

September 15, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No.

s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to you.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent for the IRP, the investigating officer checked the box to indicate that he witnessed you as the driver. He recorded the date and time of driving/care or control as August 28, 2011, at 2217 hours.

There is no evidence before me to contradict the officer's evidence. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on August 28, 2011, at 2217 hours.

Did the ASD register a warn or a fail?

Although the officer stated that you provided a fail result on an ASD on August 28, 2011, at 2226 hours, the service expiry date was four months prior, on April 29, 2011. As such, I am satisfied that an ASD did not register a fail on August 28, 2011, at 2226 hours.

Decision

I am satisfied that an ASD did not register a fail on August 28, 2011, at 2226 hours.

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

Adjudicator

September 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a "fail"?

In the Report to Superintendent, the investigating officer reported that you drove up to a road block. He recorded that you were driving or in care or control of a vehicle on August 20, 2011, at 2114 hours. The constable administered an ASD test, the result of which was a "fail". The constable reported that he informed you of your right to a second test, which you requested. He administered a second ASD test on a different device at 2126 hours, the result of which was also a "fail." The constable reported that you did not admit to when you consumed your last drink.

In your affidavit you stated _____ at the Boathouse restaurant with your son, s.22
s.22 t, and his girlfriend, s.22 n. You said you consumed your last drink quickly as
your son and his girlfriend were in a hurry to leave. You said that after everyone at the table
had paid, you still had about half a drink left, which you quickly finished and walked out of the
restaurant to your car, which was parked right across the street from the restaurant. You said,
"at most one minute later, I came across a roadblock on Marine Drive ap _____ 5 km
from the Boathouse." Your evidence is corroborated by the affidavits of s.22 and
S s.22 .

In written submissions, Ms. Rudovica, submitted that your breath samples were not taken within 15 minutes of your last drink to allow for the elimination of mouth alcohol, a requirement indicated in the Superintendent's Report on Approved Screening Devices. I agree with Ms. Rudovica. The constable's evidence does not contradict your evidence that you had consumed alcohol within 15 minutes of the second ASD test. As a result, I am unable to conclude that more than 15 minutes elapsed between the time of the second ASD test and the time you last consumed alcohol.

Based on the evidence before me, I cannot be satisfied that an ASD registered a "fail" on August 20, 2011, at 2126 hours.

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

Decision

I am not satisfied an ASD registered a "fail" on August 20, 2011, at 2126 hours.

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

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

cc.Lolita Rudovica
fax: 604.581.2017

September 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to your lawyer, Mr. Jonathan Israels, on your behalf. I have proceeded with the hearing based on this confirmation.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report To Superintendent ("the Report"), Constable Kazuta identified himself as the investigating officer and indicated that you admitted to being the driver. In the Report To Superintendent regarding the Vehicle Impoundment, the officer has stated that you hit a parked car which pushed that car into another parked car, and that the passenger-side front wheel on your vehicle was broken off. In the Report, the officer has reported the time and date of driving/care or control as 01:10 hours, on September 1, 2011.

You have provided no evidence to challenge or refute the police evidence on this point. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on September 1, 2011, at 01:10 hours.

Did the ASD register a "WARN" or a "FAIL"?

In the Report, the officer has noted that he detected an odour of alcohol, and that your speech was incoherent.

The officer has indicated that you admitted to consuming 2 beer, and that you informed him that the time of your last drink was unknown. The constable indicated that he made an ASD demand, and you understood the demand. He then conducted the ASD test at 01:20 hours, and it registered a "FAIL" reading. The officer indicated that he provided you with the opportunity for a second test, and you declined.

Mr. Israel's refers me to the ASD Calibration Expiry date on the Report. The officer has reported the Calibration Expiry date as "2012/04/25". Your lawyer argues because the date is greater than 31 days from the date of the incident I cannot rely on the "FAIL" result. He refers to the Superintendent's Report on ASDs and the RCMP ASD training manual, both of which state that ASD's are to be calibrated monthly or every 31 days. He has also provided me with a decision by one of my colleagues in support.

While I am not bound by the decisions of other adjudicators, I concur that the date is outside the time guidelines. As a result, I cannot be satisfied that I have a valid test result to consider.

Based on the evidence before me, I cannot be satisfied that an ASD did register a "FAIL" on September 1, 2011, at 01:20 hours.

Decision

I am not satisfied that the ASD did register a "FAIL" on September 1, 2011, at 01:20 hours. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

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

s.15

Adjudicator

cc Jonathan Israels Fax (604) 488- 1413

September 9, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to your lawyer, Mr. Dale Marshall, on your behalf. I have proceeded with the hearing based on this confirmation.

In the Notice of Driving Prohibition, Constable Sneek indicated that you failed or refused, without a reasonable excuse, to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an ASD. However, other evidence provided by the police, specifically in the Report to Superintendent ("the Report"), provided the results of your ASD test, indicating that obviously you did not fail or refuse to provide a sample, and that fail/refusal was noted by the officer in error.

As a result of this error, I do not need to consider any other issues.

Decision

I cannot be satisfied that you failed or refused to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an ASD on August 21, 2011. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

s.15

Adjudicator

Cc Dale Marshall
Fax: (250) 920 - 0177

September 9, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Mr Dil Gosal. I proceeded with the hearing based on this information.

In your Affidavit you provide a narrative of events from the time you attended a birthday party at
s.22 on the evening of August 21, 2011, until your wife and mother arrived at the scene of the incident to pick you up. You acknowledge being in your vehicle, sitting in the driver's seat, without your seatbelt on, while waiting to be picked up from the Mac's convenience store at 9194 Scott Road. You stated your intention not to drive, but to wait for a ride home.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In his Report to Superintendent (Report), Constable Ray stated that on August 21, 2011 he witnessed you as the sole occupant of a vehicle, seated in the driver's seat at 22:00 hours. The vehicle was considered operable.

Your lawyer submits that a crucial issue in this review is whether you were a driver. In conducting this review I am mindful of the fact that under s. 215(1) of the Act, a driver includes a person having the care or control of a motor vehicle, whether or not the motor vehicle is in motion.

Part of the test for whether a person has care or control of a vehicle requires some use of the vehicle or its equipment that involves a risk of putting the vehicle into motion so that it could become dangerous. Your lawyer, argued that you were simply in the driver's side of the vehicle when the peace officer came upon the vehicle. You were not a driver; you did not have care or control. Your lawyer referred me to the case of *Lightfoot v British Columbia (Attorney General)* [2004] BCJ no 2134 (BCSC) and argued that although there is a presumption of care or control when a person occupies the driver's seat, that may be rebutted if you never engaged in a course of conduct that involved a risk of putting the vehicle in motion. Mr Gosal also drew my attention to *R v McLachlan et al*, 2009 BCSC 431. Your lawyer submitted that to establish care or control, a person must voluntarily consume alcohol and be impaired; while in such a state, use the vehicle or its equipment and fittings in such a way as to create a risk of setting the vehicle in motion, so that it could become dangerous.

Your lawyer argued, on the basis of both your evidence and that of the constable's, that: 1) You were not driving the vehicle; and, 2) the vehicle was not on or running. While the constable's evidence is silent, you state that the vehicle was parked, with the emergency brake on and engaged. The keys were in your pocket.

In your affidavit, you stated that you had no intention of driving and at no time was the vehicle driven. However, if a person could set a vehicle in motion, they may still have care or control of a vehicle. Acts of care or control, short of actual driving, would involve some use of the vehicle or course of conduct that would involve a risk of putting the vehicle in motion so that it could become potentially dangerous. A lack of intent to operate a vehicle does not necessarily mean that you did not have care and control.

When Constable Ray first attended the scene, you admit to being in the driver's seat. You asserted in your affidavit that your brother drove the vehicle and you were sitting in the passenger seat. You are silent as to why the situation had changed, but I infer that when the

collision took place with a vehicle parking adjacent to you, you got out of the vehicle. Neither you, nor the attending officer, indicated that the vehicle was inoperable. You state that the vehicle was not on. The keys were not in the ignition, but sitting on the passenger seat. You describe the vehicle as a s.22 a. You maintain it had been parked by your brother, who left the emergency brake fully on. At the time the police officer approached the parked vehicle, there was no significant risk of the vehicle being put into motion. The vehicle was parked, with the emergency brake engaged. I accept that you did not intend to drive the vehicle and had made prior arrangements with your mother and wife for a ride home.

Based on the evidence before me, I find that it is more likely than not that you were not a driver within the meaning of section 215.41(1) of the Act on August 21, 2011, at 22:00 hours. As a result, there is no need for me to consider the issue of whether or not the ASD registered a 'fail'.

Decision

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

s.15

Adjudicator

cc: Dil Gosal
Fax: (604 598 1117)

September 7, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a “fail”?

In the Report to Superintendent and the Narrative Report, the investigating officer reported that he and another officer observed a vehicle travelling at a high rate of speed. The officer reported that they followed and caught the vehicle, and subsequently identified you as the driver of that vehicle.

The constable administered an ASD test at 2330 hours, the result of which was a “fail”. The constable reported that he informed you of your right to a second test, and that you did not request one. The constable reported that you admitted to consuming alcohol, but would not say what type, when, or how much. The constable reported that you also stated you had consumed Nyquil.

In your affidavit you stated you had been feeling ill that evening, and had purchased medication to help with your cough and sore throat, including Vicks Nyquil Cold & Flu Relief. You outlined events over the course of the evening, which included your consuming one bottle of beer and two additional partial drinks. Before departing a friend’s residence, you said you felt sick, vomited, and took Listerine to wash out your mouth. You said you consumed a mouthful of Nyquil as you sat in the driver’s seat before the drive home. Your evidence indicates that you got in your vehicle sometime between 2320 hours, when you began to leave your friend’s residence, and 2329 hours, when you were stopped by police.

s.22 , who was with you at your friend’s residence and a passenger in your vehicle, provided an affidavit in which he corroborated your evidence that you were feeling ill and that you consumed a mouthful of Nyquil while you were in the vehicle. You attached a receipt indicating the purchase of “Vicks Cust CG/CL PM 170ML” on August 22, 2011, and a website printout indicating that the second ingredient in Nyquil Cold & Flu Relief Liquid is alcohol.

In oral submissions, Ms. Leamon submitted that your breath samples were not taken more than 15 minutes after your last drink to allow for the elimination of mouth alcohol, a requirement indicated in the Superintendent’s Report on Approved Screening Devices.

I agree with Ms. Leamon. The constable’s evidence is consistent with yours in that you told him you had consumed Nyquil, and the constable’s evidence does not otherwise contradict your evidence that you had consumed alcohol within 15 minutes of the ASD test. As a result, I am unable to conclude that more than 15 minutes elapsed between the time when you last consumed alcohol and the time of the ASD test. In turn, I am not satisfied that mouth alcohol was not a factor in the results of the ASD test.

Based on the evidence before me, I am not satisfied that an ASD registered a “fail” on August 22, 2011, at 2330 hours.

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

Decision

I am not satisfied an ASD registered a “fail” on August 22, 2011, at 2330 hours.

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

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you or someone authorized by you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 7, 2011. You are responsible for any storage costs after that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc. Sarah Leamon
fax: 604.685.8308

September 6, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Preliminary Matters

The Office of the Superintendent of Motor Vehicles faxed disclosure documents to your representative, Keven Schechter, on August 26, 2011. I have before me a fax communication result report confirming successful transmission of the disclosure documents. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

Upon review of the evidence submitted by the officer, I find that there is insufficient evidence for me to establish clear timelines throughout the IRP Report to Superintendent for the following: driving or care or control, time reasonable suspicion formed, time of ASD demand. As such, I find that there is a lack of evidence from the police for me to confirm that you were the driver within the meaning of section 215.41(1) of the *Act*.

Based on the entirety 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*, on August 24, 2011, at 01:08 hours. Accordingly, I must revoke your prohibition pursuant to section 215.5.

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

Decision

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

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 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.

Adjudicator

cc: Keven Schechter
fax: 250-334-7374

SEPTEMBER 22, 2011

s.22

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

Introduction

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

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

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

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

Preliminary Matters

Records at this office confirm that disclosure was provided to your lawyer, Harpreet Nirwan, prior to your scheduled written hearing. I have proceeded with the hearing based on this confirmation.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a "fail"?

Upon reviewing the officer's evidence, I note that he administered a test of your blood alcohol level using an ASD on September 12, 2011, at 00:39 hours, the result of which was a "fail". However, the officer neglected to record the service expiry date of the ASD unit he used to test

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your breath. Without knowing the service expiry date, I have no means of knowing whether or not that date had already passed, and whether or not your test results are reliable.

Consequently, I find that based on the evidence, I am not satisfied that an ASD did register a “fail” on September 12, 2011, at 00:39 hours.

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

Decision

Based on the evidence before me, I am not satisfied that an ASD registered a “fail” on September 12, 2011.

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

The corresponding vehicle impoundment has also been revoked. I understand that staff from this office called the registered owner of the vehicle and informed her that the vehicle was being released on September 21, 2011, and that our office would be paying the towing and storage charges on the vehicle for up to and including that date, due to the successful IRP review.

cc: Harpreet Nirwan
(604) 594-8280

September 30, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure has been provided to your. I have proceeded with the hearing based on this information.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (Report), the investigating officer, Constable Stewart stated that on July 31, 2011, you admitted to care and control of a vehicle at 02:15 hours. Corporal Cook attended the scene of a collision where the constable stated you admitted to being a driver. On the Notice, the officer alleged that you had care or control of a motor vehicle at 03:41 hours while on Highway 101, Powell River, BC. In the Report, the constable states that he formed a reasonable suspicion at 03:37 hours and made a demand at 03:39 hours. The constable has not provided reliable evidence of the time of driving. Therefore, I am unable to find that you were operating a vehicle within the meaning of the section 215.41(1) of the Act on July 31, 2011.

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

Decision

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(a) of the *Motor Vehicle Act*.

s.15

Adjudicator

September 8, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Preliminary Matters

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

In your written submission, you admit that you are in the wrong and have committed an offense but are "contesting the severity of the punishment". You note that you have a good driving record. Your driving history is not a consideration in this review.

You also requested the suspension of your license be shortened as you are an owner of a flooring business and need to drive for work. You stated that the vehicle that was impounded is used for work and owned by the business. I acknowledge and appreciate the impact a driving prohibition can have on your personal and professional circumstances. However, under the Act, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. In addition, the Act does not grant me any discretion to alter the terms of a driving prohibition unless that prohibition is lengthier than the Act requires.

In the Notice of Driving Prohibition, Constable Stein indicated that you failed or refused, without a reasonable excuse, to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an ASD. However, other evidence provided by the police, specifically in the Report to Superintendent ("the Report"), provided the results of your ASD test, indicating that obviously you did not fail or refuse to provide a sample, and that fail/refusal was noted by the officer in error.

As a result of this error, I do not need to consider any other issues.

Decision

I cannot be satisfied that you failed or refused to comply with a demand made under the Criminal Code to provide a sample of breath for analysis by means of an ASD on August 20, 2011. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

September 15, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a fail?

Your lawyer, Natasha Gulamhussein, pointed out that the ASDs used by the officer had expired calibration dates. She argued that the results were not reliable. I concur that the ASD results are unreliable. Therefore, based on the evidence before me, I am not satisfied that the ASD registered a fail.

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

Decision

I am not satisfied that the ASD registered a fail.

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 15, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Natasha Gulamhussein
604-637-1617

September 14, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* ("Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*, that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for 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 reports.

Preliminary Matters

At the beginning of the oral review, I listed the disclosure documents and your lawyer, Jonathan Israels, confirmed that he had received them. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

In the IRP Report to Superintendent (IRP Report), Peace Officer Crowston is identified as the investigating officer. The IRP Report indicates that the vehicle pulled up to a stationary roadblock with the engine running, vehicle keys in the ignition, vehicle in drive, and you seated in the driver's seat. The IRP Report states that the date and time of driving or care or control was on September 2, 2011, at 02:55 hours.

Neither you, nor your lawyer, have submitted any evidence to refute this issue.

Based on the entirety of 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 2, 2011, at 02:55 hours.

Did you fail or refuse to comply with a demand?

As noted by your lawyer, the officer indicated that you were served with a Notice because you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD. However, the IRP Report clearly indicates that you provided a "fail" result on an ASD at 02:58 hours. While you have a right to a second ASD test, the Act does not require a second ASD test for the purpose of an IRP. As such, it is not possible for you to have failed or refused to comply with the demand since you had already provided a suitable sample of your breath.

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

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

Decision

I am not satisfied that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 2, 2011.

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

Adjudicator

cc: Jonathan Israels
fax: 604-488-1413

September 1, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

During your oral hearing I confirmed with you that you received all of the disclosure documents. I have proceeded with the hearing based on this confirmation.

Issues

There are two issues in this review:

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

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

Facts, Evidence and Analysis

Did the ASD register a “fail”?

In the Report to Superintendent (RTS), Constable LeBlanc stated that an ASD test was administered on you and that a “fail” result registered at 18:41 hours. The constable stated that you were informed of your right to a second ASD test and but that you chose not to exercise that right. I also note that Cst. LeBlanc stated in the RTS that after the ASD you admitted to consuming “2 beer 15 minutes before being stopped”.

During your oral hearing you stated that you and your friend, s.22 arrived at the s.22 s.22 after work around 5:50 PM, and you ordered a bottle of Lucky beer. At around 6:15 you ordered a second bottle of Lucky beer. You stated that half way through your second beer you glanced at your watch and notice that the time was 6:26 PM. You took note of the time because your wife was expecting you home with the truck at 6:30 PM and you were now going to be late. You quickly finished the last half of your beer within a few minutes and placed the money for the bill on the table and left. You were driving down Otter Point Rd for maybe 8 or 9 minutes when you were stopped. You stated that the officer approached your vehicle and advised you that you had a burnt out taillight. You stated that Cst. LeBlanc said he was following up on the empty beer can in the back of your truck, and then he asked you if you would provide a breath sample. You stated that you did not refuse his request because you had only had two beers. You stated that Cst. LeBlanc advised you that you failed the breath test. You stated that you immediately expressed to him that there was no way you could have failed. You stated he then said to you “well, you failed, have you been drinking this evening?” and that you responded by advising Cst. LeBlanc that you had 2 beers after work and that you finished the last one within 15 minutes of being stopped. You told him that you ordered the second beer around 6:20 PM, not that you finished it at 6:20 PM. You stated that from the time you finished your second beer to when you were providing the breath sample that only 10 or 11 minutes had passed. You felt that everything was very rushed and that Cst. LeBlanc was very dismissive with you. You stated that you feel there is no way that you could have blown a “fail” and that maybe it was because so little time had passed between rushing to finish your second beer, being pulled over, and breathing into the roadside device.

You provided a written statement from your friend, J s.22 , who was with you s.22 M s.22 on the evening in question. s.22 sta nd he were at the s.22 until 6:30 PM. He stated that when you realized what time it was that you quickly finished your beer at 6:30 PM and abruptly left.

In determining whether the ASD registered a “fail”, I am mindful of the effects of recent alcohol consumption and the 15 minute post consumption delay. I note that in the RTS the officer indicates that you stated to him that you consumed “2 beers after work 15 minutes before being stopped” and that the officer has recorded that you advised him your last drink was at 18:20 hours. You explained in detail that you told the officer you ordered your second beer around 18:15 to 18:20 hours. You also stated in the oral hearing that you partially agree with what the officer wrote down in section 2 on the RTS. You stated that what you told the officer was that you had “2 beers after work and one you just finished within the last 15 minutes just before being stopped”. You provided a statement from s.22 confirming that you finished your second beer at 18:30 PM and abruptly left the pub.

I do note that the RTS states the ASD test was administered on you within the same minute as being stopped. I find your evidence to be convincing and I accept your evidence that you consumed beer "within 15 minutes of being stopped". Specifically that you had finished your second beer around 18:30 hours, which is 11 minutes prior to providing a breath sample at 18:41 hours.

Based on the totality of the evidence before me, I am not satisfied on a balance of probabilities that more than 15 minutes had passed to allow for the elimination of mouth alcohol before the ASD test. I find it more likely than not that the ASD registered a "fail" due to alcohol in your mouth, and not as a result of alcohol in your blood. I am therefore satisfied that the ASD did not register a "fail" within the meaning of section 215.41(2).

Decision

I am not satisfied that an ASD registered a "fail" result on August 19, 2011, at 18:41 hours. I therefore 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.

The vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 31, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

SEPTEMBER 9, 2011

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Buckler indicates that he witnessed you driving or in care or control of the vehicle on August 20, 2011, at 0007 hours. You did not dispute this evidence.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on August 20, 2011, at 0007 hours.

Did the ASD register a warn?

Constable Buckler states in the RTS that you admitted to having consumed alcohol prior to driving. He notes that the time of your last drink was at 2000 hours. In part four of the RTS, the officer states that you provided a sample of breath into an ASD, and that the device registered a “warn” at 0009 hours. Constable Buckler advised you of your right to a second test, but you declined to exercise this opportunity.

In your submission, you acknowledged having consumed alcohol prior to driving, but you say that there “may have been miscommunication in this as the officer wrote that I finished my last glass at 8:00, while this is actually when it was poured.” You say that you “sipped this one glass throughout the evening, finishing at around 11:00 pm, as [you] knew that [you were] driving and this was to be my only drink. [You were] very confused as to how this could have affected [your] ability to drive and put [you] within the WARN range of the ASD between 0.05 and 0.08 blood alcohol level.”

Although you said that you finished your glass of wine at around 11:00 pm, you also stated that you had a last sip from the glass about an hour later, when you were returning the glass to the kitchen. You said that from the time of this last sip, to when you were pulled over by the police, “only five or ten minutes had passed.” You are suggesting that mouth alcohol caused the ASD to register a “warn”, rather than the level of alcohol in your blood.

In your written submission, you provided statements from people who were with you in the evening prior to the IRP. You also stated that you found calculations on the internet to estimate what your blood alcohol content should have been at the time you were stopped. You acknowledged, however, that these “are not official calculations and will not be considered as such.” There are many factors that can affect a person’s blood alcohol content to greater or lesser extents. Each person’s body and experience with alcohol is different and context specific. Accordingly, I will consider this evidence in light of your “mouth alcohol” argument, but I can give it little weight.

When I consider the evidence overall, on a balance of probabilities, I find that it is more likely than not that mouth alcohol was responsible for the result of the ASD test. Based on the evidence before me, I am not satisfied that an ASD registered a “warn” on August 20, 2011, at 0009 hours.

Decision

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, but I am not satisfied that the ASD registered a “warn” on August 20, 2011, at 0009 hours. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. Original receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You may send your receipts and invoices to the address on page one of this letter.

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

Also, you will be reimbursed for the \$250 licence reinstatement fee, the \$200 IRP penalty fee, and the \$31 duplicate licence fee that you paid. It will take 6 – 8 weeks for these cheques to be sent out.

s.15

Adjudicator

SEPTEMBER 23, 2011

s.22

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

Introduction

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

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

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

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

Preliminary Matters

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

Issues

There are three issues in this review:

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

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Critchley states that he witnessed you driving on September 9, 2011, at 2128 hours. You did not dispute this issue.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 9, 2011, at 2128 hours.

Did you fail or refuse to comply with a demand?

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

In the RTS, Constable Critchley said that he “smelled the odor of liquor immediately.” In the oral hearing, you admitted to having consumed two to three glasses of wine. You could not remember if you consumed one before dinner, as well as two with dinner, or just two with dinner. Regardless, you acknowledged having consumed alcohol prior to driving.

You said that when you have dinner with the friends you visited that night, you usually stay over, as you do not like to drive after dark. The lights of oncoming traffic blind you. That night you realized, however, that your friends’ guest room was already taken by another visitor, so you had to drive home. You said that you are afraid of the Sooke Road after dark, so you drove slowly and carefully, pulling over to let other vehicles pass you. You gave this explanation in response to the officer’s observations noted in the Report to Superintendent, Vehicle Impoundment (the RTS/VI).

The constable states in the RTS that he became suspicious that you had alcohol in your body at 2128 hours. Your lawyer notes that the officer did not demand that you provide a breath sample on an ASD until 2137 hours – nine minutes later. Mr. Tam argues that this conflicts with the requirement under the *Criminal Code* that the demand be made “forthwith”. In support of this position, Mr. Tam provided two previous decisions of other adjudicators, although he acknowledged that I am not bound by such decisions. Adjudicators consider each case based on its own fact pattern. Unfortunately, your lawyer did not provide any authorities to assist in determining at what point the court sees a delay as beyond “forthwith.”

Mr. Tam also suggested that the officer did not explain what occurred in those nine minutes. While he may not have made any notes in the RTS, the officer stated in the RTS/VI, “[d]river arrested ASD demand read.” There are no details of what the arrest entailed, but the statement indicates that the officer was executing police business during the nine minutes in question.

In *Smithson v. Superintendent of Motor Vehicles and A.G. of B.C.*, 2005 BCSC 411, the court surveys a number of decisions that attempt to define “forthwith”. I note paragraphs 17 - 19 of *Smithson*, which includes the perspective of the Supreme Court of Canada on this issue:

“[17] In *R. v. Bernshaw* [1995] 1 S.C.R. 254 the Supreme Court of Canada (per Sopinka J. for 5) held “forthwith” did not mean “immediately” and that s. 254(2) must be interpreted to mean the ASD test may be administered within the time required to take a proper test, bearing in mind the two hour limit imposed for a BAC test under s. 254(3).

[18] Cory J., (for 4), concurring in the result, adopted a “flexible approach” which (at paragraph 74) “strikes a proper balance between Parliament’s objective of combating the evils of drinking and driving, on the one hand, and the rights of citizens to be free from unreasonable search and seizure”. That is, the policy objective must be balanced against **Charter** considerations.

[19] In *R. v. Higgins* [1994] M.J. No. 44 (Man. C.A.), Scott C.J.M. held at paragraph 15, ‘The determinant factor is not the length of the delay but the reasons for it.’”

While *Smithson* is not exactly on point with your situation, I find that it provides useful direction on interpreting the “forthwith” requirement for your case. In view of the comments from the courts, and the officer’s indication that he arrested you prior to making the demand, I find that on a balance of probabilities, it is more likely than not that a valid demand was made on September 9, 2011, at 2137 hours.

I now turn to the issue of whether you failed or refused to comply with the ASD demand. Constable Critchley states in the RTS that you made nine attempts to provide a breath sample, but that you were unsuccessful. Your evidence in the oral hearing is consistent with that of the officer.

I inferred that you were concerned by the officer’s statement that you “refused” to provide a breath sample, despite your concerted efforts. The issue that I must consider is whether you failed or refused to comply with the demand. I trust that you will agree that your inability to provide a suitable breath sample qualified as “failing” to comply with the demand.

Based on the evidence before me, I am satisfied that you failed to comply with a valid demand on September 9, 2011, at 2137 hours.

Did you have a reasonable excuse?

In the oral hearing, you said that you su

s.22 You provided evidence from s.22
t ly with the demand, because you were
ASD to produce a result.

s.22

Based on the evidence before me, I am satisfied that you had a reasonable excuse for failing to comply with a demand.

Decision

I am not satisfied that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 9, 2011, at 2147 hours. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

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

s.15

Adjudicator

cc. Andrew Tam
250-480-0004

September 2, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure was made available to you. I reviewed the disclosure documents with you and have proceeded with the hearing on that basis.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a fail ?

In his Report to Superintendent (Report), Constable Olson, stated that he formed a reasonable suspicion at 21:30 hours on August 20, 2011. The constable noted that at first you stated you did not have anything to drink, but then stated you had a couple of beers earlier. Before the breath sample, you were asked if you had anything to drink in the last 15 minutes. You answered, no. The constable made an ASD demand at 21:35 hours and you understood the demand. He indicated that an ASD registered a 'fail' at 21:35 hours. The constable stated that you were offered a second test, which you declined. In his attached Synopsis, Constable Olson noted that while the paperwork was being completed you stated that you had three beers earlier and the last one was only 5 minutes prior being stopped. Constable Olson stated that he explained that was why he had asked when your last drink was earlier at the time of the breath sample. Constable Olson served you with the required paperwork and explained it to you. You did not ask for a second breath sample.

During your oral submission you stated that you had your last drink just before you left your residence, three to four minutes before being pulled over by Constable Olson at 21:30 hours. When the constable first asked you about your drinking behaviour, you became flustered and did not want to get into trouble. You initially denied consuming alcohol and then admitted to consuming two beers. Later you advised the constable the time of your last drink.

As noted in the Superintendent's Report on ASDs, it is current police practice for breath samples are taken at least 15 minutes after the last drink was consumed to allow for the elimination of mouth alcohol. It is clear from the Report that Constable Olson established the time of your last drink while writing up his paper work, but before serving the Notice. I accept that you informed the constable of your recent consumption and the time of your last drink.

Based on the totality of the evidence before me, I am not satisfied that 15 minutes had passed to allow for the elimination of mouth alcohol before the ASD test. I find it more likely than not that the ASD registered a 'fail' due to alcohol in your mouth, and not as a result of alcohol in your blood. I am therefore satisfied that the ASD did not register a 'fail' within the meaning of section 215.41(2).

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

Decision

I am not satisfied that the ASD registered a 'fail' on August 20, 2011, at 21:35 hours. I therefore revoke your driving prohibition, as required by s. 215.5(4)(c)(i) of the Act. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 2, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

September 30, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a “fail”?

In the Report, Constable Oliveira noted that a test result of ‘fail’ registered on an ASD at 22:30 hours on September 13, 2011. The constable indicated that you were informed of your right to request a second test, which you subsequently exercised five minutes later with a different ASD. When the constable administered the second ASD at 22:35 hours, another ‘fail’ registered. In accordance with the Act, your second test result governs.

I note, however, given that the service expiry date was recorded as September 8, 2011, the ASD had expired at the time you received your screening. As a result, I cannot consider the ASD test result as reliable.

Based on the evidence before me, I am not satisfied that an ASD registered a ‘fail’ on September 13, 2011, at 22:35 hours.

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

Decision

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

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

Adjudicator

September 16, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s. 22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure has been provided to your lawyer, Ajeet Kang. I have proceeded with the hearing based on this information.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (Report), the investigating officer, Constable Ennis stated that on September 8, 2011, he observed you driving a vehicle. The constable did not indicate a time of driving/care or control in his Report. On the Notice, the officer believed that you were had care or control of a motor vehicle at 03:10 hours while on 151A Street, Surrey, BC. In the Report, the constable states that he formed a reasonable suspicion fifteen minutes earlier at 02:55 hours. The constable did not provide evidence of the time of driving. Therefore, I am unable to find that you were operating the vehicle within the preceding three hours.

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 8, 2011.

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

Decision

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

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 16, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Ajeet Kang
Fax: (604 572 6127)

September 15, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that your lawyer, Jennifer Currie, has been provided with all of the disclosure documents. I have proceeded with the review based on this confirmation.

In her written submission, Ms. Currie stated that your prohibition should be overturned because the IRP regime set out in section 215.41 – 215.51 of the *Motor Vehicle Act* "is unconstitutional and of no force and effect". Further, Ms. Currie submitted that the IRP regime infringes on sections 7, 8, 10, and 11(b) of the Canadian *Charter of Rights and Freedoms*.

I acknowledge Ms. Currie's suggestions; however, I am only authorized by the Act, to consider and make decisions on the issues outlined in section 215.5 of the Act. Moreover, the Act does not grant the authority, to resolve any of these constitutional issues.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Nicholls identified herself as the investigating officer and stated that you were the driver of the motor vehicle. In the Synopsis, Cst. Nicholls stated that she attended Valley View Memorial Gardens Graveyard and that at 23:15 hours she awoke a male in the driver’s seat of the vehicle. Cst. Nicholls stated that the vehicle was turned off but the keys were in the ignition. Cst. Nicholls stated that you advised her that you had gone to the s.22 Cst. Nicholls stated in the RTS that the date and time of driving or care or control was on August 26, at 23:15 hours.

In your affidavit, you stated that you decided to go on your monthly visit to Valley View Memorial cemetery and that at approximately 9:00 p.m. you arrived at the cemetery. You stated that the purpose of your trip was to devote a couple of hours to visiting a s.22

. You stated that while you were smoking a cigar on your tailgate you noticed a bottle whiskey in a clear tote box in the back of your truck and had a drink from it. You stated that at 9:37 p.m. you made a phone call to your mother to let her know where you were and that you gave her a heads up that she might be picking you up from the cemetery that night. You stated that at 10:05 p.m. your mother called you to see if you were okay and that you told her you were fine and asked her to leave home in about an hour to pick you up because you did not want to drive. She asked you again if you wanted her to make you dinner but that you told you did not feel like eating. You stated that after sitting on the bench you started to feel cold and tired so you decided to go sit in your truck while you waited for your mother. You put the key in the ignition to turn the music on in hope that it would “put [your] mind at ease”.

You stated that you were woken up by the officer and that you told the officer that you were there to spend time at your s.22 and that that you were waiting for a ride. You stated that the officer asked you if you had been drinking that evening and that you said yes and that you were not planning on driving. You also stated that you did not tell the officer that you were at a party earlier that evening. You stated that you told the officer that you had a couple of beers before coming to the cemetery and that you had been drinking while you were at the cemetery. You stated the officer told you that she needed to get a breath sample from you, and that you responded to her by saying that “...there is no need for this. I’m not going to be driving, I’m getting picked up”. You stated that before blowing into the breathalyzer you again told the officer that you were getting picked up. You stated that the officer responded to you by saying that she could not take that chance because the keys were in the ignition.

You stated that when the officer approached you that your truck was parked on a flat surface in a lawful parking space, and you were in the driver’s seat with the seat fully reclined and you were not wearing a seatbelt. You stated that your truck was in “park” and that the gear shift is located on the steering column, and that your truck has a safety mechanism that prevents it from shifting out of park when the engine is not running. You stated that your mother arrived a minute or two later and tried to speak to the officer to explain but the officer said to your mother “I’m sorry, it’s done now”.

Your mother, s.22 a, provided a statement in which she said that you called her at 9:36 p.m. She said you informed her you were at Valley View cemetery at your s.22 . She stated that you advised her you would most likely need a ride home and that you would let her know. She stated that she asked you if you wanted her to make you some dinner but that you told her not to bother. She stated that at 10:05 p.m. she called you to see if you were okay and stated that you asked her to come in about an hour to pick you up because you had some liquor to drink, and that she assured you she would do so.

After she hung up from you she stated that she was restless so she decided to go ahead and make something for you to eat anyway. She stated the cooking took longer than she thought and that it was 11:15 p.m. by the time she left her home to get you. She stated that you called her at 11:27 p.m. and 11:37 p.m. asking where she was and that she phoned you to see how to get to where you and the officer were in the cemetery. She stated that she “drove to the spot where [you] and the cops were.” She indicated that she spoke to Cst. Nicholls and that Cst. Nicholls said to her “I’m sorry its all done and in the system” and then Cst. Nicholls handed you some papers. Your mother stated Cst. Nicholls then got in her car and suggested you and your mother leave.

In her written submission, Ms. Currie argued that you were not a “driver” within the meaning of section 215.41(1) of the Act. She argued that although there is a presumption of care or control when a person occupies the driver’s seat that may be rebutted if the accused can prove on a balance of probabilities that he was not in the driver’s seat for the purpose of setting the vehicle in motion. Part of the test for whether a person has care or control of a vehicle requires some use of the vehicle or its equipment that involves a risk of putting the vehicle into motion so that it could become dangerous. Ms. Currie argues that you were found sleeping in the driver’s seat of the vehicle and that you were in the vehicle to stay warm and to wait for your mother. She stated that under the circumstances there was no risk of the vehicle being put in motion or becoming dangerous while you were sleeping in the driver’s seat of your vehicle. She stated that Cst. Nicholls failed to prove that you were in “actual” care or control of your vehicle at approximately 11:15 p.m. on August 26, 2011. In support of her submissions Ms. Currie referred to and provided me with the case of *R. v. McLachlan*.

After reviewing the evidence before me, I note that Cst. Nicholls evidence that you advised her you were at the cemetery to speak to your s.22 is consistent with your evidence as to why you were at the cemetery. Cst. Nicholls stated in the Synopsis that she had to wake you and that the vehicle was turned off. I find that this is also consistent with your evidence that you were tired, that you fell asleep and that you did not turn on your truck’s engine. While Cst. Nicholls evidence is silent, you stated that your seat was fully reclined, that your seatbelt was not on and that the vehicle was in “park”.

I recognize that in Cst. Nicholls evidence there is no mention of you drinking at the cemetery. However, I accept your evidence that you were drinking whiskey at the cemetery, prior to Cst. Nicholls arrival. I find that your claim is supported by the statement provided by your mother. In which she stated that you advised her on the phone at 10:05 p.m. that you had liquor to drink. I further note that the RTS indicates that you did advise Cst. Nicholls you were drinking whiskey.

Additionally, I find that the times of the calls you said you made to your mother and received from her to arrange a ride home from the cemetery, are supported by the images you provided, and I find that these calls were made before Cst. Nicholls arrived.

I am satisfied that you did not intend to drive the vehicle. I find that you made arrangements for your mother to pick you up and that you fell asleep and that the engine was not running.

Furthermore, in the absence of any evidence to the contrary, I find that your seat was fully reclined, and the vehicle was in "park", and parked in a lawful parking spot on a flat surface, and that the vehicle's gearshift is located on the steering column. I am satisfied the vehicle could not have been set in motion accidentally. In turn, I am not satisfied that you were a driver within the meaning of section 215.41 of the Act on August 26, 2011, at 23:15 hours.


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

Decision

Based on the evidence before me, I am not satisfied that you were the driver as defined under section 215.41(1) of the *Motor Vehicle Act* on August 26, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.4(1)(c)(i) of the *Motor Vehicle Act*. You may resume driving, once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If not already done, you may go directly to the impound lot where the vehicle is being stored for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 15, 2011, the date you were notified that 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

r

cc: Jennifer Currie
Fax: [604] 590-5626

SEPTEMBER 26, 2011

s.22

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

Introduction

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

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

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

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

Preliminary Matters

At the beginning of the oral review, I listed the documents I received from the police which were sent to you. Your lawyer, Jack Harris, acknowledged that he had received them.

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

I note that Constable Abrahamson served you with a Notice of Driving Prohibition alleging that on September 12, 2011, you failed or refused to comply with a demand for a sample of your breath. However, I see that the officer indicated in his Report to Superintendent that an ASD registered a “fail” result.

Consequently, I find that there is no evidence before me supporting the allegation that you failed or refused to comply with a demand.

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

Decision

Based on the evidence before me, I am satisfied that you did not fail or refuse to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an approved screening device on September 12, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(4)(c)(i) of the *Motor Vehicle Act*. You may resume driving 90 days after that date, after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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 22, 2011, the date you were informed 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.

September 23, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Preliminary Matters

Our records indicate that copies of all documents related to this prohibition were faxed to the office of your legal counsel, Claire Hatcher. During the oral hearing Ms. Hatcher acknowledged that she had received disclosure. I have proceeded with the hearing based on this confirmation.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In his Report to Superintendent regarding your Immediate Roadside Prohibition (Report) and attached Synopsis, Constable O'Keefe indicated that on September 4, 2011 at 14:55 hours, he located your vehicle in a parking stall at Entrance Bay and observed you sitting in the driver's seat with the vehicle running.

Ms. Hatcher submits that Constable O'Keefe has not provided evidence sufficient to establish that you were in care or control of the vehicle or that you intended to drive. Ms. Hatcher provided a copy of the court decisions, *R. v. McLachlan* [2009] B.C. J. No. 631 and *R. v. Huynh* [2008] B.C.J. No. 1114, in support of her submissions.

In your sworn affidavit you depose that you and your friend, s.22 were at Cultus Lake on the day in question. At approximately 2:30 p.m., you decided to get out of the sun for a short time and spend some time in your car with the air conditioning on, listening to music. s.22 n accompanied you. You assert that you had no intention of driving your vehicle; you had the emergency brake engaged and you were not wearing your seatbelt. You acknowledge drinking alcohol during the day; however, you had previously arranged for your roommate to pick you up at 5:00 p.m. because you did not want to drive after consuming alcohol.

Ms. Hatcher provided a sworn affidavit from s.22 n and a written statement from your roommate, s.22 which corroborate your submissions.

Ms. Hatcher submits that you have rebutted the presumption of care or control with your evidence that you had no intention of driving your vehicle. Further, because the emergency brake was engaged, you did not pose a risk to the public.

After reviewing your evidence and the court decisions provided by Ms. Hatcher, as well as Constable O'Keefe's evidence, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act at the time in question.

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

Decision

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 4, 2011 at 14:55 hours. I therefore revoke your 90-day driving prohibition and monetary penalty as required by section 215.5(4) of the Act. The prohibition has been removed from your driving record and you can attend a Driver Services Centre to obtain a new driver's licence.

The vehicle impoundment is also revoked. You may go directly to the place that your vehicle was impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 23, 2011. You are responsible for any storage costs beyond that date. You should know that if this vehicle is not retrieved within 30 days of the expiry of the impoundment, the impound lot may take steps to dispose of the vehicle.

s.15

Adjudicator

cc Claire Hatcher
Fax: (604) 687-3022

September 8, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Carmichael identified himself as the investigating officer. The constable reported observing a vehicle parked in a parking lot on a street with one occupant sitting in the driver's seat with the keys to the vehicle next to the gear shift. The constable identified you as that person.

The constable reported that you were driving or in care or control of a motor vehicle at 03:57 hours, on August 19, 2011.

The constable reported observing vomit on the door of the car, and said that you "admitted to drinking 'way too much'".

In oral submissions, Mr. Baker argued you were not driving or in care or control of the vehicle.

In your affidavit, you said that after consuming several glasses of beer, you left a restaurant when it closed at about 3:00 a.m. You said that, after talking with friends, you walked from the restaurant to your car and realized you should not drive because you had consumed too much alcohol. You said that once at your vehicle, you telephoned your mother and requested that she come to your location to give you a ride home. You said she agreed to do so. You said you sat in your vehicle waiting for your mother to arrive. You had used the key to open the door and once in the vehicle, you put the keys down; you did not put the keys in the ignition. You said you never intended to drive the car and did not attempt to start the car. You said while sitting in the vehicle, you felt nausea and vomited through the open window of the driver's door. You said you received a call from your mother at 3:49 a.m., telling you she had to stop for gas and would be arriving soon.

You said that when the police arrived, you told the officer you had called your mother and expected her there soon. You said you could not obtain your cell phone records for the hearing since they were not yet available, but you provided copies of photographs of your cell phone screen showing the time of the call to your mother, at 3:17 a.m., and from your mother, at 3:49 a.m.

Your mother, s.22 g, provided an affidavit in which she said that she was sleeping when you called at approximately 3:00 a.m. on the morning of August 19, 2011. She said you told her you were drinking and were not feeling very well and asked for a ride home. She said she left with her husband to the location you had indicated. She said she had to stop for gas along the way, and called you after that to tell you they would be there soon. She said when they arrived, the police were there, and that she spoke with them.

In my view, the officer's evidence that you had vomited and that you admitted to drinking "way too much" is consistent with your evidence that you should not be driving because you had consumed too much alcohol. The times of the calls you said you made to your mother and

received from her, are supported by the images you provided, and I find these calls were made before the police arrived.

Based on the evidence before me, I am satisfied that you did not intend to drive the vehicle. I find the keys were not in the ignition, and I am satisfied the vehicle could not have been set in motion accidentally. In turn, I am not satisfied on a balance of probabilities that you were driving or in care or control of a motor vehicle.

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41 of the Act on August 19, 2011, at 03:57 hours.

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

Decision

Based on the evidence before me, I am not satisfied that you were the driver as defined under s. 215.41 of the *Motor Vehicle Act* on August 19, 2011.

I therefore revoke your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.4(1)(c)(i) of the *Motor Vehicle Act*. You may resume driving, once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

If not already done, the owner of the vehicle may go directly to the impound lot where the vehicle is being stored for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 8, 2011, the date you were notified that the vehicle was eligible for release. The vehicle owner is responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc. David Baker
fax: 604.303.6922

September 15, 2011

s.22

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

Introduction

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

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

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

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

Preliminary Matters

Records at this office indicate that full disclosure of the documents before me was provided to your lawyer, Kevin Filkow.

Mr. Filkow argued that the IRP legislation is unconstitutional, as it violates sections 8, 10, and 11(d) of the *Charter of Rights and Freedoms*. He provided me with a copy of the decision in *R. v. Orbanski*, and suggested that it stands for the proposition that an ASD result is not intended to be determinative. He also argued that the IRP legislation is unconstitutional because it is criminal legislation, which is an area within the exclusive jurisdiction of the federal government.

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent for the IRP (the "IRP Report"), the investigating officer checked the box to indicate that he witnessed you as the driver. He recorded the date and time of driving/care or control as August 27, 2011, at 0146 hours.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on August 27, 2011, at 0146 hours.

Did the ASD register a warn or a fail?

Although the officer stated that you provided a fail result on an ASD on August 27, 2011, at 0220 hours, the calibration expiry date was five months prior, on March 31, 2011. As such, I am satisfied that an ASD did not register a fail on August 27, 2011, at 0220 hours.

Decision

I am satisfied that an ASD did not register a fail on August 27, 2011, at 0220 hours.

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

cc: Kevin Filkow
Fax: 604-270-3787

September 8, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure documents regarding this matter were provided to your lawyer, Mr. Jeremy Carr, on your behalf. I have proceeded with the hearing based on this confirmation.

Your lawyer has provided information regarding your interaction with the officer regarding the time of your last drink. As indicated on the fax sent to Mr. Carr regarding the documents for this

matter, you are responsible for supplying all relevant evidence in support of your case. Adjudicators will not admit information and statements from your lawyer, as evidence on disputed matters. Therefore, I cannot consider this information as part of this review.

Issues

There are two issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the Act?
2. Did the ASD register a “WARN” or a “FAIL”?

Facts, Evidence and Analysis

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

In the Report To Superintendent (“the Report”), Constable Kelly identified herself as the investigating officer and indicated that she witnessed you driving. The officer has stated that she observed erratic high speed driving. In the Report, the officer has reported the time and date of driving/care or control as 01:13 hours, on August 19, 2011.

You have provided no evidence to challenge or refute the police evidence on this point. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, on August 19, 2011, at 01:13 hours.

Did the ASD register a “WARN” or a “FAIL”?

In the Report, the officer has noted that she observed a lack of response to the emergency lights, she detected an odour of liquor, and that you had glassy eyes, were overly chatty and responded poorly to direction.

The officer has indicated that you admitted to consuming 3 drinks, and that you informed her that the time of your last drink was unknown. The constable indicated that she made an ASD demand at 01:15 hours, and you understood the demand. She then conducted the ASD test at 01:16 hours, and it registered a “WARN” reading. The officer indicated that she provided you with the opportunity for a second test, and you accepted. A second test was administered at your request at 01:35 hours, and it registered a “FAIL” reading.

Mr. Carr suggested that the officer did not have a reasonable suspicion to issue a demand, and that the ASD test results are therefore invalid. He also suggested that the officer was required to inquire into the timing of your alcohol consumption, and as she did not, he argues that the demand was invalid.

The validity of the demand is not at issue in this review. Section 215.5(1)(b)(i), which governs this review, requires me to confirm your prohibition if I am satisfied that you were the driver within the meaning of section 215.41(1), and that the approved screening device registered a “fail”.

I agree that the officer should address the time and amount of your alcohol consumption as part of her investigation. However, I note that the police evidence is that she did inquire, and you informed the officer that you had 3 drinks, and the time of your last drink was unknown. You have provided no evidence to challenge or refute the police evidence on this point.

Mr. Carr also asserted that as none of the officer's evidence is sworn, it should be given only minimal consideration. I note that there is no requirement for the police evidence to be sworn, and that I will give it the appropriate weight in my considerations

Finally, Mr. Carr argues that the supplemental report provided by the officer that corrects the 2nd ASD calibration expiry date should not be considered over the information in the original police Report, and should not be considered sufficient. He also suggested that considering "this unauthentic amendment ... would be a breach of procedural fairness". As a result, he submitted that the Notice of Driving Prohibition is therefore invalid. I disagree. The revised police evidence has been disclosed to Mr. Carr, and he has had a chance to respond. I am required to consider relevant information from the police.

I note however, that the revised Calibration Expiry date for the ASD used in the second test is 2011/08/18, and therefore expired just before the time of this incident. As a result, I cannot be satisfied that I have a valid test result to consider.

Based on the evidence before me, I cannot be satisfied that an ASD did register a "FAIL" on August 19, 2011, at 01:35 hours.

Decision

I am not satisfied that the ASD did register a "FAIL" on August 19, 2011, at 01:35 hours. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

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

SEPTEMBER 16, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No.

s.22

Introduction

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

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

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

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

Preliminary Matters

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

Issues

There are 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

Constable Sidhu checked the box on the Notice indicating that you are prohibited from driving, because you failed or refused, without reasonable excuse, to comply with a demand to provide a breath sample into an ASD. I note, however, that the constable has stated in the Report to Superintendent that you did comply with the demand.

There is no evidence before me to support the allegation made on the Notice; a driver must have proper notice of the charge to be answered, which is not the case here. Accordingly, I am not satisfied that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD.

I do not need to consider any other issues.

Decision

I am not satisfied that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD, as alleged in the Notice.

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

s.15 r
Adjudicator

September 14, 2011

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

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

Facts, Evidence and Analysis

Did the ASD register a “fail”?

In his Report to Superintendent (Report), Constable Anderson, stated that he formed a reasonable suspicion 15:03 hours on September 2, 2011. The constable noted that you stated you had your last drink “last night.” In the attached synopsis Constable Anderson stated that when asked if you had any beer today, you stated, “not really,” when asked if that was a “yes” or “no”, you stated you were drinking last night, but nothing today. Constable Anderson stated that your speech was slightly slurred and your reaction time was slow. Constable Anderson located an open Budweiser beer and a ¾ full can of Budweiser. A further search revealed two (2) empty cans of Pilsner.

The constable made an ASD demand at 1505 hours and you understood the demand. He indicated that an ASD registered a ‘fail’ at 1510 hours. The constable stated that you were offered a second test, which you declined.

In your written submission you stated that you consumed a couple of sips of beer while driving.

s.22 submission, he stated that he spoke to Constable Anderson while you were at roadside and Constable Anderson advised him that he stopped you and found open beer in the vehicle. s.22 I suggested that the constable ought to have waited 15 minutes before administering the test to clear any residue from her mouth.

As noted in the Superintendent’s Report on ASDs, it is current police practice for breath samples to be taken at least 15 minutes after the last drink was consumed to allow for the elimination of mouth alcohol.

Based on the totality of the evidence before me, I am not satisfied that 15 minutes had passed to allow for the elimination of mouth alcohol before the ASD test. I find it more likely than not that the ASD registered a ‘fail’ due to alcohol in your mouth, and not as a result of alcohol in your blood.

Decision

I am not satisfied that an ASD registered a “fail” result on September 2, 2011, at 1510 hours. I therefore revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

The vehicle impoundment is also revoked. If the owner has not already done so, he may go directly to the location where your vehicle is impounded for the immediate release of his vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 14, 2011. The owner is responsible for any storage costs beyond that date. The owner should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

SEPTEMBER 29, 2011

s.22

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

Introduction

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

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

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

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

You applied for a review of an IRP that you were issued on September 20, 2011, by Kimberley police. However, to date, we have not received any documents from the police detachment to indicate that you were even served with an IRP. Consequently, I am not satisfied that an ASD did register a "fail" on September 20, 2011.

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

Decision

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

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

September 13, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS), Constable Guenther identified herself as the investigating officer. She reported that “driver pulled over, then only person in vehicle and no one exited vehicle.” In the Vehicle Impoundment Report to Superintendent, the constable reported “observed vehicle driving and speeding and pulled over and no one exited and driver was in passe [sic]...Driver speeding and when RCMP followed, he immediately pulled into safeway parking lot and jumped to passenger seat and threw keys in the back behind passenger seat...driver, jumped...from his seat to passenger.”

The constable reported you were driving or in care or control of a motor vehicle at 251 hours, on August 28, 2011.

In your affidavit, you have said that you were not driving the vehicle, and that you were asleep in the passenger seat with your seatbelt on. This is supported by the affidavit and oral evidence of s.22, who said that he was driving at the material time. He said after parking the vehicle, a four-door truck, he climbed into the back seat and, constable approached the driver’s door, he exited out the rear passenger door. s.22 said he crouched beside the passenger side of the vehicle and could see the constable’s feet under the truck at the driver’s door, heard the constable open the driver door and radio for assistance saying, “I think we have a jumper”. s.22 q said he removed his sandals, left them beneath the truck, and fled barefoot. s.22 said the rear window of the vehicle is tinted, and it would not be possible for someone from the rear to see into the vehicle. During the hearing, s.22 played what he said was an i-phone recording from the evening, and from which a female voice could be heard to say, “why would you run if you’re not having something to hide.” s.22 said this was an i-phone recording of the constable.

Mr. Debou submitted that s.22 did have something to hide, namely that he was the driver and that had already been recently prohibited.

s.22 said that after he fled, he was hiding in bushes and saw the arrival of more police officers including a canine unit. He said he saw them disperse after the tow-truck arrived. I note that your evidence and s.22 evidence is consistent with the fact that he is the owner of the vehicle.

In my view, your evidence and the evidence of s.22 is compelling in that s.22 was in the vehicle when the constable observed the vehicle in motion. I find the constable’s evidence that no one had exited the vehicle to be unpersuasive in the face of the details of your evidence.

As I find the officer's evidence on this point unpersuasive, I find I am unable to draw a conclusion as to who was driving at the material time. As a result, I am not persuaded on a balance of probabilities that you were driving or in care or control of the vehicle at the material time.

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41 of the Act on August 28, 2011, at 251 hours.

Having made that finding, it is unnecessary for me to consider other issues in this review.

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act and that the ASD did register a "fail" on August 28, 2011 at 251 hours.

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

If not already done, the owner or someone authorized by the owner may go directly to the location where your vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 13, 2011. The owner is responsible for any storage costs beyond that date. The owner should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent to dispose of the vehicle.

Adjudicator

cc. Robert Debou
fax: 604.924.1818

September 21, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office indicate that no disclosure has been provided to you. I have proceeded with the hearing based on this information.

Issues

There are two issues in this review:

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

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

Decision

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

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

s.15

Adjudicator

September 19, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On September 5, 2011, you applied to the Superintendent of Motor Vehicles for a review of your driving prohibition, and I am delegated the authority to conduct this review.

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

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

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

Issues

There are two issues in this review:

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

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

Decision

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

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

September 23, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Preliminary Matters

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

Did you fail or refuse to comply with a demand?

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

In the Report to Superintendent (Report), Constable Senay noted a smell of liquor from the vehicle: she did not record an admission of drinking. The constable stated in the Report that she formed a reasonable suspicion at 01:41 hours, and an ASD demand was made nineteen minutes later. Constable Senay noted in the report that you did not admit to the consumption of alcohol. The time of last drink is recorded as U/K, or unknown.

The roadside ASD demand is governed by s. 254(2) of the *Criminal Code*. That allows a peace officer to demand that a driver of a motor vehicle provide a sample of breath forthwith as is necessary to obtain a screening of the breath at the roadside. That demand can only be made where a peace officer reasonably suspects that the person who is operating the motor vehicle has alcohol in his body.

For a valid demand the investigating officer must have reasonable grounds. There was no admission of drinking and an alleged smell of alcohol from the vehicle does not constitute adequate grounds in itself, following the reasoning in *R v Webster*, [2004] BCJ No 631 and *R v Hoodicoff* [2005] BCPC 458. The constable provided only the odour of liquor emanating from the vehicle as the evidentiary basis for the ASD demand. Other standard indicia of impairment were completely absent. In my view the suggestion that there was a reasonable suspicion cannot be sustained. Given the evidence, I find that the officer, on a balance of probabilities, did not meet the required standard of reasonable suspicion that you had alcohol in your body, and therefore, I am satisfied that the demand was invalid.

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

Decision

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

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 23, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

September 26, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

I had not received any evidence from the police by the time the review took place.

Decision

Given the lack of police evidence, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act* or that the ASD registered a fail on September 18, 2011. I therefore revoke your driving prohibition and monetary penalty as required by section 215.5 of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

According to your lawyer, Michael Bozic, your vehicle has already been released. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of release on receipt of any invoice that you may have settled with the tow company.

s.15

Adjudicator

cc: Michael Bozic
Fax: (604) 609-3972

September 20, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

Preliminary Matters

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

Issues

There are three issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (Report), Constable Neid, of the Kelowna RCMP, stated that he observed you driving a vehicle at 14:10 hours on September 7, 2011. The vehicle was stopped for speeding in a school zone. The driver was the lone occupant of the vehicle. In his Occurrence Report the constable noted that he was conducting a school zone enforcement on McCurdy Road. He heard a vehicle squeal its tires as it started from the stop sign at Hollywood Road and McCurdy Road. The vehicle, a s.22 r, accelerated to in excess of 50km/hr. Constable Neid stopped the vehicle and identified you as the driver by reference to a valid class 5 BC driver's licence.

In your manuscript, you state that around 2:00pm on September 7, 2011, you were pulled over by a police officer on McCurdy Road. The officer asked for your driver's licence and registration. During your oral submission you admitted that you were a driver.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act on September 7, 2011, at 14:10 hours.

Did you fail or refuse to comply with a demand?

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

In the Report, Constable Neid noted a moderate odour of liquor on your breath. The constable stated that you admitted to consuming liquor; your last drink was 10:00 pm the previous night. The constable noted you had red and watery eyes; and a flushed face. In his Occurrence Report, Constable Neid stated that there was an odour of liquor in the vehicle which continued even though both vehicle windows remained open.

At 14:16 hours, the constable formed a reasonable suspicion that you had alcohol in your body. Constable Neid stated that he made an ASD demand at 14:18 hours. In the Report, he noted that you understood the demand.

You stated in your submission that you had taken 'empties' in your vehicle less than half an hour before the incident. You attributed the odour of liquor in your vehicle and on your hands to the recycling. You acknowledged drinking alcohol the previous evening and that the time of your last drink was 10:00pm. You did not challenge the constable's description of your physical appearance. I find that Constable Neid had an adequate evidentiary basis for the ASD demand. Accordingly, I am satisfied a valid demand was made by Constable Neid at 14:18 hours, on September 7, 2011.

As to the second issue of whether you failed or refused to comply with the demand, in section 6 of the Report, 'Failure or Refusal to Comply with Demand', the constable stated that you failed or refused to comply with a demand at 14:27 hours on September 7, 2011. In his Occurrence

Report, Constable Neil described multiple opportunities you were given to provide a breath sample. You were cautioned regarding the consequences of failing to provide a satisfactory breath sample for analysis. The constable instructed you on how to provide a suitable sample. The constable noted that you were cautioned that refusal or failure to provide a proper sample was equivalent to a 'fail.' After multiple attempts the constable considered that you had failed to provide a suitable breath sample.

Prior to the first attempt the constable noted that you asked if you could use your s.22 prior to providing a sample. The constable was of the opinion that you were not having any issues speaking steadily. The officer equated such a capacity with that required to provide enough breath for an ASD sample. The constable advised you not to use your s.22 since it could potentially have interfered with the proper functioning of the ASD.

When presented with the ASD for the first test the constable noted in his Occurrence Report that you appeared to be making an effort to provide a sample, but were not passing any air through the instrument. The constable advised you that you were not blowing any air. You contradicted the constable. When presented with a second opportunity to provide a sample, you did not pass any air through the ASD. The constable stated that he again cautioned you regarding the consequences of failing to provide a sample. The third attempt resulted in the ASD registering a 'NoGo.' At this point the constable recorded in the Occurrence Report that the ASD timed out. As the constable replaced the mouthpiece, he noted that you explained you had s.22 and you needed to take a s.22. The constable took your dialogue to indicate that you were not short of breath.

The constable provided a mouthpiece for you to practice with. You made one effort at providing air through the mouthpiece. The constable then requested you to do the same thing into the ASD. On the penultimate attempt you provided enough air to begin the sampling process but stopped short. Again the ASD registered 'NoGo.' The constable again explained the consequences of a failure to comply with a breath demand. He presented you with an ASD for one more attempt. Constable Neid stated that 'again, no air whatsoever through the instrument.' At this point, 14:27 hours, Constable Neid determined that you had failed to provide a breath sample for analysis.

The essential elements of the offence described under section 254 of the *Criminal Code* consist of a proper demand and a refusal or failure to comply with that demand. Where a failure is alleged, as is your case, the proof required flows from the inference that a person intends the natural consequences of her acts. The inference may be drawn from proof that an adequate sample was not provided after a clear explanation was given as to how to blow into an ASD, and being given adequate opportunity to provide a sample into an ASD that was in working order.

You argued that you did not fail to provide a sample of breath. You asserted that you were willing to provide a breath sample and attempted to do so. In your submission you stated that you tried 'with all your might' to follow the officer's instructions. You explained to the constable at the scene that you had s.22. You showed the constable your s.22. He refused to permit

you s.22 . The constable would not listen to your remonstrations. You acknowledged being given a demonstration of how to blow into an ASD. When you tried to blow, you would run out of air before the ASD registered a result. You implied that you sincerely tried to provide a suitable breath sample.

A failure to provide an adequate sample is established when the inference can be drawn that a person intended the natural consequences of his acts: an adequate sample was not provided after a clear explanation was given as to how to blow into the ASD; you were given adequate opportunity to blow into an ASD; and the ASD was in working order. It is clear from the evidence that you were not blowing adequately into the device. You were given an ample opportunity to provide a breath sample for analysis by an ASD. Although Constable Neid cautioned you, and prompted you to provide a sample, you failed to do so, at least five times.

Given the evidence before me, I am satisfied that you failed to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD at 14:27 hours, on September 7, 2011.

Did you have a reasonable excuse?

You submitted that you had a reasonable excuse. In your submission you maintained that you suffer from asthma, allergies, and Chronic Obstructive Pulmonary Disease (COPD). You have

s.22

s.22 can be construed as a reasonable excuse.

As part of your submission, you included a medical report from s.22 Pharmacare special authority request, a requisition for s.22 receipts. You provided an September 13, 2011. Your family physician, s.22 and other health care professionals were not able to state the effect of your symptoms on breathing patterns.

A reasonable excuse must involve some circumstance which renders compliance with the demand extremely difficult or likely to involve a substantial risk to the subject's health. I accept that you were in a state of stress during the incident, and the police officer did note your objections that you suffered from s.22 He recorded your concerns, but discounted their import. I accept that your s.22 may have caused insurmountable difficulty in carrying out the constable's instructions and your physical state was such that you would not be able to provide a breath sample into an ASD after the demand.

Given the evidence, I find that on a balance of probabilities, due to your medical symptoms, you had a reasonable excuse for failing to comply with a demand on September 7, 2011, at 14:27 hours.

Decision

I am satisfied that you had a reasonable excuse for failing or refusing to comply with a demand made under the *Criminal Code* to provide a sample of breath for an analysis by means of an ASD on September 7, 2011 at 14:27 hours.

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

Your vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 20, 2011. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

September 28, 2011

s.22

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

Introduction

On September 11, 2011, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

Preliminary Matters

At the beginning of the oral review, I listed the disclosure documents and your lawyer, Richard Ballantyne, confirmed that he had received them. I have proceeded with the hearing based on this confirmation.

Issues

There are three issues in this review:

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

Upon review of the evidence before me in its entirety, I find that your case turns on the following issue; did you fail or refuse to comply with a demand?

Did you fail or refuse to comply with a demand?

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

In section two of the IRP Report under Reasonable Suspicion for Demand, the officer indicated the following: Constable Dixon and Constable Parsons smelled odour of liquor on breath, slurring words, admitted to drinking lots of alcohol. The time that the officer formed her reasonable suspicion for the demand is noted as 21:14 hours. In section three of the IRP Report, the officer indicated that the ASD demand was read to you at 21:27 hours. I note that there are thirteen minutes between the time the officer formed her reasonable suspicion for the demand, and the time that the officer read the ASD demand to you.

Section 215.41 of the *Act* requires the officer make an ASD demand to a driver as per the *Criminal Code*. The *Criminal Code* requires that the ASD demand be made forthwith or as soon as practicable. I see no reason or explanation for the thirteen minute delay between the time the officer formed her reasonable suspicion and the time of the ASD demand. With no evidence before me to explain this delay, I cannot find that the officer made a valid ASD demand as per section 254 of the *Criminal Code*. As a result, I find that you could not have failed or refused to comply with the demand.

Based on the evidence before me in its entirety, I am not satisfied that a demand existed and as such you could not have failed or refused to comply with a demand.

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

Decision

I am not satisfied that you failed or refused, without a reasonable excuse, to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD on September 11, 2011. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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

Adjudicator

cc: Richard Ballantyne
fax: 604-859-3361

September 22, 2011

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

At the beginning of the review I checked that your lawyer, Mitch Foster had received full disclosure of the documents before me. He acknowledged that he had received them.

Issues

There are two issues in this review:

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

Facts, Evidence and Analysis

Did the ASD register a warn or a fail?

In the Report to Superintendent (the "Report"), the constable indicated that an ASD test was administered at 19:35 hours on September 4, 2011, and that the result of that test was a fail. The constable indicated that he advised you of your right to a second test and that you initially requested one, but then withdrew that request. The constable provided the explanation "Given opportunity but then declined prior to test by refusing to provide the sample – NOGO x3".

Section 215.42(2) of the Act states that a second analysis must be performed with a different ASD than was used for the first test. I find the constable's evidence regarding the use of a second ASD to be lacking, I am not satisfied that a different ASD was used for the second test.

Based on the evidence before me, I am not satisfied that an ASD registered a fail on September 4, 2011, at 19:35 hours.

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

Decision

I am not satisfied an ASD registered a fail on September 4, 2011, at 19:35 hours.

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

Please note that the corresponding vehicle impoundment is also revoked. If you have not already done so, you or someone authorized by you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 22, 2011. You are responsible for any storage costs after that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Mitch Foster
Fax: 604-687-4299