

JULY 19, 2012

s.22

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

Introduction

On August 14, 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 analysis by means of an approved screening device (ASD) (the Demand), 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, Sarah Leamon, in disclosure. Ms. Leamon acknowledged that she had received them on your behalf. 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

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

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 (RTS), Constable Wallace stated that he formed the reasonable suspicion that you had alcohol in your body at 2040 hours. The officer noted that he read the Demand at 2149 hours. I agree with Ms. Leamon that the Demand was not made "forthwith", as required by the *Criminal Code*. As a result, I am not satisfied that a valid Demand existed; you could not have failed or refused to comply with an invalid Demand.

Having made this finding, I do not need to consider 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. 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. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Driver's Licence.

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 14, 2011, the date your vehicle was eligible for release. 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 are responsible for any storage costs beyond that date.

s.15
Adjudicator

cc. Sarah Leamon
604-685-8308 (fax)

July 10, 2012

s.22

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

Introduction

On October 15, 2010, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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. You referred to the police evidence in your submission, and I 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 approved screening device register a ‘FAIL’?

Facts, Evidence and Analysis

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

In the Report to Superintendent (“RTS”), Cst. Young of the s.22 RCMP indicated that on October 15, 2010 he identified you as the driver of the vehicle.

In your affidavit dated May 1, 2012, you stated that you had boarded a flight to s.22 on October 14, 2010. You provided copies of the pages of your passport to show your connections along the trip. In addition, you provided a copy of your itinerary and copies of baggage claim receipts and boarding passes. I find this evidence sufficient to establish that you were not the driver at the time of the incident in question.

Decision

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 October 15, 2010.

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by section 215.5 of the Act.

The vehicle impoundment is also revoked. I note that your vehicle has already been released from the impound lot. Upon receipt of your proof of payment, we will reimburse you for your towing and storage charges paid up to and including the day the vehicle was eligible for release. You may send your invoice to this office at the address noted on the previous page.

s.15
Adjudicator

JULY 20, 2012

s.22

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

Introduction

On June 30, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on the ground that “you did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation, because you were prohibited from driving because a sample of your breath on an ASD registered “fail” and your ability to drive was affected by alcohol.

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

In the oral hearing, Mr. Green directed my attention to section 215.47(d) that requires a peace officer who serves a Notice to promptly forward to the superintendent “a report, in the form established by the superintendent, sworn or solemnly affirmed by the peace officer....” As Mr. Green noted, the Report to Superintendent (the “RTS”) in your case was not properly sworn or solemnly affirmed. While I will give less weight to the RTS as a result of this deficiency, section 215.49 (d) states that I must consider:

“(d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer, including peace officers’ reports that have not been sworn or solemnly affirmed.”

[emphasis added]

Mr. Green also contended that the officer did not make a valid demand for you to provide a breath sample. Under the Act, the validity of the demand is relevant only when a driver fails or refuses to provide a breath sample. In your case, however, the evidence indicates that you provided breath samples upon demand. Section 215.5(1)(b) of the Act, 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”. As a result, the validity of the demand is not at issue in this review. The only issues that I can consider are those, which are outlined below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

In the Report to Superintendent (the “RTS”), Constable Devine indicated that he witnessed you driving or in care or control of the vehicle on June 30, 2012, at 2155 hours.

Given the particular set of facts in your situation, I find that Constable Devine did not provide sufficient evidence for me to be satisfied that you were in care or control of the vehicle. Consequently, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 20, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

You argued that the IRP process is unconstitutional and referred to Mr Justice Sigurdson's decision of November 30, 2011 in the matter of *Sivia v British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639 [Sivia #1]. The provincial legislature amended the Act effective June 15, 2012, to address the constitutional issues raised in that case. I note that you were served with a Notice after new provisions to the Act had come into effect.

In your submission you suggested that there should be a 15-20 minute wait between a first and second ASD analysis. The timing of breath samples is addressed in the Superintendent's Report on ASDs: Breath samples are taken at least 15 minutes after the last drink was consumed to allow for the elimination of mouth alcohol. You acknowledged that your last drink was about 5½ hours prior to the first ASD test.

You contended that the investigating officer requires training and certification to perform and use an ASD. The implication is that he should have provided credentials to establish that he was so qualified. Pursuant to section 215.47, duties of peace officer related to driving prohibition under section 215.41, a peace officer who serves a Notice is under no obligation to forward such credentials.

You applied on the ground(s) that:

- I did not refuse or fail to comply with the officer's demand to provide a breath sample; however, that ground is not applicable to your situation because the officer alleged that a sample of your breath on an ASD registered a 'fail'.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (Report), Constable Hanemaayer of the s.22 RCMP stated that he observed a vehicle under your care or control at 01:50 hours on July 5, 2012. In his narrative the constable stated that he observed a vehicle travelling north bound on s.22. The vehicle turned onto s.22 and drove west bound. The vehicle accelerated and the constable paced the vehicle, before initiating a roadside stop. You were the lone occupant of the vehicle sitting in the driver's seat, behind the steering wheel, with your seatbelt on and the motor running. You produced a valid BC driver's licence by which the constable identified you.

Based on the evidence before me, I am not satisfied that first analysis was conducted on a reliable ASD. Consequently I cannot be satisfied that a second analysis was performed using a different ASD.

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 23, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

July 20, 2012

s.22

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

Introduction

On June 30, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on the ground that you did not refuse or fail to comply with the officer’s demand to provide a breath sample; however, that ground is not applicable to your situation, because you were prohibited from driving because a sample of your breath on an ASD registered “fail”, and your ability to drive was affected by alcohol.

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

Issues

The following are the issues in this review:

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

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

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

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

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act. I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(1) 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.

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date your vehicle was eligible for release. 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.

July 27, 2012

s.22

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

Introduction

On July 14, 2012, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

- Was the ASD reliable?

Facts, Evidence and Analysis

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

Did the ASD register a 'fail'?

Constable Attwell stated in the Report to Superintendent (Report) that a test result of 'fail' registered on an ASD at 21:15 hours on July 14, 2012. The constable indicated that he showed you the test result.

In his narrative the constable stated that he formed a reasonable suspicion at 21:13 hours on July 14, 2012. The constable noted that you stated you had 'a beer an hour ago'.

During your oral submission you stated that shortly before 9:00 pm you had stopped and decided to eat a sandwich. After doing so you flossed your teeth and rinsed with Listerine mouthwash. Approximately one (1) to two (2) minutes later you came upon the road block on the corner of s.22 When pulled over, Constable Attwell asked if you had anything to drink; you told him you had one beer about an hour earlier. The interaction took no more than 30 seconds. You then waited another two (2) to three (3) minutes before Constable Attwell made a demand. The ASD registered a 'fail' when you provided a breath sample.

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, or an alcohol based oral product has been used, to allow for the elimination of mouth alcohol. It is clear from the Report that Constable Olson established the time of your last drink, but was unaware that you had recently used Listerine mouthwash.

In your submission you provided a letter from your dentist Dr s.22 dated July 19, 2012, in which he notes:

s.22 has been a patient of ours since September 16, 2008. He currently has a s.22

s.22

You also included a letter from s.22 was with you when the subject s.22 2011. Ever since, you have needed to s.22

She stated that she in

Your friend s.22 provided a written statement. He witnessed the incident and stated that after purchasing a sandwich in s.22 to go, you stopped along s.22 to eat the food. After you ate, he saw you s.22 and rinse with Listerine mouthwash for about a minute. Two minutes later, you came up to the road block. Your brother, s.22 affirmed this version of events in his written statement.

You also included with your submission an expert report authored by Mr NK Shajani, a forensic consultant. Based on your self-reported weight and drinking behaviour, Mr Shajani calculated that your theoretical maximum BAC at 9:15 pm on July 14, 2012 would have been 16 mg%, with a very similar result of 14 mg% eight minutes later. The implication being made is that given your alleged drinking pattern, an Alco-Sensor IV DWF should have provided a similar reading to the results calculated in the Shajani Report.

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).

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 27, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

July 20, 2012

s.22

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

Introduction

On July 4, 2012, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

In the Report to Superintendent regarding your IRP (Report) and attached Narrative, Officer Mills indicates that on July 4, 2012 at 22:10 hours, he observed you sitting in the driver's seat of a vehicle parked in the parking lot of the s.22

In your written submissions you deny that you were in care or control of the motor vehicle. You assert that you had no intention of driving and had arranged for a designated driver. You have provided a number of written statements in support of your position, including a written statement from your mother.

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

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

Decision

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

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

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

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

July 5, 2012

s.22

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

Introduction

On June 20, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you in care or control of a motor vehicle on s.22 You confirmed you were driving. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

The officer noted in his narrative that the device registered a "FAIL". There is no evidence to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer noted that he advised you of the right to a second test. There is no evidence to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

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

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

Given that the penalty applied was compatible with the lowest test result, both being the same, I am satisfied that the Notice was served on the basis of the lower analysis result as dictated by the Act.

Was the ASD reliable?

The officer failed to provide certificates of a qualified ASD calibrator to confirm that both devices were operating correctly. I am not satisfied that the ASDs were reliable.

Decision

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

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

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

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

July 17, 2012

s.22

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

Introduction

On June 27, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

You applied on the ground that “the ASD, which formed the basis for the prohibition, did not register a FAIL reading”; however, that ground is not applicable to your situation because the prohibition was issued to you based on a “WARN” result on an ASD.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The evidence before me is that you were advised of your right to a second test and you requested a second test. However, I note that I do not have before me a valid Certificate of Qualified ASD Calibrator for the ASD used for your first test, ASD 101404. In the absence of this evidence, I cannot be satisfied that the ASD was functioning correctly and cannot rely on the result of the first test. Because you requested two tests, and there is only one valid result, I am satisfied that the Notice was not served on the basis of the lower of the two analyses.

Decision

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

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

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

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

July 25, 2012

s.22

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

Introduction

On July 5, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and AnalysisWere you advised of your right to a second analysis?

In the Narrative and the Report to Superintendent, it is the officer’s evidence that you were not informed of your right to a second test. It is also your evidence that you were not informed of this right.

Section 215.42 of the Act requires an officer to inform a driver of this right. For this reason, I am satisfied that you were not advised of your right to a second breath test analysis. Having made this finding, I do not need to consider the other issues.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 25, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.



s.15

Adjudicator

July 12, 2012

s.22

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

Introduction

On June 21, 2012, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence indicates that on June 21, 2012 at 1545 hours, Officer Smith witnessed you driving on the s.22

During the hearing you acknowledged driving.

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

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

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

Officer Smith indicates that at 1545 hours, he detected an odour of liquor coming from you. When asked how much alcohol you had consumed that day, you told Officer Smith that you had two beers at lunch time.

At 1548 hours, Officer Smith read the ASD demand and you advised that you understood.

Officer Smith explained how to provide a breath sample into the ASD. You told him that you would not be able to blow because you have a s.22. Officer Smith provided you with a number of opportunities; however, you did not provide a breath sample suitable for analysis.

During the hearing you acknowledged that you did not provide a suitable breath sample.

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

Did you have a reasonable excuse?

During the hearing you stated that you told Officer Smith that you had a s.22 that prevented you from providing a suitable breath sample into the ASD. In his Occurrence Report, Officer Smith indicates that you told him that you had a s.22 that prevented you from blowing properly. Officer Smith also indicates that although he allowed you to use your s.22 you were still unable to provide a suitable breath sample.

You also provided evidence from your doctor to indicate that you s.22
Further, you were diagnosed with s.22 on June 22, 2012 and admitted to s.22
s.22 for five days. Your doctor also submits that your condition s.22
s.22 which could impair your ability to blow into a breathalyzer test unit.

Based on the evidence, I am satisfied that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

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

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

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

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 July 12, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

July 20, 2012

s.22

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

Introduction

On June 29, 2012, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records at this office confirm that your legal counsel, Darcy Lawrence, received full disclosure of the documents before me. During the oral hearing Mr. Lawrence acknowledged that he had received disclosure. I have proceeded with the review based on this confirmation.

Issues

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

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

In his evidence, Officer Dumais indicates that on June 29, 2012 at 0100 hours, he observed your vehicle parked in the A&W parking lot with the interior light on. Officer Dumais turned around to take a closer look and observed you lying on the front seat of the vehicle with your feet positioned along the driver’s seat. You were the sole occupant of the vehicle and told Officer Dumais that you were waiting for your friend to exit the s.22 and that your friend had the keys. Officer Dumais found the keys on the floor beside you.

In your sworn affidavit you provide a detailed account of the evening in question and deny that you were in care or control of the motor vehicle. You assert that you had no intention of driving and had arranged for s.22 to drive your vehicle.

Mr. Lawrence provided copies of sworn affidavits from s.22 and s.22 corroborating your evidence.

Mr. Lawrence made the following submissions:

- You were not occupying the driver’s seat.
- You were lying on a bench seat with your feet on the driver’s seat.
- There is no evidence before me that you were engaged in an act which involves some use of the vehicle’s fittings or equipment.
- The vehicle keys were on the floor.
- You had no intention of driving and were waiting for s.22 to drive you home.
- The totality of the evidence fails to prove that you were in care or control of the vehicle.

Mr. Lawrence has provided a copy of the court decision, *R. v. McLachlan* [2009] BCSS 431, in support of his submissions and referred to its salient points several times during the hearing.

In reviewing the evidence, I do not find your evidence completely credible. First, if you were laying on the bench seat of your vehicle with your feet on the driver’s seat, it would have been very awkward for you to get into this position if you had been sitting in the passenger’s seat. You would have had to move your feet up and over the seat to the left, to place them on the

driver's seat. I find it more likely that you were sitting in the driver's seat and simply laid down on the passenger's side, moving your feet up on the driver's side. Further, I am not convinced that s.22 drove you to the s.22. If so, why would he leave you asleep in your vehicle after the s.22 closed and leave with his girlfriend if the original intention was for you not to drive your vehicle? In addition, he states that he did not find out for two days that you were prohibited from driving. If he had driven you to the pub and was going to drive you home, I find it likely that you would have called him the next day to let him know that you received a prohibition from driving because the officer did not believe that you were waiting for him to drive you home.

In spite of my concerns with your description of events, I find your evidence that you had no intention of driving equally compelling as the police evidence. The police evidence indicates that you were sleeping in your vehicle, the keys were on the floor and you told the officer that you were waiting for a friend. Your evidence is that you told the officer several times that you did not drive that night, had no intention of driving and that s.22 was the driver. s.22 corroborates this. As a result, I am not completely satisfied by the police evidence that you were a driver within the meaning of section 215.41(1) of the Act.

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

Decision

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

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

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

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 July 20, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

pc: Darcy Lawrence

JULY 20, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

Upon reviewing the evidence of Constable Ritchie and your written submission, I find that there is one issue that is determinative of this review.

Was the ASD reliable?

Section 215.47(e) of the Act requires the officer to forward to the superintendent information relating to the calibration of the ASD, on the basis of which the notice of driving prohibition was served. Constable Ritchie did not provide any such evidence in his submissions. I, therefore, have no compelling basis on which to determine if the ASD was reliable.

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

Decision

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

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

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

July 18, 2012

s.22

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

Introduction

On June 27, 2012, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

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

During the hearing, you stated that you only had two beers that evening and a soda water and lime. You indicated that you told the officer you had two beers, that you were truthful, because you knew you were not impaired. You stated that you had the first beer around 10 pm and by 10:30 pm you finished drinking it and had a soda water and lime. You explained that an altercation that took place between you and another male patron at the pub. This male patron felt bad about the way he responded to you being at the table with his girlfriends and he bought you a beer. In your both your oral and written submissions, you indicated that your second beer was given to you and consumed between 11 pm and 11:30 pm. You indicated that you finished the second beer about 1-2 minutes before leaving and about 3-4 minutes before the first ASD test. You noted that you were never asked by the officer “When” you finished your last drink, you did not know that the time of it mattered.

I note that in the Report to Superintendent (the RTS), at section 11 “Time of last drink? (Driver Response)”, the constable has written “N/A”. In the Narrative Text Hardcopy (the Narrative), the officer has stated that he asked “how much [you] had to drink tonight...” and that you stated “two beer”. The RTS states that the time of driving or care or control was at 23:30 hours, and that two ASD tests were administered on you. Both ASDs registered a “FAIL” result at 23:35 hours and 23:38 hours, respectively.

In determining the effects of mouth alcohol on ASDs, I turn to the Superintendent’s Report on ASDs (the Report on ASDs), which contains information reflecting current police practices. The Report on ASDs states that breath samples are taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol.

Based on all the evidence before me, I find it more likely than not that the ASDs registered “FAIL” readings 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”. As a result, I must revoke your prohibition pursuant to section 215.5.

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

Decision

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

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

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

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 July 17, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

July 26, 2012

s.22

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

Introduction

On July 8, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

Upon reviewing Constable Rieger's ("Cst. Rieger") evidence and your lawyer's submissions, I find there is one determinative issue before me.

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

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

You were prohibited from driving for failing or refusing to comply with a Demand without a reasonable excuse. As Ms. Andrews noted, however, Cst. Rieger's evidence is inconsistent and shows a significant delay in making the Demand. She noted that the Report to Superintendent ("RTS") indicates that the Demand was made at 10:20 hours, 40 minutes after Cst. Rieger formed his reasonable suspicion that you had alcohol in your body.

In the absence of further evidence, I find that a 40 minute delay is not consistent with the requirement that the Demand be made "forthwith". In the circumstances of your case, I find that the Demand was not valid, so you were not required to comply with it.

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

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

Decision

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

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

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

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

s.15
Adjudicator

cc Sylvia Andrews
604-244-0617 (fax)

July 18, 2012

s.22

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

Introduction

On July 2, 2012, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

In the Report to Superintendent (the RTS), the constable stated that you provided breath samples into two ASDs and that the devices both registered “FAIL”, as a result of the analyses. In the Narrative Text Hardcopy (the Narrative), the constable indicated that just before 15:00 hours you were observed leaving a bar, and that he pulled you over at 14:58 hours. He stated that the smell of “beverage alcohol” coming from your mouth was overwhelming. He said that at 15:00 hours he asked you when you had your last drink and that you replied “2:30...just now”.

In your affidavit, you indicated that you were pulled over less than 5 minutes after you finished your beer. You explained that when the constable asked you if you had been drinking you initially told the officer “it was a long time ago” because you did not think one beer was of any consequence, but after he asked you again you told him you had one beer. Then he asked you when you had your last drink you stated that you told the constable you had finished your beer at “2:30...just now”. You indicated that you said “2:30” because you believed it to be 2:30 pm when you made that statement.

In s.22 affidavit, he confirmed that he was with you when you were pulled over by the constable. s.22 stated you, he and s.22 ordered one bottle of beer each. He noted that s.22 left prior to you and him because s.22 wife arrived. He stated that both you and he finished your beers and left the pub at approximately 3:00 and walked to your vehicle. He stated that you were pulled over shortly after leaving. He further indicated that he heard the officer ask you if you had been drinking and that you told him you had just finished your beer. He stated that no more than 5 minutes elapsed between the time you finished your last drink and the time you provided the two breath samples.

In s.22 affidavit, he confirms that you only had one beer at the pub. He also stated that he was with you all day and that he does not believe you consumed any other alcohol.

During the hearing, Mr. Baker argued that on a balance of probabilities it is more likely than not that you consumed the beer 5 to 10 minutes prior to providing both breath samples into the ASDs. As such, it is likely that the “FAIL” results were due to residual mouth alcohol. He referred to the constable’s evidence and noted the following:

- The constable observed you exit the bar “just before 15:00 hours”
- He stopped you one block away “at 14:58 hours”
- There are no symptoms of impairment recorded
- The time of the demand is 15:00 hours

- The first ASD test was at 15:02 hours
- The second ASD test was at 15:05 hours

Mr. Baker also noted that your evidence is consistent with that of the constable's with regards to the timing of the events and that more specifically that you told the officer you had consumed one beer and that you had just finished it. In support of his submissions Mr. Baker provided the case of *R v. Bernshaw*.

In determining the effects of mouth alcohol on ASDs, I turn to the Superintendent's Report on ASDs (the Report on ASDs), which contains information reflecting current police practices. The Report on ASDs states that breath samples are taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol.

Based on all the evidence before me, I find it more likely than not that the ASDs registered "FAIL" readings 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". As a result, I must revoke your prohibition pursuant to section 215.5. Having made this finding, I do not need to consider any other issues.

Decision

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

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

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 July 17, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

Cc: David Baker
Fax: [604] 303-6922

July 24, 2012

s.22

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

Introduction

On July 8, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

The evidence before me is that you were advised of your right to a second test and you requested a second test. However, I note that I do not have before me a valid Certificate of Qualified ASD Calibrator for the ASD used for your second test, ASD 058812. In the absence of this evidence, I cannot be satisfied that the ASD was functioning correctly and cannot rely on the result. Because you requested two tests, and there is only one valid result, I am satisfied that the Notice was not served on the basis of the lower of the two analyses.

Decision

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

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

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

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

Adjudicator s.15

cc: by fax
Brian Mickelson by fax:[604]-637-1617

July 4, 2012

s.22

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

Introduction

On June 18, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

There is no evidence before me from the officer that the ASD used to form the basis for the prohibition was properly calibrated or serviced.

I am satisfied that the ASD was not reliable.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 4, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

July 12, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Your lawyer, Sarah Leamon, requested that your IRP should be revoked as the ASD test results cannot be legally used to form the basis of imposing the IRP, nor can they be admitted or relied upon as evidence under the IRP provisions. Ms. Leamon submits that to do so would amount to a violation of your constitutional rights under the Charter of Rights and Freedoms (the “Charter”), specifically, your right to counsel under section 10(b). To support her argument, Ms. Leamon provided and referred to the case *R. v. Brigitte Schultz*.

I have read the case but find that I disagree with Ms. Leamon. I note that the date of judgment of *Schultz* was November 6, 2009, nineteen months before the *Motor Vehicle Act* was amended when new IRP legislation was introduced.

Specifically, the Act states that if a peace officer makes a demand to a driver under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD, and the ASD registers a warn or a fail, and the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol, the peace officer must serve on the driver a notice of driving prohibition. Further, I have no authority or jurisdiction to address the constitutional validity of the legislation, nor am I aware of any court decisions declaring the legislation unconstitutional.

Ms. Leamon provided a copy of *Spencer v. the Superintendent of Motor Vehicles* to confirm that I must not give more credibility to the police evidence over that of yourself. I accept that.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you in care or control of a motor vehicle in s.22. You confirmed you were driving. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

The officer noted in his narrative that the device registered a "FAIL". There is no evidence to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer noted that he advised you of the right to a second test. There is no evidence to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer noted that you declined the opportunity of the second test. You agree that you did but only initially. After being placed in the police car you re-considered your position and asked the officers if you could do the second test after all. The younger policeman said that you could but he was immediately overruled by his senior partner, who told you that it was too late because you had already declined. While I note that the officer made no reference to this in his report / narrative, I find I prefer your more detailed evidence over that of the officer.

I am not satisfied that you were provided with a second breath test analysis. Given this, I need not consider the other issues.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 12, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date your vehicle was eligible for release. Receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you.

s.15

Adjudicator

cc: Sarah Leamon
Acumen Law Corporation
Fax: (604) 685-8308

July 4, 2012

s.22

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

Introduction

On June 20, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

At the beginning of the oral hearing, I confirmed with you that you had received full disclosure.

Issues

The following are the issues in this review:

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

- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice was served on the basis of the lower analysis result?
- Was the ASD reliable?

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

Having considered the evidence in its entirety, I find that the time of driving is not reliable. As such, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act.

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

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 4, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

JULY 12, 2012

s.22

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

Introduction

On June 22, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In the oral hearing, you told me that you recently returned from your s.22
You are a s.22 and need the vehicle out of the impound lot, so that you can sell it to help

resolve your difficult financial situation. You also mentioned a number of other struggles you have faced in the past few years.

I understand that receiving a 90-day driving prohibition can have serious consequences in a person's life. As I said in the hearing, however, under the Act I am not authorized to consider hardship, personal circumstances or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Labrum indicated that he witnessed you driving or in care or control of the vehicle on June 22, 2012, at 1721 hours. There is no contrary evidence before me.

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

Did the ASD register a "FAIL"?

In the RTS, Constable Labrum stated that you provided a breath sample into an ASD and that the device registered a "fail" at 1726 hours. You confirmed that this happened.

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

Were you advised of your right to a second analysis?

In the Narrative, the officer stated that he read you your right to a second test and advised that the lower result of the two tests would prevail. There is no contrary evidence before me.

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

Was the second analysis provided by the officer?

Constable Labrum said that you provided a breath sample and that the device registered a “fail” at 1735 hours. You agreed that this occurred.

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

Was the second analysis performed on a different ASD?

In the RTS and the Narrative, the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

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

In the RTS, the constable stated that both ASDs used to analyze your breath registered “fail”. I am satisfied that the Notice was served on the basis of the “fail” result.

Was the ASD reliable?

Section 215.47(e) of the Act requires the officer to forward to the superintendent information relating to the calibration of the approved screening device, on the basis of which the notice of driving prohibition was served. Constable Labrum did not provide any such evidence in his submissions. I, therefore, have no compelling basis on which to determine if the ASDs were reliable.

Based on the evidence before me, I am not satisfied on a balance of probabilities that the ASDs were reliable. Having made this finding, I do not need to consider any other issues.

Decision

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

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

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

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

s.22

IRP Review Decision

Page 4

pay towing and storage costs up to and including **July 12, 2012**. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.22

Adjudicator

July 27, 2012

s.22

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

Introduction

On July 7, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

In her written submission, your lawyer, Sarah Leamon, stated that she has reviewed the disclosure materials. I have proceeded with this review based on that confirmation.

Issues

Having reviewed all of the material before me, I find that one issue is determinative of this matter, namely, was the ASD reliable?

Facts, Evidence and Analysis

Was the ASD reliable?

Your evidence, which I accept, is that you were smoking a cigarette when you pulled up to the police roadblock. Since the officer's evidence is that you were driving at 2355 hours and you provided the ASD sample at 2356 hours, it follows that you were smoking less than two minutes prior to providing the ASD sample.

Ms. Leamon provided an excerpt from an ASD resource that advises ASD operators to wait three minutes after the subject has finished smoking. The resource indicates that "presence of smoke in breath sample can cause inaccurate readings and damage device".

I am satisfied that the ASD was not reliable.

Decision

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

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

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

July 13, 2012

s.22

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

Introduction

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

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

- You were a driver within the meaning of section 215.41(1);
- the ASD registered a 'warn' as a result of your blood alcohol concentration (BAC) being not less than 50 milligrams of alcohol in 100 millilitres of blood (50 mg%)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Records at this office indicate that disclosure was provided to you. You confirmed receiving the police evidence and I proceeded with the hearing based on this information.

In your submission you described the need for a clean driving record. You have applied for a new job and need a driver's licence for your work. I can appreciate this incident may have implications for your employment and finances. You also use your vehicle to supplement your income by selling items at the market. However, under the Act I am not authorised to consider transportation needs or personal circumstances. The scope of the review is limited to the grounds as defined in section 215.5 of the Act. I do not have discretion to reduce your driving prohibition, monetary penalty, or vehicle impoundment unless permitted by the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (Report), Constable Ruefli of the s.22 RCMP stated that he witnessed you drive or have care or control of a vehicle on June 24, at 21:45 hours. In his narrative the constable described responding to a complaint of a possible impaired driver travelling westbound onto s.22. The constable was on the way to the registered owner's residence address at s.22 when the vehicle, with BC licence plate(s) s.22, was seen driving slowly up s.22. The vehicle stopped and then made a wide right turn into a back alley. The constable activated his emergency equipment. The vehicle came to a stop. You were identified as the driver by reference to a valid photo BC driver's licence. You were the lone occupant.

In your submission you stated that you were on your way home from the flea market in s.22 on when you were stopped by the RCMP, three to four houses from your residence.

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

Did the ASD register a 'fail'?

Constable Ruefli stated in the Report that a test result of 'fail' registered on an ASD at 22:02 hours on June 24, 2012. The constable indicated that he showed you the test result.

There is no evidence before me to refute that of Constable Ruefli with respect to this issue. Based on the evidence before me, I am satisfied that the ASD registered a 'fail'.

Were you advised of your right to a second analysis?

Constable Ruefli noted in his Report that after the first ASD test was completed he informed you of your right to a second test on a different ASD and that the lower ASD test result would prevail. In his narrative, the constable noted that he read the second ASD offer from a card. You understood.

In your submission you stated that the police did not inform you of your right to a second test on a different ASD. They just did it.

In accordance with the Act, a peace officer is obliged to inform you that you have a right to a second test by providing another sample of breath into a different ASD. It is incumbent upon the applicant to request the second test, without undue delay, prior to being served with a copy of the Notice.

Based on the evidence, I find that the constable did provide you with an opportunity to provide a second sample of breath for an ASD analysis. You may not have specifically requested a second test, but you understood an offer had been made to you and provided a breath sample for a second ASD analysis. In your letter you described providing four samples of your breath. The second and third attempts did not register a result.

However, you also asserted that Constable Ruefli failed to explain the purpose of the second test, or that the result of a lower test would prevail.

The constable, in his narrative, referred to reading your right to request a second test at 22:04 hours from a card. A peace officer may refer to preprinted information cards to assist in discharging their duty. An IRP information card would follow closely the provisions of the IRP legal framework; by legislation the lower of the two ASD tests will prevail. The constable would be prompted to ask if you understood your right and, if you would be prepared to provide another sample. He noted you understood.

While Constable Ruefli may not have explained the significance to you of your second and third attempts to provide a breath sample which did not register a result, in terms that you understood, he nevertheless met the requirements of the Act. By accepting his offer of a second analysis, you exercised your right to a second test.

Based on the evidence before me, I am satisfied that you were advised of your right to a second analysis.

Was the second analysis performed using a different ASD?

In his Report the investigating officer noted two different ASD serial numbers for the first and second tests; 101837 and 069346 respectively.

Based on the evidence before me, I am satisfied that the second analysis provided by the investigating officer was performed using a different ASD.

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

The Notice was served on the basis that the ASD tests registered a 'fail' reading, both at 22:02 hours, and 22:11 hours on June 24, 2012. I am satisfied that the Notice was served on the basis of a lower analysis.

Was the ASD reliable?

Constable Ruefli did not provide any Certificate of a Qualified ASD Calibrator. Since I cannot determine whether or not the screening device was appropriately calibrated, I cannot be satisfied that an ASD did register a 'fail' on June 24, 2011.

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 12, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

JULY 20, 2012

s.22

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

Introduction

On June 30, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

In the Report to Superintendent (the "RTS"), Constable Potter indicated that you provided a breath sample into an ASD with serial number 101996. The officer also provided a Certificate of Qualified ASD Calibrator regarding an ASD with serial number 101966. There is no evidence before me regarding the calibration of the ASD used to analyze your first suitable breath sample, therefore, I cannot be satisfied that the first ASD was reliable. Having made this finding, I do not need to consider other issues.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 20, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

cc. Hugh McCallum
604-534-1021 (fax)

July 25, 2012

s.22

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

Introduction

On July 4, 2012, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

I have reviewed all of the evidence before me, and make the following observations:

- The Narrative Text Hardcopy (the Narrative) shows that at 01:13 hours “Cst. Delia-Paolera and Cst. Irwin attended” the scene. It was at his time Cst. Della-Paolera spoke with you.
- The Notice indicates that at 01:49 hours the officer had the reasonable suspicion to believe that you had care or control of a motor vehicle and that your ability to drive was affected by alcohol.
- The officer recorded the time of driving or care or control in the Report to Superintendent (RTS) as 01:30 hours. I note that this is after they arrived on scene at 01:13 hours and that the officer’s evidence in the Narrative does not indicate that when they arrived at 01:13 hours you were either in or anywhere around the vehicle.
- The Vehicle Impoundment Notice indicates that it was at 02:00 hours you were operating a motor vehicle.
- The RTS states the time the officer formed reasonable suspicion was at 01:35 hours.
- The RTS shows that the time of the ASD demand and first ASD test result registered as a “FAIL” at 01:35 hours.
- The RTS also indicates that at 02:00 hours you refused to provide a sample of your breath. The Narrative states that at 01:39 you were detained and placed in the rear of the police car. While not providing a specific time, the Narrative also indicates that near 01:39 hours you were explained the right to a second test but that you “refused”.

It is reasonable for me to conclude that since the times provided by the officer, as noted above, are inconsistent and confusing, that they are unreliable. Given this, it calls into question the reliability of the officer’s evidence as a whole. As, such I am not satisfied of the allegations in the Notice.

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 25, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

July 23, 2012

s.22

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

Introduction

On July 4, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the General Occurrence Hardcopy Synopsis (“Synopsis”), the investigating officer reported conducting a vehicle stop after he observed a vehicle pull out of a parking lot. The officer identified you as the driver of the vehicle, and in the Report to Superintendent (“RTS”), he reported that you were driving or in care or control of a vehicle at 02:19 hours, on July 4, 2012.

You did not dispute the officer’s 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 July 4, 2012, at 02:19 hours.

Did the ASD register a “FAIL”?

In the RTS, the officer reported that the result of the ASD test was a “FAIL”. You did not dispute that the result was a “FAIL”. I am satisfied that the ASD registered a “FAIL”.

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

In the Synopsis, the officer reported that he conducted a vehicle stop in a nearby alleyway after observing the vehicle you were driving pull out of a parking lot. In the RTS, he noted the location as s.22 In the RTS, the officer reported that you admitted to having consumed alcohol, but he did not report any response to the question of when you consumed your last drink. The officer indicated there was no delay in making the demand and administering the first ASD test. He recorded the time of the ASD test at 02:24 hours.

In your evidence, you said you attended a pub located at s.22 At approximately 2:10 a.m., you were ready to leave. You had a final toast and made your way out. As you departed, you vomited near some bushes outside. You believe you entered your car no earlier than about 2:20 a.m. You said you were stopped by the officer almost immediately following your departure from the parking lot. You admitted to the officer that you drank beer that night, but the officer did not ask you when you had your last drink, or whether you had vomited. You said less than 15 minutes had passed since your last drink at the pub and since you had vomited outside the pub.

The evidence before me is consistent that after you departed the pub parking lot, the officer stopped you almost immediately. Since he administered the ASD test within 5 minutes of

observing you driving, I cannot be satisfied that at least 15 minutes elapsed between the time you consumed your last drink or when you vomited, and the time of the ASD test.

I am satisfied that your BAC was less than 80 mg% even though the ASD registered a "FAIL".

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

Decision

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

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

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

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.

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date your vehicle was eligible for release. Receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you.

s.15
Adjudicator

cc. Gloria Ng
fax: 604.677.5560

JULY 24, 2012

s.22

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

Introduction

On July 3, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

You were prohibited from driving for failing or refusing to comply with a Demand without a reasonable excuse. In order for you to comply with a Demand, it must be in accordance with section 254(2) of the *Criminal Code*. As your lawyer noted, however, the officer's evidence in the Narrative indicates that the Demand was made 13 minutes after the officer formed the reasonable suspicion that you had alcohol in your body. According to case law on this issue, a 13 minute delay is not consistent with the *Criminal Code*'s requirement that the Demand be made "forthwith". In the circumstances of your case, I find that the Demand was not valid, so you were not required to comply with it. Having made this finding, I do not have to consider any other issues.

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

Decision

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

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

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

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

s.15
Adjudicator

cc Jonathan Israels
604-488-1413 (fax)

July 17, 2012

s.22

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

Introduction

On June 26, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Mr. Westell provided an excerpt from the court decision, *Spencer v. the Superintendent of Motor Vehicles* [2011] BCSC 1311, and asserts that:

- Police are not deemed to have a credibility advantage and the case must be determined impartially on the evidence.

- The evidence is not to be unfairly parsed to create standards that are unknown to and unknowable by you.
- Such parsing as takes place, recognizes the deficiencies or gaps in the police record as well as those in your evidence.
- If there is insufficient evidence to decide the case, it must be resolved in favour of you, in line with the proper allocation of the burden of proof and the concept of a balance of probabilities.

I concur and have proceeded with the review on this basis.

Issues

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

Facts, Evidence and Analysis

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

In the Report to Superintendent and attached Occurrence Report, Officer Abendroth indicates that on June 26, 2012 at 18:34 hours, police received a 911 call regarding a possible impaired driver on s.22 with BC licence plate

s.22 After arriving at your residence, Officer Abendroth located the unoccupied vehicle parked at the back of the residence and encountered you inside your residence.

Section 215.41(1) of the *Act* states:

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

Because you were not in your vehicle at the time Officer Abendroth encountered you, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*.

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 17, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

pc: Kevin Westell via fax

JULY 18, 2012

s.22

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

Introduction

On June 27, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

On the application form, you indicated that you were applying for the review on all the grounds listed on the form. However, not all of these grounds are applicable to your situation. There are three bases on which an officer can serve a Notice of Prohibition. These include:

- a sample of your breath on an ASD registered “warn” and your ability to drive was affected by alcohol;
- failing or refusing to comply with a demand for a breath sample, without reasonable excuse; or
- a sample of your breath on an ASD registered “fail” and your ability to drive was affected by alcohol.

The list of grounds for review on the application form addresses these three scenarios. You were prohibited from driving for the second reason. I will consider all the grounds for review that apply in your situation, but not those that apply to the first and third reasons.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

Constable Veillette served you with a Notice, alleging that you operated or had care or control of a motor vehicle and that you failed or refused to comply with a Demand for a sample of your breath or blood under section 254 of the *Criminal Code*. I find that there is insufficient evidence that you were a driver within the meaning of section 215.41(1).

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act. Having made this finding, I do not need to consider other issues.

Decision

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

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

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

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

s.22
Adjudicator

cc. Albert King, Q.C.
250-753-6123 (fax)

July 17, 2012

s.22

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

Introduction

On June 27, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

The evidence before me is that you were advised of your right to a second test and you requested a second test. However, I note that I do not have before me a valid Certificate of Qualified ASD Calibrator for the ASD used for your first test, ASD 101859. In the absence of this evidence, I cannot be satisfied that the ASD was functioning correctly and cannot rely on the result of the first test. Because you requested two tests, and there is only one valid result, I am satisfied that the Notice was not served on the basis of the lower of the two analyses.

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 17, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.


s.15

Adjudicator

Reza Mansoori-Dara, Mines & Company
cc: Fax: 604-687-3097

I
July 19, 2012

s.22

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

Introduction

On July 4, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

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

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

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, David J. Sue-A-Quan. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

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

- Was the ASD reliable?

Facts, Evidence and Analysis

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

In the Occurrence Report, Constable Thornton indicated that you were driving or in care or control on July 4, 2012, at 0050 hours. You did not dispute this evidence from the constable.

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

Was the ASD reliable?

In the Certificate of Qualified ASD Calibrator there is evidence before me that the ASD calibration expiry date was recorded as "June 27, 2012". Consequently, I am satisfied that the ASD was not reliable.

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

Decision

As a result of my findings, I revoke your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act. I note that the vehicle was not impounded.

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

Adjudicator s.15

cc: David Sue-A-Quan by fax: [604] 633-9768

July 6, 2012

s.22

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

Introduction

On June 17, 2012, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

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

In the Report to Superintendent regarding your IRP (Report) and attached Narrative, Officer Herman indicates that on June 17, 2012 at 0150 hours, he observed you drive up to a roadblock at s.22

In your written statement you acknowledge driving at the time in question; however, you refute that the roadblock was on s.22. You indicate that you turned off s.22 into the private road that leads to the underground parking of your condo, when an officer motioned you to pull over.

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

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

The police evidence indicates that you provided a breath sample into the ASD at 0153 hours, which resulted in a "FAIL". The Superintendent's Report on ASDs provided to you with disclosure of the police documents, indicates that ASDs in British Columbia are calibrated to display a "FAIL" reading when a BAC is 100 mg% or over.

You acknowledge that the ASD registered a "FAIL" when you provided a breath sample. You did not provide any evidence to refute that the "FAIL" was a result of your BAC exceeding 80 mg%.

Based on the evidence, I am satisfied that the ASD registered a "FAIL" and that it was as a result of your BAC exceeding 80 mg%.

Were you advised of your right to a second analysis?

Based on the police evidence, Officer Herman informed you of your right to a second breath test.

You submit that Officer Herman did not inform you of your right to a second breath test. Your girlfriend corroborates your evidence.

Based on your detailed submissions, I am satisfied that it is probable that you were not advised of your right to a second breath test.

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

Decision

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

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

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

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

Adjudicator s.15

July 13, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

I note that the charge indicated on the Notice was for failing to comply with a demand to provide a sample of breath for analysis by an ASD. The Report to Superintendent (Report), submitted by Constable Johnston, indicates in Section 6, however, that you complied with the demand and provided a breath sample at 02:04 hours on July 1, 2012. The officer submitted no persuasive evidence of a failure or refusal to comply with a demand. Accordingly, I do not find that you failed to comply with a demand.

Decision

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

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

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

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 July 13, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Sarah Leamon
Fax: (604 685 8308)

July 26, 2012

s.22

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

Introduction

On July 8, 2012, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

Were you advised of your right to a second analysis?

Based on the police evidence contained in the Report to Superintendent (“RTS”), Constable Boffy (“Cst. Boffy”) informed you of your right to a second breath test.

During the oral hearing you provided a detailed account of the sequence of events as you recall them to have occurred. You stated that when you were pulled over Cst. Boffy advised you of your rights and explained that he had a suspicion you were impaired, then he requested you to blow into the ASD. You stated that you told him that you were not impaired and that you only had one beer “maybe 10 minutes ago”, not “more than 10 minutes ago” as noted in the RTS.

You explained that Cst. Boffy told you that you registered a “FAIL”, and you expressed to him that you were shocked and that you did not believe the result. You said you asked him what else you could do and he re-iterated to you that you blew a “FAIL”, then proceeded with his paperwork. You stated that at no time did Cst. Boffy tell you that you could have a second test; you had no clue that was an option. You stated if you knew that you could have done a second test you would have “jumped at that chance” because you were not impaired at all, as you only had one beer.

I note that Cst. Boffy made no reference to a second breath test analysis in his Narrative; I find that you have provided a significant account of the events and I prefer your more detailed evidence over that of Cst. Boffy.

Based on your detailed submissions, I am satisfied that it is probable that you were not advised of your right to a second breath test.

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 26, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

JULY 16, 2012

s.22

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

Introduction

On June 26, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on the ground that “you did not refuse or fail to comply with the officer’s demand to provide a breath sample;” however, that ground is not applicable to your situation, because you were not prohibited for this reason. You were served with the IRP because a sample of your breath on an ASD registered “fail”, and your ability to drive was affected by alcohol.

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “RTS”), Constable Bedard indicated that he witnessed you driving or in care or control of the vehicle on June 26, 2012, at 2253 hours. There is no evidence before me to the contrary.

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

Did the ASD register a “FAIL”?

In the RTS, Constable Bedard stated that you provided breath samples into two ASDs and that the devices both registered “fail”, as a result of the analyses. In the Narrative, the officer said he asked you how much you had consumed and he noted that you said, “I had a pint a minute ago.” In paragraph 10 of your affidavit, you said you finished the majority of a pint of beer at 10:51 pm. s.22 a server at the bar where you drank, provided a statement confirming your evidence in this regard.

In paragraph 16 of your affidavit, you noted the Superintendent’s Report on ASDs (the Report on ASDs), which contains information reflecting current police practices. The Report on ASDs states that breath samples are taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol.

Based on all the evidence before me, I find it more likely than not that the ASDs registered “fail” readings 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”. As a result, I must revoke your prohibition pursuant to section 215.5.

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 16, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

July 31, 2012

s.22

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

Introduction

On July 23, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

There is no evidence before me from the officer that the ASD used to form the basis for the prohibition was properly calibrated or serviced.

I am satisfied that the ASD was not reliable.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 30, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

cc: Roberto Alberto Carr Cuchan & Company
by fax [250] 388-7327

July 12, 2012

s.22

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

Introduction

On June 25, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The investigating officer noted that he saw you in care or control of a motor vehicle that was parked on s.22 You agree, but stated that it was parked in your driveway.

Prior to that your neighbour had been driving your vehicle, with you as the passenger, which is not unusual because you do not have a valid licence. The only time you were in the driver's seat of the vehicle is while it was parked at home. The definition within the Act that I must consider is that of "driver", which includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion. Your driveway is not considered a highway or an industrial road.

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act and, as such, need not address the other issues.

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 12, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Chris Massey
Fax: (250) 920-0177

July 17, 2012

s.22

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

Introduction

On July 2, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Your lawyer, Mr. Justin Haines suggested that *Charter* relief applies to your file. It is my position, however, that the Superintendent when conducting a review under s.215.41 of the Act does not decide Charter issues.

Mr. Haines also contended the issue of the demand not being made “forthwith”. Under the Act, the validity of the demand is relevant only when a driver fails or refuses to provide a breath sample. In your case, however, the evidence indicates that you provided a breath sample upon demand. As a result, the validity of the demand is not at issue in this review. The only issues that I can consider are those, which are outlined below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “Report”), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 07:57 hours.

In the Occurrence Report, the investigating officer stated that the s.22 RCMP received a complaint that a s.22 had hit the ditch. The officer stated that you admitted that you were the driver.

Mr. Haines submitted that it is apparent that the time of driving recorded in the Occurrence Report reflects the time the accident was reported to the police rather than the time of driving. Mr. Haines referenced section 94.1 of the Act where “at any time within three hours” applies.

Here, I must determine whether you were a driver within the meaning of section 215.41(1). While it is possible that the complaint was received at 0757 hours I find it reasonable to infer that the accident had just occurred given the time of day, and the number of witnesses involved.

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

Did the ASD register a “FAIL”?

In the Narrative, the officer stated that he detected a strong odour of liquor on your breath, you admitted to consuming a “few drinks”. In the Report, the officer recorded that you registered a “FAIL” result on an ASD at 0834 hours.

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

Were you advised of your right to a second analysis?

In the Report the police evidence states that you were informed of your right to a second test on an ASD and that the lower of the two results would prevail, but you did not request a second test. Additionally, in the Narrative, Constable Krause stated that you were offered a second test and that it was explained to you that the lower of the two ASD tests would prevail, he stated that you understood but you declined.

Based on the evidence before me, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As noted, I have made a finding that you were informed of your right to a second analysis but you declined it. On this basis, I am satisfied that a second analysis was not requested and therefore not provided by the officer.

Was the second analysis performed on a different ASD?

As there is only one breath analysis, and you did not request a second test, there was no requirement for the use of a second ASD.

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

As there was only one breath analysis, I am satisfied that the Notice was served on the basis of the "Fail" result.

Was the ASD reliable?

Mr. Haines drew my attention to the Report to Superintendent whereby the officer recorded the ASD serial number as **100881** and **100811** on the Certificate of Qualified ASD. Based on the evidence Mr. Haines questioned the reliability of the ASD and the possibility of an unjust result.

I agree, based on the evidence before me, I cannot be satisfied that the ASD used was reliable.

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including July 17, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date your vehicle was eligible for release. 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.

Adjudicator s.15

cc: Justin L. Haines
Heather Sadler Jenkins LLP
by fax: [250] 565-8001

July 24, 2012

s.22

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

Introduction

On May 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 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 confirm that full disclosure of the documents before me was provided to your lawyer, Bruce McIntosh. I have proceeded with this review based on that 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"), the officer stated that a witness saw you in an elevator, then later observed you drive a vehicle out of a parking lot. The witness indicated that there was a strong odour of liquor and you were swaying. Additionally, the officer indicated that you admitted to driving. He noted the date and time of driving or care or control as May 21, 2011, at 17:49 hours.

Your evidence is that after arriving home from a casino, you ate, then went to sleep. While sleeping, you were awakened by your wife who informed you that a police officer was at your front door looking for you. The officer questioned you about your alcohol consumption that day. He requested that you undergo a breath test and made you exit your home to do so.

Mr. McIntosh argued that the officer overstepped his authority when he drove to your home and made your wife wake you up and proceeded to make a breath demand. He stated that IRP's are meant to be executed at roadside.

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

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

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

Decision

I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act. I therefore revoke your driving prohibition and monetary penalty, as required by s. 215.5(1) of the Act.

Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date your vehicle was eligible for release. Receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you


s.15

Adjudicator

cc: Bruce McIntosh, Metrotown Law Group
Fax: 604-568-4597

JULY 16, 2012

s.22

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

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with 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, Clair Hatcher, in disclosure. Ms. Hatcher acknowledged that she had received them on your behalf. 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

Having reviewed the evidence of Constable Lerhe-Thomas and Ms. Hatcher's submissions, including the affidavit evidence, I find there is one issue that is determinative of this review.

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

In the Report to Superintendent (RTS), Constable Lerhe-Thomas stated that he witnessed you driving or in care or control of the vehicle on October 16, 2011, at 0126 hours. He said that you were in the driver's seat and the vehicle was running. You did not dispute this information, but you said you had no intention of driving. Your lawyer stated that there is no evidence of driving and insufficient evidence to establish care or control of the vehicle. Ms. Hatcher argued that you were not, therefore, a "driver" as defined by the Act and the common law.

Given the particular set of facts in your situation, I agree with your lawyer. I find that the officer did not provide sufficient evidence for me to be satisfied on a balance of probabilities that you were driving or in care or control of the vehicle.

Based on the evidence before me, I am satisfied that you were not a driver within the meaning of section 215.41(1) of the Act on October 16, 2011, at 0126 hours.

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

Decision

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 16, 2011, at 0126 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 once you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for the Enhanced Driver's Licence.

s.15
Adjudicator

cc. Claire Hatcher
604-687-3022