00 hours and resulted in a "fail".

You said in your Affidavit that you "did downplay" the amount of beer you consumed. You told the officer that you had two beers in total and your Affidavit evidence is that you had four beers in total. I note that you also provided misleading information to the officer regarding the time of your last drink. I question why you believe saying "twenty minutes ago" would sound better than "just finished" your last beer. In addition, I find it noteworthy that although s.22 has said what time you arrived and what time you left, he has not confirmed that you finished the last few sips of your second beer and then started your drive home. Ultimately, I do question the reliability of your evidence and I do not find your stated drinking pattern very credible.

Based on the information that was available to the officer at the time, he was reasonable in relying on the results of the first ASD test to conclude as he did and to advise you of your right to a second test. I note that the second ASD test was taken at 8:00 p.m., fifteen minutes after the officer formed his reasonable suspicion.

I have considered the report provided by Mr. Jeffery. I note that Mr. Jeffery bases his opinion on your stated drinking pattern and I have already found it lacks credibility. In my opinion, I cannot reconcile Mr. Jeffery's opinion regarding your BAC with the two "fail" ASD test results on two ASDs that I have already found to be functioning reliably at the time.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 11, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Claire E. Hatcher
by fax 604-687-3022

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 25, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

One of the grounds that you applied on is not relevant to your circumstance. I will consider all the applicable grounds in this review.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation. Your employer, s.22 was present during the hearing.

In the hearing you stated that you are employed as a s.22 and require your driver’s licence to work. Further, you asked for consideration to be given to a restricted licence that would allow you to drive to and from work.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, or an individual’s driving record in this review. The

IRP Review Decision
Page 2

scope of the review is limited to the grounds as defined in the Act. In addition, subject to section 215.5(3), the Act does not grant me any discretion to alter the terms of a driving prohibition.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent for the IRP (the "Report"), the officer indicated that you were driving or in care or control at 0215 hours on September 25, 2013. The officer submitted an Occurrence Report (the "Narrative"), which forms part of the Report and is also sworn. In it, he noted that he responded to a 911 call from a witness reporting that two unknown males were fighting and one of the males was attempting to hit the other one with a large stick or club. The witness observed one of the males get into a s.22 written on the side and drive off. The officer reported that he conducted a traffic stop and you were identified as the driver.

At the outset of the oral hearing you stated that you were involved in an altercation with your roommate, s.22. You stated that it escalated to a fist fight and causing damage to the company truck you were driving. You stated that you did not want to fight anymore and you decided to leave. You stated that your plan was to take the truck to your bosses' residence. You stated that you were driving for two reasons: 1) for your own safety and 2) to protect the truck from further damage.

At the end of the hearing you played two threatening voice mail messages that you received from s.22 that night.

While I acknowledge the situation with regard to the decision you made to leave the scene, the critical issue here is I must determine whether or not you were driving your vehicle. I find that you were. It is not necessary for me to determine, among other things, whether or not there you were in danger.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report, the officer indicated that he formed his suspicion at 0217 hours and read the ASD demand at 0218 hours. He checked the box to indicate that you had an odour of liquor on your breath, and he indicated that your response to being asked the time of your last drink was "a while ago".

In the Narrative, the officer stated that he formed the suspicion that you were impaired by alcohol given the following:

- The sharp left hand turn where the vehicle came near the left curb.
- You pulling into a dead-end complex in what appeared to be an attempt to avoid police.
- The odour of liquor on your breath.
- Slurred speech.
- Watery, drooped eyes.
- last drink, and this time you stated that “it was about 2 hours ago”.

s.22 stated that given the area you would have had to make a right turn rather than a left turn as the officer suggested. He stated that

s.22 He stated that given the nature of why you were stopped one would expect you to appear the way up did. Regardless, you admitted to consuming alcohol, and you did not deny alcohol consumption in your oral hearing.

It is also noteworthy that when the officer requested your driver's licence you produced a student card and a Sin card.

Based on the evidence before me, I am satisfied that the officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Report. The officer checked the box to indicate that you refused. He recorded the time of the refusal as 0218 hours. In the Narrative, the officer stated that after he read the demand you remained silent, he asked you several times if you understood. Your response was “no, I'm not going to blow into that thing” and started to walk away. You were advised of the consequences. And again you responded that you were not going to blow into the device as you knew you had been drinking. When the officer placed the ASD in front of your face you responded by lashing your hand at the officer to swat the device away. You then responded by saying that you would not blow into the device and told the officer to “fuck off.”

Based on the evidence I find that you were intentionally avoiding providing a suitable sample.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You stated that you refused because you were upset, bleeding from the mouth, and the officer did not give you the opportunity to tell him what happened. You stated that when you arrived at the police station you were not given an opportunity to provide a breath sample.

As I stated in the hearing the officer was under no obligation to allow you to provide a breath sample at the station.

I acknowledge that you were bleeding from the mouth; however, I do not find that the evidence supports that your injury attributed to you not complying with the officer's demand.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 25, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

November 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for a review on the grounds that you did not refuse or fail to comply with an ASD demand. This ground does not apply to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which do apply to your situation.

At the beginning of the oral hearing, I confirmed with you, that you had all of the disclosure documents. I will proceed with the review based on the evidence before me.

You asked that I consider your past driving record; and, the fact that you do not have a criminal record. However, under the Act I am not permitted to consider a driving record or someone's criminal history. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0200 hours on October 19, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer indicates that the RCMP received a complaint at 0145 hours of two intoxicated females that left a party and drove away in a
s.22 The officer reported that while en route they were informed that the vehicle had returned.

The officer reported that four witnesses provided statements all stating that you were in care or control of the s.22 and were observed driving away.

Witness # 1, s.22 stated you were not known to her. She had not been drinking. She stated that you took off, driving the vehicle with another girl s.22 hanging out of the vehicle. She stated that she saw you drive toward the highway, speeding "like crazy".
s.22 was caught in the door and dragged for a short distance. She stated that you came back and went after s.22

Witness, # 2, s.22 stated that people were using drugs. A girl tried to drive; he jumped in the truck and turned it off. The girl pushed and hit him in the face. The girl was driving the s.22 the girl drove south, toward town. He stated that he lost sight of the girl driving for about two minutes. The officer reported that s.22 appeared intoxicated.

Witness # 3, s.22 stated that she tried to stop you from driving. She stated that she talked you through it until the police arrived. The truck was never actually driven anywhere; the vehicle was on, because she was cold. She stated that the keys were in your purse; however, the vehicle has a push start.

Witness # 4, s.22 stated that the girl in the s.22 had tried to drive away. She stated that she heard you s.22 She stated the girl drove away. She stated

that she did not know you. She stated that she did not lose sight of you and then stated that she lost sight of you briefly. She stated that after you took off driving she walked back. She stated the girl was drinking and driving and has kids.

In the hearing you stated that you arrived at an outside party between 12:00-12:30 a.m. You stated that you made arrangements for s.22 to drive you home. You stated that there was an altercation; with a couple of girls from the party in which you had sustained various injuries. You stated that s.22 left so you phoned your common-in law husband, s.22 for a ride. You stated that he agreed to come and get you. You stated that you gave s.22 a set of keys. You stated that the police at no time observed you driving or in care or control. You deny that you drove the truck; and you asked that I consider the likelihood of you driving away and then returning to such a volatile environment. You asked that I consider that the officer never took a statement from you and that the witnesses had a hidden agenda. Last, you asked that I consider the inconsistencies in the witness's statements.

When considering this issue I acknowledge that the police did not observe you driving nor in care or control. When considering the witness statements I find that you are referenced as either the "girl", or s.22

I have placed a significant amount of weight on s.22 statement for the following reasons:

- The officer stated that s.22 appeared sober.
- You are not known to her.
- s.22 statement of you "speeding like crazy" cannot be misconstrued for "trying to drive", "starting your vehicle" or just simply "sitting in the vehicle for warmth".

I also placed less weight on s.22 statement as the officer stated he appeared intoxicated. That said, I have considered that:

- You were not known to him.
- He lost sight of the girl driving for about two minutes, and then you came back (this suggests to me that you were in motion).

I have placed less weight on s.22 statement for the following reasons:

- s.22 statements suggest that you are known to her.
- She was your passenger; and, therefore had a different involvement than the others.
- The officer stated that s.22 pupils did not look normal.

I have placed less weight on s.22 statement as the offer's evidence is unclear on two points:

She was a little drunk (it is unclear to me whether the officer was referring to you or s.22

- After she took off she walked back (again, it is unclear to me who walked back.)

You have asked me to apply the standard of "beyond a reasonable doubt". However, beyond a reasonable doubt is the highest standard of proof that must be met in a criminal sanction in the courts. This is an administrative process where the standard of proof is weighed on a balance of probabilities.

While I acknowledge that there are inconsistencies in the witness statements the majority of the evidence before me suggests that you were driving at the reported date and time. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided two ASD "FAIL" results.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on October 4, 2013, he checked the calibration of ASD serial number 053334. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013.

For the second ASD, the qualified ASD calibrator certified that on October 4, 2013, he checked the calibration of ASD serial number 100964. He found the ASD to be within the recommended

limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as November 20, 2013.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

November 14, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

you were a driver within the meaning of section 215.41(1);
the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
you were advised of your right to request a second analysis;
if requested, it was provided and performed with a different ASD;
the Notice was served on the basis of the lower analysis result; and,
the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

Were you a driver within the meaning of section 215.41(1) of the Act?
Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
Were you advised of your right to a second analysis?
Was the second analysis provided by the officer and performed using a different ASD?
Was the Notice served on the basis of the lower analysis result?
Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Was the ASD reliable?

After considering the evidence before me, I am not satisfied the ASD used for your first breath test was reliable.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc. Bryan Fitzpatrick
Callison Zeunert Law Corporation
fax: 250-785-4346

October 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Richard Hewson. Mr. Hewson faxed this office a letter on October 16, 2013, stating that “[He has] been instructed not to make submissions on this review”. Mr. Hewson requested that this review proceed on the basis of the evidence that is before me. To date I have not received any submissions from you with regards to your IRP. As such, I have proceeded with this review on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (“RTS”), the officer identified you as the driver of the vehicle, and recorded the time and date of driving or care or control of the vehicle as 00:36 hours, on October 6, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer stated that the ASDs registered “FAIL” results at 00:47 hours and 00:58 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the officer on this point. I am satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the officer’s with regard to this issue. I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 00:58 hours.

There is no evidence before me disputing that of the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 101134, and the serial number for the second ASD as 101114. There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded in the RTS that both results registered as “FAIL” results. There is no evidence before me that refutes the officer’s evidence on this point. I am satisfied that the Notice was served on the basis of the “FAIL” result, since each result was the same.

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of a Qualified ASD Calibrator (the “Certificates”) for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on September 12, 2013, he checked the calibration of ASD serial number 101134. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 10, 2013, and the service expiry date as June 5, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 29, 2013, he checked the calibration of ASD serial number 101114. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 27, 2013, and the service expiry date as July 31, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 6, 2013. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 6, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

Adjudicator

cc: Richard Hewson
Fax: [250] 558-9935

NOVEMBER 12, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?

- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Jackson and your lawyer’s submissions, I find there is one determinative issue in this review.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the “Certificates”), the officer provided evidence that two distinct ASDs were used for two analyses. However, based on the unique evidence provided by your lawyer on your behalf, I am not satisfied that the second analysis was performed on a different ASD. Having made this finding, I do not need to consider other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

cc. Kyla Lee
604-685-8308 (fax)

October 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sylvia Andrews. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did the ASD register a "Warn", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

After reviewing the evidence before me, I note that the Report to Superintendent (the "RTS") has not been signed by the officer. As a result, I am not satisfied that the RTS is properly before me.

Having made this finding I do not have to consider any of the issues in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

Adjudicator

cc: Sylvia Andrews
Fax: 604-244-0617

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 23, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. I have proceeded with this review based on that confirmation.

Ms. Lee submits that there is no evidence to indicate that your ability to drive was affected by alcohol. Ms. Lee further submits that you have provided an explanation for symptoms of

impairment noted by the officer. Ms. Lee states that in the absence of any evidence that your ability to operate a vehicle was affected by alcohol, the prohibition must be revoked as a nullity. Ms. Lee provided *Wilson v Superintendent of Motor Vehicles* and *Andree v Superintendent of Motor Vehicles* in support of her position.

Ms. Lee states, "Although this tribunal has, in the past, taken the position that it cannot revoke a prohibition despite an absence of reasonable grounds to believe a driver's ability to drive is affected by alcohol, this is not a correct interpretation of the law." Ms. Lee states that there is no difference between an IRP which is revoked on the basis on an unsworn Report to Superintendent, which is also not a ground for review in section 215.5(4).

I have read and considered the *Wilson* and *Andree* cases and I acknowledge your lawyer's submission with respect to the Court's ruling in these cases. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. I acknowledge Ms. Lee's submissions; however, I note that whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Ms. Lee also provided *Spencer v Superintendent of Motor Vehicles* and *Scott v Superintendent of Motor Vehicles* to affirm the necessary principles when determining credibility, and determining that the onus is on the officer to justify the prohibition.

I am aware of and have read the *Scott* and *Spencer* decisions and have conducted my determinations of credibility accordingly.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0125 hours on September 23, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over and were identified as the driver via your BC driver's licence.

In your submission you state, "I was driving down Gladwin Road in Abbotsford."

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0131 hours and 0134 hours, both resulting in "FAIL" readings.

In your submission you confirm that you provided two "FAIL" samples.

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0133 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0134 hours.

In your submission you confirm that you provided a second sample of your breath.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 56512 and your second sample of breath into ASD serial number 41148. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 56512 and 41148.

In your submission you state, "Constable Ramsden then went to his police vehicle and got another machine."

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 29, 2013, he checked the calibration of ASD serial number 56512. He found the ASD to be within the recommended limits

and functioning correctly. He recorded the ASD calibration expiry date as September 26, 2013, and the service expiry date as August 21, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 29, 2013, he checked the calibration of ASD serial number 41148. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 26, 2013, and the service expiry date as July 25, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state that as you were driving, you and your girlfriend were drinking from a bottle of Vitamin Water, into which you had mixed some vodka. You state that you distinctly remember taking a swig from the bottle five minutes before being stopped by the officer. You state that you did not tell him that you had just taken a swig from the Vitamin Water bottle as you did not want to get a ticket for having open liquor in the vehicle. You state that you knew that a few sips from the bottle would not impact you and you knew that you were not over the limit. You state that you have since learned about the effects of mouth alcohol and you are certain that your last drink was less than fifteen minutes from the time you blew into the ASDs. You state that your last drink was five minutes before you were stopped, and therefore, no more than fourteen minutes passed between your last drink and the time you blew into the second machine. You state that at no time did the officer explain the effects of mouth alcohol to you and if he had, you would have told the officer that you had just taken a swig from the bottle.

You have also provided an email from, s.22 to, "Lawyer Lee", in which s.22 confirms that you had a mixed drink of Vitamin Water and vodka in the truck that you were drinking only a few minutes prior to being pulled over. s.22 states that no more than five minutes passed from the time of your last sip, to the time you were pulled over.

You have also provided pictures showing the bottle in the centre console of your truck, and a medical report, indicating that you s.22

In her submission, Ms. Lee states that there is a concern regarding the officer's evidence and the use of the ASD. Ms. Lee states that your desire not to tell the officer about your recent drink is understandable as you could have been ticketed for open liquor in the vehicle. Ms. Lee states that you did not know about the issue of mouth alcohol, but if you did, you would have told the officer about your recent consumption. Ms. Lee further states that the officer had clear knowledge that you had recently departed a drinking establishment and that when this is the case, the denial of consumption is not sufficient to establish that mouth alcohol is not a factor, and further inquiries must be made. Ms. Lee states that the officer had the suspicion that you had alcohol in your body, despite your denial of consumption, and therefore, should not have relied upon your denial to determine that mouth alcohol was not a factor.

Ms. Lee submits that the officer's evidence lacks credibility and your evidence should be preferred. Ms. Lee states that your evidence is internally consistent, and is not at any point contradictory, confusing, or illogical. Ms. Lee states that the officer's evidence lacks necessary details required to be considered credible. Ms. Lee states that the officer has not provided any supporting Narrative evidence with respect to testing procedures, or information regarding the devices used. Ms. Lee also states that the report from the pub lacks necessary information

about the substance or author of the report, and no statement from the complainant has been provided.

With regard to mouth alcohol, I note that the officer was not aware of any open alcohol in the vehicle, and as Ms. Lee states, “given that it was a bottle of Vitamin Water, it is not reasonable to expect that Constable Ramsden would have assumed that it contained alcohol and would have known of the need to delay the tests.” From Ms. Lee’s evidence, it is clear that the only reason for the officer to delay the analysis was the fact that you had recently left a drinking establishment. In support of this position, Ms. Lee provided *R v Kirton*, *R v Bensmiller*, and *R v Seivewright*.

I do not find this to be reasonable, you did not just deny consuming alcohol in relation to the bottle in the vehicle; you denied consuming alcohol at all. The evidence indicates that you denied consumption, and followed the advice of your girlfriend to withhold this information from the officer. I am mindful of the submissions made by Ms. Lee regarding the fact that you had recently departed a drinking establishment; however, you made it clear that you did not intend to be truthful with the officer at the time of the analysis. In response to “how the Driver responded to the question, “Time of your last drink?”” the officer writes, “said he had no (sic) consumed any alcohol previous in the day. When asked again, the female passenger coached the driver into not answering the question.” You confirm this in your submission, “I said, “No.” Constable Ramsden asked again. s.22 whispered to me to not answer the question. I did as s.22 said.”

I acknowledge that you have provided explanations for the indicia noted by the officer. With regard to the red eyes, slurred speech, and balance issues you state, “I was very tired that day, and had been taking pain medication. This may be why my eyes appeared red and my speech sounded slurred. I know this was not caused by alcohol. My trouble walking was caused by s.22 I acknowledge your submission; however, I also note that you do not provide any information regarding your drinking pattern beyond your statement that you did not feel impaired. The officer states, “Driver was jovial with police but appeared heavily intoxicated.” The officer’s evidence also indicates that a witness called police to state that you were extremely intoxicated and had spent \$200 on alcohol while at Lou’s Bar and Grill. I acknowledge Ms. Lee’s submission regarding the credibility of the witness’s evidence, but I do not have any evidence before me to the contrary, nor do you refute this aspect of the officer’s Narrative.

I do not find that it is the internal consistency, external consistency, or consistency with common sense and ordinary human experience that cause me to question the reliability of your evidence, but rather, your deliberate and mindful attempts to be deceitful with the officer. I acknowledge the email from s.22 corroborating your version of events; however I note that this evidence does not contain a name, let alone a swearing statement, or a signature. The only identifying mark is the email address from which it originated. As such, I do not find it to be credible.

Based on the evidence before me, I do not find your claim of mouth alcohol to be credible, and I accept the ASD results as valid.

Ms. Lee also provided a number of previous decisions to illustrate that prohibitions with similar fact patterns are often revoked. Ms. Lee noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

IRP Review Decision
Page 6

As the officer attempted to determine the time of your last drink, and you were deliberately deceitful and chose to withhold information, I do not find the previous decisions provided by Ms. Lee to be relevant.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 23, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Kyla Lee
fax: 604 685-8308

SEPTEMBER 19, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On June 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). On August 19, 2013 you were granted permission to apply for a review of the Notice although the seven day period for applying for a review had expired. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 80 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you prior to the review date. I have proceeded with this review based on that confirmation. You submitted written information on August 30, 2013. In reaching my decision in this written review I have considered all of the relevant information available to me.

Several of the grounds on which you applied for a review do not apply to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL"?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Facts, Evidence and Analysis

There is one issue my decision on which is determinative of this review.

Were you a driver within the meaning of section 215.41(1) of the Act?

I am not satisfied that you were a driver within the meaning of section 215.41 of the Act.

Decision

As a result of my findings, I revoke your driving prohibition and monetary penalty as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence. Please note that this decision does not change any licensing requirements or other prohibitions from driving.

^{s.15}
Adjudicator

NOVEMBER 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Julian van der Walle. I proceeded with this review based on that confirmation.

In paragraph seven of your affidavit, you said you have a flawless driving record and you are not the type of person who would drive after you consumed a significant amount of alcohol. Your lawyer argued that your driving history demonstrates your evidence of good character, which must be considered pursuant to the *Hathaway* decision. In this decision, the applicant provided evidence of good character from other people. Unlike *Hathaway*, you chose not to provide evidence from your passenger or anyone else to substantiate your driving practices and your version of events. You were not required to do this, but it serves to distinguish your situation from *Hathaway*.

Further, if I were to rely on your driving record as a statement of your good character and your propensity to not drive after drinking, I would have to consider the driving record of applicants with multiple alcohol-related driving offences for the opposite conclusion. I am not permitted to do the latter, so in keeping with administrative fairness and natural justice, I cannot consider your driving record as relevant to this review. I am authorized by the Act to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), Constable Strebchuk indicated that he witnessed you driving or in care or control of the vehicle at 0225 hours, on October 18, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, Constable Strebchuk said you provided breath samples into two ASDs and that the devices both registered “FAIL”, as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered “FAIL” at 0230 and 0247 hours, respectively, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Synopsis and the Occurrence Report-1 (the "OR"), Constable Strebchuk indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the RTS, the Synopsis and the OR, Constable Strebchuk indicated that a second analysis was provided. Your lawyer argued that the second analysis was not provided "forthwith", pursuant to section 215.5(1)(b) of the Act. The specific timing of the second analysis is not a matter that is relevant to the issues I am authorized to consider. The second analysis is not provided pursuant to an official demand that must be made forthwith. Rather, it is an opportunity for a driver to challenge the result of the first ASD test. There is no requirement for the police to have even one ASD device on hand at the time of stopping a possible impaired driver. There is no evidence before me that you were prejudiced by the practical delay of waiting for a second ASD to arrive.

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

Constable Strebchuk submitted two Certificates stating that Greg Ficht certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF (the "Calibrator"). The Calibrator stated that on the 12th day of October, 2013, he checked the calibration of the ASD with serial number 101134 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG307802, Expiry: 2015-03-19. This ASD was found to be within the

recommended limits. It had a calibration expiry date of November 9, 2013 and a service expiry date of June 5, 2014.

The Calibrator stated that on the 28th day of September, 2013, he checked the calibration of the ASD with serial number 101100 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG307802, Expiry:2015-03-19. This ASD was found to be within the recommended limits. It had a calibration expiry date of October 26, 2013, and a service expiry date of July 31, 2014. I note that the ASD serial numbers on the Certificates match the serial numbers of the ASDs referenced on the RTS.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In your affidavit, you said you consumed 1½ glasses of wine between approximately 11:30 pm and 1:00 am on the evening in question. You said you left the bar a little after 2:15 am with your passenger. You lit a cigarette and began driving home. You said when you noticed the emergency lights of the police car, you pulled over, put out your cigarette and began to find your licence and registration documents. When the officer came to the window you handed him the documents and asked why you were pulled over. You said he told you it was because he saw you leave a "liquor primary establishment". In contrast, Constable Strebchuk's evidence in the OR is that he noticed the vehicle swerving in and out of its lane. Both you and the officer have provided sworn or solemnly affirmed statements, and there are limited means of preferring either of your evidence in this regard. Further, based on the evidence before me, it is possible that both statements are accurate. Regardless, the reason the officer pulled you over is not directly relevant to the matters I am authorized to consider in this review. Accordingly, I will give little weight to the inconsistency in this regard.

You said Constable Strebchuk asked you to exit the vehicle and he read you the breath demand. You said he had the ASD on his person and you provided a breath sample right away, which registered "FAIL" on the device. You said you took the last puff of the cigarette "only a couple minutes at most" before you provided your first sample.

Mr. van der Walle quoted a paragraph from a 1996 document entitled, *Resource Reading Operators Approved Screening Devices (ASD)* ("RR ASD"), however, he did not provide a copy of the document, so I could read the quote in the context of the passage. The portion of the document provided is as follows:

"Do not allow subject to blow smoke into the device; wait 3 minutes after smoking.
Presence of smoke in breath sample can cause inaccurate readings and damage device."

Your lawyer argued that you were smoking very soon before each sample was taken. He suggested that the details of "exactly when [you were] smoking in relation to when each sample was taken" is given in your affidavit. First, there is no evidence before me that you blew smoke into the device. Second, you did not, in fact, say exactly how long it was between your last puff

of smoke and providing a breath sample. I find it is reasonable that you would not know how long it was, because I infer you were unaware of the relevance of this at the time. Further, the passage that was cited is indefinite in saying the presence of smoke in a breath sample “can” not “will” cause inaccurate readings and damage device. The portion of the RR ASD you’re your lawyer provided does not interpret what it means by inaccurate readings. It could be inaccurately high or inaccurately low. According to your evidence, I should infer the former.

Based on your evidence, the following events occurred after you put out your cigarette:

- you pulled out your licence and registration documents,
- you handed the documents to the officer, who presumably examined them,
- you discussed why you were pulled over with the officer,
- you exited the vehicle,
- the officer read you the demand, and
- you provided a breath sample.

This is consistent with the officer’s evidence of having observed you driving, forming the suspicion, reading the ASD demand three minutes later, and having you provide a breath sample two minutes later. I agree with your lawyer that pursuant to the *Scott* and *Spencer* decisions, it is inappropriate to assume the officer’s evidence has a baseline of reliability. However, it is not wholly inconsistent with your version of events, so I do not need to prefer one over the other.

Mr. van der Walle urged me to conclude that there were less than three minutes between the time of your last puff of smoke and when you provided a breath sample. He argued that I should further conclude that the timeline was narrow enough that it caused the ASD result to be inaccurate. I infer that based on your reported drinking pattern and your evidence of not feeling “intoxicated”, I should conclude that whatever smoke was left in your lungs when you provided a breath sample caused the ASD analysis to interpret a very low BAC as being higher than 80 mg%. I find that your lawyer’s evidence of how smoking can affect an ASD result is inconclusive. This conclusion is supported by the uncertainty in your evidence regarding how much time passed after your last inhalation and before providing a breath sample.

Based on all the evidence before me, I am not persuaded to find on a balance of probabilities that there was sufficient smoke in your breath sample to render the first ASD result inaccurate.

In terms of the second ASD analysis, you noted that you had to wait until a second device was delivered before providing a breath sample. In paragraph five of your affidavit, you indicated that after standing on the side of the road for a few minutes, you sat in the back of the police cruiser for a few more minutes to get warm. At that point, the officer agreed to let you smoke a cigarette outside, after walking you to your vehicle where you grabbed your cigarettes. You said you smoked a full cigarette and began walking back to the police cruiser, which was a couple of metres from where you were smoking. You said Constable Strebchuk approached the other police cruiser and took an ASD from the officer who brought it. I find it reasonable to conclude that Constable Strebchuk had a brief conversation with the other officer, before walking back to where you were standing. You said you blew into the device and the officer told you it

registered a "FAIL".

You said you did not feel intoxicated and you were surprised that you blew a "FAIL", given how much you said you consumed prior to being pulled over. You said you very much doubt that the devices registered accurate "FAIL" readings, because you were not intoxicated while driving.

Mr. van der Walle argued that the second ASD test was administered too soon after smoking, which rendered the result inaccurate. Again, your evidence about the timing is vague, as you said you stood outside for a couple minutes, inside the vehicle for a couple minutes, finished your cigarette, and waited while the officer obtained the second ASD. Again, given the uncertainty of how smoking affects an ASD result and how much time actually passed between you smoking and providing a breath sample, I am not persuaded to find that the second ASD test inaccurately represented your BAC. As your lawyer indicated, section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied on a balance of probabilities that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 18, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc. Julian van der Walle
250-503-0249 (fax)

November 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on three grounds, two of which are not applicable to this IRP; the Notice was not served on the basis of your refusing or failing to provide a sample of breath upon demand, nor were you served a 7-or 30 day prohibition. I have considered all grounds relevant to the basis upon which the Notice was served.

Records before me confirm that you received all of the disclosure documents, and your counsel, Kyla Lee, confirmed she had received all documents at the time of review. I have proceeded with the review based on this confirmation.

Ms. Lee also referred to the recent BC Supreme Court decision, *Wilson*, to emphasize a fundamental requirement of the legislation that is not reflected in the officer's evidence: a person's ability to drive must be shown to be affected by alcohol in order for the IRP to stand. I rely on the interpretation of the legislation in this review with regards to the superintendent revoking a

prohibition: s. 215.5(4) of the Act requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is thus no statutory authority for me to revoke a prohibition on this basis.

Ms. Lee referenced *Murray v Superintendent of Motor Vehicles* to state that the BC Court of Appeal determined that, in the absence of a sworn or affirmed report, in the form prescribed by the Superintendent, the adjudicator cannot continue with the review.

Ms. Lee stated that it appears that Constable Lambie (the technician) signed the jurat and there is no evidence that she is a commissioner for taking affidavits. Ms. Lee submitted that these defects should be taken seriously. Ms. Lee cited the court of appeal case of *Murray* to support her position.

Ms. Lee made reference to the fact that the identity of the commissioner for taking affidavits is the "technician." Further, there is portion of a signature crossed out and not initialed. I have considered Ms. Lee's submission on this point; however, I do not find it compelling. As established by the courts, I do not find that I need to know the identity of the commissioner to accept the jurat as properly sworn.

Ms. Lee submitted that the officer's evidence is not reliable on the basis of his timelines. She submits that in his Report the officer records the time of driving as 0128, the time he formed his suspicion at 0132 hours, and the time he read the demand as 0133 hours. Yet, in his Narrative his evidence shows that he read the demand at 0131 hours and formed his suspicion at 0133 hours. Ms. Lee provided me three previous decisions from our office and referred to the case of *Modghill v. Superintendent of Motor Vehicles*.

I am not bound by previous review decisions which, in any event, are fact specific. I must also add that determinations on issues are dependent on specific findings made by the Adjudicator conducting each individual review.

Ms. Lee also provided *Scott v British Columbia (Superintendent of Motor Vehicles)* and *Spencer v British Columbia (Superintendent of Motor Vehicles)* to assert that your version of events must be weighted equally with those of the officer.

I have read and considered both cases and I am mindful of what I must consider in conducting this review. With respect to the timing of the events I find that the officer recorded the time of driving as 0128 hours in both his Report and his Narrative. With regard to the time he formed his suspicion and the time of the demand I am not convinced that either of these times is relevant to my determination in the context of this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer, Constable (Cst.) Millar indicated that you were driving or in care or control of a vehicle at 0128 hours on August 15, 2013. In his Narrative Text Hardcopy (the "Narrative") Cst. Millar reported that he stopped a s.22 for speeding through the intersection of the Fraser highway at 200th Street. He reported that when your vehicle was pulled over you were directly witnessed driving, and identified by your BC driver's license.

In paragraph 6 of your affidavit, you outline the details of your driving at that time. Your statement confirms the evidence of the officer on this point.

Ms. Lee submits that the officer recorded that you were driving s.22 however, the make of your vehicle is actually s.22 I acknowledge that Ms. Lee is not refuting that you were the driver; rather, she makes this submission for me to question the officer's evidence with respect to his credibility.

I acknowledge that the officer recorded s.22 rather than s.22 however, I am not convinced that anything turns on this error.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided an ASD "FAIL" result at 0133 and 0138 hours respectively.

In paragraph 12 of your affidavit you stated that you blew into the machine and it registered a "FAIL."

I am satisfied that the ASD registered a "FAIL" result.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the Narrative, he reported that the second test was administered at 0138 hours.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0138 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 089051 and your second sample of breath into ASD serial number 101769. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 089051 and 101769.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

The officer provided two Certificates of Qualified ASD Calibrator, in which Alison L. Lambie certified that the ASDs bearing the serial numbers 089051 and 101769 were found to be within the recommended limits when she checked their calibration. She also certified that to the best of her knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Report, Cst. Millar recorded your response to the time of your last drink as, "00:28 hours." In the Narrative, the officer stated that there was a moderate odour of liquor detected in the vehicle, you admitted to consuming one drink, and when you were walking with Cst. Millar he detected a moderate odour of liquor on you. To the "template" question in the Narrative of "How did driver respond to "time of last drink?" Cst. Millar recorded: "My last drink was about one o."

Ms. Lee provided *R v. Seivewright*, particularly with regard to the officer observing you leaving a pub (drinking establishment) and the inference that could be made with regard to the possibility of a recent drink.

In paragraph 8 you said that when the officer asked the time your last drink, you told him it was a while ago.

Your passenger, s.22 submitted that you both consumed two drinks over a period of two hours at the Baseline Pub. He submitted that you consumed your last drink and immediately left the pub. He denied that you were speeding. He said; rather, you took your foot off the clutch too fast and drove roughly over the tracks giving an illusion that you had been traveling faster than you actually were.

Your affidavit contrasts with what you told the officer at roadside. The officer recorded your response for your last drink as 0028 hours. As well, you told the officer that you had one drink. I find it more likely than not that your response was 1 hour ago and the officer recorded your response as 0028 hours as that was one hour before the reported time of driving. Further, it is clear that your response in the Narrative of "about one o" does not make any sense; however, if I accept your response was

“about one hour ago”, In my view I can infer that both the Narrative and the Report are consistent with your response being “one hour ago.”

Further, Ms. Lee provided me with an excerpt of an operator’s resource on ASDs with regard to section D “Mouth Alcohol:”

alcohol present in subject’s mouth as a result of recent consumption of alcoholic beverages, belching, or burping, can cause inaccurate test results; if the police officer honestly believes that the motorist has engaged in the above activity within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity.

On this basis I am not convinced that your response of a “while ago” would more likely than not have satisfied the officer to the degree that he would not have questioned you further to establish exactly what “a while ago” meant.

In addition, it is unclear to me how knowing the officer’s reason for asking the question would change your answer if you were answering truthfully. I note that twice you were dishonest with the officer with respect to your alcohol consumption and I find that this causes me to question the credibility of your submissions for this review. Consequently, I do not find your evidence to be persuasive or credible and I accept the officer’s evidence with regard to when you consumed your last drink.

Section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%, and I have already made a finding that the ASDs were reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 15, 2013. As you have already served 24 days you have 66 days remaining. Your driving prohibition commences November 10, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

November 19, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, I spoke with your sister, s.22 She indicated that she would be acting s.22 informed me that she had spoken with a representative who had contacted you with regard to the review hearing. Specifically, she advised this representative that she would be s.22 during the oral hearing and indicated that this request was acknowledged. You advised s.22 that you

had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

In IRP Application for Review, you indicated one ground for review which is not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because an ASD test resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

You advised s.22 that this is your first fine and that you have nothing on your driving record. While I acknowledge these submissions, I do not have authority to consider a person's driving record in this review.

You advised s.22 that you just want your licence back and that you are sorry. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances and transportation needs. The scope of this review is limited to the grounds as defined in the Act.

You advised that at times during the investigation, you may have misunderstood what the officer said because s.22 Moreover, that although a second officer spoke to you, s.22

While I acknowledge these submissions, s.22 did not provide me with any compelling evidence that indicates you did not understand the officer's instructions. Moreover, there is no evidence before me that you advised the officer that you did not understand his instructions or that there were any delays to explain procedures related to the investigation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 0207 hours on October 30, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 0209 hours and 0214 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101540 and 072953, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Barry Selver certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 18, 2013, and October 16, 2013, respectively. He also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Narrative Text Hardcopy – Occurrence Report – 1 (the "Occurrence Report"), the officer indicates that you had slurred speech while speaking with police. Further, he submits that you admitted to consuming alcohol and that when you were asked the time of your last drink that you indicated you had consumed, "one beer, one hour ago."

You advised s.22 that you had no intention to drink and drive and that you do know the law with respect to drinking and driving. s.22 advised me that you went to a funeral that day and proceeded to a family member's home where you had one beer. She advised me that you specified that you had consumed this beer over a one hour time period and that you "sipped" it. As such, you thought the beer had worn off because you did not feel the effects of it while driving. You also advised s.22 that you have a doctor's note that states you are s.22

While I acknowledge the submission that you have a doctor's note indicating that you are s.22 at the time of the hearing I did not have this note before me. Further though, you provided evidence that you did drink on this day; therefore, I do not find the doctor's note to be relevant here.

While you may have felt that the one beer you had consumed would have worn off prior to driving, I do not have any compelling evidence before me that would cause me to doubt the "FAIL" readings on the ASDs that I have found to be reliable. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

SEPTEMBER 19, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Michael Shapray. I have proceeded with this review based on that confirmation. As of the time scheduled for this review no information or submissions on your behalf have been received. In reaching my decision in this written review, I have considered all of the relevant information available to me.

For your benefit in this review I have considered all of the grounds of review which apply to your situation.

Issues

The following are the issues considered in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The officer's evidence is that on September 1, 2013 at 0435 hours a vehicle was stopped at a roadblock. You were its operator and identified yourself with your driver's licence.

There is no evidence to the contrary.

I am satisfied that at 0435 hours on September 1, 2013 you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

Two issues must be considered. I must determine whether a valid ASD demand was made and whether you failed or refused to comply with that demand.

Was a valid demand made on you?

The officer's evidence is that you fumbled with your driver's licence. There was an odour of liquor on your breath, you had a greasy complexion, and glassy eyes. You initially denied consuming any alcohol. When subsequently questioned you stated that your last drink was two and one half weeks prior. From your appearance the officer concluded that you had been at a bar or nightclub. The officer formed his suspicion that you had alcohol in your body at 0436 hours and made a demand that you provide a breath sample at 0437 hours.

There is no evidence to the contrary.

An officer must be satisfied that you have been driving and must have a reasonably based suspicion that there is alcohol in your body before demanding that you provide a sample of your breath into an ASD. The amount of evidence required to support a reasonable suspicion is low. The demand to provide a sample must be made immediately after the officer forms the suspicion that you have alcohol in your body.

The smell of liquor on your breath alone provides sufficient grounds for the officer to make his demand. This smell, in combination with your physical appearance, satisfies me that the officer had grounds to demand a breath sample from you. The officer made his demand without delay after he formed his suspicion.

I am satisfied that a valid ASD demand was made on you.

Did you fail or refuse to comply with that demand?

The officer's evidence is that he explained to you how the ASD worked and how to provide a proper sample. In the Report the officer swore that the ASD referred to in it was functioning correctly and that the officer was a qualified ASD operator.

You made the following attempts to provide a breath sample:

- 1) On your first attempt you put the ASD straw into your lips but did not blow any air into it. No breath exited from the exhaust port of the ASD. You were verbally directed to

- blow but did not respond. The officer explained to you that providing a breath sample was similar to blowing up a balloon and then demonstrated how he would blow up a balloon.
- 2) On your second attempt you were told to fill up your lungs with air and blow into the straw. Again you did not blow any air into the ASD straw. The officer tried to coach you into blowing but you did not respond.
 - 3) The officer then explained to you the consequences of not providing a breath sample after a demand had been made of you. He demonstrated with a fresh straw how to provide a sample. He asked you to provide a sample. You complained that you were thirsty. The officer advised you that he had no water for you. You began complaining that it was your human right to have water and each time you were asked to provide a sample you requested water. The office concluded that you were refusing to provide a breath sample. You were arrested. After this, you stated that you would provide a sample after you had received a drink of water.

A refusal to provide a breath sample can be constructive and demonstrated through conduct. It must be clear and unequivocal. A constructive refusal is made out where an officer does everything that he could reasonably be expected to do to get a driver to co-operate and provide a sample.

I am satisfied that the ASD demand remained existing and was not modified or withdrawn by the officer asking you if you were willing to provide a breath sample after having made a demand on you. I am also satisfied that your conditional offer to provide a breath sample after you had a drink of water, made after your actions clearly indicated that you were refusing to provide one, does not modify or make equivocal your refusal. The police have no obligation, once you have clearly refused to provide a breath sample, to allow you to provide a sample at a later time.

I am satisfied that, in the circumstances, the officer did everything he could reasonably do to get you to co-operate and provide a breath sample. The only reasonable inference to be drawn from the evidence is that the approved screening device was operating properly, the tests were performed by a qualified ASD operator, there were no impediments to the provision of an adequate sample of breath, and that your failure to provide a suitable breath sample was intentional.

I am satisfied that you failed to comply with the valid ASD demand to provide a sample of your breath.

Did you have a reasonable excuse?

There is no evidence on which I could conclude that you had a reasonable excuse for your failure to provide a breath sample.

I am satisfied that you did not have a reasonable excuse for failing or refusing to provide a sample of your breath.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013. You may resume driving once you have

obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Michael Shapray (by fax)
(604) 590-5626

September 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 6, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

Having reviewed the evidence before me, I do not find that I have sufficient evidence to indicate that you were a driver or in care or control of a motor vehicle.

I am satisfied that you were not a driver within the meaning of section 215.41(1), of the Act.

Having made this finding, I do not need to consider any further evidence in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 12, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

One of the grounds on which you applied for this review is not applicable to your situation. For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

I have not received submissions on your behalf from your lawyer; however, I confirm receipt of your submissions dated October 28, 2013.

You pointed out that section 14 on the Report to Superintendent (the "Report") has been left blank as to how many pages comprise the sworn document. You asked how you could know that everything has been disclosed to you. My file consists of 8 pages of evidence submitted by the police. The confirmation sheet generated by our fax machine indicates that 9 pages

(including the one page cover sheet) was successfully faxed to your lawyer, John Hope, on October 23, 2013 at 1:22 p.m. In my view, this confirms that you have received full document disclosure.

You pointed out there were some errors in the paperwork for your driving prohibition. You said your address is incorrectly noted as being in s.22 and the temperature reading for the second ASD does not match between the Narrative Text Hardcopy (the "Narrative") and the Report. I acknowledge these errors as you have pointed them out; however, in my opinion they are clerical in nature and not relevant to the issues before me.

You explained that during the course of issuing your IRP, the officer was forced to deal with another individual who was very intoxicated and unruly. You said the officer was forced to subdue, handcuff and detain the individual until backup arrived. During this time, the individual continued to scream and rock the officer's patrol car in which he was attempting to complete his paperwork. While you have explained this situation to me, you have not indicated its relevance.

You told me that you need your driver's licence because you live in s.22 which is approximately ten kilometers north of s.22. There is no public transit in s.22 and in order to look for or travel to and from work requires a driver's licence. While I understand that it must be difficult to be without your car and driver's licence; under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues as outlined below.

You said that the final decision to return your driver's licence will be made by your doctor s.22. You then asked whether the Superintendent can consider medical conditions during an IRP review. As indicated above, I am authorized to consider only those grounds that are directly related to the issues as outlined below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report is that on October 12, 2013, at 01:40 hours, Officer Smith (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 01:48 hours and at 01:55 hours, the officer used ASD serial numbers 053335 and 103666 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 103666 at 01:55 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both ASD test results were a “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates that both ASDs used to take your breath samples on October 12, 2013, were checked for calibration on and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: John Hope
by fax 250-785-2555

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that you received full disclosure of the documents before me. I have proceeded with the review based on these confirmations.

In your written submission, you referred to the officer’s Narrative Text Hardcopy (the “Narrative”) and Report to Superintendent (the “RTS”) and provided context to a few of the officer’s observations of you on October 14, 2013. While, I acknowledge your submission, I note that these observations can assist an officer in forming the grounds for the reasonable suspicion that

a person may have alcohol in his or her body, which could lead the officer to make an ASD demand. However, in this review, the validity of the demand is not an issue. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review. As a result, the factors that led the officer to make an ASD demand are also not relevant to my considerations.

You asked that I take into consideration that you have never previously “been under any kind of suspicion related to impaired driving, and [your] sole previous discretion (as noted on [your] driving record search) was due to a lapse of concentration leading to travelling in excess of the speed limit.” I acknowledge that a 90-day driving prohibition can have far-reaching and devastating implications for a person who needs to drive for various employment and personal reasons. However, in the context of this review the Act does not authorize me to consider an individual’s driving record, personal circumstances and employment needs. The issues that I must determine in this review are outlined in detail below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In his Narrative, the officer indicated that he was inside his police vehicle and parked when he felt two abrupt “bumps, bumps” and then observed his vehicle move from side to side. The officer stated that he looked to his left and observed a vehicle less than approximately 12 inches away from his driver’s side door then swerve back in the number two (2) lane. The officer indicated that he waited inside his police vehicle to see if the driver of the vehicle was going to stop, but the driver failed to remain at the scene and continued driving. The officer activated his emergency lights and pulled the vehicle over. The officer indicated that he identified you as the sole occupant and driver of the vehicle. In the RTS, the officer indicated that the time and date of driving or care or control of the vehicle was at 14:20 hours, on October 14, 2013.

In your written submission, you indicated that you pulled over when the officer activated his emergency lights because that gave you the confidence to pull over safely.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that you provided a sample of your breath into an ASD at 14:31 hours and 14:32 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the officer on this point. I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the officer's with regard to this issue. I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 14:32 hours.

There is no evidence before me disputing that of the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 101453, and the serial number for the second ASD as 101490.

In your written submission, you referred to the officer's Narrative where he stated that he presented you with a "second (separate) ASD" and you indicated that on the Application for Review that you were unsure as to whether a separate ASD was used for your second test. You stated that you have no reason to doubt the officer and that it must have been an error in your memory on your part.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded in the RTS that both results registered as "FAIL" results.

There is no evidence before me that refutes the officer's evidence on this point.

I am satisfied that the Notice was served on the basis of the "FAIL" result, since each result was the same.

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of a Qualified ASD Calibrator (the "Certificates") for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on October 8, 2013, he checked the calibration of ASD serial number 101453. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 5, 2013, and the service expiry date as March 19, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 17, 2013, he checked the calibration of ASD serial number 101490. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 15, 2013, and the service expiry date as March 19, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 14, 2013.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Narrative and RTS, the officer indicated that when asked the time of your last drink you indicated that it was at 02:00 hours.

In your written submission, you indicated that your use of Listerine mouthwash ("mouthwash") led to an increased reading on the ASD. You stated that the mouthwash had an alcohol content of 27% and noted that you had used it prior to leaving your house. You also indicated that after you left your house while driving you vomited a small amount into your throat/mouth and so you had to pull over and use a travel size bottle of the mouthwash. You stated that this occurred no more than five (5) minutes prior to 14:20 hours and 17 minutes prior to the second ASD test. You explained that you used copious amounts of the mouthwash so close to the event and that you did so in an attempt to mask the previous night's excesses. You indicated that you drank large amounts of alcohol up until 02:00 hours and that was likely the cause of the odour the officer noted.

You stated that you strive to live a life of honesty and integrity, and involve yourself in charitable causes,

You requested that I assess your character when judging your submission.

You provided a character reference from the s.22 confirming that you have been a volunteer since April of 2011, and provided an overview of what your role within s.22 is and also provided positive descriptions of your character. You further provided a certificate for s.22

I acknowledge your submission and find that there is no evidence before me that contradicts or causes me to question the reliability of, your account of the events prior to 14:20 hours when you were stopped by the officer. I find it noteworthy to point out that other than your statement; you have not provided any material to support your assertion that the mouthwash you used contained alcohol. Regardless, while I recognize your claim that the mouthwash you used prior to being stopped caused an increased reading on the ASD, I do not find that to be likely in your case, even if the type you used contains alcohol.

The officer provided a document titled "Technical Information on the Operation and Calibration of ASDs in British Columbia" in which it states:

Breath samples should be taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol. Mouth alcohol can cause falsely high breath test readings.

You indicated that you used mouthwash before leaving your residence and then again no more than five (5) minutes prior to being stopped by the officer at 14:20 hours. I note that the undisputed evidence before me is that the ASD tests were conducted at 14:31 hours and 14:32 hours respectively. I find that if you used mouthwash at 14:15 hours, five minutes prior to the stop that would have been 16 minutes prior to the first ASD test and 17 minutes prior to the second ASD test. There is no evidence before me that mouth alcohol from mouthwash used some 16 and 17 minutes prior would have caused falsely high readings on the ASDs. As a result, I am satisfied on a balance of probabilities that the "FAIL" results were not caused by mouth alcohol.

Section 215.41(2) of the Act states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%, and I have already made a finding that the ASDs were reliable.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 14, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

OCTOBER 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, your lawyer Sarah E. Leamon, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

As there is one issue that is determinative in this review, I have only addressed that issue.

Did you fail or refuse to comply with an ASD demand?

Based on the evidence in its entirety, I am not satisfied that you failed or refused to comply with the ASD demand.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

CC: Sarah E. Leamon
By fax to 604-370-2505

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 18, 2013, 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);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device ("ASD"); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that "My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s);" however, this ground is not applicable to your situation due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Robert Pryer. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2216 hours on September 18, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that at 2202 hours an unknown pedestrian contacted Police stating that a male was parked in the middle of the road slumped over the steering wheel, and had been there for approximately 20 minutes. The officer states that when she arrived your vehicle was parked in the middle of the road and running with you in the driver's seat.

In your submission you state that the officer sent you to the hospital in an ambulance and you have attached your s.22 (the "Record"). You draw my attention to the section of the Record where it states, "PT FOUNN (sic) STANDING OVER PASSERBY'S CAR. WOULDN'T MOVE FROM SAME. CALLED RCMP-RCMP CALLED EHS AFTER PT DID TEH (sic) SAME AND STARTED VOMITING PROFUSELY." You state that you do not understand why the officer said that you were "slumped over the steering wheel" when he also reported to the ambulance driver who then reported to the Physician that you were found standing over a passerby's car. You state that you think that the officer has two stories related to your prohibition. You further state, "I was not in control of a car." In your submission you state that you do not understand why the officer said you were put in a taxi when he called an ambulance and that ambulance took you s.22

There are a number of details in the evidence before me that cause me to question your claim that you were not a driver. The Narrative indicates that you were sent home in a taxi. I also note that the Narrative was written at 2300 hours on September 18, 2013 ("Related date: Wednesday, 2013-Sep-18 at 23:00"). I find that this indicates that at 2300 hours, your 90 day IRP process was complete, and you had been sent home in a taxi. I note that the Record states, "Arrival Date. Time: 19/09/13 – 0034." I do not find it likely that if the officer had called an ambulance at the scene that you would first arrive at the hospital an hour and a half later. I also note that your IRP was served in Vancouver by Vancouver PD, a municipal detachment, and the Record indicates that you were taken s.22 and that you referred by an RCMP officer. I find it of note that on the Notice, your address is listed in Burnaby. I find that this supports the officer's statement that you were sent home in a taxi. The officer's evidence is that a witness called to state that your vehicle was stopped in the middle of the road and that you were slumped over the steering wheel. You state that you were not slumped over the wheel, but you do not address the officer's statement that your vehicle was found stopped in the middle of the road with the engine running. I do not find that if you were outside your vehicle, standing over a passerby's car at the time the officer recorded the time of driving, that the officer would have access to, and subsequently impound your vehicle. Further, there is no note in the officer's evidence that you were standing over a passerby's car, or that you were vomiting profusely at any point.

The evidence before me illustrates that two separate incidents occurred; one in Vancouver, and the second in Burnaby. I am not convinced that the Record pertains to the situation which lead to the IRP. I find it more likely that the events involved in the Record occurred afterwards. Further, I find that the information in the Record is, at best, an attempt to cast doubt about the information contained in the officer's evidence. You have not provided any compelling evidence to cause me to question the officer's version of events.

Aside from the wording in the Record, you have not provided any further evidence to support your claim. I do not find that there is any compelling evidence before me to indicate that you were not a driver when encountered by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

The officer indicates that when she arrived at the scene she smelled the odor of liquor on your breath and you stated, "I'm so drunk and I'm driving." The officer states that at 2220 hours she read the ASD demand to you.

In your evidence you state that you never stated, "I'm so drunk and I'm driving," as you s.22
You state that you did not understand anything the officer said to you.

The officer's evidence is that she explained to you how the test worked and showed you how to blow into the device. You then attempted three times to blow into the device. You do not refute this. I am satisfied that a valid demand was made on you, and that you understood what was expected of you.

I am satisfied that a valid ASD demand was made.

In the Narrative, the officer states that she explained to you how to blow into the device. The officer states that you were given three opportunities to provide a sample but you failed to do so.

I have no evidence before me to the contrary. I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your submission you state that you were extremely sick and vomiting. You submit that you could not blow into the device when you were vomiting. You reference the Record which indicates that you were vomiting profusely.

As I have determined above, I do not find it likely that the Record refers to the events related to your prohibition. I am not compelled by your submission that you had a reasonable excuse to fail to provide a breath sample.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 18, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Robert Pryer
fax: 604 736-0118

OCTOBER 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On July 26, 2012, a peace officer served you with a Notice of Driving Prohibition (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);
- the approved screening device (ASD) registered a “fail” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Motor Vehicle Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer prior to your scheduled hearing. I have proceeded with this review based on that confirmation.

You initially applied for a review of your prohibition on July 30, 2013, and on, August 7, 2012, your lawyer, Claire Hatcher, sent a fax to our office advising that you were cancelling your review hearing. On January 30, 2013, we received a fax from lawyer, Kyla Lee on your behalf, requesting that we re-open the hearing on the basis of new evidence that was not available to you and your counsel at the time of your original hearing. I have considered this matter and have decided, in the interest of fairness, to re-open your hearing.

IRP Review Decision
Page 2

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As there is one issue that is determinative in this review, I have only addressed that issue.

Was the ASD reliable?

Having carefully considered the evidence before me, I am not satisfied that the ASD was reliable.

Having made this decision, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Team Lead, Adjudication

cc: Kyla Lee
(604) 658-8308

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

Cst. Fodor indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0320 hours on September 1, 2013. In the Narrative Text Hardcopy (the "Narrative") Cst. Fodor states that he and Cst. Cosmacini were dispatched to an impaired call at 0309 hours. Cst. Fodor states that the caller, later identified as s.22 advised the police dispatcher that she was in a vehicle and the driver was impaired by alcohol. Cst. Fodor states that the vehicle was located at 0320 hours. Cst. Fodor states that he observed the vehicle parked in the driveway of an apartment building and the driver was seen getting into the vehicle and to put the vehicle in reverse. Cst. Fodor states that as he arrived the vehicle was slowly backing out of the driveway. Cst. Fodor states that when he activated his emergency lights the vehicle stopped immediately and both officers observed that the reverse lights went out. Cst. Fodor states that he approached the driver and you were identified via your driver's licence. Cst. Fodor states that the truck still had all of the lights on, but the engine was not running. Cst. Cosmacini looked inside the truck from the passenger side and observed the truck keys on the floor. Cst. Fodor states that a female exited the vehicle and spoke to Cst. Cosmacini. Cst. Fodor states that the female was identified as s.22 and stated the following:

- she met you and s.22 earlier in the day at a bar and you offered to drive her home
- she became concerned when she saw how impaired you were while driving
- she saw both you and s.22 drinking Captain Morgan rum and beer and while you were driving you threw the empty Captain Morgan rum bottle out the window

In your affidavit you state that at approximately 3:00am you were at your restaurant in downtown Vancouver and were finishing some maintenance work with your business partner s.22. You state that as you were leaving you got into s.22 truck which was parked outside the restaurant. You got into the passenger side and s.22 into the driver's. When you arrived at a stoplight a woman that you had never met jumped into the back of the truck's cab and asked for a ride. You state that you could tell when she entered the truck that she was very intoxicated. You drove down Homer Street to the 7-11 and while s.22 stayed in the car you went inside to purchase water and cigarettes. While you were inside the woman was yelling and panicking and you took her back to the truck. After two blocks her behavior became too much for you to bear so s.22 pulled into the driveway of an apartment complex and you all exited the vehicle. You state that the woman stumbled around the car, and you got back into the vehicle, you in the driver's seat, and s.22 in the passenger's. While you waited in the truck you smoked cigarettes and listened to music. The truck was not running and the keys were not in the ignition. The tail lights and the stereo of the truck continue to work until the door is opened. Shortly thereafter the police arrived, and you later learned that the woman had called them from the truck. You state that at no time on September 1, 2013 did you operate a vehicle; you only sat in the driver's seat while you waited for the woman to find a safe way home. You state that you did not intend to drive, the keys were not in the ignition, and the engine was not running.

Your evidence also includes an affidavit from s.22 confirms your version of events, and confirms that the stereo and tail lights continue to work in the vehicle when the key is not in the ignition. s.22 states that he placed the keys on the dash of the vehicle, and that they were never in the ignition and the engine was not running. s.22 states that at no time on September 1, 2013 did he see you operate a vehicle and you only sat in the driver's

seat while you waited for the woman to find a safe way home, and you did not have care or control the vehicle at any point.

You also provided video evidence from your restaurant, s.22 provided a statement to indicate that the time on the video is not correct and is two hours ahead. s.22 further submits that you are wearing a blue T-shirt, and s.22 is wearing a white T-shirt. I have accepted the time difference stated to be true, and I have continued based on the actual time, and not the time posted in the video.

The video evidence shows the vehicle to arrive at 1945 hours, and you and s.22 to exit and come into the restaurant at 1958 hours. You depart at 0230 hours and 0231 hours respectively. The vehicle departs just prior to 0233 hours (2:32:50 am).

Ms. Lee provided *Jago v Superintendent of Motor Vehicles* to submit that in order to be a driver as defined by the Act, one must be on a highway or industrial road; "A significant aspect of the scheme created by the Act for the issuance of roadside driving prohibitions is, for purposes of this analysis, that it extends only to drivers found driving or in care or control of a vehicle on a highway or industrial road. People found driving on private property that does not fall within the definition of "highway" or "industrial road" are not subject to such prohibitions." [14] Ms. Lee submitted that the driveway of the apartment building where you were met by the officers does not constitute a highway or industrial road as defined by the Act.

Ms. Lee submitted that the evidence from s.22 is highly unreliable. Ms. Lee submitted that it is clear that s.22 was intoxicated at the time, and was unlikely to be able to provide accurate information. Ms. Lee also submitted that the evidence from s.22 is "double stacked hearsay," as it came from s.22 to Cst. Cosmacini, before it was incorporated into Cst. Fodor's evidence. Ms. Lee stated that without the ability to cross examine, it is impossible to determine the reliability of s.22 statements, and there is no real evidence about what she said. Ms. Lee stated that it would have been easy for the officers to get a statement from her, but they chose not to. Ms. Lee stated that the sworn evidence from you and s.22 is far more reliable than the "double stacked hearsay" from s.22. Ms. Lee stated that it is clear from the evidence that s.22 does not know who you are and has never met you before, and therefore it is entirely possible, and likely, that she mistook you for s.22 when she identified you as the driver.

Ms. Lee referenced the decision *Scott v Superintendent of Motor Vehicles* to state that the issue of credibility must be considered in relation to "the internal consistency of each witness' evidence, its consistency with other evidence found to be reliable and its consistency with common sense and ordinary human experience." [37] Ms. Lee stated that with this in mind, it is clear that the evidence from yourself and Mr. Repin is more reliable than the hearsay and inconsistencies provided by Cst. Fodor.

Ms. Lee also provided a number of previous decisions to illustrate that prohibitions with similar fact patterns are often revoked. Ms. Lee noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

The Act defines a highway as:

- (a) every highway within the meaning of the *Transportation Act*,
- (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and

(c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited

I find that the driveway of the apartment building satisfies the definition of a “private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited.” Your evidence is that s.22 pulled off the road into the apartment driveway, parked, and waited for s.22 to find a ride home. In short, you and s.22 as members of the public, were able to access the driveway and used it for the purpose of parking the vehicle. I find that this satisfies the definition of highway as defined by the Act. I do not find the previous decisions provided by s.22 to be relevant to your situation.

The affidavits from you and s.22 both state that you were, “finishing some maintenance work at the restaurant.” I have reviewed the video evidence, and it clearly shows you and s.22 seated at the bar smoking and drinking for the majority of the video. I will not make assumptions regarding what you were doing; however, it certainly does not appear to be “maintenance work.” In both your affidavits, you and s.22 state that “at approximately 3:00 am, I was at my restaurant, s.22 in downtown Vancouver.” In your affidavit you further state, “I had red glassy eyes from working at the restaurant until after 3:00am.” I find this statement to be false as the video evidence clearly indicates that you left the restaurant at 2:32am, not after 3:00am as you claim.

Cst. Fodor’s evidence states that s.22 stated that she was concerned about how impaired you were and the fact that you kept driving. Both you and s.22 state that s.22 was highly intoxicated, and Ms. Lee submitted that it is entirely possible that s.22 falsely identified you as the driver as she had never met either you, or s.22 before. With regard to s.22 intoxication, I do not have any evidence to indicate otherwise, yet the uncontroverted fact remains that she called the police to report that she was in a vehicle with an impaired driver, the officers located the vehicle with her in it, you were seated in the driver’s seat, and you had the strong odour of liquor on your breath. However, I find that the video establishes that it is unlikely that she met you at a bar as she claims, as only half an hour passes from the time you left the restaurant to the time of her call to police. I have factored this into her credibility.

I acknowledge your evidence that the rear lights of the vehicle can remain illuminated even when the key is not in the ignition; however, this does not address the fact that Cst. Fodor observed the reverse lights to be illuminated and the vehicle to be in motion, “As the PCs pulled up the driver was slowly backing the truck out of the driveway. The truck stopped immediately and the PCs observed that the reverse lights went out.” I do not find that I have any evidence to show why the reverse lights would be on if the vehicle was not either in motion, or intended to be in motion. I understand that the lights you are referring to are the day-time running lights, and the brake lights.

With regard to care and control, I note that there are a number of points in which your evidence differs from that of the Cst. Fodor. You state that you were in the vehicle, listening to music and smoking, while the keys were not in the ignition. Cst. Fodor states that he observed you to enter the vehicle, put it into reverse, and to slowly back the vehicle out of the driveway. You and s.22 state that s.22 was driving for the entirety of the evening until you parked in the driveway, at which time you both exited and you got into the driver’s seat.

In your version of events, you submit that after the vehicle was parked in the driveway, all three of you exited the vehicle. In Cst. Fodor’s evidence he states that the three of you were in the

vehicle when they arrived and s.22 exited to speak with Cst. Cosmacini. I do not understand why, if s.22 behavior became too much to bear and you pulled over to find her an alternate ride, the three of you would get back in the vehicle, and she would still be in the vehicle when the officers arrived.

I acknowledge that you have provided an explanation for a number of the officers' observations; however, due to the internal inconsistencies with your evidence, I do not find your version of events to be credible. Furthermore, there is no evidence in your, s.22 or the officer's evidence that you attempted to explain the situation to the officer at the time. I do not find, "I told him I was not driving" to be equivalent to explaining the entirety of the situation. There is no evidence that you told the officer that it was in fact s.22 who was driving, and there is no doubt that you were in the driver's seat when you were approached by the officer.

Based on the numerous discrepancies in your evidence, I find the officer's evidence to be more compelling. The keys may not have been in the ignition when the officer approached the vehicle, but I am satisfied that the officers observed the vehicle to be in motion on the driveway, and that you were identified in the driver's seat. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Narrative, Cst. Fodor states that you had the odour of alcohol on your breath, and when asked if you had consumed any alcohol your reply was, "obviously, I'm wasted man." Cst. Fodor indicates that your eyes were red and glossy and your speech was slow and slurred. Cst. Fodor states that he read you the breath demand from a prepared card.

In your evidence you deny ever stating, "obviously, I'm wasted man." You state that your eyes were red from working in the restaurant, and you deny that your speech was slurred. You do not deny that you had the odor of alcohol on your breath.

In the hearing, Ms. Lee submitted that Cst. Fodor indicates that he read the breath demand, and not the ASD demand. Ms. Lee stated that the breath demand relates to the Datamaster machine and occurs at the police station. Ms. Lee stated that you did not refuse to comply with an ASD demand. Ms. Lee further stated that I cannot simply find that you were read the ASD demand based on the pre-printed information in the Report.

I do not find Cst. Fodor's choice to write "breath demand" in the Narrative to indicate that a proper demand was not read. There is no evidence that the officer informed you that you were going to be taken to the police station to provide a sample, or that you were under the impression that you were to provide a sample into the Datamaster. In your evidence you state, "...Constable Fodor, approached me. Right away, he asked me to blow into a roadside breathalyzer machine." I am mindful of Ms. Lee's submission; however on a balance of probabilities, I find it more likely that the officer read the ASD demand.

I am satisfied that a valid ASD demand was made.

In the Narrative, Cst. Fodor states that you advised him that you did not want to provide a breath sample. Cst. Fodor states that he then asked to you walk to the rear of the truck and

asked you again for a breath sample. Cst. Fodor states that you again refused. Cst. Fodor states that you were explained that refusing has the same penalty as blowing over the limit, but you said that you did not wish to blow.

In your evidence you state, "when Constable Fodor asked me to blow, I told him that I would not do it."

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your evidence you state that you told Cst. Fodor that you would not do the test, and that you were not driving.

As I have already found you to be a driver, I do not find this to be a reasonable excuse.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc: Kyla Lee
fax: 604 685-8308

November 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on all grounds; however, not all grounds are applicable in your situation. For your benefit I have considered all of the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jennifer Currie. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), Cst. O'Boyle stated that you were driving or in care or control of a motor vehicle on October 20, 2013, at 01:52 hours. In the Narrative Text Hardcopy Occurrence Report 1 (the "Occurrence Report") Cst. O'Boyle stated that at approximately 0150 hours in the company of Cst. Wong, he was dispatched to a report of an erratic driver heading North on Oak Street from the Oak Street Bridge. Information relayed from dispatch to the officer was that a vehicle with s.22 was swerving and driving at speeds between 60 km/hr and 130 km/hr and swerving. At approximately 0152 hours, the officers saw the vehicle approaching and stop at a red light at 41st and Oak. The Occurrence Report states that after police followed the vehicle and initiated a traffic stop, they approached the driver side door at approximately 0154 hours. You were identified as the driver by your BC driver's licence.

In a written statement entitled Narrative Text Hardcopy Police Statement 1 (the "Narrative") Cst. Wong provided evidence which corroborates the evidence provided by Cst. O'Boyle.

There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report, Cst. O'Boyle noted that he formed his reasonable suspicion at 0154 hours and he ticked the box indicating that he formed his suspicion in part, based on an odour of liquor on your breath. He noted the time of the ASD demand as 0208 hours.

In the Narrative, Cst. Wong stated that when the window of your vehicle was rolled down, he noticed a strong smell of liquor emanating from the vehicle. When questioned about the amount of liquor you had consumed, Cst. Wong said you denied consuming any alcohol whatsoever. Your passenger told police that she was the one who was drunk and you were driving her home. Cst. Wong asked you to exit the vehicle so he may discern whether or not you smelled of liquor. He said the smell of liquor from you was immediately apparent and your eyes were bloodshot and glassy. When asked a second time if you had consumed any liquor, Cst. Wong stated that you said you had not consumed any. He also noted that both he and Cst. O'Boyle could smell liquor on you and believed you were operating a motor vehicle while intoxicated. Cst. Wong stated that Cst. O'Boyle read you the ASD demand.

In the Occurrence Report, Cst. O'Boyle stated that when you got out of the vehicle, you started making small talk with police, asking them how they were and being pleasant. Cst. O'Boyle stated that while talking to you, he noticed the strong smell of liquor coming from your breath and he related this information to Cst. Wong. He said you did not seem annoyed by this and you continued to say that you did not have any alcoholic beverages that night. Cst. O'Boyle said that police called for another member to bring an ASD to the scene and that at approximately 0208 hours, another unit arrived on scene with an ASD. He noted that the demand was read to you at approximately 0208 hours.

Ms. Currie submitted that your prohibition should be overturned because the officer did not make the ASD demand forthwith as required by the *Criminal Code* and therefore it was unlawful. She referred to the Report and stated that the officer read you the demand a full 14 minutes after the time he formed the requisite suspicion to make the demand. Ms. Currie submitted that you were not behaving in a way that might have given the officers a legitimate reason to delay the demand, such as engaging in behaviors that give rise for concern for the officers' safety or that would force police to delay reading the demand. She stated that neither officer provided any evidence as to the time they called for the ASD or how long it took for the ASD to arrive once the call was made. Therefore, she said, there is no evidence before me to establish that the call for the ASD was made in a timely manner.

Further, Ms. Currie submitted that even if the call was made in a timely manner, police do not have an unlimited time frame to wait for an ASD to arrive. She argued that 14 minutes falls outside the acceptable period of time and she provided the cases of *R. v. Woods*, *R. v. Kerr*, and *R. v. Cleaver* in support of her argument. Ms. Currie submitted that in each of the aforementioned cases, the court found the ASD demand was not made forthwith and acquitted the accused.

I have read and considered the criminal cases provide by Ms. Currie and I accept that the same principle with respect to a demand exists here. However, I find that the cases of *Smithson v. Superintendent of Motor Vehicles and A.G. of B.C.*, 2005 BCSC 411, and *R. v. Perin*, 2011 BCPC 0060 to be more pertinent. In *Smithson* at paragraph 19, Justice Edwards quoted *R. v. Higgins* [1994] M.J. No. 44 (Man. C.A.), where Scott C.J.M. held that, "the determinant factor is not the length of the delay but the reasons for it." In *Perin*, the facts were markedly similar to this case; the officer did not have an ASD on hand and had to call for one to be brought to the scene. The Court held that the officer was not required to make an ASD demand upon promptly forming her suspicion because to do so would be to make a demand she could not meet.

While I acknowledge the delay between the time the officer formed his reasonable suspicion and when he read you the ASD demand, I do not find the delay to be unreasonable. I find that it was reasonable for the officer to delay making the ASD demand. He would not have been able to effect the demand by obtaining a breath sample "forthwith" because he did not have an ASD readily available to him. The evidence shows that the officer made the demand immediately or soon after the ASD was brought to the scene by another officer. I am satisfied that the demand was made as soon as possible.

As for the reasonable suspicion requirement for a roadside breath demand, it is of a relatively low standard; essentially, it is a suspicion of alcohol being in the body of the driver, and no more. Based on the officers' evidence that there was an odour of liquor on your breath, I am satisfied that the Cst. O'Boyle had the grounds to make the demand.

I am satisfied that the peace officer made a lawful ASD demand.

I now turn to the issue of whether or not you failed or refused to comply with the demand. In the Occurrence Report, Cst. O'Boyle stated that at approximately 0209 hours, Cst. Wong held the ASD for you so that you could provide a breath sample. He said that you inhaled a breath, placed your mouth over the straw and puffed out your cheeks as if blowing. He said the instrument registered NOGO which he knows to mean that an inadequate amount of breath was blown into

the ASD. Cst. O'Boyle stated that it was his opinion that you were not providing breath into the ASD on purpose as there was no sound of you blowing. Cst. Wong warned you that he could not feel any air coming out of the rear of the ASD.

Cst. O'Boyle said Cst. Wong asked you multiple time to blow into the ASD but you continued to pretend to blow without actually expelling air. He said you would turn your head in an attempt to make it look as if you were blowing. You were warned for refusal and informed that refusing to provide a breath sample held the same penalty as blowing a FAIL result on an ASD. At 0218 hours you were informed by Cst. Wong that you were being given an IRP for failing to provide a breath sample.

Cst. Boyle noted that you immediately became aggressive, even attempting to flee the area before you were served with the Notice.

In the Narrative, Cst. Wong provided corroborating evidence to support the evidence provided by Cst. O'Boyle.

There is no evidence before me to the contrary. I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

Ms. Currie argued that because the demand was unlawful, you were not required to comply with it. I have already made a finding that the demand was lawful; therefore this does not constitute a reasonable excuse.

I am satisfied that you did not have had a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Jennifer Currie
by Fax: 604-590-5626

October 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 8, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, David Baker, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence before me, I find there is one issue that is determinative in this review.

Was the ASD reliable?

I am not satisfied that the ASD used for your second analysis was reliable.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

This decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

November 12, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 22, 2013, 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;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice that the peace officer served on you.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

I confirm that I received your submission which was faxed to our office on October 28, 2013. You told me that you have been

s.22

Your driving prohibition will cause hardship on you and your daughter. You asked for the charges to be dismissed entirely or a reduction in the maximum penalty.

While I understand that it must be difficult to be without your car and driver's licence; under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that on October 22, 2013, at 00:16 hours, Officer Kim (the "officer") established you as a driver or having care or control of a vehicle.

The police evidence in the Narrative Text Hardcopy (the "Narrative") is that at approximately 00:01 hours, police received a report from staff at the Charlatan restaurant/pub that a patron, later identified as you, was very intoxicated and planning on getting in his vehicle and driving home. Staff recalled seeing you go to your vehicle earlier in the evening and remembered that the vehicle was parked just outside the restaurant. Upon arrival, the officer observed your vehicle parked on Grant Street and it was the first car parked just west of Commercial Drive, on Grant Street.

At 00:16 hours, the officers parked their vehicle on the east side of Commercial Drive and observed you get into the driver's side of your vehicle. The officer said the vehicle's rear lights turned on, followed by the front head lights. The officer then observed your vehicle move forward approximately one to two feet when staff from the restaurant came out to stop you from leaving. The officer observed you get out of your vehicle and speak with staff. At this point in time, police dispatch received an update that restaurant staff had convinced you to leave your vehicle and take a taxi home. The officer drove up to speak with you at which point he said you advised you were not going to take a taxi home.

You said that it was not your intention to drive your vehicle home. You admit that you entered your vehicle in the early morning hours and moved it approximately two feet by rolling it forward down the hill. You never started your vehicle, which has a standard transmission, but rather just took it out of gear. You moved your vehicle to allow better parking behind you. You said every time you consume alcohol at this bar you always leave your vehicle parked on the street and

pick it up in the morning. You said it is approximately a fifteen minute walk between the bar and your home, which allows you to relax and get some exercise.

I realize you said it was not your intention to drive home, however, if this is the case it causes me to question what you told me. For example, if your intention was to only move your car a few feet to make way for others to park, I question why you did not do this the first time you went out to your vehicle. I also question why the officer saw your vehicle's rear lights turn on, followed by the front head lights. If you took the vehicle out of gear to allow it to roll forward a few feet, I do not understand why you would turn on the headlights. In addition, I believe it is reasonable to infer that a conversation took place at some point between the restaurant staff and yourself. I believe it is reasonable to conclude that as a result of that conversation, restaurant staff believed it was your intention to drive your vehicle home because that is what you told them you planned on doing. Also of interest is that the officer indicates in the Narrative that you stopped your vehicle only when "staff from the restaurant came out to stop [you] from leaving." Finally, I note that you told me that it was your intention to walk home; however, there is no indication in the officer's evidence that you told him that.

I note that section 215(1) of the Act defines a driver as a person having care or control of a motor vehicle on a highway, whether or not the motor vehicle is in motion. Care and control of a motor vehicle includes some use of the vehicle or its fittings or some course of conduct associated with the vehicle, which would involve a risk of putting the vehicle in motion so that it would become dangerous. The officer observed you get into your vehicle, saw the front and rear lights come on and saw you move the vehicle forward.

Based on a consideration of the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 00:24 hours and at 00:33 hours, the officer used ASD serial numbers 101464 and 037073 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 037073 at 00:33 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were “fail”; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator indicates that ASD serial number 101464 and ASD serial number 037073 were checked for calibration and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

October 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that you and your counsel, Kyla Lee, received all of the disclosure documents. I have proceeded with the review based on this confirmation.

Your counsel, Ms. Kyla Lee, provided the case of *Scott* and referred to the principles enunciated by the court in *Spencer*, to underline the concepts of credibility which apply in this review process. From *Scott*, evidence must be assessed for consistency and credibility, with legitimacy; from *Spencer*, contemporaneous evidence prepared by an officer is not *prima facie* more credible for that reason. I am mindful of the principles as stated by the court, and apply them herein.

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was the ASD reliable?

I am not satisfied that the ASD used for the attempts in obtaining a sample of your breath was reliable.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

You may go directly to the location where the vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 18, 2013, the date the vehicle was eligible for release. You are responsible for any storage costs beyond that date, and 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. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

November 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because an ASD test

resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

In your written submission, you indicate that the officer stated that you and your friends left in one taxi, which is false. Further, you submit that you were not served with any ticket pertaining to a 90-day prohibition or provided with any explanation aside from a Notice of Impoundment. I do not find the officer indicating that you left in one taxi as opposed to two taxis relevant to the issues that I must make a finding on in this review. Moreover, while I acknowledge your submission that you were not served any ticket pertaining to a 90-day prohibition, the Notice is the ticket, and as such, I am satisfied that you were provided with the required information related to your driving prohibition.

You submit that you have just had your licence reinstated and have diligently been repaying ICBC for s.22 Accordingly, you indicate that you have learned your lesson and have vowed not to make the same mistake twice. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the “RTS”), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2300 hours on October 19, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 2305 hours and 2315 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, section 6 contains information related to the first ASD test including the serial number of the device recorded by the officer as: SN 086028. Moreover, section 8 in the RTS contains information related to the second ASD test including the serial number of the device recorded by the officer as: SN 065858. The officer also submitted two Certificates of a Qualified ASD Calibrator (the "Certificates") that bear serial numbers 086028 and 065858, respectively. Accordingly, the serial numbers indicated on the Certificates and the serial numbers recorded in the RTS are not identical, as "SN" is not indicated on the Certificates. However, I feel it is reasonable to infer that the officer recorded "SN" to denote "serial number" as both entries were recorded under the "SERIAL #" heading. Therefore, I am satisfied that the Certificates provided for ASD serial numbers 086028 and 065858, correspond to ASD serial numbers, SN 086028 and SN 065858, recorded by the officer in sections 6 and 8 of the RTS.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates in which Barry Selver certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 16, 2013, and October 1, 2013, respectively. He also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

In the Narrative Text Hardcopy – Occurrence Report – 3, the officer indicates that after initiating a traffic stop and observing you as the driver, he noticed you were not looking at him and that as you spoke, you would lower your mouth. He also noticed a strong smell of liquor emanating from the vehicle and asked you if you had been drinking. He indicates that you responded, “no”, and advised him that your friends had been. The officer then asked you to exit your vehicle and while at the rear of the same vehicle, he observed you stumble. When you were asked again where you were going, he noticed a strong smell of liquor on your breath and asked you again if you had consumed any drinks. He submits that you denied having any drinks because you were the driver and that you indicated that you were willing to blow into a machine.

You submit that at approximately 11:00 pm, you were pulled over by a police officer who alleged that you had been drinking on the presumption that he could smell alcohol in your vehicle. Conversely, you submit that you had not consumed any alcohol as you were on painkillers for a back injury you had sustained at work. Accordingly, after meeting friends at the Terminal Pub and Lounge (the Pub), at approximately 8:00 pm, during the course of the night you had a soft drink and nachos. Because you were not drinking, you submit that you had agreed to drive your friends home and that you would not have volunteered to do so if you had been drinking.

While I have reviewed the letter of support provided by s.22 in my view his statement does not appear to have been drafted independently of your written submission. Specifically, s.22 letter is strikingly similar to your submission in the sense that it appears to use the same format, same font type and size, and includes similar language. As a result, I have given less weight to this evidence.

Further, I acknowledge your submissions that you were not drinking because you s.22 and that the officer’s presumption that you had been drinking, based on the smell of alcohol in your vehicle, can be attributed to your friends in the vehicle who had been drinking. However, I note that you do not refute the officer’s evidence that he detected a strong smell of liquor on your breath once you had exited the vehicle. Moreover, you do not refute any of the officer’s evidence regarding your behaviour while seated inside the vehicle or his observation that you stumbled when standing at the rear of your vehicle.

Although you submit that you had not been drinking, you did not provide any compelling evidence that would cause me to doubt the “FAIL” readings on the ASDs that I have found to be reliable. Section 215.41 (2) of the Act states that “FAIL” means an indication on an ASD that the concentration of alcohol in a person’s blood is not less than 80 mg%. As such, I am satisfied that your BAC was not less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 25, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that disclosure documents were faxed to your lawyer, Patrick D. Angly. I will proceed with the review based on this confirmation.

Mr. Angly submitted that while there is a report that you had three drinks at the Cactus Club, and appeared to have consumed more prior to arrival; however, there is no mention of alcohol in this report. Mr. Angly submits that it is common knowledge that there are “drinks” served in restaurants which do not contain alcohol.

While I agree that there are non alcoholic drinks served in restaurants; I find it unlikely that if were drinking non-alcohol drinks you would have raised any concerns of the staff which ultimately lead to a complaint to the police.

Mr. Angly submitted that the officer formulated his grounds based on slurring of speech, and that you were avoiding eye contact. Mr. Angly submitted that while slurred speech may be an indicator of consumption of alcohol, it may also be due to a preexisting condition. In addition, there is no requirement that a driver make or maintain eye contact with an officer, and the failure to do so should not be equated with alcohol consumption.

Your lawyer has not provided any persuasive evidence that shows what you consumed at the Cactus Club nor whether or not you have a preexisting condition that could explain the slurred speech. In *Johnson v the Superintendent of Motor Vehicles* 2002 BCSC 89 the Court ruled that it is not sufficient for a petitioner (appellant) to make 'suggestions' about what might have happened. Evidence to support the suggestion is required in an administrative review. In addition, while I agree that there is no requirement to have eye contact with the officer it does support the remainder of the evidence that lead up to the stop.

Further, Mr. Angly submitted that the reasonable suspicion required by the *Criminal Code* to authorize a demand must be that the driver has alcohol in his body. In this case there were no grounds for a reasonable suspicion, as the report did not mention alcohol, there was nothing wrong with the driving observed, the driver denied consuming alcohol, and there was no smell of alcohol coming from the driver of the vehicle.

Despite Mr. Angly's submission, section 215.5(4) of the *Motor Vehicle Act* requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in s. 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0005 hours on October 25, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that he observed you driving southbound in the 4200 block of Boundary.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 0013 hours and 0018 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on October 22, 2013, he checked the calibration of ASD serial number 101477. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 19, 2013.

For the second ASD, the qualified ASD calibrator certified that on October 22, 2013, he checked the calibration of ASD serial number 036925. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 19, 2013, and the service expiry date as June 28, 2014.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 25, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Patrick D. Angly by fax 604 879 3526

November 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 27, 2013, 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;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0325 hours on October 27, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over and were identified as the driver via your BC driver's licence.

In your evidence you confirm that you were pulled over by the officer and that you were driving.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0330 hours and 0337 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test and you understood.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 065828 and your second sample of breath into ASD serial number 065836. The officer

also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 065828 and 065836.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on October 8, 2013, he checked the calibration of ASD serial number 065828. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 5, 2013, and the service expiry date as November 15, 2013.

For the second ASD, the qualified ASD calibrator certified that on October 22, 2013, he checked the calibration of ASD serial number 065836. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 19, 2013, and the service expiry date as June 28, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state:

- You recently returned from travelling and have been feeling ill, and had a bad cough.
- You had two beers over the course of the evening while working at s.22 Restaurant (the "Restaurant"). You had your first beer around 11:30pm and you finished your second around 1:30am.
- You consumed no alcohol prior to your arrival at the restaurant, or after your departure.
- You left the Restaurant at approximately 2:30am and went home.
- At approximately 3:20am your girlfriend called you and asked for you to pick her up.
- You felt sick, and took 30mL or 1 oz of Nyquil as you walked out of the door, approximately 2 to 3 minutes before 3:25am.
- You were driving for approximately 2 to 3 minutes before you were pulled over by the officer.
- You forgot about the two beers you had consumed earlier, and when you remembered, you corrected yourself and told the officer that you had consumed two beers.
- When you exited the vehicle you felt ill and leaned over. You were coughing, felt dizzy and thought you were going to vomit. You felt vomit come up your throat and into your mouth, and then swallowed it.
- The officer never made any inquiries regarding whether or not you had vomited.
- On November 1, 2013, s.22

Ms. Waker states:

- The ASD results are not accurate because there was mouth alcohol present due to your consumption of Nyquil prior to the ASD analysis, and due to the vomit in your mouth while you were dealing with the officer.
- According to page 11 of the ASD manual, if the first test is positive, the officer should wait 10 minutes before administering the second.
- You had a fever at the time of the analysis and the elevated body temperature from your fever caused the breath test results to be falsely high.
- According to the ASD manual, the electro-chemical reaction is affected by temperature because the breath to blood ratio is temperature dependent (page 5).
- According to the RCMP resource reading material for the Intox EC/IR II, if the mouth temperature is greater than 34 degrees Celsius ("C"), the breath test result will be falsely elevated.
- The resource reading material provided pertains to the Intox EC/IR II, but the Alco Sensor IV DWF uses the same electro-chemical reaction, and uses the same ratio with regard to breath results and BAC.

You have provided evidence from your doctor who states that you are being treated for s.22 and you have needed and continue to need cough medicine. You have also provided a statement from your girlfriend who states that you worked with her at the Restaurant and she called you around 3:20am to pick her up.

There are two issues with regard to the reliability of the ASD results. The first being the presence of mouth alcohol, and the second being the temperature of the breath sample provided. I will address each issue separately.

With regard to mouth alcohol, I have reviewed the evidence before me, including the ASD manual and the "Technical Information" provided by the officer, and I am satisfied that mouth alcohol, including regurgitation, can cause an elevated result in the ASD if present within 15 minutes of the ASD analysis. I also note that page 4 of the ASD manual states, "A recent drink of an alcoholic beverage or regurgitation could introduce "mouth alcohol" to the breath thus causing an exaggerated reading. A 15 minute waiting period prior to testing will insure the elimination of "mouth alcohol.""

I note in your submission you state, "I was coughing, I felt dizzy and I thought I was going to vomit. I felt some vomit come up my throat and into my mouth, I then swallowed it." The officer's Narrative states, "he walked up to PC 2849 WATTS and stated that he felt very sick, and bent over, like he was going to vomit. PC 2849 WATTS noted that he did not burp during this. He bent over for approx 2 min and then said he was fine."

I do not find it likely that you would be able to vomit into your mouth and then swallow it, without the officer taking any note. I find that the officer's note, "he did not burp," indicates that the officer was aware of the effects of regurgitation, and did not observe any to occur. I also find it odd that if you had vomited into your mouth, that you would then tell the officer that you were fine. I do not find your claim to have vomited in your mouth to be credible.

With regard to the Nyquil, I acknowledge that you have provided evidence that Nyquil contains alcohol, and I do not have any evidence before me to contradict your claim that you consumed one ounce prior to driving. However, I do not find your timeline to be compelling. I note that you claim to have been driving for approximately two to three minutes prior to the time you were

stopped by the officer. I also note that you have provided a map indicating a driving time of two minutes. A driving time of two minutes places the time of your Nyquil consumption at 0323 hours, fourteen minutes prior to your second ASD analysis. However, I do not find it to be likely that you finished your Nyquil and then immediately began driving without any amount of time passing in between. I find it reasonable that some time, at least one minute, would have passed from the time that you drank the Nyquil, and the time that you got into your vehicle, started your engine and began to drive. I do not find that your timeline indicates that your second analysis was within the 15 minute window, and therefore, I do not find that it was affected by mouth alcohol.

With regard to Ms. Waker's submission that your fever caused an elevated result on the ASD, I do not find that I have sufficient evidence to support this claim. I acknowledge that the Intox EC/IR II Resource Reading states, "If the mouth temperature is greater than 34 degrees C, e.g. if subject has a fever, the breath test result will be falsely elevated." I acknowledge your submission that you were suffering from a fever at the time; however, I do not have any evidence before me to explain the correlation between your fever and the temperature of your mouth. I do not have any evidence before me to indicate that the temperature of your breath was greater than 34 degrees C. Furthermore, I acknowledge Ms. Waker's submission that the Intox EC/IR II and the Alco Sensor IV DWF use the same internal processes, but I do not have any evidence before me to support this claim.

Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc: Cathryn Waker
fax: 604 681-0652

October 2, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 11, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence before me, I find there is one issue that is determinative in this review.

Were you a driver within the meaning of section 215.41(1) of the Act?

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 29, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Don Muldoon, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

In the hearing, Mr. Muldoon submitted that section 215.41(3)(i) clearly states that a valid demand for a sample of breath must be made under the *Criminal Code*. Mr. Muldoon stated that section 254 of the *Criminal Code* permits the officer to demand a sample of breath, so long as the demand is made "forthwith." Mr. Muldoon stated that the definition of "forthwith" is imperative to the investigation. Mr. Muldoon stated that "forthwith" means immediately, or

without delay. Mr. Muldoon noted in the officer's evidence, the time that the officer formed his suspicion that you had alcohol in your body was 0019 hours, but he did not read the ASD demand until 12 minutes later at 0031 hours. Mr. Muldoon referenced *R v Grant* and *R v Woods* in support of his position.

In the Narrative, the officer states, "PC VAN EERD canvassed for other police units with an ASD. It took approx. 12 minutes for another unit to attend with an ASD which was the reason for the ASD demand delay."

I have considered the evidence before me and it is clear that there was a 12 minute delay between the time the officer formed his suspicion and the time that the ASD demand was made on you. However, I find that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review. I have considered all of the grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0019 hours on September 29, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer states that she was driving through an intersection and encountered a motor vehicle incident. The officer states that she observed several parties standing outside their vehicles exchanging information. The officer states that she observed a s.22 with front end damage and inquired as to the identity of the driver. The officer states that you identified yourself as the driver of the vehicle. The officer states that she asked you to move the vehicle to the side of the road, and you advised that you had not done so because you did not think it was safe. The officer states that she then confirmed your identity via your driver's licence.

In your affidavit you state that you were involved in a motor vehicle accident on September 28, 2013. You state that some time after the accident the police attended, and at that time you were outside of your vehicle. You state that when the police arrived your vehicle was not running and the key was not in the ignition. You state that there was damage to the front end of your vehicle and you did not believe that it was capable of being driven. You state that the officer asked you to move the vehicle but you did not do so because you thought it was unsafe to drive. You submit that you had no intention to operate the vehicle following the accident and prior to the attendance of the police you had abandoned any further intent to use your vehicle in any way.

In the hearing, Mr. Muldoon stated that the question must be whether or not you were a driver at the time indicated by the officer as the time of driving. Mr. Muldoon submitted that the evidence clearly indicates that at 0019 hours you were not a driver and had abandoned any intention of driving. Mr. Muldoon stated that at no point did the officer witness you in care or control of the motor vehicle, and at the time that she arrived at the scene, you were outside of your vehicle exchanging insurance information with the other party. Mr. Muldoon stated that section 215.41 of the Act clearly states that a driver is defined as someone "having" care or control of a motor vehicle. Mr. Muldoon stressed that this implies the present tense, not a driver that has been in care or control of a vehicle in the previous three hours. Mr. Muldoon stated that the officer arrived at the scene at 0015 hours and at this time you were already outside of the vehicle. Mr. Muldoon submitted that your abandonment of your intention to drive is clear, as you would not move the vehicle even when asked to by police.

Mr. Muldoon provided *Hackl v Superintendent of Motor Vehicles* to assert that the intention of the driver is imperative when considering the definition of care or control. Mr. Muldoon stated that the court determined in this case that the adjudicator had erred in determining the proper definition of care or control. Mr. Muldoon also referenced *Lightfoot v Superintendent of Motor Vehicles* to further establish the grounds which must be satisfied in order to determine that you were in care or control of the motor vehicle. Mr. Muldoon stated that it must be shown that you either intended to put the vehicle into motion, or did something to put it into motion at 0019 hours. Mr. Muldoon stated that there was no such risk present at that time, and that you even declined to do so when instructed to by the officer, and you had already abandoned your intention as you had already called for a tow truck.

I have considered the evidence in your affidavit and the submission of Mr. Muldoon. The evidence clearly indicates that you were outside of the vehicle when the officer arrived at the scene. I concur that the evidence indicates that you had abandoned your intent to drive, and were not in care or control of the vehicle when the officer arrived. I also concur with Mr. Muldoon that you were not in care or control of a motor vehicle at 0019 hours. I understand *Hackl* to establish the requirement that the adjudicator account for intent when determining care and control. I further acknowledge *Lightfoot* to establish that the officer must turn his mind to the issue of care and control. I do not, however, find these decisions to be relevant to your prohibition as I do not find that the officer determined that you were in care or control of a motor vehicle, but rather than you were a driver. Aside from the time indicated by the officer on the Report and Notice, I find that the evidence clearly indicates that you were a driver at the time of the motor vehicle incident. When the officer arrived at the scene, you were outside of the vehicle speaking to the other party, but identified yourself as the driver of the vehicle. In your affidavit you state that, "On September 28, 2013, I was involved in a motor vehicle accident." You also provided a statement from ICBC indicating that you were involved in a claim from another driver. Mr. Muldoon provided an explanation that the September 28, 2013 date is logical, as the event occurred near midnight. I am satisfied that all evidence relates to the same incident. The officer notes that you were exchanging insurance information with the other party when she arrived on scene. I understand this to indicate that the incident had occurred shortly prior. While I do not have an exact time of the incident, I find that you were a driver and in care or control of a motor vehicle, prior to abandoning your intention due to the motor vehicle incident. I am satisfied that you were a driver, even if you were no longer a driver at the time the officer approached you.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0032 hours and 0035 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0032 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0035 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101479 and your second sample of breath into ASD serial number 032646. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101479 and 032646.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 101479. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as November 15, 2013.

For the second ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 032646. He found the ASD to be within the

recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as June 28, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Don Muldoon
fax: 604 974-8888

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On July 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on all thirteen review grounds, five of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

At the beginning of the oral review, I confirmed with your lawyer, Kyla Lee, that she had received full disclosure of the documents before me. I have proceeded with this review based on that confirmation.

In accordance with the BC Supreme Court's decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the "Superintendent's Report on Approved Screening Devices" which may have been disclosed to your lawyer is not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer provided a Report to Superintendent (the "RTS"), in which he recorded the date and time of driving or care or control as July 1, 2013, at 03:19 hours.

There is no evidence before me that is contrary to that of the officer's evidence that you were the driver of the motor vehicle.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 03:20 hours and 03:21 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In your affidavit, you indicated that at 02:30 hours you attended Celebrities Nightclub (the "Club") to pick up your girlfriend, s.22 You noted that you were let into the Club at 02:45 hours and upon entering you began to look for s.22

At point four, you indicated that once you found them s.22 bought you a beer, and at 03:00 hours the lights came on signaling that the club was closing and that it was time to go. You indicated that s.22 went with s.22 to gather their items from coat check and you remained behind to finish your beer. At point five, you indicated that s.22 took a few minutes getting ready to leave and that you left the Club at 03:10 hours and proceeded directly to your vehicle, but immediately before leaving you finished your beer.

At points six and seven, you indicated that you were pulled over by the officer and that he approached your vehicle and asked you if you had consumed alcohol that night, to which you responded by saying that you had one beer about an hour earlier. You indicated that what you

meant by that was that your girlfriend had ordered you a beer about an hour earlier. You stated that you were not trying to be deceptive, but that you did not know the time of your last beer was important. You stated that you were providing “a very rough estimate” and noted that at no point did the officer ask you to clarify your response.

At points eight and nine you indicated that the officer asked you to blow into a breathalyzer and that you complied with his request. You stated that the officer showed you the reading on the machine and that it said “FAIL”. At point ten, you stated that you were completely shocked by this and that you asked for a second test. At point fourteen, you indicated that the officer provided you with a second ASD test and that it also registered a “FAIL”. At point 21, you indicated that you have learned about the effects of residual mouth alcohol and that you are certain your last drink was less than fifteen minutes from both times you blew, as your last sip of beer was at 03:10 hours. You stated this is why the machine said “FAIL”. At point 22, you stated that at no time did the officer ask you the time of your last drink.

s.22 provided a letter in which at points one and two she indicated that at approximately 02:45 hours you met her and s.22 at the Club and that the three of you got a drink at the bar and took them to the dance floor. At point three, she stated that when the lights came on she waited with s.22 to get her coat from coat check, while you finished your beer.

s.22 also indicated that the three of you said “hello” to a few friends outside of the Club then went to your vehicle. At points four and five, s.22 indicated that after you were pulled over by the officer that he asked you if you had been drinking and that you told the officer you had one beer.

s.22 also provided a letter in which at points three and four she indicated that at approximately 02:45 hours you came to meet both her and s.22 at the Club and that you all got a drink at the bar and then went to the dance floor where you all remained until the Club closed. At point five she noted that s.22 and herself separated from you briefly to get her coat and that you stayed to finish your drink. She indicated that the three of you met up with some of your and s.22 friends out in front of the Club. At point seven she indicated that you had only been driving for approximately ten minutes when the vehicle was signaled to pull over by the officer. Further at point seven s.22 noted that the officer walked up to you and asked you if you had been drinking and that you told him you had consumed one beer at the Club.

Ms. Lee noted that that your timeline and version of events contradicts that of the officer’s, as such I must assess credibility. She referenced the decisions in *Spencer v. British Columbia (Superintendent of Motor Vehicles)* and *Scott v. British Columbia (Superintendent of Motor Vehicles)*, and she explained their relevance in your case. I have read both decisions and have applied them in considering the evidence before me.

Ms. Lee referred to the officer’s evidence that between 03:19 hours and 03:21 hours he observed you driving, pulled you over, approached you, and advised you to get out of the vehicle where he formed his suspicion, read you the demand, and administered two ASD tests to you. Ms. Lee argued that each of these events could not have all happened within two minutes. In Ms. Lee’s view, this evidence is illogical and not consistent with common sense and ordinary human experience, and as a result it is not possible to rely on the officer’s timeline. It is on that basis that Ms. Lee stated that I cannot make a finding that mouth alcohol was not an issue in your case.

In considering the officer's timeline I respectfully disagree with Ms. Lee's assertion that it is illogical and that it should not be relied upon. While I can acknowledge that the timing of events as recorded by the officer appear to have occurred rather swiftly, I do not find that it would have been impossible for the events to have occurred in such a manner. I note with the exception of Ms. Lee's doubt there is no compelling evidence before me to indicate that the times recorded in the RTS are not reliable. Nor have I been provided with any alternate times. It is noteworthy to point out that the evidence before me indicates that the entire event proceeded without incident, more specifically there is no indication that there were any delays which would have slowed down or hindered the officer's investigation. I find the officer's timeline of events as indicated in his evidence to be reliable.

Ms. Lee provided me with two decisions; she referred me to the one dated July 25, 2012, in which she noted that my colleague revoked an IRP because the officer's timeline was inconsistent and confusing. She argued that the decision in *Modhgill v. British Columbia (Superintendent of Motor Vehicles)* stands for the proposition that unless prior decisions of my colleagues are distinguishable, I must follow them. However, the facts in my colleague's case were very different than the facts before me. In your case, I do not find the officer's timeline inconsistent and confusing.

Ms. Lee indicated that the investigating officer did not provide supporting material from the second officer on scene to confirm his evidence. Ms. Lee noted that in contrast, however, you provided supporting material from s.22 Ms. Lee noted that in the absence of the officer's supporting evidence that your evidence should be preferred. On this point, I find it noteworthy to point out that if there was a second officer involved, as your evidence claims there was, there was no requirement under the Act for the officer to provide evidence from said officer. Having said that, I am also cognizant to the fact you have provided letters from two witnesses. However, I do not find that simply because you have provided additional supporting material that makes your evidence preferable overall.

Ms. Lee argued that the two "FAIL" results were likely caused by residual mouth alcohol due to the beer you finished less than fifteen minutes prior to both ASD tests. Ms. Lee indicated that you did not know the importance of providing the officer with the time of your last sip of alcohol. She noted that it is not up to you to know such things, that it is the duty of the officer to ask such a vital question and in your case the officer clearly did not do so. In support of this, Ms. Lee referred to the RTS and indicated that the response written at point eleven is not the response to the question of when your last drink was, but rather your response to the officer asking you how much you had to drink. Ms. Lee noted that the evidence in the RTS contradicts that contained in the Narrative. As, the Narrative shows that the officer did not ask you "What time was your last drink?" rather, it indicates that the officer asked you how much you had to drink. Ms. Lee noted that your evidence that the officer did not ask you when you had your last sip of alcohol is also consistent with your two witnesses and that heightens your credibility.

With regard your timeline, Ms. Lee provided me with a Google Maps printout, which indicates that the drive from the Club to where you were pulled over takes approximately seven minutes. She submitted that your evidence you had only been driving for about ten minutes is consistent with the reliable Google Maps evidence.

Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait fifteen minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol.

Your affidavit indicates that after a few minutes of s.22 gathering their belongings you all immediately left the club and went directly to your vehicle. Whereas in s.22 letters they indicated that upon leaving the Club and prior to going to your vehicle that the three of you stopped to talk with friends of yours. Consequently, this inconsistency causes me to question your evidence as to when you left the Club and began driving.

At point seven of your affidavit you claim that when you told the constable you had "one beer about an hour earlier" that what you meant by that was that your girlfriend had ordered you a beer about an hour ago. I find that this statement of yours contradicts others you made throughout your affidavit which indicated that your beer was ordered by s.22 sometime between 02:45 hours and 03:00 hours when the Club was closing. Further, your statement at point seven does not seem likely because it does not seem likely that based on the officer's question "if you had consumed any alcohol that night" that you would think to respond by telling him when your drink was ordered. The officer asked you if you had consumed alcohol that evening, in my view, common sense indicates that a reasonable person would respond by advising as to whether or not they "consumed" alcohol. In my view, there is nothing about the intention of the question "have you consumed any alcohol" that would make a reasonable person think about when the alcohol was ordered, rather than when they "consumed" it.

Your evidence is that the officer did not ask you what time your last sip of alcohol was, nor did he clarify the response you gave to his question of how much you had to drink. However, the undisputed evidence before me is that when the officer did inquire as to whether you had been drinking that evening and to how much, that you advised him you had one beer about an hour prior. This indicates to me that when you advised him how much you had to drink that you also voluntarily divulged when your last drink was to the officer, as such I see no reason why the officer would have clarified your response.

I find it noteworthy to also point out that you have not refuted or commented at all on the officer's evidence that you fumbled as you attempted to remove your driver's licence from your wallet, or that when you exited your vehicle you stumbled to the side of the road and that you were not wearing shoes. I find it unlikely that you would be fumbling and stumbling if you only had consumed one beer at the Club as you have claimed.

In considering the issue of mouth alcohol in your case, I find that the inconsistencies in your evidence cause me to question the reliability of your evidence on the whole; as a result I do not find your evidence that you consumed a beer within fifteen minutes of both ASD tests to be credible or convincing.

The evidence before me indicates that you advised the officer your last drink was one hour prior. Given this, the officer was not required to wait any period of time before administering the first ASD test. I find that the ASD results were not affected by residual mouth alcohol; as such I find them to be reliable. There is no compelling evidence before me that your BAC was less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that you were advised of your right to a second ASD test, on a different ASD and that the lower ASD test result would prevail. The officer also noted that you requested the second ASD test. In the Narrative the officer indicated that after your first ASD test which resulted in a "FAIL" you immediately asked if you could have second try. The officer stated that he advised you of your rights and that a lower sample would prevail, and that you agreed to a second sample.

Your evidence indicates that after your first ASD test that you requested a second test.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 03:21 hours.

There is no evidence before me to indicate that a second analysis was not completed by the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded that he advised you of your right to a second ASD test and indicated he informed you that the second ASD test would be on a different ASD, and that the lower ASD test result would prevail. Further in the RTS the officer recorded the serial number for the first ASD as 065830, and the serial number for the second ASD as 037073.

In your affidavit, you indicated that after the first ASD test registered a "FAIL" that you were shocked and that you asked the officer when the machine was last calibrated. You noted that the officer said he did not know, so you asked for a second test because you did not believe the first. You indicated that the officer placed the ASD you had just blown into on the top of his car then walked to the rear and came back with a new plastic straw for the ASD. You indicated the officer unwrapped the new plastic straw and put it in the ASD he had just placed on the top of the car. You stated that you are certain the officer used the same ASD for both tests.

In her letter, s.22 indicated that she did not hear a lot of the conversation between you and the officer, but that she saw you doing a breathalyzer test and heard you ask the officer when the machine was last calibrated. She noted that the officer said he did not know and you asked for a second test which the officer provided you. She also described a second officer coming to the vehicle and yelling at her and s.22

In her letter, s.22 indicated that you were asked by the officer to exit the vehicle and that you were taken behind the police car. s.22 stated that she and s.22 could hear the conversation between you and the officer "very clearly". s.22 stated that you were asking the officer when the equipment had last been calibrated, but that the officer said he did not know. s.22 indicated that you asked for a second test and that test was provided by the officer immediately.

Ms. Lee referred to your affidavit and the letters of s.22 and noted that it was you who asked for the second ASD test not the officer. She referred to the Narrative and stated that there is nothing in the Narrative describing that a second ASD was used. She further noted that the evidence indicates that the officer did not know what he was doing. She determined this was evident by the officer's unreliable timeline, his ASD operation knowledge, the second test was not given on a different ASD and the officer never asked you when your last drink was.

Ms. Lee stated that I should prefer your evidence that a different ASD was not used for your second test over the officer's evidence that there was a different one used.

I acknowledge that after you registered a "FAIL" result on the first ASD test that you immediately requested a second test. However, I reject your evidence that the officer did not use a different ASD for the second ASD test.

I note that s.22 indicated in her letter that she and s.22 could hear the conversation between you and the officer "very clearly", but s.22 stated that she did not hear a lot of the conversation. I find that in addition to this inconsistency, their letters do not contain any relevant or supporting material with respect to whether the officer used a second ASD.

I note that your witnesses are not helpful to you with respect to this issue, and as I have previously determined, I do not find your evidence on a whole to be very reliable. I find that I prefer the officer's more reliable persuasive evidence that a different ASD was used in the second test.

I find it noteworthy that you have not refuted the officer's evidence in the Narrative that after you asked for a "second try" that the officer advised you of your rights and that a lower sample would prevail and that you agreed to do a second sample. In the RTS the officer recorded that he advised you of your right to request a second ASD test, and that the second ASD test would be on a different ASD. The evidence in the Narrative in conjunction with the officer's evidence in the RTS reasonably satisfies me on a balance of probabilities that the officer more likely than not informed you of and was aware of the requirements of the second ASD test, specifically that the second test must be performed on a different ASD than the one used in the first ASD test.

Under section 215.42(2) of the Act a second analysis must be performed with a different ASD than was used in the first analysis. In reviewing the evidence I have inferred that there was a roadblock and other officers present. I find it more likely than not that there would have also been multiple ASDs on location available for use. Further, in his evidence, the officer has recorded two separate ASD serial numbers. I also note that the officer provided two distinct Certificates of a Qualified ASD Calibrator (the "Certificates"), each bearing a serial number that corresponds with those recorded in the RTS.

Ms. Lee referred me to the second decision of my colleague dated November 29, 2012, in which one of my colleagues revoked an IRP because the officer's Narrative indicated only one ASD was used and did not describe getting a second ASD. She again referred to the decision in *Modhgill*. I have reviewed the decision of my colleague, and find that it is distinguishable from yours. I do not find that the officer in your case provided evidence indicating that the same ASD was used for both tests.

Ultimately, based on the evidence before me, on a balance of probabilities, I am satisfied that the second analysis was performed on a different ASD.

Were the ASDs reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on June 18, 2013, he checked the calibration of ASD serial number 065830. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as July 16, 2013, and the service expiry date as November 15, 2013.

For the second ASD, the qualified ASD calibrator certified that on June 20, 2013, he checked the calibration of ASD serial number 037073. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as July 18, 2013, and the service expiry date as November 28, 2013.

There is no evidence before me to suggest that the specific ASDs used in your case were not functioning properly on July 1, 2013, at the time of your ASD tests.

I am satisfied that the ASDs were reliable.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that the result of both ASD tests was a "FAIL".

I am satisfied that the Notice was served on the lowest result which was "FAIL".

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on July 1, 2013. I note that as you have already served 20 days of the prohibition, you need only serve the remaining 70 days. Your prohibition commences October 24, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

Adjudicator

cc: Kyla Lee, Acumen Law Corporation
Fax: 604-685-8308

October 23, 2013

s.22

AMMENDED

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 3, 2013, 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);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Edward Chu. I have proceeded with this review based on that confirmation.

In accordance with the BC Supreme Court's decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the "Superintendent's Report on Approved Screening Devices" which may have been disclosed to your lawyer in this hearing is

not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Your lawyer, Mr. Chu states that the officer did not have reasonable suspicion of alcohol in your body. Mr. Chu states that the odour of alcohol on your breath is contrary to the evidence that you had not drank since 11:30pm. Mr. Chu states that all three of your passengers were drinking and the odour must have emanated from them and not your breath. Mr. Chu states that you told the officer that you had only consumed two bottles of beer and that the officer did not observe any irregular driving patterns. Mr. Chu also stated that there are a number of cases that establish that the odour of alcohol in the vehicle is not sufficient to form the basis of an ASD demand.

I find that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0335 hours on August 3, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver's licence.

In your affidavit you state that you were the designated driver for your friends and you were driving them home when you encountered a roadblock.

I am satisfied that you were a driver within the meaning of section 215.41, of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0341 hours and 0345 hours, both resulting in "FAIL" readings.

In your affidavit you state that, "I was surprised that the machine read "FAIL" twice."

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test and you requested to complete the test.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0345 hours.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101482 and your second sample of breath into ASD serial number 101461. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101482 and 101461.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on July 9, 2013, he checked the calibration of ASD serial number 101482. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 6, 2013, and the service expiry date as November 15, 2013.

For the second ASD, the qualified ASD calibrator certified that on July 16, 2013, he checked the calibration of ASD serial number 101461. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 13, 2013, and the service expiry date as November 28, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your affidavit you state that you consumed two bottles of beer while having dinner, between 10:00pm and 11:30pm. You state that you did not accompany your friends to the bar and decided to stay home. You state that you were asked by s.22 to pick her and your other friends up from the club. You state that a friend drove you downtown and you drove your friend s.22 car from the bar as the designated driver. You state that you had s.22 and the dentist instructed you to use Orajel to ease the pain in your mouth. You provided an email reminder confirming your appointment for s.22. You state that you recall applying Orajel while waiting for your friends to leave the bar. You have provided evidence to indicate that Orajel contains 54.6% alcohol. You state that your girlfriend, s.22 was quite intoxicated and the two of you were kissing a lot, including a French kiss. You state that the officer notes the smell of alcohol on your breath, but you believe that the breath emanated from the three passengers. You also state that you never told the officer that you had consumed any wine. You state that you attempted to tell the officer about your mouth alcohol concerns with regard to the Orajel and kissing your girlfriend, but the officer did not give you the opportunity to do so.

The affidavit from s.22 confirms that she went clubbing for a friend's birthday and that she called you to pick her up from the bar. s.22 also states that you kissed often before encountering the road block. s.22 confirms that s.22 and that you use Orajel constantly to stop the pain.

The affidavit from s.22 states that you were called to pick up your friends at the bar. s.22 states that after about 10 minutes of driving you encountered a police roadblock. Both affidavits also state that you do not drink very often as you are often tired from work.

s.22 states that the odour of alcohol on your breath is contrary to the evidence that you had not drank since 11:30pm. s.22 states that all three of your passengers were drinking and the odour must have emanated from them and not your breath. s.22 states that you told the officer that you had only consumed two bottles of beer and that the officer did not observe any irregular driving patterns.

s.22 states that after s.22 you have been applying Orajel, containing 54.6% alcohol on a daily basis. s.22 stated that you applied Orajel while waiting outside of the club to pick up your girlfriend and friends. s.22 states that in your affidavit you submit that the ride from the club to the road block took approximately 10 minutes, and therefore, the alcohol from the Orajel was likely present at the time of your ASD analyses. s.22 also states that kissing s.22 also likely raised your BAC.

I do not find that there is any compelling evidence before me to indicate that your ASD results were affected by mouth alcohol. Firstly, I do not find it reasonable that kissing your girlfriend would cause you to provide a "FAIL" sample on the ASD. Furthermore, I note that you first encountered the officer at 0335 hours and you provided two samples of your breath at 0341 hours and 0345 hours. I am mindful of *Giesbrecht v Superintendent of Motor Vehicles*, and the 15 minute timeframe permitted for the dissipation of mouth alcohol. In his affidavit, s.22 states that you were driving for approximately 10 minutes when you encountered the officer. From this timeline I determine that the latest you could have used the Orajel while waiting for your friends would have been 0325 hours. I note that this time is 16 minutes prior to your first ASD analysis, and 20 minutes prior to your second ASD analysis. I also note that the officer notes the smell of liquor on your breath. I am mindful of your claim that the odour emanated

from the occupants of your vehicle, however; I do not find it likely that the officer would smell the odor of liquor on your breath if the source was from the passengers in your vehicle. Furthermore, the officer notes the odour of liquor on your breath, not mouthwash. I do not find that mouth alcohol was a factor in your ASD analyses. There is no compelling evidence before me to indicate that the ASD analyses are not reliable.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on August 3, 2013. Your review was extended on August 23, 2013, and was re-extended on September 25, 2013. You have already served 19 days of your IRP and you have 71 days remaining. Your Prohibition ends on January 1, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

cc: Edward Chu
fax: 604 288-5198

September 27, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 9, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an

IRP Review Decision
Page 2

ASD test resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

In your IRP Application for Review (the "Application"), I note that your review was scheduled for September 18, 2013 at 0930 hours. Further, the Application indicates that you requested an oral hearing; however, a program used by Appeals Registry to track applicant disclosure indicates a written review was requested. At the time of the review, I had not received any submissions from you or on your behalf. Accordingly, I have proceeded with this review with the evidence I have before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), Cst. Martell indicates that you were driving or in care or control of a motor vehicle at 0041 hours on September 9, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cpl. Lacelle submits that at 0038 hours she was situated stationary at the corner of First Avenue and Yale Road. She observed a s.22 travelling southbound on First Avenue, slow at a red light, cross Cheam Avenue, and into a parking lot heading for the Birch Street exit. At 0041 hours, Cpl. Lacelle initiated a traffic stop on Cheam Avenue and submits that the driver immediately exited the vehicle to speak with her and identified himself as s.22

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

Evidence in the RTS indicates that at 0052 hours, Cst. Martell made an ASD demand on you. At 0055 hours you provided a breath sample for analysis on ASD serial number 101642. The test result was a "FAIL". Further, at 0056 hours you provided a second breath sample for analysis on ASD serial number 101638. The test result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

Evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

Police evidence indicates that you requested a second ASD test and that at 0056 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result by Cst. Martell.

There is no evidence before me to the contrary. I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Martell indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 101642, with a temperature of 25 degrees Celsius and ASD serial number 101638, with a temperature of 26 degrees Celsius were used. These unique ASD serial numbers are corroborated by a Certificate of a Qualified ASD Calibrator for each of the two devices.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 101642 was checked for calibration on August 23, 2013, with a service expiry date of February 8, 2014, and calibration expiry date of September 19, 2013;
- Qualified ASD Calibrator, Gregory Robert Dykstra, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 101638 was checked for calibration on August 23, 2013, with a service expiry date of January 3, 2014, and calibration expiry date of September 19, 2013, and;

- Qualified ASD Calibrator, Gregory Robert Dykstra, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Martell. These signatures confirm that any ASD tests referred to in the investigation were conducted by a qualified ASD operator and that the ASD units used were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 9, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.