

August 15, 2012

s.22

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

Introduction

On May 6, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

I find there is one issue determinative of this review.

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

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

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

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

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

Decision

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

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

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

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

August 16, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

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

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

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

Decision

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

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

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

Adjudicator

cc: Rory Lambert
Fax: (250 386 2123)

AUGUST 3, 2012

s.22

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

Introduction

On July 28, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 3, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

July 31, 2012

s.22

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

Introduction

On June 28, 2012, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

- you were a driver within the meaning of section 215.41(1);
- 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?

Was the ASD reliable?

Upon reviewing the all of the evidence before me, I find that there is an inconsistency in the officer's evidence regarding the calibration check on June 28, 2012. As such, I cannot be satisfied that ASD serial number 101044 was properly calibrated at the time of your second ASD breath test analysis, on June 26, 2012.

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

Decision

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

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

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

August 8, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

There is one issue determinative of this review:

Was the ASD reliable?

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

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

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 7, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

August 14, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

Decision

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

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

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

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 14, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

August 2, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

Was the ASD reliable?

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

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

Decision

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

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

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

August 17, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

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

Facts, Evidence and Analysis

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

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

Mr. Mulligan did not provide any evidence regarding this issue.

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

Did the ASD register a “FAIL”?

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

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

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

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

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

I concur.

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

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

Decision

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

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

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

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

Adjudicator s.15

cc: Michael Mulligan via fax

August 15, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 15, 2012, the date your vehicle was eligible for release. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

August 9, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 9, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Tybring Hemphill
Fax: (250 655 3329)

August 10, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

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

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

Facts, Evidence and Analysis

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

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

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

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

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

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

Decision

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

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

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

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 10, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

pc: Jennifer Currie via fax

August 14, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

Decision

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

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

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

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

Adjudicator

cc: Claire Hatcher
Fax: 604-687-3022

August 7, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

- Was the ASD reliable?

Facts, Evidence and Analysis

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

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

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

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

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

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

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

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

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 7, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

August 15, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Driving Prohibition Review Decision
Page 2

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 15, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Sarah Leamon
Fax: (604 685 8308)

August 17, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

On July 28, 2012, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

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

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

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

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

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

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

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

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

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

I concur.

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

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

Decision

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

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

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

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

Adjudicator s.15

cc: Kyla Lee via fax

August 9, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

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

Decision

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

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

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

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

August 17, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Facts, Evidence, and Analysis

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

Did you fail or refuse to comply with a demand?

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

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

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

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

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

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

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

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

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

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

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

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

Decision

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

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

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

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

Adjudicator

cc: Deepak Gautam
Fax: (604 593 5311)

August 10, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 10, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

s.22

cc: Kyla Lee
Fax: (604 685 8308)

August 9, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

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

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

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

Decision

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

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

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

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

s.15
Adjudicator

cc Paul Evans
Fax: 604.590.5626

August 10, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

There is one issue determinative of this review:

Were you advised of your right to a second analysis?

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

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

Decision

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

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

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

s.15
Adjudicator

cc: Harry Hunter
Fax: 604-986-9286

August 1, 2012

s.22

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

Introduction

On July 13, 2012, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 1, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Kevin Filkow, Michaels & Filkow
Fax: 604-270-3787

August 10, 2012

s.22

REVIEW DECISION Immediate Roadside Prohibition No. s.22

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

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

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

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

Ms. Lee did not provide any evidence regarding this issue.

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

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

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

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

I concur.

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

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

Decision

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

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

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

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 10, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

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

August 9, 2012

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

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

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

Facts, Evidence and Analysis

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

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

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

Section 215.41(1) of the Act states:

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

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

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

Decision

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 8, 2012. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.