

September 26, 2013

s.22

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

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Jeremy Carr.

Mr. Carr argued that the officer failed to ascertain the time of your last drink, that the officer did not have reasonable suspicion to issue the ASD demand, that the indicia noted were insufficient to warrant the ASD, that there was a delay in administering the ASD and as a result that the ASD demand was invalid. Mr. Carr also noted that you were detained for 15 minutes without being advised of your right to counsel. He referenced, but did not provide me with the following cases in support of his submission:

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- *R. v. Geraghty*
- *R. v. Ference*
- *R. v. Hemery*
- *R. v. Smith*
- *R. v. Woods*
- *R. v. McMurray*
- *R. v. Cleaver*

The grounds upon which I may review your driving prohibition are restricted to those set out in the Act. Despite the submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

With respect to Mr. Carr's concerns that you were detained for 15 minutes without being advised of your right to counsel, I note that you were issued an IRP under section 215.41 of the Act. Under that section there is no requirement for the officer to advise you of your right to counsel.

Mr. Carr argued that there is no evidence that your ability to drive was affected by alcohol. He cited *Wilson v. British Columbia (Superintendent of Motor Vehicles)* and submitted that your IRP should be revoked accordingly.

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

Mr. Carr noted that Justice McEwan held in *Spencer v. British Columbia (Superintendent of Motor Vehicles)* that the police are not deemed to have a credibility advantage and that the case must be determined impartially on the evidence. He further noted that as in *Gillies v. British Columbia (Superintendent of Motor Vehicles)* "credibility is a finding of fact which must be reviewed on a standard of reasonableness". Mr. Carr also referenced paragraph 30 in *Costain v. British Columbia (Superintendent of Motor Vehicles)* with respect to how an adjudicator decides between conflicting evidence.

Although Mr. Carr did not provide me with the above noted cases, I acknowledge these points and I have proceeded with the review with these in mind.

Issues

The following are the issues in this review:

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

- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 7, 2013, at 23:00 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 7, 2013, at 23:00 hours.

Did the ASD register a "FAIL"?

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

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

Mr. Carr stated that according to the RTS, the second test was not conducted until 03:26 hours, four hours and twenty six minutes after the first test. He argued that this was not "forthwith" as per the Act.

While I acknowledge the time in the RTS, I find it difficult to accept that the second test was four hours and twenty six minutes after the first test. I find it reasonable to conclude that the officer made a clerical error in the RTS. I note that the officer stated in the Narrative that he served you the driving prohibition and vehicle impoundment forms at 23:44 hours. In considering the sequence of events as indicated in the RTS and Narrative I note the following:

- Time of driving or care and control 23:00 hours
- Time of reasonable suspicion formed 23:04 hours

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- Time of approved screening device demand 23:19 hours
- Time of first ASD test 23:19 hours
- Time of second ASD test
- Time documents served 23:44 hours

Based on the evidence before me, I find it more likely than not that the second test was administered shortly after the first ASD test, and prior to the service of the documents.

I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

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

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

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

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

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

Was the ASD reliable?

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

Mr. Carr stated that you advised that the ASD used to collect the second sample was not properly functioning and witnessed the officer bang it against his hand and the door of the vehicle numerous times. Mr. Carr indicated that this was of grave concern to you and you protested having to do a second test on a damaged machine. Mr. Carr also stated that both tests were conducted on instruments with expired calibration dates.

In considering this issue, I have the officer's sworn Report before me and I have Mr. Carr's submissions with regard to what he says you told him. Consequently, as I have no direct evidence from you, I have given less weight to Mr. Carr's submissions with respect to your statements to him and more weight to the officer's evidence. It is noteworthy that there is no evidence in the police report that the officer banged the ASD on his hand and the vehicle or that you protested having to do a second test. The officer's evidence is that you were advised of your right to a second test and you quickly stated that you wished to provide a sample. I note that you have not explained what lead you to believe that the device was not functioning properly.

With respect to Mr. Carr's claim that the calibration dates were expired, I note that both calibration dates expired on September 19, 2013 and this incident occurred on September 7, 2013. Therefore, the claim that the calibration dates were expired is unfounded.

I am satisfied that the ASDs were reliable.

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

I find there is no compelling evidence before me that would lead me to question the ASD results. I am satisfied that the ASDs registered a "FAIL" as a result of your BAC exceeding 80 mg%.

Decision

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

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

Adjudicator

cc: Jeremy Carr
250-388-7327

(September 30, 2013) occurs six days in the future. Accordingly, I have no way to verify when the Declaration was in fact sworn. I have accepted this as a clerical error and proceeded with this review.

On page one of the Declaration you state that you, "received IRP No. s.22 on September 25, 2013 at approximately 21:55 pm." However, on the Notice, in the sworn Report to Superintendent (the "RTS"), and the Narrative Text Hardcopy (the "Narrative"), the investigating officer, Cst. Zaharia, submits that your prohibition was served on September 12, 2013. I have before me three documents that form part of Cst. Zaharia's sworn report indicating that the IRP investigation occurred on September 12, 2013. On a balance of probabilities, I am satisfied that your submission your IRP was served on September 25, 2013 is a clerical error.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn RTS, Cst. Zaharia, indicates that you were driving or in care or control of a motor vehicle at 2155 hours on September 12, 2013. Further, in the Narrative, Cst. Zaharia submits that at 2155 hours he was parked facing Hook Road when he observed a vehicle drive by with no plates on it. Cst. Zaharia submits that he had observed the same vehicle, approximately ten minutes prior, parked and not running in a pullout off of Hook Road. He indicates that he spoke to you while you were seated in the parked vehicle. After stopping your vehicle as it drove by some ten minute later, Cst. Zaharia observed you as the sole occupant and driver.

In the Declaration, you submit that you drove out of your rural property, down a public road, and to a gravel pullout. While parked in this pullout, Cst. Zaharia approached your vehicle and asked you, "What are you doing here?" You advised him that you had gotten into an argument with your husband and were trying to calm down.

You assert that Cst. Zaharia, "went down the hill and was waiting for [you] to drive back to the entrance to [your] property." I have no evidence before me that at the time Cst. Zaharia first encountered your vehicle that he was aware you were parked several hundred yards from the entrance of your property. I interpret this evidence as you suggesting that Cst. Zaharia targeted you as you left the pullout. If this is so, I question why he did not begin an IRP investigation when he you first encountered you at the pullout. Further, in the Declaration, you submit that the road you travelled to get to the gravel pullout was a public road. As you returned to the entrance of your property on the same road, Cst. Zaharia activated his emergency equipment and you, "stopped before the tracks and at [your] entrance."

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

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

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

Evidence in the RTS indicates that at 2159 hours, Cst. Zaharia formed the reasonable suspicion for the ASD demand. Specifically, in the Narrative, Cst. Zaharia submits that after stopping your vehicle he observed an aluminum can being tossed out of the front passenger window. He confirmed it was an open can of Budweiser beer that was half full, still cold, and contained beer. While speaking with you, Cst. Zaharia indicates that he detected an odour of liquor on your breath. However, when you were asked the time of your last drink, he submits that you would not say.

In the Declaration, you submit that you had a glass of wine with dinner at least three hours earlier and assert that you did not notice the open can of beer until you opened your door to acknowledge Cst. Zaharia and the interior light came on. You also submit that Cst. Zaharia did not ask about consumption of alcohol. On this point, you assert that in the unsworn Narrative, Cst. Zaharia indicates that he detected an odour of liquor on your breath, yet he never indicated this to you.

After providing Cst. Zaharia with your driver's licence, you submit that he produced a machine that you know is a roadside screening device. He advised you that it was a breathalyzer and that he wanted you to blow into it. You assert that Cst. Zaharia did not state a demand, read from a card or say words like a demand. You also argue that Cst. Zaharia never used words to indicate that you had no choice and that he simply produced the machine and told you that he wanted you to blow into it.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle with alcohol in their body. I have considered your submission that the three unopened cans of beer Cst. Zaharia located in front passenger side of your vehicle, as well as the open can of beer he observed being thrown out the passenger window, were left in your vehicle by your husband's brother, s.22 However, I question if you only noticed the open can of beer when your vehicle's interior light came on, why you would not have noticed the can or the unopened beer when you entered your vehicle. I feel a reasonable inference can be made that upon entering your vehicle to leave, the interior light would have come on.

I am left wondering why your husband did not provide any evidence for this review to support your claimed drinking pattern if you were with him prior to leaving your property, he spoke to Cst. Zaharia, and witnessed Cst. Zaharia empty three unopened cans of beer, allegedly left in your vehicle by his brother, while you were under investigation for impaired driving. I am also left wondering why s.22 did not provide evidence to confirm that the beer in your vehicle was put there by him.

You submit that you would have told Cst. Zaharia that you had consumed one glass of wine with dinner, if he had asked. I question the credibility of your claim that Cst. Zaharia did not ask about your consumption. You admit to throwing an open can of beer out the passenger window. Cst. Zaharia confirms this behaviour and provides details as to the quantity, temperature, and type of beer that was in this can; evidence you do not refute. I am left wondering why you chose to throw the can out the window after being stopped if you had not been drinking. As such, I find it hard to believe that after seeing a can of beer being thrown out your vehicle's window, locating additional beer in the vehicle, and noting an odour of liquor on your breath that Cst. Zaharia would not have asked about your consumption.

On this point, you submit that Cst. Zaharia indicates that he detected an odour of liquor on your breath in his unsworn Narrative. Line 14 in the RTS incorporates the Narrative as part of Cst. Zaharia's sworn report. Additionally, line 10 in the sworn RTS, in response to the question, "Applicable grounds for reasonable suspicion?", Cst. Zaharia indicates, "Odor of liquor on breath." Moreover, a peace officer is not obligated to advise a driver that they detect an odour of liquor on their breath when conducting an impaired driving investigation.

In the Narrative, Cst. Zaharia states that he, "read the ASD Breath Demand." Conversely, you submit that Cst. Zaharia did not read the demand from a card, that he was looking directly at you, and he never informed you that you had no choice but to comply. The evidence before me indicates that you understood a request to blow into a roadside screening device had been made on you. Specifically, you assert that when the machine was presented to you after Cst. Zaharia had advised you that he wanted you to blow into it, that you told him you could not blow into the ASD. I feel a reasonable inference can be made that by making this statement you understood that you had been asked to provide a sample of breath into the ASD and were obligated to comply.

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

In determining whether you failed or refused to comply with the demand, I turn again to the Narrative. Cst. Zaharia submits that when he presented you with the ASD, that you refused. The consequences of refusing were explained to you and he asked you once more if you would provide a breath sample and you stated, "I refuse."

In the Declaration, you submit that when Cst. Zaharia produced the ASD you stated, "I cannot blow into that."

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

Did you have a reasonable excuse?

In the Narrative, Cst. Zaharia submits that when he attempted to obtain a sample of your breath that you refused. After being advised of the consequences, you refused again.

After being stopped by Cst. Zaharia, you submit that you were standing beside your vehicle and were physically upset. When Cst. Zaharia produced the ASD you stated, "I am having a hard time breathing." You submit that you were also sobbing and having a hard time catching your breath. Accordingly, you stated, "I cannot blow into that", asked if you were being arrested, and if you needed a lawyer. Cst. Zaharia replied, "no" to both questions. You also assert that there was no fifteen minute delay nor was there any explanation of the consequences for refusing or failing to comply.

The evidence before me indicates that you had ample breath to form sentences and ask Cst. Zaharia questions related to the investigation. I also note that when your vehicle was stopped you admit to throwing a can of beer out of the passenger window. I question if you were upset to the point of being unable to provide a suitable sample of your breath, how you had enough presence of mind to discard a can of beer. Further, you provide evidence that you were cognizant enough to observe the behaviours of Cst. Zaharia. For example, that Cst. Zaharia had the, "dark machine in one hand and a plastic bag in his other hand. He was not reading from a card and both his hands were busy."

If you were having such a hard time breathing, I would expect that Cst. Zaharia would have provided some evidence of this but he did not. To the contrary, his evidence is that you simply stated, "I refuse." I also find it noteworthy that you did not even attempt to blow into the ASD. I do not find your evidence to be very credible. I do not believe that breathing issues caused you to refuse to comply with the ASD demand. Police evidence indicates that you refused after being presented with the ASD and then again after being advised of the consequences of refusing to provide a sample.

You submit that if you had been permitted to call a lawyer that you are sure he or she would have told you to attempt to blow. You provide evidence that when you asked if you needed a lawyer, Cst. Zaharia said, "no." On this point, in an IRP investigation a driver has no right to counsel.

You submit that there was no fifteen minute delay prior to being asked to provide a sample into the ASD. I have considered your submission, however, Cst. Zaharia not waiting fifteen minutes prior to attempting to collect a sample of your breath is not applicable in your situation. You were served with a 90-day refusal which indicates that on the Notice, Cst. Zaharia alleged you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of breath into an ASD. A fifteen minute waiting period is not an issue I must consider in this review because a suitable sample of your breath was not obtained.

You also submit that Cst. Zaharia did not provide you with an explanation of the consequences; Cst. Zaharia provides evidence to the contrary. You assert that the words, "I refuse", and, "consequences", are words that are not familiar to you with regard to the investigation. However, in the Narrative, Cst. Zaharia states, "explained the consequences and asked once more if she would provide a breath sample. At 2211 s.22 stated, "I refuse." I have already found your breathing issues to not be credible and find Cst. Zaharia's sworn evidence to be more persuasive than yours.

You also submit that you could have offered a blood sample and you were not given this opportunity. The IRP legislation allows a peace officer to obtain a sample of breath for analysis at roadside. Further, there is no provision in the Act that requires a peace officer to offer a driver the opportunity to submit to a blood test in an IRP investigation.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 12, 2013.

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

October 23, 2013

s.22

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

Introduction

On October 4, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

I acknowledge receipt of your letters dated October 7 and October 14, 2013. You said you made a bad decision to drive and were pulled over. You have only had a couple of seat belt infractions and speeding tickets in the last five years. You asked for a reduction in the prohibition or something that will enable you to continue working and take your s.22

I understand that it must be difficult to be without your car and driver's licence; however, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the "Report") is that on October 4, 2013, at 02:02 hours, Officer Michaud (the "officer") established you as a driver or having care or control of a motor vehicle. There is no evidence to the contrary before me.

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

Did the ASD register a "fail"?

The police evidence in the Report is that at 02:06 hours, the officer used ASD serial number 072222 to take a breath sample from you. The result of your ASD test was a "fail".

You said the first ASD you blew into registered a "warn" but the officer said the machine malfunctioned. He pulled out another unit and although it took forever to read, it did show a "fail".

The first ASD test that resulted in a "warn" was determined by the officer to be on a malfunctioning device. Therefore, that test is not considered a valid test. The ASD test conducted at 02:06 hours on ASD serial number 072222 is the test taken to be your first test.

I am satisfied that the ASD test registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail.

The evidence in the General Occurrence Hardcopy (the "Narrative") is that at 02:15 hours, the officer read you your right to a second ASD test from the IRP book. The officer indicated that you did understand the offer of the right to a second test. There is no evidence to the contrary before me.

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

Was the second analysis provided by the officer?

The evidence at section 7 of the Report is that you did not request a second ASD test. There is no evidence before me to the contrary.

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

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

There was only one ASD test, the result of which was a "fail"; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

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

- ASD serial number 072222 was checked for calibration on September 16, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 14, 2013, and a service expiry date of November 30, 2013.

You said that you are "not sure how reliable the reading actually was..."; however, I have before me the Certificate that tells me the Certificate was checked for calibration and found to be functioning correctly and within the recommended limits. In addition, I have the officer's affirmation that any ASD tests were conducted by a qualified ASD operator and the ASD unit was functioning correctly.

There is no evidence to the contrary before me. I am satisfied that the ASD was reliable on the night in question

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 4, 2013.

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

s.15
Adjudicator

October 17, 2013

s.22

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

Introduction

On July 27, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

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

In your written submission, you indicate that you require your driver's licence to support s.22

I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances, employment or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

You write that you have had no prior suspensions. I have no authority to consider a person's driving record in this review.

You ask that I review your prohibition, reduce its impact, and even possibly reinstate your license as this prohibition is your first alleged offence. I have no authority to shorten or alter the terms of a 90-day driving prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Duff, indicated that you were driving or in care or control of a motor vehicle at 0224 hours on July 27, 2013.

You submit that police evidence indicates that you produced a Class 5 driver's licence when you hold a s.22 While I have considered your submission, I have concluded that your licence class it is not vital in deciding this review. You also indicate that Cst. Duff was not the officer that stopped your vehicle; rather that he attended and took your breath sample. The evidence before me indicates that Cst. Duff was the investigating officer for the duration of the investigation. Moreover, you do not refute police evidence that you were driving at the time the vehicle was stopped.

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

Did the ASD register a "FAIL"?

In the RTS, Cst. Duff indicated that the ASD registered a "FAIL" at 0227 hours.

You submitted a case which excerpts *R. v. Bernshaw*, 1995 CanIII 150 (SCC), and indicates that a fail result on a roadside screening device is not, as a matter of law, sufficient by itself to constitute reasonable grounds for a breath demand under s. 254(3), where an officer is aware of circumstances that make the result of the test unreliable.

I am familiar with *Bernshaw* which is a criminal case, however, I am mindful that this is an administrative review and not a criminal proceeding. Section 254(3) of the *Criminal Code* refers to a breath test not conducted at roadside, therefore, the facts in *Bernshaw* do not apply to the facts in your case. Further, in criminal proceedings an ASD is used to form reasonable grounds for making a breath demand on a different device; that is not the case in your situation. I also have no persuasive evidence before me that Cst. Duff was aware of circumstances that made the "FAIL" result unreliable.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

In the RTS, Cst. Duff indicated that you did not request a second ASD test. Moreover, evidence in the General Occurrence Hardcopy Occurrence Report - 1 (the "Occurrence Report") indicates that you advised Cst. Duff that you understood your right to provide a second sample and refused.

You provided information that on November 30, 2011, the BC Supreme Court found that the 90-day IRP legislation violated the *Canadian Charter of Rights and Freedoms* and that on June 15, 2012, there were changes to the Act that brought back the entire IRP scheme. The information also suggests that innocent people receive IRPs and are provided with no true opportunity to challenge the evidence because it is not made available to them.

I have considered this information, however, the changes to the Act in June 2012, allowed a person to meaningfully challenge the result of an ASD. Specifically, police officers are now mandated to advise a person of his or her right to request a second test on a different ASD and that the lower ASD test result will prevail. In the RTS, Cst. Duff indicated that you were advised of both of these conditions.

I am satisfied that a second analysis was not provided by the officer because a second analysis was not requested.

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

Cst. Duff's evidence is that one ASD test was administered, the result of which was a "FAIL".

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

Was the ASD reliable?

Cst. Duff submitted a Certificate of a Qualified ASD Calibrator (the "Certificate") in which Roderick James Cairns certified that the ASD was found to be within the recommended limits when he checked its calibration on July 22, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly.

You provided information that RCMP documents indicate that an ASD has an error factor of +/- 10 mg%; however, that ASDs can be out by more than 50% when tested for calibration. The information goes on to indicate that monthly calibration tests are intended to identify faulty devices.

The Certificate indicates that the ASD used in your investigation was checked for calibration on July 22, 2013, and has a calibration expiry date of August 19, 2013. This evidence indicates that the ASD was due to be checked of calibration approximately four weeks (i.e. one month) after July 22, 2013. Further, section 14 in the sworn RTS indicates that any ASD test referred to in Cst. Duff's report was conducted by a qualified ASD operator and that the ASD unit was functioning correctly.

You also provided information that suggests ASDs can be damaged in a number of ways and may malfunction without an overt indication of a problem. I have no evidence before me that the ASD used in your investigation was malfunctioning. Further, you provided information that suggests any variation in flow rate of breath can cause the ASD to reject a sample as inadequate. Accordingly, if an officer is aware that a person is having difficulty providing a sample they can use the device's manual button to try to obtain the best sample. There is no evidence before me that you were experiencing any difficulties providing a sample or that Cst. Duff used the manual button to obtain your sample. Police evidence indicates that you provided a sample of your breath without delay and that a suitable sample of breath was collected, which resulted in a "FAIL" reading. On this point, you provided information that the Alco-Sensor IV DWF has the capacity to display the actual blood/alcohol concentration. Section 215.41(2) of the Act states that:

"fail" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood.

Accordingly, no numerical data is required as per the legislation. You also provided information that suggests an ASD does not retain calibration or breath test results. The Act does not mandate that the ASD display the device's current calibration or that police record the device's calibration at the time a test is taken.

The information you provided also suggests that ASDs should only function within a certain temperature range and that when malfunctioning an ASD may appear to operate properly even outside of the temperature range. Accordingly, you submit that the outside temperature was approximately 12 degrees [Celsius] and disclosed a Government of Canada Hourly Data Report (the "Data Report") for Abbotsford on July 28, 2013. I note that your prohibition was served on July 27, 2013, in Chilliwack. Therefore, I cannot conclude that the Data Report accurately reflects the outside temperature at approximately 0200 hours on July 27, 2013, in Chilliwack.

Further, you indicate that it has been found roadside screening devices are not accurate at variable temperature ranges. Specifically, that the ASD used in your investigation was taken from a police vehicle where air conditioning may have caused the device to be inaccurate. Accordingly, you provided excerpts from *R. v. Gill*, [2011] BCJ No. 2383 (BCPC), to indicate that an officer must turn their mind to the proper operating temperature of an ASD to ensure that an accurate result registers. I note that during cross examination the officer involved in *Gill* acknowledged that there is a temperature range within which an ASD functions properly, that being, "between 10 degrees and 40 degrees", and that if the temperature is, "outside the acceptable range, the test result will not be reliable." Moreover, in Paragraph 29 of *Buhr*, Justice Goepel noted that a test could not be initiated if the, "temperature was below 10 degrees Celsius or above 40 degrees Celsius." I note that in the RTS, Cst. Duff indicated the temperature for ASD serial number 052910 as 23 degrees Celsius. I am satisfied that this temperature falls well within the accepted temperature range of between 10 and 40 degrees Celsius.

Based on the evidence before me, I am satisfied that the ASD used for your test was reliable.

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

In the Occurrence Report, Cst. Duff submits that upon approaching your vehicle he detected an odour of liquor emanating from your breath and person that persisted when you exited the vehicle. He also observed that your eyes were glossy and bloodshot, your pupils were dilated, and that your face was flushed. When asked when you had consumed your last drink, Cst. Duff submits that you responded you had drank a few hours before.

You write that while attending a three and a half hour concert in Vancouver you consumed three draft beers along with food. You left the concert at approximately 11:20 pm and felt you were fine to drive with no tell-tale signs of impairment. You drove to Coquitlam for coffee and left approximately one hour later to drive home to Chilliwack. You assert from the time you attended the concert to the time you were near your residence that seven hours had passed. Accordingly, when you were asked if you had consumed any alcohol, you did not hesitate to advise the officer that you had consumed three beer.

I have considered your evidence that you s.22 consumed food during the concert, and that seven hours had passed prior to you being stopped by police. However, I find it noteworthy that when you left the concert, you submit that you asked your wife if you would be okay to drive. I question if you had to ask if you were okay to drive is that not an indication you were mindful you may be impaired by alcohol. I am also left wondering why your wife has not provided any evidence for this review to support your claimed drinking pattern, if she was in your company the entire evening. Further, you submit that you did not hesitate to tell the officer that you had consumed three beer at a concert. However, I note that Cst. Duff does not indicate anywhere in his evidence that you articulated the amount of alcohol you had consumed, only that you had had your last drink a few hours ago.

Moreover, you submit that you left the concert at approximately 11:20 pm and drove to a restaurant in Coquitlam for coffee. However, you submit that part of the reason why you declined the second ASD test was because you had, "been up since 5am...and [were] too tired." I find it odd that if you had been up early and knew that you had a considerable distance to drive why you would stop to have coffee after you had left a concert late in the evening. You have not provided me with any evidence that explicitly indicates that you stopped for coffee to increase your wakefulness for your drive home. On this point, you also assert that you have always been diligent to take a cab, stay in a hotel or find alternate means of transportation home if you have been drinking. However, I question why you would consume three beer when you knew you would be driving home, especially if you are not a regular drinker, as you claim.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80 mg% and I have already made a finding that the ASD used for your test was reliable. As such, I am not persuaded that the drinking pattern you provided accurately reflects your alcohol consumption that evening.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 19 days of the prohibition, you need only serve the remaining 71 days. Your prohibition commences October 18, 2013. The prohibition ends at 2359 hours December 27, 2013.

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

October 23, 2013

s.22

AMMENDED

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

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Mr. Drouillard submits that it is not enough for the officer to establish that your breath sample caused a FAIL, he must also establish that your ability to drive was affected by alcohol. Mr. Drouillard states that this requirement must be independent from the results of the breath sample. Mr. Drouillard provides *Wilson v Superintendent of Motor Vehicles* to support his claim. Mr. Drouillard states that the reasonable suspicion for the ASD demand is not the same as a reasonable suspicion that your ability to drive was affected by alcohol. Mr. Drouillard further submits that the officer pulled you over for a reason unrelated to alcohol, and had no reason to suspect that your ability to drive was affected.

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

Mr. Drouillard further submits that the officer did not have the reasonable suspicion to make the ASD demand. Mr. Drouillard submits that the officer indicates that he formed his suspicion based on your admission of consumption, but that you did not consume alcohol within the previous three hours. In the Narrative Text Hardcopy (the "Narrative"), the officer indicates that the reasonable suspicion was formed based on the "moderate odour of liquor on breath, admission of consumption, faced flushed and prro (sic) balance." In the Report to Superintendent (the "Report"), the officer indicates that he formed his suspicion based on the admission of consumption. Mr. Drouillard submits that this is inconsistent. The officer submits in the Report that the suspicion was based solely on the admission of consumption, but provides further grounds in the Narrative. Mr. Drouillard submits that this irregularity brings into question the officer's credibility. Further, Mr. Drouillard submits that the allegations of reasonable suspicion are either too vague or they are explained by other factors.

I find that the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review. Further, I do not find that the officer's credibility is impacted by the lack of indicia indicated on the Report. The Narrative is provided as a supplement to the information in the Report, and provides greater detail. I do not find the additional information provided in the Narrative impacts the officer's credibility.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 1020 hours on September 1, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over for not wearing a seat belt and were identified as the driver via your BC driver's licence.

In your evidence you state that you were pulled over by a police officer.

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

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 1027 hours and 1032 hours, both resulting in "FAIL" readings.

In your evidence you confirm that you provided two samples of your breath, both resulting in "FAIL" readings.

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

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 1030 hours.

In your evidence you state, "the police officer then advised me of my right to provide a second breath sample if I wanted."

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

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1032 hours.

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

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

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 104835 and your second sample of breath into ASD serial number 052911. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 104835 and 052911.

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

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

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

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

Were the ASDs reliable?

Mr. Drouillard submits that according to part E of the Expert Report, the ASDs are accurate only when they are calibrated correctly and when they are operated properly. In light of the calculations done by the alcohol expert, Carolyn Kirkwood, it logically follows that the reliability of the ASDs used by the officer must be called into question. Mr. Drouillard submits that the officer has failed to establish that the ASDs used in his investigation were properly calibrated. Mr. Drouillard submits that the officer has provided two Certificates of a Qualified ASD Calibrator, but the use of these documents is problematic for a number of reasons:

- The documents appear on RCMP letterhead, but they are not statutorily prescribed documents. They enjoy no presumption of reliability under the *Criminal Code* or the *Motor Vehicle Act*.
- There is no evidence stating the qualifications, or training of the qualified ASD calibrator (Roderick Cairns) indicated on the Certificates.
- Calibrating an ASD requires specific training, and there is no evidence that Roderick Cairns has not provided any particulars regarding his training.

Mr. Drouillard further submits that the officer's evidence that he operated the ASDs properly is also inadequate. As stated in the Expert Report, the ASD must be operated pursuant to a strict operating temperature in order to be accurate. Mr. Drouillard submits that the officer has provided information regarding the operating temperatures of the ASDs, but there is no evidence to indicate what the proper operating temperatures of the ASDs are. Mr. Drouillard stated that it is possible that the ASDs were operated outside of their proper operating temperatures.

With regard to the ASD calibrator, I note that the Certificate of a Qualified ASD Calibrator (the “Certificate”) states, “The ASD calibration was conducted in accordance with the training I received.” Under the Act, the operator is not required to provide proof of his qualifications and training. I am satisfied, on a balance of probabilities, that the ASDs were calibrated by a certified calibrator, and I do not have any evidence before me to indicate otherwise. The Act states, “A peace officer who serves a notice of driving prohibition on a person under section 215.41 must promptly forward to the superintendent... information relating to the calibration of the approved screening device on the basis of which the notice of driving prohibition was served.” I am confident that the Certificate satisfies this requirement. The Act does not specify that the Certificate must be in a prescribed form, only that the officer must provide information relating to the calibration of the ASD, and I am satisfied that he has done so.

In the case of *Buhr v Superintendent of Motor Vehicles*, at paragraph 29 the judge refers to the ASD operators manual which states, “a test could not be initiated if the temperature was below

10 degrees Celsius or above 40 degrees Celsius.” I note that in your case the recorded temperatures of the ASDs are 20 and 23 degrees respectively. I am satisfied that the ASDs were within the range of accepted operating temperatures.

For the first ASD, the qualified ASD calibrator certified that on August 19, 2013, he checked the calibration of ASD serial number 104835. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 16, 2013, and the service expiry date as May 17, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 19, 2013, he checked the calibration of ASD serial number 052911. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 16, 2013, and the service expiry date as March 28, 2014.

I do not have any evidence before me to indicate that the ASDs were not functioning correctly.

I am satisfied that the ASDs were reliable.

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

In your evidence you state that you consumed three two ounce whiskey drinks between 9:00pm and 11:00pm on August 31, 2013. You submit that you consumed three further drinks between 11:00pm and 1:00am. You deny drinking any alcoholic drinks after 1:00am on September 1, 2013. You state that your drinks consisted of 1.5-2 ounces of Whisky and you specifically remember seeing the Whisky bottle half empty the next morning.

Your evidence includes a report from alcohol expert, Ms. Kirkwood, who states that based on your claimed drinking pattern and the timeframe of your consumption, your BAC was a maximum of 218mg%. Ms. Kirkwood further states that alcohol is eliminated from the body at a relatively constant rate of 15mg% per hour. With this elimination rate, Ms. Kirkwood states that your theoretical BAC would have been 18mg% at the time of your first ASD analysis.

I also note that you provide reasoning for the indicia noted by the officer. You state that your flushed face was due to the embarrassment of being pulled over, and your poor balance was due to fatigue. In your affidavit you state, “My poor balance could not have been the result of any other factor (other than fatigue). It could not have been due to alcohol use because I did not feel impaired at all that morning because I did not have an alcoholic drink for many hours previously.” I find it odd that you categorically deny any effects of alcohol, when you also submit that you finished drinking half of a bottle of whisky nine hours prior. I do not find your belief that you were no longer impaired to be compelling evidence to indicate that you were not affected by alcohol. Furthermore, I note that Ms. Kirkwood calculated your maximum BAC to be 218mg%, which is more than two and a half times greater than the legal limit. At this level, I find it reasonable that your ability to recall events with certainty would be impacted, specifically the timing of, and precise measurements of your drinks. I do not find your approximation that half of the bottle was empty the next morning to be compelling evidence. I also note that it does not appear that Ms. Kirkwood took into account factors which may slow or accelerate alcohol absorption. Ms. Kirkwood states that the elimination rate can vary between 10mg% and 20mg% per hour, but there is no evidence that she factored this into her calculation.

I am mindful of the evidence provided by Ms. Kirkwood; however, I also note that you provided two samples of breath on two different ASDs. I do not have any compelling evidence before me

to indicate that the results of the ASD analyses were not reliable. As Ms. Kirkwood's report is based on your claims regarding drinking pattern, and the theoretical rate of elimination of alcohol from your body, I find the results of the ASD analyses to be more compelling. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013. Your review was extended on September 19, 2013. You have already served 17 days of your IRP and you have 73 days remaining. Your Prohibition resumes on October 24, 2013, and ends on **January 5, 2014.**

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

October 29, 2013

s.22

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

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "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 before me, I find there is one issue that is determinative in this review.

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

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

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

Decision

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

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

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

November 8, 2013

s.22

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

Introduction

On October 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your written submission, you provided details surrounding the events leading up to your encounter with Constable Majid (“the officer”). You also provided history, context, and reasons for your actions that evening. I acknowledge your submission; however, I find it noteworthy to point out that under the Act I only have the authority to consider submissions which are relevant

to the issues listed below. As such, I have considered your submission in its entirety and will address any relevant issues I am permitted to consider under the applicable sections throughout this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “RTS”), the officer indicated that the time and date of driving or care or control of the vehicle was at 23:00 hours, on October 18, 2013.

There is no evidence before me contrary to that of the officer.

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

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that you provided a sample of your breath into an ASD at 23:02 hours and 23:20 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the officer on this point.

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

Were you advised of your right to a second analysis?

In the RTS, the officer indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the officer’s with regard to this issue.

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

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 23:20 hours.

There is no evidence before me disputing that of the officer.

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

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 101751, and the serial number for the second ASD as 101744.

There is no evidence before me to the contrary.

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

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

The officer recorded in the RTS that both results registered as “FAIL” results.

There is no evidence before me that refutes the officer’s evidence on this point.

I am satisfied that the Notice was served on the basis of the “FAIL” result, since each result was the same.

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of a Qualified ASD Calibrator (the “Certificates”) for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on October 3, 2013, he checked the calibration of ASD serial number 101751. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as February 20, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 2, 2013, he recalibrated ASD serial number 101744. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 30, 2013, and the service expiry date as January 24, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 18, 2013.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 18, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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

October 8, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

Having considered all of the evidence before me, I am not satisfied that the ASD result was reliable. Consequently, I am satisfied that your BAC was less than 80 mg% even though the ASD registered a "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.

The corresponding vehicle impoundment is also revoked. Records show that your vehicle was impounded and has since been released. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. **Original receipts and invoices with proof of payment must be attached.** You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc: Don Muldoon
fax: (604) 974-8888

NOVEMBER 6, 2013

s.22

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

Introduction

On October 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD. Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sarnjeet Rai. I confirm receipt of Mr. Rai’s submissions dated October 30, 2013, and consisting of 49 pages.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the "Report") is that on October 18, 2013, at 10:57 hours, Officer McInnes (the "officer") established you as a driver or having care or control of a motor vehicle. There is no evidence before me to the contrary.

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

Did 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 valid demand was made on you, and whether you failed or refused to comply with that demand.

The evidence in the Narrative Text Hardcopy (the "Narrative") is that a collision was reported by Surrey Fire Services. When the officer attended at the scene, you were sitting in the driver seat of the vehicle and stated that you had been driving at the time of the collision. The officer indicated that your speech was slow, you appeared tired and you had an odour of liquor on your breath. The officer asked you when you had finished your last drink and you responded "last week".

The officer's evidence is that at 11:01 hours, he read you the ASD demand from the *Charter* card. You asked for a s.22 officer who arrived at the scene. At 11:18 hours, the ASD demand was read from the provided card s.22 You responded "yeah, I know".

I am satisfied that a valid ASD demand was made on you.

The officer's evidence is that you verbally said you would not provide a sample, and that you refused to provide a sample after saying so verbally. The officer said you were informed that a refusal carried the same penalty as a "fail" result. The officer indicated that you said "okay yeah" when asked if you understood and then you asked to go to the A&W.

You have not disputed any of the officer's evidence.

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

Did you have a reasonable excuse?

The officer indicated that you did not provide any reason for refusing to comply with the ASD demand.

Your lawyer submits that your driving prohibition should be revoked because there is no evidence in the materials filed by the officer that the instrument he would have used to administer the breath test was an ASD, as defined in the Act. He also submits that you were never presented with a device to blow into. Your lawyer has provided me with a copy of *Swaby v. British Columbia (Superintendent of Motor Vehicles)* 2012 BCSC1612 in support of his submission, as well as *R. v. Arsenault*, 2005 NBCA 110 and the ASD Order and Regulation.

While I acknowledge your lawyer's submission, I do not agree. I note that the difference between the *Swaby* case and yours is that in *Swaby*, the driver made several attempts to provide a breath sample. In your case, you verbally told the officer that you would not provide a sample and then you refused to do so. You did not put your lips to any device at any time. For that reason, in my view, the officer is not obligated to provide any ASD information. For this same reason, I do not find it problematic that the officer did not present you with a device. In my view, he acted reasonably in not doing so when you verbally refused to comply with the ASD demand.

I note that you said you were not impaired by alcohol at any time. However, whether or not you were impaired is not one of the issues before me. I must determine whether you failed to comply with an ASD demand and if not, whether or not you had a reasonable excuse for failing to comply. Based on a consideration of the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

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

You are prohibited from driving for 90 days. Your prohibition took effect on October 18, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15
Adjudicator

CC Sarnjeet Rai
By fax 604-594-8280

October 25, 2013

s.22

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

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

I note that the officer has provided two separate reports titled, "Narrative Text Hardcopy," both consisting of four pages. I note that the officer has provided a subtitle of each indicating, "Occurrence Report – 1" and "Occurrence Report – 2." For the purposes of this review I will follow the officer's naming and refer to the documents as "Narrative #1" and "Narrative #2".

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 1643 hours on October 6, 2013. In Narrative #2 the officer indicates that he responded to a three vehicle accident, and you were identified as one of the drivers. The officer states that you admitted to being the driver and you were identified via your drivers licence.

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

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 1722 hours and 1724 hours, both resulting in "FAIL" readings.

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

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In Narrative #2 the officer indicates that you were read your right to request a second test and you understood.

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

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1724 hours.

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

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 042914 and your second sample of breath into ASD serial number 045936. The officer also provided the Certificate of a Qualified ASD Calibrator (the "Certificate") for ASD serial numbers 042914 and 045936.

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

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

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

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

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on September 26, 2013, he checked the calibration of ASD serial number 042914. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 24, 2013, and the service expiry date as August 20, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on September 26, 2013, he checked the calibration of ASD serial number 045936. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 24, 2013, and the service expiry date as August 20, 2014.

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

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

In your affidavit you state that at approximately 2:00pm you went to Base Lines Pub for lunch and you shared some hot chicken wings and some pitchers of beer. You state that when you consumed the hot chicken wings your stomach was upset and you were suffering from heartburn. You state that the officer made no inquires as to the time of your last drink, and

approximately two minutes prior to your first sample you burped as you were still suffering from heartburn.

In her submission, Ms. Waker states that the ASD results are not reliable when there is mouth alcohol present. Ms. Waker submits that you indicate that you burped prior to the ASD analysis, and that this resulted in mouth alcohol being present on your breath. Ms. Waker states that only two minutes elapsed between the two ASD analyses, and notes that the Alco-Sensor IV DWF manual suggests a waiting period of ten minutes. Ms. Waker submits that since both ASD analyses were taken within a two minute period, both were affected by mouth alcohol. Ms. Waker states that it is clear that the officer did not make any inquiries as to the time of the last drink, and as a trained ASD operator he should know the importance of obtaining the time of last drink. Ms. Waker submits that paragraph 12 of the Report states that the officer did not determine the time of last drink, and Ms. Waker submits that this demonstrates that the officer did not address the possible presence of mouth alcohol before administering the ASD. Ms. Waker submits that the importance of the time of last drink is integral to ensuring an accurate result, as the ASD manual states that mouth alcohol can cause a falsely high reading, and suggests that the samples are taken 15 minutes after the time of last drink. Ms. Waker submits that you have sworn that you burped prior to the ASD analyses and that this is un-contradicted by the officer's evidence.

I note that the excerpt from the ASD manual provided by Ms. Waker states, "When using the A/S IV Screener, the subject can be asked if he has used any alcohol in the last 15 minutes. If his response is negative, test him immediately; if otherwise, wait 15 minutes before testing. If the test result is positive, wait 10 minutes and take a second test." I note in Narrative #1 the officer states, " s.22 (a witness at the scene) did not see s.22 have anything to drink or put anything in his mouth during the time period from the collision, up to Constable OCAMPO's arrival." The evidence indicates that the collision occurred at 1643 hours, and the first ASD analysis was conducted at 1722 hours, almost 40 minutes later. I acknowledge that the officer states that he did not determine time of last drink; however, the evidence indicates that it was not within 15 minutes of the ASD analysis. I do not find that this indicates that the officer had not turned his mind to mouth alcohol, as the evidence indicates your last drink not within the previous 15 minutes.

With regard to your claim to have burped prior to the ASD analysis, I do not find it to be credible. In the Report, the officer indicates that, "Any ASD tests referred to in this report were conducted by a qualified ASD operator and the ASD units were functioning correctly." In your evidence you state that you burped one to two minutes prior to the ASD analysis. I note that the officer indicates that he was speaking to you at 1720 hours, and administered the ASD analysis at 1722 hours. As a qualified ASD operator, I am satisfied that the officer's training would alert him to watch for burping or belching, and as such, if you had burped, I find it likely that the officer would make note of it, and delay the analysis accordingly.

I do not find that there is any compelling evidence before me to indicate that the results of the ASD analyses are not reliable. The evidence before me indicates that you provided two samples of your breath in two different ASDs, both resulting in "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 6, 2013.

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

s.15

Adjudicator

cc: Cathryn Waker
fax: 604 637-1617

November 15, 2013

s.22

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

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2249 hours on October 27, 2013. Further, in the Narrative Text Hardcopy – Occurrence Report – 1 (the "Occurrence Report"), he indicates that at 2249 hours a witness called 911 to report that a black vehicle, with two occupants, had driven off the roadway and crashed into a ditch on a straight stretch of road. The officer indicates that the witness observed, s.22 in the driver's seat 9 minutes following the crash, and another female, s.22 seated in the passenger seat." Further, that a Surrey firefighter, Captain Hart, arrived on scene 9 minutes after the crash and observed you climb out of the driver's side door. After arriving on scene a 2310 hours, the officer indicates that you identified yourself as the driver to him and provided a British Columbia driver's licence that confirmed your identity.

In his written submission, Mr. Nunrha indicates that the officer based the time of driving or care or control on a witness statement received via 911; however, that this witness is not identified nor were they at the scene of the accident. Moreover, he submits that there is no visible evidence of what occurred between the time of the accident and the time the ASD demand was made on you approximately 23 minutes later.

While I have considered Mr. Nunrha's submissions, the Occurrence Report forms part of the officer's sworn RTS. As such, I am satisfied that the witness need not be named in order to consider their observations as part of the officer's evidence. On this point, Mr. Nunrha submits that the witness was not at the scene of the accident. However, the officer's sworn evidence indicates that the witness observed you in the driver's seat 9 minutes after the accident had occurred. I infer from this evidence that the witness was on scene and as such, I disagree with Mr. Nunrha's submission on this issue.

Further, Mr. Nunrha indicates that there is no visible evidence of what occurs for 23 minutes following the accident. However, I note that he writes the, "evidence at the scene is further confirmed by Captain Hart who arrives on scene approximately 9 minutes after the accident." Moreover, in your sworn affidavit, you indicate that a firefighter (i.e. Captain Hart) arrived on scene prior to the officer. Therefore, I am not satisfied that there is no visible evidence of what occurred 23 minutes following the accident. What is more, you do not refute driving at the time the accident occurred.

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

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 2313 hours and 2331 hours, respectively. There is no evidence before me to the contrary.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

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

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

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 042901 and 042903, respectively. There is no evidence before me to the contrary.

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

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

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

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

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which L. E. Ewanyshyn certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 22, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly.

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

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

In the Occurrence Report, the officer indicates that you were calm and cooperative and very remorseful for driving while drunk. Moreover, he indicates that a strong odour of liquor was detected on your breath. Consequently, when you were asked the time of your last drink the officer submits

that you responded, "One hour ago", and that he, "confirmed with [you] that that was the last time there was ever had (sic) alcohol in [your] mouth."

In your sworn affidavit, you submit that on October 27, 2013, you and your sister, s.22 went out for a drink at approximately 9:30 pm. While at the restaurant, you had one glass of wine before leaving at approximately 10:30 pm. You submit that you were late getting to a friend's house and were driving quickly causing you to lose control of your vehicle into ditch at approximately 10:45 pm. Following the accident, you were quite shaken-up, screaming, panicking, and felt pain in your head and neck. In an attempt to calm you down, your sister told you that she had observed an opened bottle of vodka in the backseat and told you to drink it. Accordingly, you submit that you drank some of the vodka while she called Unitow to have your vehicle towed. A firefighter then arrived on scene and assisted you. Police soon followed and an officer took you aside and spoke with you separately.

When speaking with the officer, you submit that you were asked when you had your last drink of alcohol and that you believed the officer had asked you when you had consumed your first drink of alcohol that evening, so you responded approximately an hour ago. On this point, you indicate that you were unsure of and failed to properly understand some questions the officer was asking. You also submit that you did not tell him that you had drank vodka after the accident because you did not want to get in trouble for doing so. However, that after seeking legal advice you came to realize that drinking after the accident could have affected the ASD test results.

Accordingly, Mr. Nunrha submits that the results of the ASD were not reliable because you consumed alcohol after driving or care or control. Specifically, that the consumption of 2 to 3 shots of vodka following the accident affected the readings of the ASDs. Further, he indicates that police evidence confirms that you were not observed continuously from the time of driving to the time of administering the first ASD test. Specifically, that there is no other eyewitness evidence for more than 20 minutes after the accident.

After reviewing the evidence before me there are a number of details that have caused me to question your credibility. In the Occurrence Report, the officer indicates that your vehicle was witnessed driving into a ditch on a straight stretch of road with, "no defects in the road nor vehicle which would cause this to occur." Moreover, under the heading "Driver Action and Behaviour" he indicates that you were, "very remorseful for driving while drunk." In your affidavit, you do not refute the officer's description of the roadway nor do you deny his evidence that you were very remorseful for driving *while* drunk.

Further, the officer's sworn evidence is that when you advised him that your last drink was, "One hour ago", that he confirmed with you that this was the last time you had alcohol in your mouth. While Mr. Nunrha submits that you were possibly injured or "dazed" from the accident, you do not refute the officer's evidence that he confirmed that your last sip of alcohol was consumed, "One hour ago", nor do you provide evidence that you do not recall him confirming that this was the last time alcohol was ever in your mouth.

In paragraph 12 of your sworn affidavit, you submit that when you were speaking with the officer that you were asked when you had your, "last drink of alcohol." Accordingly, I infer that you understood he had in fact enquired about the consumption of your *last* alcoholic drink. I also find it very odd that your sister would suggest that you drink vodka after you had been involved in an accident that allegedly left you injured, panicked, and screaming. Moreover, I question why she would offer you vodka and call a tow truck rather than call for help. While I acknowledge you and your sister's

IRP Review Decision
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submissions indicate that a firefighter arrived on scene, I have no evidence before me that he provided you with medical attention nor does police evidence indicate that you were injured or requested medical attention. The officer's evidence is that you were calm and cooperative, not "dazed" as Mr. Nunrha submits.

I also have no evidence before me that following each "FAIL" result, you displayed shock or disbelief at the results. I wonder if you had only had one glass of wine prior to the accident, why following these results you might not think that the readings could be attributed to vodka if you had consumed it in the moments after the accident. It does not make sense to me that you would accept a 90-day driving prohibition simply because you did not want to get in trouble for drinking vodka *after* you had been driving.

Moreover, I acknowledge Mr. Nunrha's submission that the officer indicates that he had you under direct and constant observation from the time of the first sample; not the time of driving or care or control. However, I have already made a finding that following the accident a witness, followed by Captain Hart, were on scene. Therefore, Mr. Nunrha's submission that there is no other eyewitness evidence for more than 20 minutes following the accident is not valid.

Based on my analysis of this issue, I find that your evidence lacks credibility and, I find it more likely than not that you did not consume alcohol after driving. Section 215.41(2) of the Act indicates that an ASD "FAIL" result means that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 milligrams of blood and I have already made a finding that the ASDs used for your tests were reliable.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

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

October 23, 2013

s.22

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

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

You told me that you have a very clean driving record of thirty years and that you are the only driver in your family. You asked for a reconsideration and possible reduction in the penalties associated with your driving prohibition. While I appreciate that it must be difficult to be without your car and driver's licence, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the "Report") is that on October 6, 2013, at 02:01 hours, Officer Bradley (the "officer") established you as a driver or having care or control of a motor vehicle.

You wrote that you left the wedding and drove for five blocks when you saw the police. You said that your tie got stuck in your seatbelt and, when you tried to adjust it, you swerved and this is when the police pulled you over. While you have provided me with a reason for your driving behavior, you have not disputed that you were driving.

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

Did the ASD register a "fail"?

The police evidence in the Report is that at 02:14 hours and at 02:21 hours, the officer used ASD serial numbers 101731 and 101697 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

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

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail.

You submit that the officer did not ask you for a second test. I infer from this statement that you are saying the officer did not offer you a second ASD test on a different ASD. However, I note that you go on to say that the officer had difficulty putting the ASD machine into your mouth “both times” and “once again” did not show you that you failed.

I have before me evidence in the form of the Report that indicates two ASD tests were conducted on two different ASDs. I also have two Certificates of a Qualified ASD Calibrator (the “Certificates”) which are referenced below. The Certificates are for ASDs with serial numbers that match the two ASDs listed in the Report as being used to conduct your two ASD tests on October 6th.

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

Was the second analysis provided by the officer?

The evidence in the Report indicates that the second analysis was provided by the officer on ASD serial number 101697 at 02:21 hours.

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

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

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

Was the ASD reliable?

The evidence in the Certificates indicates the following:

- ASD serial number 101731 was checked for calibration on September 26, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 24, 2013, and a service expiry date of April 4, 2014.
- ASD serial number 101697 was checked for calibration on September 26, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 24, 2013, and a service expiry date of December 3, 2013.

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

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

You submit that the ASD results are unreliable and that although your ASD test registered a “fail”, your BAC was less than 0.08. You said you attended your friend’s wedding and had one beer with dinner at around 9:30 p.m., and then just before leaving you had one toast of champagne. You also told me that you only have a social drink once or twice a year because you

s.22 and you should not have tried to drive home. You say you also “know that the ASD machine is not 100% accurate because it reads the alcohol in the blood & mouth.” You further said that s.22 on a high protein diet, introducing carbohydrates triggers auto-generated alcohol production when ketones are converted to isopropyl alcohol. You said that sometimes police and paramedics mistake s.22 as being drunk from their breath and blurred vision with slurred speech.

The police evidence is that the officer observed you weaving in your lane, driving slowly and crossing the fog line several times. There was another officer who said he observed the same driving evidence. The officer said that when he asked for your driver’s licence it took you a solid three to four minutes to pull it out of your wallet and, although the officers offered to help you, you declined assistance. The officer said he smelled liquor on your breath, your eyes were glassy and your speech had a slight slur. When told to exit your vehicle, you swayed when you walked. When the officer asked you what time your last drink was, you said you consumed one beer two hours prior.

While I acknowledge your statements regarding how a person with s.22 may function if they have missed taking their medication and/or are on a high protein diet, there is no evidence before me from which I could conclude that this was in fact happening for you on the night in question such that it would result in the two “fail” ASD test results. In addition, the officer said you told him that you had one beer but you wrote that you had one beer and toasted with champagne. As such, I do not find your drinking pattern to be very credible. I have already made a finding that both ASDs were functioning correctly at the time of your tests and there is no evidence before me that ASDs measure the level of other substances in your blood stream, such as ketones. Ultimately, you have not persuaded me that you registered a “fail” result on two different ASDs for any other reason than your BAC exceeded 80 mg%.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 6, 2013.

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

SEPTEMBER 19, 2013

s.22

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

Introduction

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

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

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

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

Preliminary Matters

At the beginning of the hearing your lawyer, Danny Markovitz, confirmed that he had received all of the documents before me. I have proceeded with the review based on that confirmation. Your lawyer provided written material on September 18, 2013, in addition to making submissions at the oral hearing on September 19, 2013. I have considered all relevant evidence in reaching my decision.

In your affidavit you note that if you are required to use an ignition interlock device you will lose your employment. I can appreciate that the consequences associated with a driving prohibition can be serious. I am not, however, able to address these consequences in this review.

You checked off all of the grounds for review on the Application for Review form. Some of those grounds do not apply to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply to your situation.

Issues

The following are the issues considered in this review:

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

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

The officer's evidence is that on September 9, 2013 at 2355 hours a vehicle which was the subject of a complaint to police about an impaired driver was located. You were sitting in the driver's seat, asleep with your head slumped down, with the vehicle running. You were awoken. You had glassy eyes, slurred speech, an odour of liquor on your breath, and had to hold onto the outside of the vehicle to avoid falling over. You admitted consuming alcohol that evening and, when asked the time of your last drink, replied "Couple of hours ago."

Your evidence is that on the night of September 10, 2013 you were in your vehicle. You felt fatigued and decided to take a nap. Your vehicle was not running and your keys were in the vehicle's console.

Your lawyer submits that when deciding if you were a driver or not I should give careful consideration to the fact that if your vehicle was running, as the officer says, there is no evidence that the officer ever asked you to turn it off or reached in and turned it off himself. The key to the vehicle is an electronic or remote key and was in the console. Your driving prohibition should be revoked if I accept your evidence.

The fact that there is no evidence that the officer turned off or asked you to turn off your vehicle is a neutral fact; the absence of evidence is not proof that something either did or did not occur. This absence of evidence of the officer either turning off, or asking you to turn off, your vehicle supports neither your evidence nor the officer's.

My decision regarding which evidence to accept is most strongly influenced by my assessment of your ability to observe the events, record them in your memory, recall and describe them accurately. You were asleep when first approached by the officer, had glassy eyes, slurred speech, an odour of liquor on your breath, and had to hold onto the outside of the vehicle to avoid falling over. You admitted consuming alcohol that evening. The combination of these facts leads me to conclude that your evidence is fragile and cannot be accepted as reliable. I conclude that the vehicle was running when the officer approached it.

I note that you were not at your residence when the officer dealt with you. Your vehicle was running and you were in the driver's seat. I am satisfied that there was a realistic risk that you would decide to drive when you awoke and that you would set your vehicle in motion.

I am satisfied that at 2355 hours on September 9, 2013 you were a driver within the meaning of section 215.41(1) of the Act.

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

Two issues must be considered. I must determine whether a valid ASD demand was made and whether you failed or refused to comply with that demand.

Was a valid demand made on you?

The officer's evidence is that you had glassy eyes, slurred speech, an odour of liquor on your breath, and had to hold onto the outside of the vehicle to avoid falling over. You admitted consuming alcohol that evening and, when asked the time of your last drink, replied "Couple of hours ago." The officer formed his suspicion that you had alcohol in your body at 2356 hours and read from the Charter card the demand that you provide a sample of your breath into an ASD at 2358 hours.

There is no evidence to the contrary.

An officer must be satisfied that you have been driving and must have a reasonably based suspicion that there is alcohol in your body before demanding that you provide a sample of your breath into an ASD. The amount of evidence required to support a reasonable suspicion is low. The demand to provide a sample must be made immediately after the officer forms the suspicion that you have alcohol in your body.

The smell of liquor on your breath in combination with the officer's other observations of you and your admission that you had consumed alcohol with your last drink occurring a couple of hours before the officer dealt with you supports the officer's suspicion. There was no delay between the time the officer formed his suspicion and the time the breath demand was made.

I am satisfied that a valid ASD demand was made on you.

Did you fail or refuse to comply with that demand?

The officer's evidence is that after the ASD demand was read you responded by saying "I don't want to blow, I will not blow." The officer advised you that a refusal to provide a breath sample carries the same penalty as a "FAIL." You indicated that you understood and stated "Don't Care." The officer again advised you that refusal carried the same penalty as a "FAIL" and you replied "I will not blow in that machine."

Your evidence is that you refused to give a breath sample.

I am satisfied that you refused to comply with the valid ASD demand to provide a sample of your breath.

Did you have a reasonable excuse?

The officer's evidence is that you did not convey a reason for why you unequivocally refused to provide a breath sample.

Your evidence is that you refused to give a breath sample because you did not have care and control of your vehicle. You told the officer that you should not have to provide a breath sample because you were not driving, the engine was off, and the keys were not in your personal

possession.

Having concluded that you were in care and control of your motor vehicle, it is clear that you were mistaken about your right to refuse to provide a breath sample. An honestly, but mistakenly, held belief that a set of facts allowed you to refuse to provide a breath sample is not a reasonable excuse for refusing to provide a breath sample. I also consider that if you considered that you were not in care and control of your vehicle when the officer demanded that you provide a breath sample you likely would have conveyed that reason for refusing to the officer.

I am satisfied that you did not have a reasonable excuse for failing or refusing to provide a sample of your breath.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 10, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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

s.15

Adjudicator

pc: Danny Markovitz (by fax)
(778) 297-3131



October 15, 2013

s.22

C/O PHILIP RIDDELL
62222 SHAUGHNESSY STREET
PORT COQUITLAM, BC V3C 6K5

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

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Your lawyer, Philip Riddell confirmed in his written submission that you received all of the disclosure 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

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

In the Report to Superintendent (the "Report"), the investigating officer -- Cst. Stutt -- indicated that you were driving or in care or control of a vehicle at 0224 hours on September 22, 2013. He provides in his occurrence report that he observed your vehicle proceeding towards a road block check stop. You were then directly witnessed driving, and identified by your BC Driver's license.

In paragraph 9 of your affidavit, you confirm that you were driving; this corroborates the evidence provided by the officer on this point.

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

Did the ASDs register a "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0225 and 0230 hours.

Your affidavit does not provide evidence that the ASDs provided "FAIL" results; Mr. Riddell's submissions also do not place the ASD results into evidence.

With no contrary information to indicate other results on the ASDs, I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the occurrence report, he provided detail that this occurred at 0230 hours, and that this was "read from IRP book." He also provides that you understood the offer of a second analysis. He checked 'YES' to indicated that you requested a second ASD test.

Neither your affidavit nor Mr. Riddell's submissions address this point of evidence. I am satisfied that Cst. Stutt advised you of your right to a second analysis, and that you requested a second test which the officer provided to you. There is no evidence contradicting that of the officer on this point.

Was the second analysis performed on a different ASD?

The Report contains the detail that ASD serial number 104903 was used for the second test at 0230 hours; this is a separate serial number than that of 045936, for the ASD used in the first test.

You state no evidence to the contrary. I am therefore satisfied that the second analysis was performed on a different ASD from that used in the first analysis.

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

Both the Report and the occurrence report contain the officer's evidence that both ASD test results were "FAIL". With no evidence otherwise, I am satisfied that the Notice was served on the basis of the lowest analysis result, here being "FAIL".

Was the ASD reliable?

The officer provided Certificates of a Qualified ASD Calibrator in which an ASD Calibrator certified that he is a qualified to perform this operation. These Certificates form part of the sworn Report.

The qualified ASD Calibrator D.W. Jones certified that on August 28, 2013, he checked the calibration of ASD serial number 045936. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 25, 2013, and the service expiry date as August 20, 2014.

He also certified that on August 28, 2013, he checked the calibration of ASD serial number 104903. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 25, 2013, and the service expiry date as January 31, 2014.

On line 11 of the Report, Cst. Stutt provides that you did not state the time of your last drink to him at roadside. On line 12, he indicates "NO" in answer to the prompt concerning any delay. In the occurrence report he provides: "did not admit to any consumption."

In paragraph 12 of your affidavit, you provide the detail that you were drinking a can of Budweiser as you approached the roadblock area, and then "opened the rear slider in the pick-up truck I was driving and poured the remaining half can out of the rear slider into the rear bed of the truck."

You confirm that you remained silent when the officer questioned you on liquor consumption. You state: "I have always understood that I have the right to remain silent under Canadian law."

Mr. Riddell provides more:

- you are afforded the right to remain silent as per section 7 of the *Charter*;
- the officer did not inform you of the impact mouth alcohol would have on test results;
- your exercise of this right cannot be used to infer anything of your conduct.

He also relies on materials concerning the Alco-Sensor IV DWF to illustrate the common practice well-known to police of imposing a waiting period where they detect mouth alcohol may be present.

In regards to your right to silence, you do not present that there was a risk of self-incrimination, or even that you perceived one to be present. Your affidavit statement of "the right to remain silent under Canadian law" is quite broad; you do not provide why you chose to exercise that right at this point -- there is no indication in the officer's evidence that he informed you this investigation was criminal in nature. Further, you chose to exercise this right on some aspect of information needed by the officer -- the time of your last drink -- yet chose to impart other information to the officer: your name, address, and "other details including my driver's license." While Mr. Riddell asserts I cannot draw any inference from your exercising of this right, I do find a mistaken application of that right: the right to silence, in a criminal context, is presumably all-encompassing, and accompanied with an officer's informing you of your right to counsel.

I find that your withholding of this information known only to you -- both at the outset of the officer's interaction with you, and after the first ASD registered a "FAIL" -- as misleading the officer in his investigation. The evidence satisfies me that the officer was reasonable in administering the ASD without delay and had no reason to doubt the result's accuracy. I find the first test to be valid and that it was reasonable for the officer to rely on it at the time it was taken.

There is nothing after the first test result, neither in the officer's evidence, nor your affidavit, to suggest you expressed shock or disbelief at the result on the initial test. This despite your very clear assertion throughout that you only had two-and-one-half beer that evening. The officer, then, had no reason to doubt the accuracy of that first test result, and proceeded with a second test. With a second test result of "FAIL", again you provided no information to the officer which caused him to question the accuracy of the result.

I infer from your evidence that you did not know of the effects of mouth alcohol at the time of the interaction with the officer; you could not have withheld information on a concept unknown to you. It is established as fact that you did not state anything to the officer. Had you provided some answer, even a false answer, to the officer, your ignorance on the effects of mouth alcohol could loosely serve as a reason for the mistaken information. Instead, I cannot rely on your 'right to silence' assertion; you did not express any plausible reason why you felt the need to exercise that right for that particular component of the officer's investigation.

I am therefore satisfied, based on the officer's evidence, that the ASDs, and the results obtained, were reliable at the time the samples were taken.

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

You provided that you had two beer on the evening in question. You were drinking a beer in your vehicle upon driving up to a road check, making the total over the evening two-and-one-half beer.

Mr. Riddell calculates your BAC to be 46 milligrams, based on the two beer you consumed, and taking into account the beer you drank up until encountering the roadblock: "his blood alcohol level would not exceed 80 milligram percent." He does not provide the formula for his calculation, yet it is based on your stated drinking pattern.

In assessing whether or not to accept your stated drinking pattern as truthful, I have considered the related issue of your silence on the time of last drink at roadside. I have examined that issue above, and find that withholding of information to have the intention of misleading the officer in his investigation. I therefore find your evidence overall to be unreliable, and I question whether your statements made to Mr. Riddell and myself are similarly misleading. Therefore, Mr. Riddell's calculation, based on your stated alcohol consumption is of no assistance, and I give it no weight.

There is no compelling evidence before me that leads me to question the ASD results. I accept as fact that the ASDs both registered "FAIL" results; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

s.22

IRP Review s.22

Page 5

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

s.15

Adjudicator

cc. Philip Riddell Law Corporation
fax: 604-520-6035

November 12, 2013

s.22

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

Introduction

On October 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with 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

Our records indicate that you received the disclosure documents for this review. Your written review was scheduled for November 5, 2013, at 9:30 am. As of the review time, no submission has been received from you. Therefore, I will proceed with this review on the evidence before me.

You applied on several grounds, some of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on October 22, 2013, at 23:05.

There is no evidence before me contradicting the officer's evidence. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 22, 2013, at 23:05.

Did the ASD register a “FAIL”?

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

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

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

Was the second analysis performed on a different ASD?

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

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

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

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

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

Was the ASD reliable?

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

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 22, 2013.

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

September 27, 2013

s.22

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

Introduction

On September 6, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You applied for this review on a number of grounds that are not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of breath into an ASD. All grounds for review that apply to your case will be considered in this review.

Mr. Rai submits that the investigating officer never obtained a valid ASD “WARN” or “FAIL” result, therefore, he did not have reasonable grounds to believe that your ability to drive was affected by alcohol. He also submits that the officer did not provide evidence you exhibited poor driving behaviour or a statement from the alleged witness who identified you. Further, Mr. Rai

submits that there is no evidence in the officer's report that indicates the ASD tests administered would have constituted reasonable grounds to believe your ability to drive was affected by alcohol. On the Notice the officer alleged you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of breath into an ASD. As a result, a "WARN" or "FAIL" result was not obtained. Therefore, the officer's reasonable grounds to believe that your ability to drive was affected by alcohol is null. Mr. Rai also lists three pre-conditions set out in the Act that he asserts must be satisfied before an IRP can be issued. However, the second and third pre-conditions do not refer to a 90-day refusal under section 215.41(d) of the Act. Further, I have read and considered *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1638, and I acknowledge Mr. Rai's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), the investigating officer, Cst. McFarlane, indicates that you were driving or in care or control of a motor vehicle at 2219 hours on September 6, 2013. Further, in the Report to Superintendent Vehicle Impoundment under, "3. Details – All other Impoundments", Cst. McFarlane submits that at approximately 2207 hours police received a call from a female complainant that a male was impaired and would be leaving in his vehicle from the s.22 Your vehicle was pulled over as it attempted to drive north onto 128th Street. You were observed as the sole occupant and driver and your identity was confirmed with a valid British Columbia driver's licence.

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

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

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

Evidence in the RTS indicates that at 2220 hours, Cst. McFarlane formed reasonable suspicion that you were driving or in care or control of a motor vehicle with alcohol in your body. Specifically, in the Narrative Text Hardcopy (the "Narrative"), he submits that after your vehicle

was pulled over he observed that you smelled heavy of liquor, slurred your speech, were rambling about things with no logic, and were unsure on your feet. When asked the time of your last drink, you stated it was at, "7:00 pm and it was two drinks at lunch." An ASD demand was made on you at 2222 hours.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle with alcohol in their body. Cst. McFarlane observed indicia of consumption in you and you admitted to consuming two drinks at lunch. Therefore, I conclude that Cst. McFarlane had reasonable grounds to make an ASD demand on you.

There is no evidence before me to the contrary. I am satisfied that the peace officer made a valid ASD demand.

In the Narrative, Cst. McFarlane submits that you were provided with three opportunities to provide a suitable sample of breath into an ASD. Prior to your first attempt, he submits that you were shown how to blow into the ASD properly and that you stated you understood. Cst. McFarlane submits that you stated, "that is as hard as I am going to blow", and began rambling about things that were not relevant to what was going on. You were also informed that a refusal carried the same penalty as an ASD "FAIL" and you stated you understood. Following your third failed attempt, Cst. McFarlane deemed a refusal at 2222 hours.

Referencing *Swaby v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1612, Mr. Rai submits that there is no police evidence that indicates the, "device was checked to ensure it was operating properly while [you] attempted to blow into the device." Further, he submits that there is a lack of police evidence to establish your incorrect manner of blowing into the ASD.

Part of disclosure for this review included a Certificate of a Qualified ASD Calibrator, which includes the following evidence:

- ASD serial number 045929 was checked for calibration on August 28, 2013, with a service expiry date of January 24, 2014, and calibration expiry date of September 25, 2013, and;
- Qualified ASD Calibrator, Cpl. D.W. Jones, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is solemnly affirmed and signed by a Commissioner for taking affidavits, as well as Cst. McFarlane. These signatures confirm that any ASD test referred to in the investigation was conducted by a qualified ASD operator and that the ASD unit used was functioning correctly. As a qualified ASD operator, Cst. McFarlane is trained to understand the functionality of an ASD. I have no evidence before me that explicitly states that the ASD was not functioning correctly, particularly when you were attempting to provide a sample of breath into the device. Further, I note in the Narrative, Cst. McFarlane submits that you were shown how to provide a suitable sample of your breath into the ASD and that you imparted that you understood. I have no evidence before me that at any point during the investigation you advised Cst. McFarlane that you did not understand how to provide a suitable sample. I also note that you were given three opportunities to provide a sample. Police evidence indicates that

you advised Cst. McFarlane, “that is as hard as I am going to blow.” You do not refute this evidence. Therefore, I feel a reasonable inference can be made that by making this statement you imparted your understanding that you were required to blow into the ASD with force.

I acknowledge Mr. Rai’s submission that Cst. McFarlane does not provide evidence as to what it was about your manner of blowing that was considered wrong. I have already determined that the ASD used in the investigation was reliable. Therefore, I feel a reasonable inference can be made that because the ASD was in proper working order, the manner in which you were blowing did not permit a suitable sample of breath to register in the ASD. On this point, I note that you were provided instructions on how to properly blow into the device and that you stated you understood, yet you failed to provide a breath sample suitable for analysis. You do not refute this evidence.

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

Did you have a reasonable excuse?

In the Narrative, in response to the question, “Did driver convey any reasons why a sample was not provided (e.g. medical / physical limitations)?”, Cst. McFarlane indicates “No.”

I have no persuasive evidence before me that you provided Cst. McFarlane with a reasonable excuse for failing or refusing to comply with the ASD demand. Instead, after being provided with three opportunities to provide a suitable sample and advised that refusing carried the same penalty as a “FAIL” result, you responded by saying, “that is as hard as I am going to blow.”

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 6, 2013.

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

October 23, 2013

s.22

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

Introduction

On August 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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.

I do not find that I have sufficient evidence before me to indicate that you failed to comply with the officer's ASD demand.

I am satisfied that you did not fail or refuse to comply with the ASD demand.

Having made this finding, I do not need to consider any further evidence in this review.

Decision

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

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

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

The corresponding vehicle impoundment is also revoked. Records show that your vehicle was impounded and has since been released. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. **Original receipts and invoices with proof of payment must be attached.** You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc: Sarah Leamon
fax: 604 370-2505

November 5, 2013

s.22

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

Introduction

On October 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records before me confirm that disclosure documents were faxed to your lawyer, Craig D. Sicotte. I will proceed with the review based on this confirmation.

You checked the boxes next to all of the grounds on the application form. However, the grounds associated with a “WARN” result on an ASD and with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition. I will consider all grounds available to you in this review.

Mr. Sicotte asked that I consider a revocation on the basis that there was a 27 minute delay with regard to the second test with no explanation. To support his position Mr. Sicotte provided case law in *R v. Woods* [2005], *R v. Muscat* [2005], and *R v. Allen* [2004]. Mr. Sicotte referred to certain paragraphs in these cases that speak to the demand being made “forthwith” under s. 254(2) of the *Criminal Code*, exclusion of evidence, and a *Charter* breach specific to right to counsel.

Further, Mr. Sicotte acknowledged that this is an administrative hearing; however, the delay amounts to a violation of your constitutional rights under the *Canadian Charter of Rights and Freedoms* (the "Charter").

I have no authority under the Act to consider whether or not being issued an IRP based on an ASD "FAIL" result contravenes of your *Charter* rights. Section 215.41 of the Act allows police to rely on ASD results to issue driving prohibitions. This review is authorized under, and limited to the grounds set out in, section 215.5 of the Act.

Further, as there is no demand read for the second test; therefore; there is no requirement for the second test to be made "forthwith." Last, the Act does not permit me to exclude evidence.

In paragraph 8 of your affidavit you stated that you are required to travel to your client's businesses and homes on a regular basis. The loss of your driver's licence will be severely detrimental to your employment.

While I understand and appreciate your situation, I am not authorized to consider hardship, employment or transportation needs in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 2330 hours on October 17, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that the Surrey RCMP received a report of a three vehicle motor vehicle incident. You were identified as the driver of one of the three vehicles; driving an s.22

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

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 2351 hours and 0018 hours respectively.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

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

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

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

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

The officer recorded both results as "FAIL".

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

Were the ASDs reliable?

In paragraph 5 and 6 of your affidavit you suggested that the devices were not accurate based on the small amount of alcohol you consumed.

The officer provided Certificates of a Qualified ASD Calibrator for each ASD, in which L.E. Ewanyshyn certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, he certified that on October 1, 2013, he checked the calibration of ASD serial number 101689. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 29, 2013 and the service expiry date as January 11, 2014.

For the second ASD, he certified that on September 24, 2013, he checked the calibration of ASD serial number 101733. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 22, 2013 and the service expiry date as January 25, 2014.

There is no evidence to the contrary; I am therefore satisfied, based on the officer's evidence, that the ASDs were reliable at the time the officer used them to obtain samples of your breath.

Decision

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

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

Adjudicator s.15

cc: Craig Sicotte by fax 604 585 8964

NOVEMBER 14, 2013

s.22

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

Introduction

On October 24, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

When you applied for this review, you checked two grounds listed on the application form; however, these two grounds are not applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

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

In your written submission, you said you were not driving erratically or speeding or swerving. You have never received a prohibition in the "WARN" range. You indicated that both your school and employment involve long commutes for you. You indicated that the IRP will cause hardship for you and your family and you sincerely apologized for your mistake and hope I can offer leniency.

I understand and acknowledge that receiving a 90-day driving prohibition can have significant consequences in a person's life. However, under the Act, I cannot consider a person's driving history, hardship, personal circumstances, transportation or employment in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Further, I am authorized to vary a prohibition under section 215.5(2) of the Act if I determine that you were prohibited from driving for a longer time period than the Act requires. Section 215.5(2) does not apply in your situation, so I am not authorized to vary the length of the prohibition or offer other "leniency".

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "RTS"), Constable Jordan indicated that he witnessed you driving or in care or control of the vehicle at 0020 hours, on October 24, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Jordan said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 0023 and 0027 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

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

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

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

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

Was the ASD reliable?

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

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

In your submission you said on the night in question, you and your friends were at a restaurant on King George Highway. You said you consumed three glasses of beer and ate a small meal. After leaving the restaurant you said you were not driving erratically or speeding or swerving prior to stopping at the roadblock. You said you were honest with the officer about your consumption of alcohol and complied fully with him. In contrast, the officer's evidence is that you said you had a beer at five o'clock or approximately seven hours prior to encountering the roadblock. Further, the officer's undisputed evidence is that you had a strong odour of liquor on your breath, you were slurring your words, you stumbled when you walked and were unsteady

on your feet, and you had watery, bloodshot eyes. The officer also stated that you were loud and obnoxious and had to be given basic direction repeatedly.

You said you are a s.22 and you did not feel that the amount of beer you consumed would affect your judgment and you apologized.

While you may not have felt affected by alcohol when you drove, you did not provide any persuasive evidence that would cause me to doubt the "FAIL" readings on the ASDs that I found to be reliable. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

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

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

September 30, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The evidence in the Report to Superintendent (the “Report”) is that at 22:24 hours on September 10, 2013, Officer McStravick (the “officer”) established you as driving or having care or control of a motor vehicle.

The Narrative Text Hardcopy (the “Narrative”) indicates that a witness reported a male (later identified as you) as possibly being intoxicated and standing next to his vehicle. The witness advised that he had spoken with you and you advised that you planning on driving home. The witness described you as staggering, unable to light your cigarette. When the officer located your vehicle in the parking lot, you were the only occupant sitting inside. The vehicle was turned off, the keys were in your right hand and you were motioning the keys to the ignition. You were not wearing a seatbelt.

You submit that you were not driving or in care or control of your vehicle. You said you were sitting in your car, that you were drunk but had not started your car.

Care or control of a motor vehicle can result from acts that are short of driving. Such acts involve some use of the vehicle or its fittings or some course of conduct associated with the vehicle, which would involve a risk of putting the vehicle in motion so that it would become dangerous. There are two types of risk: (i) the risk created by the driver’s initial use of the vehicle, its fittings or equipment, and (ii) the risk of future change of intention to drive. The risk inherent in an impaired person starting the ignition of a motor vehicle has been the basis for a finding of care or control in numerous British Columbia court decisions. The act of sitting up in the driver’s seat with the keys in the ignition constitutes an inherent risk that the driver could inadvertently move the vehicle. The fact that the keys were not in the ignition and you had not as yet moved the vehicle is not relevant.

The issue I must consider is the risk that you posed to yourself and the public. I have carefully considered all of the evidence before me, and I find that under the circumstances you did pose a risk because there was a real possibility that you would intentionally or unintentionally set the vehicle in motion. I have made that finding for a number of reasons, which I will now outline.

Your car was functional at the time in question, and it was not parked at your final destination. In addition, you told the witness that you were planning on driving home. When the officer located your vehicle you were sitting in the driver’s seat, you had the keys in your right hand and you were motioning the keys to the ignition.

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

Did the ASD register a “fail”?

The evidence in the Report is that you provided a breath sample for analysis on ASD number 101705 at 22:34 hours and the result of that sample was a “fail”. There is no evidence to the contrary before me.

I am satisfied that the ASD did register a “fail”.

Were you advised of your right to a second analysis?

The evidence at section 7 of the Report is that the officer advised you of your right to a second test on a different ASD and explained that the lower of the two test results would prevail. This is supported by the evidence in the Narrative which states that at 22:36 hours, the officer advised you of your right to request a second test. There is no evidence to the contrary before me.

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

Was the second analysis provided by the officer?

The evidence in the Narrative is that you advised that you understood the offer but you refused, stating that you knew what it would read. There is no evidence to the contrary before me.

I am satisfied that the second analysis was not provided by the officer.

Was the second analysis performed on a different ASD?

As noted above, a second analysis was not performed.

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

As the only analysis result was a “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificate of a Qualified ASD Calibrator regarding ASD Serial number 101705 indicates that it was checked for calibration on August 15, 2013 and found to be within the recommended limits and functioning correctly. The calibration expiry date for this ASD is September 12, 2013.

I am satisfied that the ASD used for your breath test was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 10, 2013.

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

^{s.15}
Adjudicator

October 22, 2013

s.22

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

Introduction

On October 4, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You checked the boxes next to all of the grounds on the application form. However, the grounds associated with a “WARN” result on an ASD and with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition. I will consider all grounds available to you in this review.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jennifer Currie. On October 16, 2013, Ms. Currie advised our office by fax that you would not be forwarding any statements or submissions for the review, nor have I received any from Ms. Currie. As such, I have proceeded with the review on the evidence before me.

Issues

The following are the issues in this review:

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

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

In the Report to Superintendent (the “Report”), the officer indicated that you were driving or in care or control of a motor vehicle at 2325 hours on October 4, 2013. There is no evidence before me to the contrary.

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

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASD registered a “FAIL” at 2332 hours. There is no evidence before me to the contrary.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

The officer’s evidence is that you were provided with a second analysis on a different ASD and you registered a “FAIL” result. There is no evidence before me to the contrary.

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

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

In the Report and the Narrative, the officer indicated that the result of both ASD tests was a “FAIL”. I am satisfied that the Notice was served on the lowest available result which was “FAIL”.

Were the ASDs reliable?

In the Certificates, L.E. Ewanyshyn certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 1, 2013, and

September 18, 2013, respectively. He also certified that to the best of his knowledge the ASDs were functioning correctly.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 4, 2013.

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

Adjudicator s.15

cc: Jennifer Currie
Fax: 604-590-5626

October 3, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

Mr. Harris provided me with the criminal law cases of *R. v. Geraghty* 2008 BCPC 0063, and *R. v. Hoodicoff* 2005 BCPC 0458, in support of his assertion that your prohibition be revoked on the basis that the officer did not form reasonable suspicion on which to make the ASD demand.

I note that both of the above-noted cases are criminal cases, which are instructive but not determinative of an administrative review. The standard of proof is beyond a reasonable doubt in a criminal case, while it is on a balance of probabilities in an administrative review such as this. Further, the evidentiary rules are different in the two venues. In addition, whether an officer had reasonable suspicion to make the ASD demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The police evidence in the Report to Superintendent (the “Report”) is that on September 14, 2013, at 02:30 hours, Officer Reshaur (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

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

Did the ASD register a “fail”?

The police evidence in the Report is that at 02:45 and at 02:50 hours, the officer used ASD serial numbers 101650 and 101665 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101665 at 02:50 hours.

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

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

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

Was the ASD reliable?

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

- ASD serial number 101650 was checked for calibration on August 29, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 26, 2013, and a service expiry date of October 31, 2013.
- ASD serial number 101665 was checked for calibration on August 29, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 26, 2013, and a service expiry date of August 20, 2014.

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

Decision

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

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

s.15
Adjudicator

cc: G. Jack Harris
By fax 604-859-1375

SEPTEMBER 26, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

Was the ASD reliable?

In the Report to Superintendent (the “RTS”), Constable Guy indicated that you provided a breath sample into an ASD with serial number 024941. The officer also provided a Certificate of a Qualified ASD Calibrator regarding an ASD with this serial number. However, there is no information on the Certificate about manufacturer, the lot number or the expiry of the dry gas Alcohol Standard used to check the calibration of the ASD. Consequently, I cannot be satisfied that this ASD was reliable. Having made this finding, I do not need to consider other issues.

Decision

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

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

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

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 26, 2013. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

OCTOBER 24, 2013

s.22

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

Introduction

On October 7, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In the oral hearing, Ms. Lee cited the *Spencer* and *Scott* decisions regarding assessing credibility in an administrative review. She said the court in *Spencer* held that the police are not presumed to have a credibility advantage. Ms. Lee also addressed the importance of a tribunal holding a neutral position when considering evidence. I reviewed *Spencer* and *Scott*, and I am mindful of the principles of fundamental justice and procedural fairness set out in these cases. I have applied these principles in conducting this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “RTS”), Constable Pehlivanian indicated that he witnessed you driving or in care or control of the vehicle on October 7, 2013, at 0139 hours. There is nothing before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

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

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

In the Narrative Text Hardcopy (the “Narrative”), Constable Pehlivanian said he stopped the vehicle you were driving because the lights were not on. He also noted that you stopped in an abrupt manner. In the RTS and the Narrative, the officer said he smelled an odour of liquor coming from your breath, although you denied having consumed any alcohol. Constable Pehlivanian also stated that your eyes were “glassy”.

In your affidavit, you said you had not consumed any alcohol that night, so it was impossible for the officer to smell an odour of liquor on your breath. You said you do not recall if your eyes were glassy or not, but you noted that it was 1:40 in the morning and you were tired, which would have caused your eyes to appear this way. You also said you were driving in a well-lit area of Vancouver, so you did not notice that the vehicle lights were not on. You said you pulled over to the base of the Burrard Street Bridge and stopped immediately upon seeing the police lights.

I have some concerns about your response to the officer’s evidence of your driving behaviour. While I find it is reasonable that you may not have been able to tell if the vehicle lights were on, if that area of the city was well lit, I find it is more likely than not that a reasonable person who was not under the influence of alcohol would automatically turn on the vehicle lights before driving at this hour.

You addressed the officer’s statement that you stopped “abruptly” by saying you pulled over to the base of the Bridge and stopped immediately. In turning your mind to the officer’s description of an abrupt stop, rather than denying it or explaining it, you described it differently. You

indicated you were tired when you explained that the early hour was why your eyes appeared glassy. Yet despite your fatigue, you remembered the specifics of how you came to a stop when you noticed police lights behind you. These concerns raise questions in my mind about the reliability of your evidence.

Your denial of consumption implies that the officer fabricated his evidence of having noticed the odour of liquor on your breath. When I consider all the evidence before me, including the issues noted above, as well as further concerns detailed later in this decision, I do not find your version of events to be reliable. I prefer the officer's evidence that he smelled the odour of liquor on your breath.

In the RTS, Constable Pehlivanian said he read you an ASD demand at 0141 hours. As there is no persuasive evidence before me to the contrary, I am satisfied that the officer made a valid demand. I now turn to whether you failed or refused to comply with the demand.

In your affidavit, you said the officer asked you to blow into the roadside breathalyzer and you were cooperative and agreed to do as he asked. You said Constable Pehlivanian held the breathalyzer up to you and you breathed in, put your lips around the mouthpiece and tried to blow, but the machine did not seem to accept your breath. You said you blew as hard as you could, but you were told you had not blown properly. You said Constable Pehlivanian took the machine away and told you to do it again, but again he said you were not doing it right. You said you tried your best to blow into the machine properly each time.

In the Narrative, the officer said that after making the ASD demand, he explained how to provide a proper sample and presented an ASD to you with a "fresh straw", which I infer to be a new mouthpiece. He said your first attempt to comply with the demand registered as a "no go" and the officers had observed that you gave a poor sample. He clarified this by saying you did not blow air continuously.

Constable Pehlivanian said he again advised you of the proper technique and reminded you to take a deep breath and to blow continuously for a longer period of time. In paragraph seven of your affidavit, you said the officer did not give you any instructions or further information about what you were doing wrong. Elsewhere in the affidavit, you indicated that you were trying to be cooperative and tried to do your best each time you were asked to blow. In paragraph 10 you said you tried your best to do as he had asked. This implies that he gave you some instructions, which you were trying to follow. If you sincerely wanted to do as he asked, but you did not understand what you were doing wrong, it seems odd that you did not ask him for further explanation. Further, in paragraph six of your affidavit, you said when you tried to blow the first time, the machine did not seem to accept your breath. I infer you are saying that the machine seemed blocked, and yet you did not comment on this to the officer. I find the inconsistencies in your affidavit reduce the credibility of your evidence.

Constable Pehlivanian stated that after your second unsuccessful attempt to provide a sample, he "took the ASD and demonstrated a proper sample." If there had been something wrong with the device, the officer would not have been able to make this demonstration. The officer's evidence is that he explained how to provide a sample at least twice and demonstrated the

proper technique when you did not follow his instructions. After the demonstration, the officer said you were given another opportunity to comply with the demand, but you exhibited the same behaviour as before, by not blowing longer than 1 – 2 seconds. The officer said he concluded that you were not willing to provide a proper sample and he advised you as such.

I recognize that a peace officer is not presumed to have reliable evidence. However, I did not find the internal inconsistencies in his evidence that I found in yours after examining everything that is before me. The only reason I would decrease the weight I give to Constable Pehlivanian's evidence is because the Narrative is not a sworn document. Your affidavit is affirmed, which gives it more weight in this regard, but the inconsistencies I noted throughout the evidence causes me to question the document's reliability. I find on a balance of probabilities that the officer's evidence is more credible than yours.

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

Did you have a reasonable excuse?

Your lawyer asserted that you had a reasonable excuse for not complying with the demand for two reasons. First, she argued that there is insufficient evidence before me that the device presented to you was the type of ASD that is required by section 215.41(2) of the Act. Second, she argued that there is insufficient evidence before me that the device was functioning correctly.

In the oral hearing, Ms. Lee recognized that the officer referred to having used an ASD or "approved screening device" throughout his evidence. I acknowledge that on the RTS, Constable Pehlivanian did not indicate which type of ASD he used, nor did he submit a Certificate of a Qualified ASD Calibrator to establish that the reliability of the device. I note, however, that there is evidence that he turned his mind to the type of ASD he used in the fourth paragraph in the Narrative where he states: "presented ASD #171 that had serial number 058812 and expired on 13-10-22." I agree that we do not know what kind of ASD it was or if the expiry date refers to the calibration or service date. However, given the evidence before me and applicable case law, it is not necessary to have evidence of the ASD's reliability.

Ms. Lee relied on the *Swaby* case as an authority for her arguments. However, *Swaby* is distinguishable from your situation, because in that case there was no evidence before the adjudicator that the screening device was an ASD and no evidence as to how the driver was blowing incorrectly into the machine.

A more applicable case is *Pan v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1766. At paragraph 43 of *Pan*, the court commented on authorities which demonstrate that evidence about the proper functioning of an ASD is unnecessary where the adjudicator accepts evidence that the driver did not blow sufficient air into the device. I accepted the officer's evidence that you were not willing to provide a proper sample into the device. Further, at paragraph 42 of *Pan*, the court stated that, while it would be better practice for officers to always provide the details of the ASD type, serial number, and calibration and expiry

dates, there is no legal requirement in all cases of failing or refusing to comply with a demand for an officer to provide evidence of the suitability or the proper functioning of the device.

Ms. Lee submitted the decision of another adjudicator dated March 5, 2013, as a precedent to follow in deciding your case. While both cases involve a failure or refusal to comply with the demand, the decision letter Ms. Lee provided does not include the fact situation on which the adjudicator made findings of credibility. Accordingly, there are insufficient details of the circumstances to compare that case to your situation, so I do not find it to be a useful precedent.

Based on all the evidence before me, I find on a balance of probabilities that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

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

You are prohibited from driving for 90 days. Your prohibition took effect on October 7, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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

October 7, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records before me confirm that you received all of the disclosure documents. I have proceeded with this review based on confirmation from your lawyer, David Albert.

Mr. Albert submits that this prohibition “falls in line” with the BC Supreme Court ruling on *Wilson*. He points to both the legislation and the Notice as containing the words “. . . and your ability to drive is affected by alcohol”; this is a required condition for the officer to serve the Notice. With no evidence that your ability to drive was affected by alcohol, he posits that the issuing of this IRP is a nullity.

I have read the BC Supreme Court ruling on *Wilson*. Section 215.5(4) of the *Act* requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an

officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in section 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis. I proceed with this review on the other grounds on your application.

You applied on the ground "I did not refuse or fail to comply with the officer's demand. . ."; however, this ground is not available to you because of the basis for which the Notice was served: an ASD "FAIL" result.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0655 hours on September 15, 2013. He provides in his narrative report that he observed your vehicle directly, as he stopped the vehicle at his location. He then spoke to you at that time.

Mr. Albert provided no submissions on this point. With no evidence to the contrary, I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a single ASD "FAIL" result at 0657 hours.

There is no evidence to the contrary on this point. I find the ASD registered a "FAIL" result at that time.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he explained to you your right to a second test on a different ASD, and that the lower test result would prevail.

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

Was the second analysis performed on a different ASD?

With only one test occurring, no different ASD was required by the officer.

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

Both the Report and the narrative report contain the officer's evidence that a single ASD test result was "FAIL".

With no evidence to the contrary, I am satisfied that the Notice was served on the basis of the lower analysis result, here being "FAIL".

Was the ASD reliable?

The officer provided a Certificate of a Qualified ASD Calibrator for the ASD, in which J. Schwenneker certified that he is qualified to perform this operation. This Certificate forms part of the sworn Report.

For the ASD, J. Schwenneker certified that on August 27, 2013, he checked the calibration of ASD serial number 101460. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 24, 2013 and the service expiry date as November 15, 2013.

You provide no evidence concerning the reliability of the ASD. I am therefore satisfied, based on the officer's evidence that the ASDs were reliable at the time the samples were taken.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

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

s.15

Adjudicator

cc. David H. Albert
Stern Albert Shapray & Associates
fax: 604-590-5626

November 8, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. On November 4, 2013, I received a fax from Acumen Law Corporation advising that Paul Doroshenko would be conducting the hearing on Ms. Lee’s behalf. At the beginning of the hearing, Mr. Doroshenko, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

In your IRP Application for Review you indicated a number of grounds that are not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving

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

Mr. Doroshenko referred to *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 676, to underline the concepts that police do not have a credibility advantage and that there is no presumed baseline of police competence and reliability. I am familiar with this case and have kept it in mind when reviewing the facts of your case.

Ms. Lee provided *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1638. During the hearing, Mr. Doroshenko acknowledged J. Dley's ruling that a peace officer must have reasonable grounds to believe, as a result of the analysis, that a driver's ability to drive was affected by alcohol in order to serve the Notice. I am familiar with the *Wilson* case, however, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground for review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the “RTS”), Cst. McKinnon indicated that you were driving or in care or control of a motor vehicle at 2150 hours on October 20, 2013. There is no evidence before me to the contrary.

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

Did the ASD register a “FAIL”?

In the RTS, the Cst. McKinnon indicated that the ASD registered a “FAIL” at 2157 hours. There is no evidence before me to the contrary.

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

Were you advised of your right to a second analysis?

In section 7 of the sworn RTS, Cst. McKinnon indicated that he advised you of your right to a second test on a different ASD and that the lower test result would prevail. In the same section, he indicated that you did not request a second ASD test. Further, in the Narrative Text Hardcopy – Synopsis – 2 (the “Synopsis 2”), under the heading “ASD INFORMATION”, Cst. Hooper indicates that you were advised of a second test and that there was a, “Refusal.”

In your affirmed affidavit, you submit that following the first ASD test which resulted in a “FAIL”, that you were, “completely shocked by this. [Your] mind went blank. [You] could not think or speak.” Cst. McKinnon then said, “so do you know what this means?”, and proceeded to tell you that your licence was suspended and that your vehicle would be towed. You submit that you have seen the RTS where Cst. McKinnon indicated that he advised you of your right to a second test; however, that he did not tell you this at any point and that you did not get a second test. Accordingly, you submit that you have since learned that you had the right to a second test on a different machine. However, at the time of the investigation, you did not know that you had this right and Cst. McKinnon did not advise you of this. Had you known, you indicate that you would have requested a second test on another machine because you knew that you were not over the limit.

Mr. Doroshenko submits that very rarely is a second sample not requested by a driver because a second ASD is most often on scene. In your situation, he submits that Cst. McKinnon was nearing the end of his shift and relied on Cst. Hooper to write the corresponding Narrative Text Hardcopy – Synopsis – 1 (the “Synopsis 1”) and the Synopsis 2. However, Mr. Doroshenko questioned who Cst. Hooper is as it appears from your affirmed affidavit that he was not present during the investigation. On this point, he submits that Cst. Hooper included intentionally vague, passive sentences in the Synopsis 1 and was silent with respect to a second test because he was not witness to Cst. McKinnon's investigation. Further, he submits that the only information regarding a second test in the Synopsis 2, is under the heading “ASD INFORMATION” where in response to the question, “Driver Advised of Second Test?”, Cst. Hooper indicates, “Yes”. Because the only evidence I have before me with regard to a second test are ticked boxes in the RTS and “Yes” in the Synopsis 2, without an explanation of a decline, Mr. Doroshenko submits that on a balance of probabilities it is more likely than not that you were not advised of your right to a second test.

Aforementioned, I have before me a sworn RTS and the Synopsis 2 that form part of Cst. McKinnon's sworn report. I note that both documents indicate that you were advised of a second test and that you did not request the test. Therefore, while I acknowledge Mr. Doroshenko's submission that Cst. Hooper is silent with regard to a second test in the Synopsis 1, I find that this is not the case in the Synopsis 2. Moreover, I disagree with Mr. Doroshenko's submission that the Synopsis 2 provides no explanation of you declining a second test. Under the heading “ASD INFORMATION”, Cst. Hooper recorded, “Refusal.” Because this is recorded after the question, “Driver Advised of Second Test?” and below, “2. ASD Used”, I infer, “Refusal”, to indicate that you were advised of a second test but refused the test. Moreover, I am satisfied that no additional explanation of you declining a second test would be required as Cst. Hooper indicates that you refused a second test.

Mr. Doroshenko submits that Cst. Hooper deliberately avoided providing evidence because he was not on scene. After reviewing your affirmed affidavit, I acknowledge that it appears as though you interacted with Cst. McKinnon, exclusively. However, I have no evidence before me that Cst. Hooper was not present from the time Cst. McKinnon commenced the IRP investigation. On this point, I note that in the Synopsis 1 when describing your driving behaviour, Cst. Hooper wrote, "PC's also observed s.22 swerving into oncoming lanes." I infer from this submission that Cst. McKinnon was in the company of another officer(s) when making these observations and as such, I find it more likely than not that Cst. Hooper was present during the investigation.

Here, I have compelling, sworn evidence in the RTS and Synopsis 2, from two officers present during your investigation, that indicates you were told about a second test. To the contrary, the only evidence I have from you is that Cst. McKinnon did not tell you about a second test. Further, you submit that you were shocked by the "FAIL" result causing your mind to go blank and that you could not think or speak. However, I note that in paragraph 10 of your affirmed affidavit, you submit that following the "FAIL" result Cst. McKinnon said, "so do you know what this means?". I question if your mind went blank and you could not think, how you could recall the exact words Cst. McKinnon said to you immediately following the "FAIL" result. Based on the evidence before me, I prefer Cst. McKinnon and Cst. Hooper's evidence over yours and as such, I am satisfied that you were advised of a second test and that you did not request one.

Ms. Lee also submitted the case of *Modhgill v. Superintendent of Motor Vehicles*, along with several previous decisions from our office where the Adjudicators made a finding that there was a lack of persuasive or sufficient evidence to confirm that the driver was informed of their right to a second test, and the prohibitions were revoked. I have read and considered the decisions of my fellow Adjudicators. However, I am not bound by previous review decisions which, in any event, are fact specific. As well, I must add that the determination of whether or not an officer advised a person of their right to a second test is fact specific and dependent on specific findings made by the Adjudicator conducting each specific review.

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

Was the second analysis provided by the officer?

I have already made a finding that you were advised of your right to a second analysis and that a second analysis was not requested.

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

The officer's evidence is that one ASD test was completed, the result of which was a "FAIL".

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

Was the ASD reliable?

The officer submitted a Certificate of a Qualified ASD Calibrator in which J. Schwenneker certified that the ASD was found to be within the recommended limits when he checked its calibration on September 24, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASD used for your test was reliable.

Decision

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

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

s.15

Adjudicator

cc: Paul Doroshenko, Kyla Lee (by fax)
604-685-8308

October 8, 2013

s.22

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

Introduction

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

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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 ‘I did not refuse or fail to comply with the officer’s demand. . .’ This ground is not available to you because of the reason the officer served the Notice: a sample of your breath registered as “FAIL” on an ASD.

In the oral hearing, I confirmed with your representative, Justin Myers, that he received all of the disclosure documents. I have proceeded with the review based on this confirmation.

On September 26, 2013, at the oral hearing, Mr. Myers inquired as to the status of the vehicle impoundment on this review. Initially a three-day impoundment was indicated in the Notice of Vehicle Impoundment which was served on you. Later that same day, the vehicle was released at no cost to you beyond the three-day impound.

Throughout his submissions, Mr. Myers makes reference to the case of *Wilson v. OSMV*, 2013, and examines the officer's evidence in this IRP. He notes that the officer in this case provides no evidence that your ability to drive was affected by alcohol.

Section 215.5(4) of the Act lists the specific grounds on which I can revoke a prohibition. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in that section, therefore it is not a ground of review. There is no statutory authority for me to revoke a prohibition on this ground raised by Mr. Myers.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Burtini – indicated that you were driving or in care or control of a vehicle at 0343 hours on September 19, 2013. Cst. Burtini provides in the occurrence report that: there was a near-collision between his vehicle and yours and your vehicle made a left-hand turn onto the same street; your vehicle sped away when Cst. Burtini activated his emergency lights. Your vehicle was then subsequently stopped – at 0343 hours -- by another police unit, and that unit identified you as the driver of the vehicle with your driver's licence.

On your behalf, Mr. Myers has submitted that I can't consider the observations prior to the stop at 0343 hours because there is no evidence that you were operating the motor vehicle at the time.

Cst. Burtini provided evidence that he observed your car's licence plate number, and it is recorded in the officer's occurrence report. He also recorded the vehicle make and colour. I infer that at this time Cst. Burtini obtained information from police database – he adds also the detail of the year of vehicle, as well as you being the registered owner.

There is no firm denial on your part that you were the driver. Mr. Myers has provided submissions which question the officer's observations, on your behalf, yet these contain no evidence to provide for your whereabouts prior to your vehicle being stopped at 0343. There is no direct evidence from

you on this point, and with that, I assign less weight to Mr. Myers submissions on this point, being hearsay.

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

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0357 and 0359 hours.

There is no evidence to the contrary on this point. Mr. Myers acknowledges two "FAIL" results in his submissions at paragraphs 19 and 34.

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

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test.

Mr. Myers took no issue with this component of the officer's evidence.

With no evidence to the contrary, I am satisfied based on his evidence that the officer advised you of your right to a second analysis.

Was the second analysis provided by the officer?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'FAIL' at 0359 hours.

With no evidence to the contrary, and Mr. Myers acknowledging statements describing two "FAIL" readings, I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

The officer records a separate ASD serial number for the second analysis that took place at 0359. He also provided a separate 'Certificate of a Qualified ASD Calibrator' for each ASD.

Your lawyer takes no issue with this component of the officer's evidence.

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

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

The officer recorded both test results as "FAIL". There is no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator J. Schwenneker certified that on September 10, 2013, he checked the calibration of ASD serial number 101487. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 8, 2013 and the service expiry date as March 19, 2014.

For the second ASD, the qualified ASD Calibrator J. Schwenneker certified that on September 17, 2013, he checked the calibration of ASD serial number 086043. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 15, 2013 and the service expiry date as May 14, 2014.

Mr. Myers makes no submissions to question the reliability of the ASDs; I therefore find the ASDs reliable at the time the samples were taken.

Decision

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

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

s.15

Adjudicator

cc. Justin V. Myers
Myers McMurdo Karp Patey
fax: 604-688-8350

October 18, 2013

s.22

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

Introduction

On September 30, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2227 hours on September 30, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that at 2211 hours a complainant called police to report a possible impaired driver. The officer states that the complainant followed the vehicle to Commercial Drive where it was pulled over. You were identified as the driver.

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

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 2227 hours and 2238 hours, both resulting in “FAIL” readings.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2238 hours.

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

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 058119 and your second sample of breath into ASD serial number 054603. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 058119 and 054603.

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

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

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

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

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 10, 2013, he checked the calibration of ASD serial number 058119. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 8, 2013, and the service expiry date as March 19, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 10, 2013, he checked the calibration of ASD serial number 054603. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 8, 2013, and the service expiry date as November 15, 2013.

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

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

In the hearing, Mr. Harris submitted that the officer did not take the necessary precautions to ensure that your breath sample was not affected by mouth alcohol. Mr. Harris submitted that your reply to the time of your last drink, "a while ago," and further clarification, "within the last hour," is not sufficient information upon which the officer can continue the analysis. Mr. Harris submitted that your response, "within the last hour," is inclusive of the 15 minutes prior to the analysis. Mr. Harris stated that the officer failed to ask the appropriate probing questions, such as, "was your last drink within 15 minutes?" Mr. Harris provided an excerpt from the ASD Operators Manual which states, "When using the A/S IV SCREENER, the subject can be asked if he has used any alcohol in the last 15 minutes. If his response is negative, test him immediately, if otherwise, wait 15 minutes before testing." Mr. Harris also noted a document in the officer's evidence titled, Technical Information on the Operation and Calibration of ASDs in British Columbia, which states, "Breath samples should be taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol."

I have considered Mr. Harris' submission, along with the evidence before me regarding the 15 minute time frame for mouth alcohol. I concur with Mr. Harris that the response, "within the last hour," implies a possibility that your last drink was within 15 minutes. However, I note that the complainant first reported a possibly impaired driver at 2211 hours and that your first ASD analysis was conducted 16 minutes later at 2227 hours. There is no evidence before me to indicate that there was open alcohol in your vehicle, or that you had consumed alcohol while driving. In fact, I do not have any evidence before me regarding your drinking pattern at all. In the case of *Johnson v Superintendent of Motor Vehicles* Justice Wong stated that "An administrative review is not a situation where a 'suggestion' which is put forth in an effort to raise a reasonable doubt will suffice. The petitioner must put forth something other than

suggestions, or hypotheticals, which would move an Adjudicator to be satisfied in his favour.” [35]. I do not find that I have any evidence before me, aside from Mr. Harris’ suggestions, that the results of your ASD analyses were impacted by mouth alcohol. I note that you provided two breath samples on two different ASDs, which both registered “FAIL” readings. Section 215.41(2) of the Act indicates that a “FAIL” result on an ASD indicates that the concentration of alcohol in a person’s blood is not less than 80mg%.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 30, 2013.

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

s.15

Adjudicator

cc: G. Jack Harris
fax: 604 859-1375

September 23, 2013

s.22

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

Introduction

On September 8, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your review application you checked the ground “I did not refuse or fail to comply. . .” however this ground is not available to you on the basis of the Notice served: an ASD “FAIL” result.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 0115 hours on September 1, 2013. I find this date entry at the topmost portion of the Report to be in error, yet rely on the abundance of the evidence provided by the officer – a narrative report and Notice of Prohibition, in addition to two vehicle impoundment documents -- to find the true date of September 8, 2013 to be the correct date.

In your written submission you provide: “On September 08 of 2013 was I pulled over by a peace officer”, and describe how you were proceeding the wrong way down a one-way street.

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

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided two ASD “FAIL” results at 0120 and 0135 hours.

In your statement you confirm two fail results.

With no evidence to the contrary on this point, I am satisfied that the ASD registered a “FAIL” result.

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked ‘YES’ to indicate that

Page 3

you requested a second ASD test; the narrative report provides: s.22 advised that he would like the second test.”

In your statement, you confirm that a second test was provided by the officer: “. . . a second test was done and again the machine said fail again.”

I am satisfied overall that you were advised of your right to a second breath test analysis, and that you requested a second test which the officer provided to you.

Was the second analysis performed on a different ASD?

The Report notes the detail that ASD serial number 101804 was used for the second test at 0135 hours; this is a separate serial number from that of 101473, for the ASD used in the first test.

You state no evidence to the contrary. I am therefore satisfied that the second analysis was performed on a different ASD

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

Both the Report and the narrative report contain the officer’s evidence that both ASD test results were “FAIL.” You confirm this detail in your written statement.

I am satisfied that the Notice was served on the basis of the lowest analysis result, here being “FAIL”.

Was the ASD reliable?

The officer provided a Certificate of a Qualified ASD Calibrator for each ASD, in which J. Schwenneker certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, J. Schwenneker certified that on August 13, 2013, he checked the calibration of ASD serial number 101473. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 10, 2013 and the service expiry date as November 28, 2013.

For the second ASD, J. Schwenneker certified that on September 3, 2013, he checked the calibration of ASD serial number 101804. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 1, 2013 and the service expiry date as November 15, 2013.

You provide no evidence concerning the reliability of the ASDs. I am therefore satisfied, based on the officer's evidence that the ASDs were reliable at the time the samples were taken.

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

On this point, specifically regarding your BAC level, you provide the following statements:

- I did not feel impaired or felt that I was intoxicated.
- I do not feel that I was drunk. I did not feel any symptoms or signs that I was impaired.
- I know it says that a fail is over .08 but I was not given the amount.

The IRP legislation, section 215.41(2), specifies a "FAIL" result on an ASD to mean an indication that your BAC is not less than 80 mg%. In line with this legislation, ASDs track only "FAIL" results beyond a certain threshold; this officer served the Notice based on this indication, with no legislative need to assess a true numerical reading on the ASD.

Despite your statements, you do not provide any factual evidence as to your true BAC level. You do acknowledge drinking liquor, and said so to the officer at roadside, yet admit "I am not a heavy drinker and only drink wine once in a while."

I accept the ASD results recorded by the officer as fact. Your statements, especially when considering your assertion that you do not drink very often, lead me to conclude that it is more likely you are not able to assess your true BAC as accurately as an ASD.

I conclude that the ASDs registered a "FAIL" result; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 8, 2013.

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

OCTOBER 30, 2013

s.22

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

Introduction

On October 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, David Milbourn. At the beginning of the hearing, Mr. Milbourn advised that he would not be making submissions but that you wished the IRP review to proceed and a decision to be made based on the evidence that is before me. I have proceeded with the review based on that 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 you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

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

The evidence in the Report to Superintendent (the "Report") is that on October 15, 2013 at 02:00 hours, Officer Hudson (the "officer") established you as driving or having care or control of a motor vehicle. There is no evidence before me to the contrary.

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

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

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

The evidence in the General Occurrence Hardcopy (the "Narrative") is that when the officer engaged with you at roadside, you admitted to having one drink in the evening but would not give further details. The officer said you had slurred speech when answering his questions and he could also smell an odour of liquor coming from your breath. The officer said that at 02:05 hours he read the ASD demand to you from a departmental issued *Charter* card. The officer explained the process of giving a breath sample. There is no evidence to the contrary before me.

I am satisfied that a valid ASD demand was made on you.

The officer said that you refused to provide a sample of your breath by turning away from the officer, shaking your head side to side and saying "I'm sorry, I love you guys, I'm so sorry". The officer asked again if you would give a breath sample into an ASD and you again refused by stating "no". The officer advised that if you did not give a breath sample, you would be charged with refusal which carried the same penalty as a fail. The officer said you stated "no, no, no, no". The officer said he asked if you understood that refusing is the same as a fail, and that your vehicle would be towed and your driver's licence suspended. The officer said you stated "ya, who cares".

There is no evidence to the contrary before me. I am satisfied that you did fail or refuse to comply with the ASD demand.

Did you have a reasonable excuse?

There is no evidence before me from which I could conclude that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

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

You are prohibited from driving for 90 days. Your prohibition took effect on October 15, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15
Adjudicator

CC David Milbourn
By fax to 604-526-8056

October 23, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

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

Based on the evidence before me, I do not find that I have sufficient evidence to indicate that you refused or failed to comply with the ASD demand.

I am satisfied that you did not fail or refuse to comply with the ASD demand.

Having made this finding, I do not need to consider any further grounds in this review.

Decision

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

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

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

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

s.15
Adjudicator

cc: Kyla Lee
fax: 604 685-8308

October 23, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

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

You indicated that this prohibition has completely threatened your job. Specifically, that you s.22 in Vancouver and must be at work by 4:00 am, however, that no buses or skytrains are scheduled to leave this early from Port Moody. As such, you submit that will have no transportation options when s.22 You also indicated that you s.22

I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances, employment or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the sworn Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 2303 hours on October 5, 2013. There is no evidence before me to the contrary.

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

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASD registered a "FAIL" at 2317 hours. There is no evidence before me to the contrary.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

In the RTS, the officer indicated that you did not request a second ASD test. There is no evidence before me to the contrary.

I am satisfied that a second analysis was not provided by the officer because a second analysis was not requested.

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

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

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

Was the ASD reliable?

The officer submitted a Certificate of a Qualified ASD Calibrator in which J. Schwenneker certified that the ASD was found to be within the recommended limits when he checked its calibration on September 17, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASD used for your test was reliable.

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

The officer's evidence in the General Occurrence Hardcopy – Occurrence Report – 1 (the "Occurrence Report") indicates that she observed your vehicle driving erratically and without due care. Upon stopping your vehicle, she indicates that you looked dazed and your movements appeared abnormally slow. The officer also observed that your eyes were red, that your pupils were extremely dilated, and submits that you denied having consumed any liquor. When you were asked if you had a medical condition that could be affecting your driving, the officer indicates that you informed her that you s.22 Further, she indicates that you informed her that you were on medication for this condition, however, that you were able to drive while taking it. You provided a name for the medication; however, the officer submits that she had never heard the name of the drug. The officer also indicates that you were quite agitated throughout the investigation and could not give a reason for your driving behaviour but that you continually denied having consumed any liquor. Moreover, she indicates that when cover units arrived on scene that she spoke with them, returned to your vehicle, and at this point could smell a slight odour of liquor on your breath.

During the hearing, you advised me that the officer's account of events in the Occurrence Report are accurate and that you are thankful she pulled you over when she did. You advised me that you had one glass of wine at a Canucks game and acknowledged that you never should have driven or been in a car. On this point, you indicated that you had begun taking

s.22 medication one week prior to being served with your prohibition and that you had no idea how you would react while taking it. Accordingly, you submit that this behaviour was completely out of character for you.

While I acknowledge your submission that you recently began taking s.22 medication, you did not provide any evidence as to how this medication may have affected the ASD result. Further, I note that during the investigation the officer inquired if you had a medical condition that could be affecting your driving. Police evidence indicates that you informed the officer that you were taking medication s.22 but that you were able to drive while taking it. Additionally, police evidence indicates that you continually denied consuming any liquor; however, you advised me that you had consumed one glass of wine. This evidence conflicts. You did not provide any compelling evidence that would cause me to doubt the "FAIL" reading on the ASD that I have found to be reliable. Section 215.41(2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg %. As such, I am satisfied that your BAC was not less than 80 mg%.

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

Decision

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

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



November 5, 2013

s.22

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

Introduction

On October 16, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your IRP Application for Review, you applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the officer indicated you were being

prohibited from driving because an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

In your written submission, you indicate that upon review of the investigating officer's documentation that it appears he wrote down improper information. Specifically, that he recorded the incorrect vehicle owner and licence plate information on the Notice of Impoundment and spelled your address incorrectly on the Notice. Further, you submit that you overheard the officer ask a fellow officer, “what to do next, as he doesn't do [IRP investigations] very often.” Accordingly, you indicate that you found this to be very unprofessional and that it made you uneasy knowing that the officer did not know how to properly handle the situation. While I acknowledge your submissions, any concerns you have with respect to the officer's conduct during the investigation must be made in writing directly to the appropriate police authority as they are not issues before me in this review.

You submit that you believe this prohibition should be shortened. While I acknowledge your submission, I do not have delegated authority to shorten or alter the terms of a 90-day IRP.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the “RTS”), the officer indicated that you were driving or in care or control of a motor vehicle at 2332 hours on October 16, 2013. Further, in the Narrative Text Hardcopy – Occurrence Report - 1 (the “Occurrence Report”), the officer submits that he and a fellow officer observed a vehicle with s.22 stopped in the 00 block of West Hastings Street in Vancouver. After conducting a traffic stop, the officer identified you as the driver and observed one front passenger.

You write that on October 16, 2013, you and co-worker were sitting in a rental vehicle in a designated parking area in Vancouver. Accordingly, you submit that the vehicle was not in motion; rather that it was at a standstill and in park.

While I acknowledge your submission that you were not driving the vehicle when this event took place, section 215(1) of the Act indicates that a:

“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.

Further, in the Act the definition of “highway” includes every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited. In your submission, you do not refute the officer’s evidence that you were observed seated in the driver’s seat and provide evidence that you were parked in a designated parking area. Therefore, considering the definition of a “highway”, I am satisfied that a designated parking area fits within this definition as it infers the public has access to this area for the purpose of parking a vehicle.

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

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 2339 hours and 2346 hours, respectively. There is no evidence before me to the contrary.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

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

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

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101464 and 054602, respectively.

You submit that after a “FAIL” registered on the first ASD that you requested a second test; however, that the officer did not have more tips for the device so he had to have another officer bring him more. You submit that at no point did you see or did the officer state that it was a different ASD from the one used during your first test. Rather, that the officer only advised you that he was putting a second, clean tip on the device. As such, you submit that he did not make you aware that you were blowing into a secondary ASD.

In the RTS, the officer indicated information for two distinct ASDs. Specifically, section 6 in the RTS contains information related to the first ASD test including the serial number of the device: 101464. Moreover, section 8 in the RTS contains information related to the second ASD test including the serial number of the device: 054602. The officer disclosed Certificates of a Qualified ASD Calibrator (the "Certificates") that bear the identical serial numbers he recorded in sections 6 and 8 of the RTS. Further, in the Occurrence Report, he indicates that after you blew into, "ASD S/N 101464 (exp. Oct 29, 2013)", it registered a "FAIL". Following this, the officer indicates that you requested a second ASD [test] and as a result, "blew into ASD S/N 054602 (exp. Oct 29, 2013)." On this point, the expiry date for both devices indicated in the Occurrence Report (i.e. Oct 29, 2013) corresponds with the ASD calibration expiry date of 2013-10-29 indicated on the Certificates.

Further, you submit that the officer advised you that he was putting a second, clean tip on the device. I infer that by using the word "tip", you are referring to an ASD mouthpiece. Accordingly, I feel a reasonable inference can be made that when a different ASD is used, a new mouthpiece would also be used and subsequently inserted into the ASD. As such, considering your evidence that the officer advised you that a second, clean tip would be inserted into the device, I think it is more likely than not that a different ASD was used by the officer. Moreover, aforementioned the officer recorded a unique serial number for each of the two devices in the RTS and the Occurrence Report and disclosed two Certificates bearing the identical serial numbers. While I acknowledge your submission that at no point did you see or did the officer state that a different ASD was used for your second test, based on the evidence before me, I think it is more likely than not that a second, different ASD was used to obtain the second analysis.

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

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

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

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

Was the ASD reliable?

The officer submitted Certificates in which J. Schwenneker certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 1, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 16, 2013.

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

September 20, 2013

s.22

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

Introduction

On September 2, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

In your affidavit, you stated that if the officer’s allegations of you having bloodshot, glassy eyes and a flushed face are accurate, it was not due to alcohol intoxication, but rather it was due to the fact that a drug had been put in your drink.

Symptoms such as bloodshot, glassy eyes and a flushed face can contribute to an officer suspecting that a person has alcohol in her body, which may lead an officer to make an ASD demand. However, the validity of the demand is not an issue in this review. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 02:32 hours on September 2, 2013. In the Narrative Text Hardcopy (the "Narrative") Cst. Fong stated that she was dispatched to a report by a witness of an erratic driver. The witness reported to police that he observed the driver of a ^{s.22} swerving in and out of their lane heading eastbound on the Lougheed Highway while he followed it. The witness kept the vehicle in view until he saw a police car conduct a traffic stop of it.

Cst. Fong said she observed the vehicle to be driving significantly below the speed limit and straddling the line swerving in and out of the number two lane. The officer said she activated her emergency lights and conducted a traffic stop of the vehicle. You were identified as the driver by your BC driver's licence.

In your affidavit you confirmed you were stopped by police at approximately 2:30 am; however, you disagree with the officer's allegation that you were swerving in and out of the lane. You agreed that you were driving significantly below the speed limit. You said you were driving slower because you started feeling strange and not well.

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

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 02:45 and 03:01 hours, respectively.

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

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to a second analysis. There is no evidence before me to the contrary.

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

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

The officer's evidence is that you were provided with a second analysis on a different ASD and you registered a "FAIL" result. There is no evidence before me to the contrary.

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

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

In the Report and the Narrative, the officer indicated that the result of both ASD tests was a "FAIL". I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

The officer provided a copy of a Certificate of Qualified ASD Calibrator ("Certificate"), which indicates that on August 12, 2013, Ryan David Schlecker, a qualified ASD Calibrator (the "Calibrator"), checked the calibration of an ASD with serial number 101953 by means of a dry gas Alcohol Standard, Manufacturer: Airgas, Lot Number: AG210801, with an expiry date of April 17, 2014. The calibrator indicated that to the best of his knowledge, the ASD was functioning correctly and had a calibration expiry date of September 9, 2013 and a service expiry date of November 28, 2013. This information is regarding the same ASD in which you provided your first breath sample.

The officer also provided a second Certificate which indicates that on August 7, 2013, Lesley Norman, a qualified ASD Calibrator (the "Calibrator"), checked the calibration of an ASD with serial number 061076 by means of a dry gas Alcohol Standard, Manufacturer: Airgas, Lot Number: AG210801, with an expiry date of April 17, 2014. The calibrator also indicated that to the best of his knowledge, the ASD was functioning correctly and had a calibration expiry date

of September 4, 2013, and a service expiry date of January 30, 2014. This information is regarding the same ASD in which you provided your second breath sample.

Ms. Currie submitted that the ASD "FAIL" reading is unreliable because the Certificates are unreliable. With respect to the first ASD you blew into, Ms. Currie submitted that the Certificate is unreliable because one cannot be satisfied that it was signed by Ryan David Schlecker, the purported Calibrator. Ms. Currie provided a Certificate for an ASD with serial number 101952 which also bears the name of Ryan David Schlecker as the Calibrator. She said that the signature on it is significantly different from the signature on the Certificate for ASD 101953, the ASD used for your first test. She submitted that I cannot be satisfied that the Certificate was signed by Mr. Schlecker and therefore cannot be satisfied that the Certificate was completed by a qualified Calibrator or that the information contained within it is reliable.

With respect to the second ASD with serial number 061076, Ms. Currie submitted that the Certificate for this ASD is also unreliable because she said the signature of Lesley Norman, the Calibrator, was photocopied onto the Certificate prior to the Certificate being completed. She said this fact becomes apparent when one compares the signature on the Certificate for ASD 061076 to the signature on the Certificate for ASD 040219 that she provided with her submissions. Ms. Currie argued that if you placed one Certificate on top of the other and hold it up to the light, it is apparent that the signatures are exact duplicates of each other. She said the only reasonable inference that can be drawn is that the signature of Lesley Norman is a photocopy and that it already existed on the Certificate prior to the time other information, such as the serial number and service expiry date was filled out. She said that this same issue arose several months ago with Certificates in Vancouver which resulted in dozens of IRPs being overturned.

Ms. Currie submitted that the above noted issues render the Certificates and the information they contain unreliable.

I have considered Ms. Currie's submissions and I have examined the Certificates she provided and compared them with the Certificates provided by the officer in this case.

With respect to the signatures for Ryan David Schlecker, while I am not a hand writing expert, I agree that there appears to be a difference between the two Certificates. However, the Certificate for ASD 101952 appears to contain what I interpret to be an actual "signature", while the Certificate for ASD 101953 appears to be initialed. As I do not know how Mr. Schlecker signs his name each and every time he does so, I am unable to conclude that he signs his name exactly the same each time. For this reason, I am unable to conclude that he did not sign both Certificates or certify the accuracy of the contents of each. I find Ms. Currie's argument to be speculative and therefore, I am not persuaded that the content of the Certificate for ASD 101953 is unreliable.

As for the signatures of Lesley Norman, while the signatures are quite similar, I do not find them to be precisely the same on the Certificates for ASD 061076 and ASD 040219. Again, while I am not a hand writing expert I held the Certificates up to the light as Ms. Currie suggested and they do appear quite similar in this way; however, when examined side by side, I note that the

“a” in Norman appears to be more open over all and flatter at the bottom in the Certificate for ASD 061076, while the same letter appears overall narrower in the Certificate for ASD 040219. For this reason I am not persuaded that the signature for Lesley Norman was photocopied and already existed on the Certificate before the other information as filled out. Therefore, I am not persuaded that the content of the Certificate for ASD 061076 is unreliable.

Based on the evidence before me, I am satisfied that the ASDs were reliable.

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

In your affidavit, you provided details of your drinking pattern and the circumstances under which you believe you s.22 You said you went out to dinner with your boyfriend but did not consume any alcohol at dinner. You indicated that the only alcohol you consumed was approximately 10 ounces of wine at a party you attended with your boyfriend after dinner. You said you did not know anyone at the party and that initially you declined a drink when it was offered to you. At some point later, the same person who offered you a drink earlier provided you with what you described as approximately 9 ounces of red wine. You said you were not in the mood to drink, so you placed the glass on a table in front of you without drinking it, but later you decided to drink it.

At approximately 12:30 am, you said you noticed that you had “a few sips left in the bottom of [your] glass” and that a few minutes later you noticed your glass was gone. According to your affidavit, a couple of minutes later a person returned with your wine glass half full of wine. You said you drank one more ounce of wine, but nothing more that evening.

You indicated that when you and your boyfriend left to drive home, you initially felt fine but that approximately 15 minutes before you were pulled over, you started to feel weird. You said it was not a feeling of alcohol intoxication but a feeling that you were dreaming. You did not pull over because you said you felt as though you could still drive.

You provided details of what transpired after you were served with the IRP. You indicated that

s.22

Your boyfriend, s.22 provided a similar account of events to corroborate your evidence. Ms. Currie provided the expert opinion of Mr. Shajani in which he stated that based on your stated drinking pattern, your BAC would been between 33 and 60 mg% at 2:45 am, and 28 and 58 mg% at 3:01 am.

While I appreciate the seriousness of the illness you experienced with respect to s.22 without your consent, there is no evidence before me from which I can conclude that s.22 would or could be detected on an ASD. Further, there is also no evidence before me as to how s.22 affects the body, including how a person would present under the influence of such s.22 would affect other substances such as

alcohol, in one's bloodstream or body. For these reasons, I am not persuaded that the presence of s.22 affected your ASD breath test results.

With respect to your drinking pattern, I am not convinced that it was as you stated. Given that your evidence is that you were drugged at a party, I am not convinced that your recollection of the events of the evening is complete or accurate. The circumstance that you described suggests to me that you were not always aware of the location or the exact contents of your wine glass and therefore, I am not satisfied that you consumed the amount of alcohol you reported. As well, I have already made a finding that the ASDs used in your case were reliable.

As Mr. Shajani's opinion with respect to your BAC is based on your reported drinking pattern, I have given it little weight in making my determinations. I note that his opinion was silent on the effects of s.22

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 2, 2013.

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

s.15

Adjudicator

cc: Jennifer Currie, Stern Albert Shapray & Associates
Fax: 604-590-5626

October 18, 2013

s.22

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

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

You rely on a recent BC Supreme Court decision, *Wilson*, to outline the principle that a person’s ability to drive must be shown to be affected by alcohol in order for a prohibition to stand. I look to the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.5(4) of the *Act* requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had ‘a reasonable ground to believe

your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 1903 hours on September 29, 2013. He provides in his narrative report that he stopped a vehicle after he had determined it was speeding. You were then directly witnessed driving, and identified by your BC Driver's licence.

In your statement of October 8, 2013, you outline the details of your driving at that time. Your statement confirms the evidence of the officer on this point.

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

Did the ASDs register "WARN"?

In the Report, the officer indicated that you provided two ASD "WARN" results at 1906 hours and 1908 hours.

In your statement, you describe your action of blowing into the machine when asked to do so by the officer, and the ASDs reading 'WARN'.

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

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the occurrence report, he provided detail that this occurred at 1908 hours, and that this was read from a "Charter card." He also provides that you understood the right to a second test.

In your statement, you indicate the presence of a second test; I am satisfied the officer conveyed all of the information regarding the second test to you at roadside.

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

I am satisfied that the second analysis was provided by the officer. You confirm this in your statement.

In the Report, the officer lists ASD serial number 101662 for the second ASD test; this is separate and distinct from the first ASD used. I am satisfied that a different ASD was used.

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

The officer recorded both test results as "WARN". There is no evidence before me to the contrary; the penalty applied is therefore compatible with the lowest test result.

Were the ASDs reliable?

The officer provided Certificates of a Qualified ASD Calibrator for each ASD, in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, L.E. Ewanyshyn certified that on September 18, 2013, he checked the calibration of ASD serial number 101658. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 16, 2013 and the service expiry date as July 9, 2014.

For the second ASD, D.W. Jones certified that on September 10, 2013, he checked the calibration of ASD serial number 101662. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 8, 2013 and the service expiry date as October 19, 2013.

I am therefore satisfied, based on the officer's evidence that the ASDs were reliable at the time the samples were taken.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

You provided that you were at a wedding reception the previous day, and that you had no liquor on the day of your interaction with the officer. The officer's evidence confirms this, noting your statement that you had drunk the day prior, ending at 11pm.

You know you weren't impaired, and state: "Alcohol can take up to 15 hours to be metabolized by our liver and every person has a different metabolism rate depending on the weight and other factors. I was in no way impaired or a threat to anyone on the road."

I attach weight to your input, noting your s.22
You provide no specifics on the numerous other factors that can affect metabolism rates, and elimination rates, and do not speculate under what possible causes your blood alcohol level

could still possibly be elevated. You provide no evidence to detail what you had consumed or in what quantity.

There officer's evidence relies on two ASDs which I have determined were reliable at the time of testing.

I cannot revoke a prohibition on your stated recall of the degree of your impairment, however. I attach more weight to the officer's evidence in the IRP. I accept as fact that the ASDs registered "WARN" results; as per the Act, this indicates a concentration of alcohol in blood to be not less than 50 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on September 29, 2013.

s.15

Adjudicator

November 12, 2013

s.22

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

Introduction

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

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

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

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

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

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

Preliminary Matters

In your letter received in this office on October 30, 2013, you expressed your apologies for this prohibition, and stated that you need a vehicle for your job as a source of income. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances, employment or

transportation needs. The scope of this review is limited to the grounds as defined in the Act; I cannot consider your previous driving record or history.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Raison -- indicated that you were driving or in care or control of a vehicle at 0148 hours on October 26, 2013. Cst. Raison provides in the IRP Narrative that he observed you as the driver of a vehicle which approached a roadblock on his watch. He then verified your identity with your BC driver's license.

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

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0148 and 0150 hours.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered "FAIL" results as they appear in the evidence of Cst. Raison.

Were you advised of your right to a second analysis?

In the Report, Cst. Raison indicates that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the IRP Narrative, he notes this occurred at 0150 hours.

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

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

The officer's evidence in the Report is that he provided the second analysis on your request. He indicates that this was on ASD serial number 101644, which is a separate ASD from that used on the first test.

I am satisfied that he provided the second analysis, and further that it was performed using a different ASD.

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

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

Were the ASDs reliable?

Cst. Raison provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASD serial numbers 045921 and 101644, which he used to test the samples of your breath. These Certificates, completed by L.E. Ewanyshyn, form part of the sworn Report.

For the ASDs he certified that on October 16, 2013, he checked the calibration. He found the ASDs to be within the recommended limits. He recorded the ASD calibration expiry dates as November 13, 2013 and the service expiry dates as July 9, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 26, 2013. I am satisfied that the ASDs were reliable.

Decision

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

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

November 19, 2013

s.22

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

Introduction

On October 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Ms. Currie submits that your prohibition should be revoked based on the case of *Wilson v. Superintendent of Motor Vehicles*, 2013 BCSC 1638. I have read and considered *Wilson* and I acknowledge your lawyer's submission with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 03:50 hours on October 29, 2013. There is no evidence before me to the contrary.

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

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASD registered a "FAIL" at 03:52 hours. There is no evidence before me to the contrary.

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

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second analysis on a different ASD, and that the lower result would prevail. He also stated that you declined a second test.

You stated that the officer asked you if you were willing to do a second test, but you deny that he told you that it would be done on a different ASD or that the lower result would prevail. You said that he did not explain the test to you in any detail, and you told him that you were not willing to do the second test because you were not certain of the law or the rules.

I acknowledge that some of your evidence on this point conflicts with the officer's. However, the Act only requires officers to advise individuals of their right to a second analysis, which is the issue before me here. There is no requirement under the Act that they must advise it will be on a different ASD or that the lower reading will prevail.

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

Was the second analysis provided by the officer?

As you did not request a second analysis, this issue is not applicable to your case.

Was the second analysis performed on a different ASD?

As you did not request a second analysis, this issue is not applicable to your case.

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

In the Report, the officer recorded the result of the ASD test as a "FAIL".

As only one ASD test was administered, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided a Certificate of Qualified ASD Calibrator for the ASD bearing the serial number 101674, which is the same serial number recorded in section 6 of the Report. Constable Jason Parker certified that the ASD was found to be within the recommended limits when he checked the calibration on October 26, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASD was reliable.

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

In the Report, the officer indicated that there was an odour of liquor on your breath. In the Synopsis, the officer stated that you smelled faintly of liquor and that you admitted to consuming 3 beers, 3 hours prior. He also noted that there was a lack of indicia of impairment.

You stated that while at a restaurant you consumed 3 small glasses of 5% Asahi beer between 11:15 p.m. and 12:30 a.m., which is the equivalent of 1.5 regular size bottles which are 330 ml. You stated that you left the restaurant at 1:30 a.m. and went to a friend's house where you visited, watched television, and drank green tea with no alcohol in it. At about 3:45 a.m. you left your friend's house and had been driving for about 5 minutes when the officer pulled you over.

You stated that the officer did not get out of his vehicle right away. You said that while you waited for him, you began to wheeze because s.22 at your friend's house, it was cold outside and cold temperatures s.22 and you were nervous about being pulled over by police. You submitted photocopies of your most recent prescriptions s.22

You stated that you started looking for your inhaler in the center console which was full of various other items, one of which was perfume. You said it was very dark and your fingers closed around an object that you believed to be your inhaler. You quickly brought it to your mouth and without looking at it you pressed the top of the container twice to spray your s.22 into your mouth. You said that you always press on your inhaler twice so that you can spray two doses into your mouth while taking one breath.

You stated that you immediately realized there was a horrible taste in your mouth which was not consistent with the taste of your s.22 You looked down and realized that you were holding your travel size bottle of Chloe perfume and not your inhaler. You said that this bottle is approximately the same size and shape as your inhaler and both bottles need to be pressed from the top to expel a spray. You stated that the taste was so bad that you immediately took a drink from a box of non-alcohol ice tea that you had in your car, and then you saw the officer standing at your window. You indicated that he obtained your driver's licence and went back to his vehicle. While you waited for him to return you drank more ice tea and used your inhaler. You stated that the officer returned, you exited the vehicle, had a conversation with him about your desire to have a cigarette and your invalid licence, which you claim to have known nothing about. The officer then asked you if you had anything to drink that night and you told him about the beer you consumed about 3 hours prior.

You indicated that you were shocked by the fail result on the ASD. You stated that you did not know that your perfume contained alcohol, and you were not aware that spraying the perfume in your mouth less than 15 minutes before the test could affect the test result. You also stated that you did not spray perfume in your mouth intentionally or to hide the fact that you had been drinking earlier in the evening.

Ms. Currie submits that given your evidence and the report from forensic expert Nizar Shajani, the fail reading is unreliable due to the presence of mouth alcohol. In his report, Mr. Shajani stated that based on your stated weight and drinking pattern, your maximum BAC at 03:52 a.m. would have been between 0 mg% and 5 mg%. In a test conducted by Mr. Shajani on November 11, 2013, after establishing that you were in an alcohol free state, you sprayed Chloe perfume in your mouth and two minutes later you produced a BAC reading of 121 mg%.

Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. As such, I accept that alcohol contained in perfume, if sprayed into a person's mouth within 15 minutes of an ASD test, could affect the results of the test.

After considering your evidence, I am not convinced that you sprayed perfume into your mouth. Although you stated that your perfume bottle is approximately the same size and shape as your inhaler, I find it noteworthy that you did not submit any compelling evidence to support this claim, such as a photograph of the two items. As such, I find that I must rely on my own general knowledge of the shape and size of an inhaler and a small perfume bottle. My knowledge of inhalers is that they are an "L" shaped container and that the bottom of the "L" is placed into a person's mouth. The person then seals their lips around that portion of the container, before pressing down on the top to release the medicine. I know of no perfume bottle that is shaped like an "L", but more importantly, one that would function in the same manner as an inhaler in order to release the perfume.

Further, I note that the officer stated that there was an odour of liquor on your breath. You stated that you only consumed the equivalent of 1.5 beers with the last being almost 3 and a half hours prior, and sprayed perfume in your mouth and drank ice tea only 2 minutes before your interaction with the officer. However, if this was in fact true, I think the odour of perfume and ice tea would have been the prevailing odour on your breath, and not alcohol.

I do not find your evidence to be credible.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%, and I have already made a finding that the ASDs were reliable.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 29, 2013.

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

October 25, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

In her written submission, your lawyer, Sacha Roudette, cites the *Spencer*, *Gillies*, and *Costain* decisions and argues that adjudicators must follow the courts' directives in these cases when conducting hearings. I agree with your lawyer. In conducting this review, I am mindful of and have applied the principles of natural justice and administrative fairness, as required by these cases.

Ms. Roudette submits that the legal burden of proof rests with the officer. I concur and I have conducted this review accordingly.

Ms. Roudette also submits that the Act only allows the service of an IRP if the officer has made a demand under the *Criminal Code*. Ms. Roudette submits that the *Criminal Code* only authorizes officers to make an ASD demand if they have formed a reasonable suspicion that a person has alcohol in his or her body and has operated a motor vehicle within the preceeding three hours. Ms. Roudette states that because the officer did not delay the analysis due to mouth alcohol, the circumstances were objectively sufficient to cast doubt on the reliability of the ASD reading taken without delay. Ms. Roudette further elaborated that *Wilson v. Superintendent of Motor Vehicles* established that the officer must have evidence to indicate that your ability to drive was affected by alcohol.

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

I note that the officer has provided two separate reports titled, "Narrative Text Hardcopy," one consisting of a single page, and the other of four pages. I note that the officer has provided a subtitle of each indicating, "Synopsis – 1" and "Occurrence Report – 1." For the purposes of this review I will follow the officer's naming and refer to the documents as "the Synopsis" and "the Narrative".

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0140 hours on October 5, 2013. In the Narrative the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver's licence.

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

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 0142 hours and 0202 hours, both resulting in “FAIL” readings.

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

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0201 hours.

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

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0202 hours.

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

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101844 and your second sample of breath into ASD serial number 059567. The officer also provided the Certificate of a Qualified ASD Calibrator (the “Certificate”) for ASD serial numbers 101844 and 059567.

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

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

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

Ms. Roudette submits that because your ASD analyses were impacted by mouth alcohol your right to have the lower ASD analysis govern was violated.

I do not find the issue of mouth alcohol to be relevant to this ground. You provided two samples of your breath, both resulting in “FAIL” readings. The prohibition was served based on the “FAIL” result.

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

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on October 1, 2013, he checked the calibration of ASD serial number 101844. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as March 20, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on September 14, 2013, he checked the calibration of ASD serial number 059567. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 12, 2013, and the service expiry date as June 21, 2014.

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

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

Ms. Roudette submits that your response to the officer indicating that your last drink was two hours prior was true. Ms. Roudette states that you advised her that you were suffering from severe stomach pains and that you had vomited immediately prior to being stopped. Ms. Roudette states that you further advised her that after having been told that you failed the first test, you informed the officer that you were shocked, and the officer informed you that you were able to do a second test. Ms. Roudette states that you informed her that while you were waiting for the second ASD analysis you were instructed to wait in your vehicle. While you were waiting, you claim that you vomited in your mouth several times, as you did not think you were at liberty to open the door of your vehicle. You submit that you informed the officer of this, but he told you that it would not affect the ASD results. Ms. Roudette submits that the officer cannot objectively rely on the ASD results considering the possibility of contamination by mouth alcohol. Ms. Roudette submits that the presence of mouth alcohol will falsely elevate the alcohol detected by an ASD, and will result in an inaccurate measure of your BAC.

I accept that vomit can cause an elevated result on the ASD if it occurs within 15 minutes of the analysis. I note that the officer indicates in the Report that, "Any ASD tests referred to in this report were conducted by a qualified ASD operator and the ASD units were functioning correctly." I do not find it likely that if you informed the officer that you had recently vomited, that he would continue with the analysis regardless, and further, make no note of it in his evidence. Considering the evidence before me, I do not find your claim to be credible. First, you submit that you "vomited immediately prior to being stopped." I note that the officer states that you had, "an overwhelming odour of liquor on (your) breath." I do not find it likely that if you had vomited immediately prior to your encounter with the officer that he would smell an overwhelming odor of liquor, and not vomit.

I do not find your version of events to be compelling. The evidence before me indicates that you provided two samples of your breath on two different, calibrated, functioning ASDs, which both resulted in "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

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

Decision

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

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

cc: Sacha Roudette
fax: 250 388-7327

October 2, 2013

s.22

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

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

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

Facts, Evidence and Analysis

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

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

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

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

Decision

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

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

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

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

Adjudicator s.15

pc: Joel Whysall by fax 604 637 1617

September 26, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

On your Application for Review, you identified Lolita Rudovica as your lawyer. On September 12, 2013, this office faxed Ms. Rudovica 16 pages of disclosure documents which included a fax cover sheet. The fax cover sheet stated that the written review was scheduled for September 18, 2013, at 9:30 am. Additionally, the fax cover sheet indicated that if written submissions were to be made, they were to be received at this office by the scheduled review time. To date I have not received any written submissions from you or Ms. Rudovica. As such, I have proceeded with this review on the evidence before me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (“RTS”), the officer indicated that he observed you as the driver of the vehicle. In the RTS, the officer recorded that the time and date of driving or care or control of the vehicle was at 16:19 hours, on September 5, 2013.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, at 16:19 hours, on September 5, 2013.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 16:21 hours and 16:26 hours, respectively.

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

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that you were advised of your right to a second ASD test, on a different ASD and that the lower ASD test result would prevail. The officer also noted that you requested the second ASD test.

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

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 16:26 hours.

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

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 101666 and the serial number for the second ASD as 101651. There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

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

In the RTS, the officer indicated that the result of both ASD tests was a "FAIL". I am satisfied that the Notice was served on the lowest result which was "FAIL".

Was the ASD reliable?

In the RTS, the officer solemnly affirmed that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of Qualified ASD Calibrator for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 101666. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 18, 2013, and the service expiry date as October 18, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 12, 2013, he checked the calibration of ASD serial number 101651. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 9, 2013, and the service expiry date as September 13, 2013.

There is no evidence before me to suggest that the specific ASDs used in your case were not functioning properly on September 5, 2013, at the time of your ASD tests. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 5, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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

Adjudicator

cc: Lolita Rudovica
Fax: [604] 581-2017

September 26, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

In your IRP Application for Review, you indicate two grounds for review. All grounds for review that apply to your case will be considered in this review.

On September 18, 2013, I received a fax from Mr. Juriloff stating that you would not be making an application. I infer from Mr. Juriloff’s fax that you will not be making any submissions for consideration in this review. As I have not received any submissions on your behalf, I will proceed with this review with the evidence I have before me.

Issues

The following are the issues in this review:

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

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

In the Report to Superintendent (the “RTS”), the investigating officer, Cst. Jordan, indicates that you were driving or in care or control of a motor vehicle at 2301 hours on September 5, 2013. Further, in the Narrative Text Hardcopy Synopsis - 1 (the “Synopsis”), Cst. Jordan submits that he was working a road block in the 6800 block of 138 Street in Surrey. In the Narrative Text Hardcopy Occurrence Report – 1 (the “Occurrence Report”), he submits that you were witnessed by police as the sole occupant and driver when your vehicle was stopped. Your identity was verified with a British Columbia driver’s licence.

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

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

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

Evidence in the RTS indicates that at 2302 hours, Cst. Jordan formed reasonable suspicion that you were driving or in care or control of a motor vehicle with alcohol in your body. In the Occurrence Report, he submits that when you were initially stopped you were trying to keep your head turned away from him. He detected a moderate odour of liquor on your breath, observed that you had watery, glassy eyes, and were fumbling trying to retrieve your driver’s licence. When asked the time of your last drink, you advised him you, “left a party at 1030, no drink”, then you said you had, “a drink just before [you] left the party at 10:30.” An ASD demand was made on you at 2302 hours.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle, with alcohol in their body. Upon approaching your vehicle, Cst. Jordan detected a moderate odour of liquor on your breath, observed that your eyes were watery and glassy, and that you were unsteady on your feet after being asked to exit your vehicle. Further, you advised him that you had had one drink before you left a party at 2230 hours, apologized, and asked him to let you go.

There is no evidence before me to the contrary. I am satisfied that the peace officer made a valid ASD demand.

In the Synopsis, Cst. Jordan submits that you failed to provide an ASD sample despite being shown four times how to do so. In the Occurrence Report, he submits that you said you would

provide a sample and he demonstrated how to provide a sample prior to your first opportunity to blow into the ASD. On your first attempt, Cst. Jordan states that you, “puffed out [your] cheeks but did not blow, then sucked back and blew a very short puff of air.” Following this, you were shown a second time how to provide a suitable sample. You then blew a very short puff of air. You were shown again how to provide a suitable sample. On your third attempt, Cst. Jordan states that you, “puffed out [your] cheeks, blew some air out of the side of [your] mouth and then blew a very short puff of air in to the ASD.” You were shown again how to provide a suitable sample into the ASD. On your final attempt, you puffed out your cheeks, without blowing, and then blew a very short puff of air. Cst. Jordan also indicates that following your first three failed attempts you were informed of the consequences of failing to provide a suitable sample. He submits that you said you understood and that you were trying. Following your fourth failed attempt, a refusal was deemed at 2306 hours.

Cst. Jordan provides evidence that you were shown how to provide a suitable sample of your breath into an ASD on four occasions and were instructed to blow one long, continuous breath until told to stop. I have no evidence before me to the contrary. Therefore, I am persuaded that the blowing behaviour submitted by Cst. Jordan indicates that you were intentionally providing little air into the ASD and not blowing one continuous breath as you were instructed to do.

There is no evidence before me to the contrary. I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Occurrence Report, in response to the question, “Did driver convey any reasons why a sample was not provided (e.g. medical / physical limitations)?”, Cst. Jordan submits that you said, “please sir no I’m scared.”

I have no evidence before me as to what you were scared of. Further, I note that when you were advised that failing to provide a suitable sample of your breath held the same penalty as a “FAIL” you stated you, “understood and that [you were] trying.” I have no persuasive evidence before me that you provided Cst. Jordan with a reasonable excuse for failing or refusing to comply with the ASD demand.

There is no evidence before me to the contrary. I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

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

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

Adjudicator

cc: Brian Juriloff (by fax)
604-504-5880



October 1, 2013

s.22

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

Introduction

On September 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on all of the grounds available, some of which are not applicable to this IRP; the Notice was not served on the basis of your refusing or failing to provide a sample of breath upon demand, nor the provision of a “WARN” ASD result. I have considered all grounds relevant to the basis upon which the Notice was served.

Records before me confirm that you received all of the disclosure documents, and your counsel, Kyla Lee, confirmed she had received all documents at the time of review. I have proceeded with the review based on this confirmation.

Your lawyer, Ms. Kyla Lee, provided the case of *Scott* and referred to the case of *Spencer* to underline the concepts that police do not have a credibility advantage, and a consideration of the consistency of each witness’s evidence is necessary with the same analysis of credibility applying to all.

Ms. Lee also referred to the recent BC Supreme Court decision, *Wilson*, to emphasize a fundamental requirement of the legislation that is not reflected in the officer's evidence: a person's ability to drive must be shown to be affected by alcohol in order for the IRP to stand. I rely on the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.5(4) of the Act requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is thus no statutory authority for me to revoke a prohibition on this basis.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (the "Report"), the investigating officer -- Cst. Jordan -- indicated that you were driving or in care or control of a vehicle at 0105 hours on September 13, 2013. He provides in his narrative report that he was conducting speed enforcement at 168th Street in Surrey. He witnessed your car traveling at an excessive speed which required pursuit, and when your vehicle was pulled over by police you were directly witnessed driving, and identified by your BC driver's license.

In paragraph 5 of your affidavit, you outline the details of your driving at that time. Your statement confirms the evidence of the officer on this point.

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

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided an ASD "FAIL" result at 0112 hours.

There is no evidence to the contrary on this point. In your affidavit at item 13 you provide that you blew, "the machine worked", and you observed the machine read "FAIL."

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

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the narrative report, he provided detail that this occurred at 01:13 hours, and this "right to a second test was read from a supplied card."

He provides further detail:

- you asked the police what you should do;
- he explained that now you have a 90-day IRP;
- if you provided a second sample with a lower reading, it would be a 3-day IRP;
- the lower of the two samples is the one that police have to act on;
- you could not at this point be charged for refusing;
- you stated: "I'm not going to bother with it."
- you were informed of the time limit for requesting a second test;
- upon being asked again if you had changed your mind before service, you said: "I don't want to."

The following are statements I find within your affirmed affidavit:

15. Constable Jordan explained that I had the option of taking a second test. I do not remember clearly what he said when he explained to me. I do remember that Constable Jordan did not tell me it would be on a different machine.
16. I thought about taking a second test, but I was worried that if I blew a "Fail" again, it would make my situation worse. I tried to ask Constable Jordan for advice but he did not help me out very much.
21. I have since learned that I have the right to a second test on a different machine. I did not know this at the time. Constable Jordan did not explain my second test to me very clearly. He definitely did not tell me it would be a different machine. Never once did I see any second machine with him. Had I known I had the right to take a second test on a different machine, I would have definitely done a second test.

Ms. Lee acknowledges that Cst. Jordan provided detailed narrative information on his explanation to you about the possible outcome of you providing a second test; however, this narrative does not include evidence that he told you about the use of a different ASD. In addition, she posits that the information specifically regarding a 3-day IRP outcome was "not accurate" - there are other possible outcomes, such as an ASD providing a numerical result, which would result in no IRP, possibly combined with a longer vehicle impound due to excessive speed.

Ms. Lee points to a Ministry of Justice news release of June 14, 2012 which coincided with the introduction of this law, particularly a passage which describes the obligation of an officer at roadside: "Police must advise drivers of their right to a second breath test on a second approved screening device" and "Police must tell drivers that the lower of the two readings will prevail." She reiterates this principle of the officer's duty to inform a driver with meaningful information, in order for it to have weight, from the case of *Gillies*. Cst. Jordan's failure to advise you correctly, in this instance, is not in keeping with the intent of the legislation. Likewise, the format of the Report that Cst. Jordan used contains specific bullet points on these key details for this very same reason, as a surety that officers will convey this information specifically.

In regards to the officer imparting the information regarding a second ASD to you at roadside, I cannot infer that he did so simply from the boxes he checked in the Report. The narrative report does not add anything to this evidence simply by naming the "supplied card" that he read from. Without the card being supplied as evidence, I cannot easily verify if that information was imparted to you.

At the same time, I cannot simply ignore that the officer recorded that he conveyed this information to you, and the likelihood that the "supplied card" contained that information in line with the legislation. I weigh this likelihood against statements in your affidavit, particularly item 15, wherein

you note “I do not remember clearly what he said when he explained to me” – curious when I consider that you can recall what was *not* stated by the officer at roadside.

I recognize that the detail regarding a different ASD is not captured in the officer’s report on pages 2 and 3. This does not constitute an omission, however, and I distinguish this level of detail to be necessarily specific as an answer to your request that he “tell you what you should do” – the ramifications of your choice were explained to you, and the officer was explaining the potential choice of outcome available to you, in answer to your question. Despite the answer, you state “he did not help me out very much.” I do not find the officer provided mistaken information by referring to a 3-day IRP, he simply named this as a lower outcome, and this does not prejudice your right to a second test.

In addition, in item 16, you express your immediate concern at roadside as being the fear that you would provide another “FAIL” result. I can’t accept this as an explanation of how you would be prejudiced by the use of the same device. You did not express misgivings about the functionality of the first ASD at roadside; there likewise is no record of inaccurate readings or trouble obtaining a sample. Cst. Jordan’s evidence on this point is that the first test result was “obtained with no delays.” Likewise, I cannot rectify your statement from item 21 with your worry about providing another “FAIL” result. You don’t provide specifics on how knowing of a different ASD would have led you to make a different choice; your evidence does not illustrate concerns or problems you identified with the ASD or its results.

You do not deny that initially the officer read information from a card; however you state that you “do not remember clearly”. In all likelihood I accept the officer’s evidence that the correct information was imparted to you from a card containing correct information. Your submissions on this point do not negate the possibility that the correct information was given by the reading of the “supplied card”.

In conclusion, I am satisfied that you were advised of your right to a second analysis. Cst. Jordan’s credibility is established on this weighing of the evidence he presents with no inconsistencies. I assess Cst. Jordan’s credibility on this point to apply to other evidence throughout this review.

Was the second analysis provided by the officer?

Cst. Jordan checked “NO” in the Report to indicate that you did not request a second ASD test. The narrative report provides your statements: “I’m not going to bother with it” and “I don’t want to.”

I am satisfied that the second analysis was not provided by the officer.

Was the second analysis performed on a different ASD?

As above, there was no second test provided by the officer.

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

The officer recorded the single test result as “FAIL”. There is no evidence before me to the contrary; the penalty applied is compatible with the lowest test result.

Was the ASD reliable?

Cst. Jordan recorded your response to his query 'time of last drink' three times in his evidence:

1. in the Report, line 11: "I had 2 or 3 beer and finished my last one 20 minutes ago."
2. the shorter synopsis: " s.22 admitted to 2 – 3 beer having finished the last one 20 minutes prior to being stopped."
3. the occurrence report: s.22 said: "I had 2 or 3 beer and finished my last one 20 minutes ago."

Ms. Lee posits that the ASD result was falsely elevated due to mouth alcohol. She provided 'RCMP Resource Reading' which states: ". . . if the peace officer honestly believes that the motorist has engaged in the above activity [i.e., recent consumption] within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity." She also provided the case of *Seivewright*, which reiterates this principle at paragraph 15, and introduces the concept of the officer "honestly and reasonably" feeling that a short delay may be necessary, at paragraph 17.

Your evidence on this point is that you stated to the officer "I had two or three beers "not even twenty minutes ago."" Further, in item 19: "My last drink was at 1:00 am. No more than twelve minutes passed between my last drink of alcohol and the time I blew into the machine." With reference to your affidavit, Ms. Lee asserts that the test result is not reliable *in fact*, despite an officer's belief that it was reliable at the time.

I understand your statements regarding where you came from, the driving time, and even the true time span you state occurred, in item 19: "No more than twelve minutes passed between my last drink of alcohol and the time I blew into the machine." You are clear in determining these points of time in your affidavit.

What is not clear to me, however, is your explanation of this in somewhat different terms to the officer at roadside; "not even twenty minutes ago" is substantially different than "fewer than five minutes", which is the time you are now proposing as driving time from your friend's house, item 5 in your affidavit. Twelve minutes ago, which is the time span you are calculating as the maximum time passed, is too accurate a calculation for you to make at roadside. You do not explain why you chose to state "not even 20 minutes ago" – which the officer recorded as "20 minutes ago" – if that was not accurate.

Also, you do not explain surprise or shock at the result of the test. Your reaction at item 14 does not raise any question on a falsely elevated ASD result; you even maintain "I had not had that much to drink. I did not feel impaired" – no record that you expressed shock or dismay at the result. Granted, you state you were not aware of mouth alcohol, but that lack of knowledge would not negate a surprised reaction to the result.

Based on the foregoing, I am satisfied, based on the evidence and an assessment of both your and Cst. Jordan's credibility overall, that the ASD result was reliable at the time the sample was taken, not falsely elevated by mouth alcohol.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 13, 2013.

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

s.15

Adjudicator

cc. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

September 27, 2013

s.22

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

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

Based on the evidence before me, I am not satisfied that you failed or refused to comply with the 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.

You may go directly to the location where the vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 27, 2013, the date the vehicle was eligible for release. You are responsible for any storage costs beyond that date, and you should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 16, 2013

s.22

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

Introduction

On September 25, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on three grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

At the outset of your oral hearing your lawyer, Joe Doyle, confirmed that he received full disclosure. I have proceeded with the review based on that confirmation.

Mr. Doyle argued that there is no evidence before me that your ability to drive was affected by alcohol. Mr. Doyle submitted that your driving prohibition should be revoked on that basis. He directed me to the case of *Wilson v. Superintendent of Motor Vehicles* in support of his submission.

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

Mr. Doyle stated that the officer's evidence is a complete mess. He indicated that the officer made numerous changes to his evidence and although he initialed some of the changes the commissioner did not initial any of the changes. Mr. Doyle submitted that there is no way of knowing whether these changes were made before or after the commissioner signed the Report to Superintendent (RTS). Mr. Doyle also noted that on the RTS the officer crossed out the first ASD serial number and he did not address this in either Report to Superintendent Supplemental to file (RTSSF).

Having carefully considered the officer's evidence in its entirety, I do not come to the same conclusion as Mr. Doyle. While I acknowledge that there is no way of knowing if the commissioner signed the RTS before or after the officer made some changes, I have no evidence before me other than Mr. Doyle's speculation that it was not initialed before the commissioner signed it. However, I note that the officer has provided two sworn RTSSFs. In one RTSSF the officer corrected the date of driving or care or control from September 26, 2013, to September 25, 2013. In the other RTSSF the officer changed the time of suspicion from 23:26 hours to 23:27 hours and the time of the second test from 23:44 hours to 23:45 hours. I note the both RTSSFs were signed by the officer and a commissioner. I acknowledge that the officer crossed out the first ASD serial number and that he did not address this. However, I do not find this to be problematic as there is no requirement for him to do so. In my consideration of the officer's evidence I do not find anything that calls into question the reliability of the evidence before me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the officer's evidence he noted that you were a driver or had care or control of a motor vehicle on September 25, 2013, at 23:25 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 25, 2013, at 23:25 hours.

Did the ASD register a "FAIL"?

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

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

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

Was the second analysis performed on a different ASD?

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

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

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

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

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

Was the ASD reliable?

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

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 25, 2013.

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

Adjudicator

cc: Joe Doyle
604-688-8356

October 11, 2013

s.22

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

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

I acknowledge receipt of your letter in which you talked about the events of September 20, 2013. You said that you did not argue with the officer but were feeling upset and had started to cry. You explained to the officer that you had s.22 the next day that you needed to go to. You said the officer did not seem to care.

I have also reviewed your dad's letter. He explains that he came outside the house and observed that you were dealing with police. He said that you were upset but cooperating. He also said that while cooperating, you were swearing but it was not being directed at the police.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer's evidence in the Report to Superintendent (the "Report") is that on September 21, 2013, at 01:47 hours, Officer Raison (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

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

Did the ASD register a "fail"?

The officer's evidence in the Report is that at 01:50 hours and at 01:51 hours, the officer used ASD serial numbers 101661 and 101645 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail".

You said that you did not understand fully what a "fail" meant on the test because you thought there should have been a number. However, ASD's are calibrated to display the word "warn" or "fail" in the window, and a BAC percentage is not indicated.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101645 at 01:51 hours.

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

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

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

Was the ASD reliable?

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

- ASD serial number 101661 was checked for calibration on August 29, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 26, 2013, and a service expiry date of October 18, 2013.
- ASD serial number 101645 was checked for calibration on September 6, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 4, 2013, and a service expiry date of August 28, 2014.

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

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

You said that while at the Wheelhouse Pub you consumed a mixed drink (gin and pineapple juice) and a beer. You said about two hours after you had your last drink, you left to get something to eat and go home.

The officer's evidence is that police were called by a citizen who observed you leaving the Wheelhouse Pub. When the officer was speaking with you, he detected a strong odour of liquor on your breath and indicated that you were uncooperative and aggressive to police.

You claim that you consumed one mixed drink and one beer. However, I note that your BAC was measured twice using two different ASDs which I have already found to be functioning reliably. I therefore wonder if you are mistaken about your drinking pattern on that night. I find your evidence to be not credible.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013.

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

s.15
Adjudicator

November 1, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

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

At the time of this review I have yet to receive any submission from you or your representative. I have continued with this review based on the evidence before me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2214 hours on October 14, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over and were identified as the driver via your BC driver's licence.

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

Did an ASD register a "FAIL"?

The officer indicates in the Report and in the Narrative that you provided a sample of your breath at 2232 hours which resulted in a "FAIL" reading.

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

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2232 hours.

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

Was the second analysis provided by the officer?

The officer indicates in the Report that you did not request a second analysis. I have no evidence before me to the contrary.

Was the second analysis performed on a different ASD?

As you did not request a second analysis, the officer was not obligated to provide a second ASD.

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

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

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

Was the ASD reliable?

The qualified ASD calibrator indicates that on October 1, 2013, he checked the calibration of ASD serial number 101700. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as February 20, 2014.

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

Decision

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

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

October 29, 2013

s.22

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

Introduction

On October 8, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Your lawyer sent me a copy of your Affidavit, together with a previous decision rendered by an adjudicator with our office. She also provided me with a copy of the *Scott v. Superintendent of Motor Vehicles* 2013 BCSC 676 case, and the *Modhgill v. Superintendent of Motor Vehicles* 2012 BCSC 1971 case. Ms. Lee told me that she is relying on the *Spencer v. Superintendent of Motor Vehicles*, 2011 BCSC 1311 case, but has not provided me with a copy. I wish to point out that I am familiar with the principles set out in *Scott* and *Spencer* and have proceeded with this review with those principles in mind. However, with regard to the previous decision rendered by an adjudicator with our office; I do not have the facts of the case before me in this review

hearing. Therefore, I cannot verify whether the facts in that case are identical to the facts in your case. I will render my decision after considering all of the relevant information provided to me.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

The Report to Superintendent (the “Report”) indicates that at 23:36 hours on October 8, 2013, Officer Chu (the “officer”) established you as a driver or having care or control of a motor vehicle. There is no evidence before me to the contrary.

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

Did the ASD register a “fail”?

The police evidence in the Report is that at 23:42 hours and at 23:45 hours, the officer used ASD serial numbers 101968 and 040235 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

As indicated above, the second ASD test was conducted at 23:45 hours on ASD serial number 040235.

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

Was the second analysis performed on a different ASD?

As indicated above, the second analysis was provided by the officer on ASD serial number 040235 at 23:45 hours.

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

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

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

Was the ASD reliable?

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

- ASD serial number 101968 was checked for calibration on October 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 2, 2013, and a service expiry date of April 9, 2014.
- ASD serial number 040235 was checked for calibration on October 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 2, 2013, and a service expiry date of February 27, 2014.

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

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

You said that you had been at the Cactus Club on October 8, 2013, arriving at around 8:00 p.m. You drank two pints of draught beer, ordering your first drink when you arrived and your second drink at around 10:30 p.m. You were leaving at around 11:30 p.m. and finished the last of the beer in your glass. You said you were concerned about an odour of liquor on your breath as you had only just finished your beer. You said your breath was also bad because you had not eaten anything that evening, nor had you been to get your teeth cleaned in two years. You are self-conscious about your breath so you often use mouthwash. You got into your car and did not feel impaired by alcohol. You said you knew you could drive safely and you were not over the legal limit. However, because you did not want any difficulty if you were pulled over, you decided you would rinse your mouth out with mouthwash before driving away. Not even thirty seconds elapsed between the time you rinsed your mouth with mouthwash and the time you pulled away in your vehicle. You had been driving for fewer than four minutes at the time you were stopped by police.

Your lawyer says that your two ASD test results were falsely elevated as a result of the existence of mouth alcohol due to recent use of mouthwash. Ms. Lee also says that there is no reason to reject or disbelieve your evidence.

The officer's evidence is that staff at a restaurant notified police that you declined an offer to call a taxi for you, and drove off in your own vehicle. When the officer engaged with you at roadside, he said the first words you muttered were "I know that I shouldn't be driving right now." The officer said your speech seemed slurred, your eyes were watery and there was "a strong smell of liquor" upon your breath. When asked to exit the vehicle, the officer said you displayed difficulties standing. The officer said you told him your last drink was at 11 o'clock. The officer proceeded to administer two ASD tests, both of which resulted in a "fail".

In paragraph 7 of your Affidavit you said you were "fine to drive", however, the first words you said to the officer when you were pulled over were "I know I shouldn't be driving right now." You explain this statement by saying you told the officer you were tired and not in a good headspace. Your two statements are contradictory. You first say you were fine to drive and then say you know you should not be driving. I question why you would dismiss the bartender's offer to call you a taxi if you knew you should not be driving, for whatever reason. Because your own evidence contradicts itself, I find it causes me to question its reliability.

I note that you dispute that you had difficulty standing and explain that there was some uneven ground that could have been interpreted as balance problems. However, you have not disputed any of the officer's other observations regarding your slurred speech, watery eyes and a strong smell of liquor on your breath.

You said that you were self-conscious about your breath and worried about being stopped and investigated by police because you had just finished your beer. You said you used Scope Outlast approximately four minutes before engaging with the officer. You attached as Exhibit "A" to your Affidavit a photograph of the bottle of Scope Outlast that you used. The label says "long lasting mint". In my view, if a person used a "long lasting mint" mouthwash, that person could reasonably expect their breath to still smell minty four minutes later. However, the officer said he noticed "a strong smell of liquor" on your breath, and not a smell of minty mouthwash. Consequently, I do not find your evidence that you used mouthwash four minutes prior to engaging with the officer to be very credible.

Finally, in response to the two "fail" ASD tests you said you were "shocked", "speechless" and that your "mind was reeling". However, the issue before me is not whether you were, or you felt, impaired. I cannot comment on how impaired you feel you were at the time, and I rely on the fact that you blew two "fail" ASD tests on two separate ASDs – both of which I have already found to be functioning properly on the night in question. Ultimately, you have not convinced me that you blew two "fail" ASD test results for any other reason than your BAC was not less than 80 mg%.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 8, 2013.

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

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

s.15
Adjudicator

cc: Kyla Lee
by fax 604-685-8308

October 29, 2013

s.22

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

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

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

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

Decision

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

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

This decision does not change any other prohibitions from driving or licensing requirements.

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

October 4, 2013

s.22

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

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

You applied on several grounds, some of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Records indicate that your lawyer, Jaspreet Malik, received full disclosure.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 15, 2013, at 00:13 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 15, 2013, at 00:13 hours.

Did the ASD register a “FAIL”?

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

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

Were you advised of your right to a second analysis?

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

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

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

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

Was the second analysis performed on a different ASD?

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

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

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

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

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

Was the ASD reliable?

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

In your affidavit you stated that the device used for the second ASD test fell out of the officer's hand onto the roadway. You said that that you asked the officer to "swap out the machine for the one that had not been dropped", but the officer ignored your request. s.22 affidavit supports your evidence.

Mr. Malik stated that it is well known that the Alco-Sensor IV DWF has many mechanical and electrical problems. He suggested that these potential problems are magnified when the ASD is dropped. He argued that a dropped machine should not be used because it may not be reliable. Mr. Malik provided me with a document entitled "Subpart L-Alcohol Screening Tests" which he claimed is a portion of the user manual for the Alco-Sensor IV. I note that at the top of page two and three of this document it references "DOT Rule 49 CFR Part 40 Section 40.245 – Department of Transportation". I am unable to conclude that this document is from the user manual for the Alco-Sensor IV. He also provided me with an article related to the reliability of the ASD which is illegible. Mr. Malik suggested that the lack of any note by the officer that the ASD was dropped coupled with the secondary sources allows me to draw an inference that the secondary sources are true and that for this reason the officer omitted the dropping of the ASD from his report.

In considering the evidence before me, I have concerns with your credibility. I note that you have not disputed the officer's evidence that you kept insisting that there was an alternative option and that the police did not need to do this. Nor have you disputed that officer's evidence that you kept saying you have received preferential treatment by other officers. It is also interesting to note that it took the officer several minutes to tell you that this was the legal way and that there were no other options. Additionally, I note that you do not deny the officer's evidence that upon the initial screening you kept looking away, that you had a strong odour of liquor on your breath, that your eyes were watery, that your face was flushed, and that you seemed a little bit sleepy. In considering the officer's undisputed evidence, I find it reasonable to conclude that you were trying to impede the officer's investigation which leads me to question your evidence that the officer dropped the device. Ultimately, I do not find your evidence credible and I am not persuaded that the officer dropped the second ASD.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

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

Adjudicator

cc: Jaspreet Malik
604-543-9112

SEPTEMBER 30, 2013

s.22

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

Introduction

On September 8, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an ASD. Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing your lawyer, Ricky Bal, 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

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

The evidence in the Report to Superintendent (the "Report") is that on September 8, 2013 at 00:43 hours Officer Van Nieuwland (the "officer") established you as driving or having care or control of a motor vehicle. There is no evidence before me to the contrary.

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

Did 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 valid demand was made on you, and whether you failed or refused to comply with that demand.

The evidence in the Narrative Text Hardcopy (the "Narrative") is that the officer became aware of the event as a result of a complainant calling police to report a vehicle swerving all over the road.

When the officer pulled you over, you were the only occupant in the vehicle. The officer describes your behavior as having slurred speech and stumbling when asked to leave the vehicle. He also detected an odour of liquor and, in response to what time was your last drink, you said you had one beer an hour ago. The Report indicates that the ASD demand was made on you at 0045 hours.

Mr. Bal pointed out that on page 2 of 4 of the Narrative, the question is "was demand read from Charter card or made from memory? Mr. Bal points out that although this is an either/or question, the officer answered "yes" and this resulted in an invalid demand. In my view, the ASD demand is valid because the officer either read the ASD demand from the Charter card, or he recited it from memory. In either case, the ASD demand was made on you by the officer.

I am satisfied that a valid ASD demand was made on you.

The evidence in the Narrative is that the first ASD test was withdrawn because you continued to suck on the sterilized mouthpiece after being shown how to provide a proper sample on it.

You indicated at paragraph 16 that you were "shown what [you] now know is a roadside-screening device...", which would indicate that, at the time, you did not know it was a roadside screening device. However, I note that at paragraph 22 you indicated that "[you] were not concerned about giving a breath sample into an approved screening device." This seems to be a contradiction in your implied misunderstanding of the roadside screening device. In addition, if you had no concerns about giving a breath sample I fail to understand why your speech could have been misinterpreted as slurring or stuttering, or why your body was trembling with panic.

At paragraph 18 of your Affidavit you say that "the officer then told me to take a deep breath in and breathe out. He demonstrated the same." When the officer put the device to your mouth, you said you took a deep and emphatic breath in to show the officer that you were "following his directions." In my view, this is a clear indication that you understood what the expectation was

and how to provide a sample of your breath into the ASD. The officer notes however that you continued to suck on the sterilized mouthpiece.

I am satisfied that you did fail or refuse to comply with the ASD demand.

Did you have a reasonable excuse?

Mr. Bal submits that s.22 and that you assumed what the officer wanted in terms of providing a breath sample but the officer did not make it clear. Mr. Bal said that you felt scared and panicked. You had the full desire and intention to comply with the ASD demand, but the officer took the device away from you before you had a chance to comply.

In reading your Affidavit, I note that you are s.22 As well, you said you spent "most of [your] time speaking with others" when you were at the social gathering on September 7, 2013. It seems to me that in order to work successfully in s.22 one would have to have a fairly good grasp of s.22 Part of a s.22 duties include communicating effectively with customers and staff. I have trouble understanding how you accomplish this if you are s.22
s.22

In addition, the officer has not made any notes in the Narrative that you had difficulty understanding what he was saying. You understood that the officer received a complaint about your driving behaviour. When the officer asked you about consuming alcohol, you understood the question and were able to answer. When the officer asked you to exit your vehicle, you were able to understand and did so. When the officer explained and demonstrated how to provide a breath sample, you understood but continued to suck on the sterilized mouthpiece.

Based on a consideration of the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

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

You are prohibited from driving for 90 days. Your prohibition took effect on September 8, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15
Adjudicator

CC Ricky Bal
By fax to 604-590-5626

OCTOBER 10, 2013

s.22

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

Introduction

On August 2, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition. I am delegated the authority to conduct this review.

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

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

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

Preliminary Matters

At the beginning of the hearing your lawyer, Sarah Leamon confirmed that she had received all of the documents before me prior to the scheduled hearing. I have proceeded with this review based on that confirmation. Your lawyer provided written material and made submissions at the oral hearing on August 15, 2013. The time for providing this decision was extended to October 16, 2013. In reaching my decision in this review I have considered all of the relevant information available to me.

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

Your lawyer made submissions referencing the *Canadian Charter of Rights and Freedoms* (the

“*Charter*”), arguing that admitting or relying on an ASD violates of your “*Charter*” rights and that the results of roadside screening devices cannot be utilized as evidence to incriminate drivers. Without the right to counsel, an ASD can only be used as an investigative tool to confirm or reject the police officer’s suspicion that a driver might be impaired.

I have no authority under the Act to consider whether or not being issued an IRP based on an ASD “FAIL” result contravenes of your *Charter* rights. Section 215.41 of the Act allows police to rely on ASD results to issue driving prohibitions. My review is authorized under, and limited to the grounds set out in, Section 215.5 of the Act.

Ms. Leamon also referred to the principles of fundamental justice and procedural fairness set out in *Spencer v. British Columbia*, which I am mindful of, and have applied, in this review.

In this review I have considered all of the grounds of review which apply in your circumstances.

Issues

The issues considered in this review are:

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

Facts, Evidence and Analysis

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

The officer’s evidence is that on August 2, 2013 at 2331 hours a vehicle was stopped at a roadblock. You were its driver and identified yourself with your driver’s licence.

Your evidence is that on August 2, 2013 at approximately 2331 hours you were stopped at a roadblock.

I am satisfied that on August 2, 2013 at 2331 hours you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “FAIL”?

The officer’s evidence is that at 2336 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a “FAIL.” At 2340 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a “FAIL.”

Your evidence is that you provided two samples of your breath into breath testing machines both of which displayed the word “fail.”

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

Were you advised of your right to a second analysis?

The officer's evidence is that you were advised of your right to provide a second sample of your breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

Your evidence is that the officer told you that you could do a second breath test to verify the results of the first test.

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

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second breath sample into an ASD for analysis.

Your evidence is that you provided a second breath sample.

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

Was the second analysis performed on a different ASD?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 101654. The second sample of your breath was analyzed by an ASD with serial number 101666.

Your evidence is that for your second breath test the officer presented you with a second breath testing machine.

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

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

Two samples of your breath for analysis were provided into two different ASDs. The result of the analysis of each of the two samples was a "FAIL." The lowest analysis result was a "FAIL."

There is no evidence to the contrary.

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

Was the ASD reliable?

The first analysis of your breath was performed on an ASD with the serial number 101654. Constable Klein provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 10, 2013. This ASD had a Calibration Expiry Date of August 7, 2013 and a Service Expiry Date of October 11, 2013.

The second analysis of your breath was performed on an ASD with the serial number 101666.

Constable Klein provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 24, 2013. This ASD had a Calibration Expiry Date of August 21, 2013 and a Service Expiry Date of October 18, 2013.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to Superintendent, Constable Klein swore that your ASD tests were performed by a qualified ASD Operator and that the ASDs were functioning correctly.

There is no evidence to the contrary.

I am satisfied that the ASDs were reliable.

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

The officer's evidence is that there was an odour of liquor on your breath and your speech was slurred. You admitted that you had consumed alcohol and, when asked the time of your last drink, you responded "About 8-8:30."

Your evidence is that on August 2, 2013 you golfed with a friend, s.22 until 9 p.m. You and he then had dinner, leaving the golf course at around 10:45 p.m. You were driving and stopped at the home of your uncle, s.22, arriving there just before 11:15 p.m. He made you a drink of Crown Royal and water. After twelve minutes you told your uncle you had to leave, finished the remainder of your drink, and began driving home. You were stopped at the roadblock approximately 4 minutes later. Although you knew you were not impaired, when the officer asked you if you had been drinking you panicked and answered "yes." When you were asked the time of your last drink, you thought it would be better to say the first thing that came to your mind which was "...around 8:00 or 8:30 p.m." because you thought this would sound better than telling the truth which was that you had finished a drink only five minutes prior to entering the roadblock. The time that passed between your last [drink] of alcohol and the time you encountered the roadblock was no more than five minutes. You did not know about the issue of mouth alcohol; had you known of it you would have told the officer about the drink you had consumed only minutes prior to encountering him. You did not have slurred speech, the officer has no idea how you ordinarily speak, and you were not impaired by alcohol. You provided witness statements from s.22 confirming your evidence.

Your lawyer submits that this is a case where residual mouth alcohol falsely elevated the ASD results causing "FAIL" results although your BAC was less than 80 mg%. You admitted having a drink which explains the odour of liquor on your breath but you had minimal symptoms of alcohol consumption, consistent with a low BAC. The evidence shows that you had only one drink at 2327 hours at your uncle's house. Both of your ASD tests were completed by 2340 hours, 13 minutes after your last drink and within the 15 minute elimination period required for residual mouth alcohol to dissipate. Your evidence, including your witness statements, is internally consistent. I should conclude that the ASD results were due to recent alcohol consumption and residual mouth alcohol and, to be consistent with previous review decisions, revoke your driving prohibition.

When considering your evidence I begin with the common sense proposition that people do not lie unless they perceive an advantage in doing so. Your evidence is that you had only one drink at your uncle's house and you knew that you were not impaired by alcohol. It seems

contrary to common sense how, if these were your circumstances, you would become panicked or think that you would need to lie; you would encounter no problems if you told the truth. I do not think that you perceived any advantage to lying, do not think you lied, and accept that you were truthful when the officer asked if you had been drinking and you answered "yes."

I then consider what reasonable motivation you could have to not want to admit you had just finished a drink. Given that, on your evidence, you had only one drink and were not impaired, there is no logical basis for you to have any concerns about having just finished a drink because it would make no difference to the officer whether you had just finished a drink or not. You have offered no credible explanation for thinking that telling the officer you had finished a drink "...around 8:00 or 8:30 p.m. " would sound better than telling the officer that you had finished a drink only five minutes prior to entering the roadblock.

Finally, I consider the reliability of your statement that your last drink was "...around 8:00 or 8:30 p.m." In responding to the officer's question you provided this answer spontaneously. It was the first thing that came to your mind. It was made at a time and in such a way that you did not have time to consider its consequences and you did not have time to concoct an answer. As a spontaneous utterance, made in circumstances where there was no reason to lie or fabricate, I find that this statement has great validity and that I can rely on it. You were being truthful to the officer when you stated that your last drink was around 8:00 or 8:30 p.m.

With these considerations in mind, I am satisfied that your last drink was more likely around 8:00 or 8:30 p.m., as you initially advised the officer, and not at 2327 hours or within 15 minutes of providing your breath samples to the officer. I do not accept your evidence that you had a drink at your uncle's which you finished within 15 minutes of providing either of your breath samples. There was no need for the officer to wait for an elimination period to allow mouth alcohol to dissipate prior to obtaining either of your breath samples. I am satisfied that each of the ASD results accurately measured your BAC and that these results can be relied on when reaching my decision in this review.

Sub-section 215.41(2) of the Act states that "fail" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood." The Act provides consequences for a person who provides a breath sample resulting in a "FAIL" indication on an ASD. The Act refers to "fail" results on ASDs and not BAC levels. In your case, I have concluded that both breath samples you provided resulted in "FAIL" results on each of two ASDs. Sub-paragraph 215.5(4)(b)(iii) of the Act states that a driving prohibition must be revoked if I am satisfied that the ASD did not register the "FAIL" as a result of your BAC being not less than 80 mg%. There is no evidence in this review on which I could conclude that your BAC was less than 80 mg%.

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

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(1) of the Act. I note that as you have already served 12 days of the prohibition, you need only serve the remaining 78 days of the prohibition which recommences October 17, 2013. The prohibition ends January 2, 2014. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance

Corporation of British Columbia.

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

s.15

Adjudicator

cc: Sarah Leamon (by fax)
(604) 370-2505

September 26, 2013

s.22

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

Introduction

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

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

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

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

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

Preliminary Matters

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

Two of the grounds on which you applied for a review do not apply to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

There is one issue my decision on which determines this review.

- If you failed or refused to comply with the demand, did you have a reasonable excuse?

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 September 26, 2013. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

cc: Diego Solimano by fax: 604 687-8996

November 5, 2013

s.22

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

On October 16, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Ms. Lee submitted that there is no evidence that your ability to drive was affected by alcohol. Ms. Lee referred to the case of *Wilson v. Superintendent of Motor Vehicles* 2013 BCSC 1638.

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

Ms. Lee stated that the date in the jurat in the Report to Superintendent (the "Report") appears to be crossed out and changed. Further, she submits that the officer failed to initial the change. While I acknowledge this change in the jurat, I am satisfied that the jurat contains a signature and therefore, the Report is properly sworn.

Ms. Lee provided a copy of your driving record; Ms. Lee lawyer argued that your driving history demonstrates your evidence of good character, which must be considered pursuant to the *Hathaway* decision. In this decision, the applicant provided evidence of good character from other people. Unlike *Hathaway*, you chose not to provide evidence from anyone else to substantiate your driving practices and your version of events. You were not required to do this, but it serves to distinguish your situation from *Hathaway*.

Further, if I were to rely on your driving record as a statement of your good character and your propensity to not drive after drinking, I would have to consider the driving record of applicants with multiple alcohol-related driving offences for the opposite conclusion. I am not permitted to do the latter, so in keeping with administrative fairness and natural justice, I cannot consider your driving record as relevant to this review. I am authorized by the Act to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

In the Report the officer reported that you were driving or in care or control at 2245 hours on October 16, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer reported that you failed to come to a stop at a stop sign and you were paced at 100km/h in a 50km/h zone. The officer notes that you were identified as the driver via your BC driver's licence.

In the IRP Notice and the Vehicle Impoundment (VI) Notice the officer recorded: "at 2245 hours on Harvie Road/88th Avenue at Surrey the driver was operating a motor vehicle".

Ms Lee questioned the reliability of the time of diving with relation to the time the officer formed his suspicion at 2309 hours (25 minutes later). Ms. Lee submitted that given the nature of the stop and the very fact that the officer described you as cooperative and polite supports the unlikeness of that particular time.

Ms. Lee provided two of previous decisions to illustrate prohibitions with similar fact patterns with regard to the time of driving are often revoked. Ms. Lee noted in *Modhgill v British Columbia*

(*Superintendent of Motor Vehicles*) that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

In considering this I find the officer more than likely recorded the time he initially observed you rather than the actual stop. I acknowledge that the officer has not provided an explanation for the delay however, I am not convinced that it negates his recorded time of driving.

I have also turned my mind to the case in *Johnson v the Superintendent of Motor Vehicles* 2002 BCSC 89 where the Court ruled that it is not sufficient for a petitioner (appellant) to make 'suggestions' about what might have happened. Evidence to support the suggestion is required in an administrative review. You have not provided any persuasive evidence that shows the time of driving occurred at any other time.

I am satisfied that the vast majority of the evidence supports that you were a driver within the meaning of section 215.41(1), of the Act at 2245 hours.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2311 hours and 2315 hours, both resulting in "FAIL" readings.

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

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2312 hours.

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

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2315 hours.

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

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101660 and your second sample of breath into ASD serial number 101659. The officer also provided the Certificate of a Qualified ASD Calibrator for the same serial numbers.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on October 1, 2013, he checked the calibration of ASD serial number 101660. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as September 20, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 1, 2013, he checked the calibration of ASD serial number 101659. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as September 20, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In point 4 of your affidavit you stated that you consumed three beers between 4:30 p.m. -6:30 p.m.

In point 5 and 6 you stated that you have a pre-existing medical condition, s.22 and in May 2013 your doctor prescribed s.22 for this condition. You provided a photo copy of your prescription. You stated that on October 16, 2013, you forgot your prescription at home which worsened your symptoms.

In point 12 you stated that you told the officer that you had not been drinking because it was so long ago.

In point 15 you stated that before you blew into the device you were experiencing the heartburn feeling and stomach acid was backing up in your throat. You stated that you were burping.

In point 20 you stated that you are certain there was fewer than 15 minutes between the last time you burped and the time you blew into the second ASD.

In the hearing, Ms. Lee submitted that you have provided evidence to indicate that you suffer from a medical condition which causes acid reflux and frequent belching.

Ms. Lee submitted a report from Mr. Nizar Shajani, an expert in forensic toxicology and a blood alcohol expert. In summary, Mr. Shajani states that the proper procedure for obtaining reliable breath test results mandates that the subject be observed for at least 15 minutes prior to any breath test. He states that this observation must be face to face and uninterrupted to ensure there is no burping, belching, or regurgitation which could falsely elevate the test result.

Ms. Lee also provided a document from the RCMP entitled, "Resource Reading – Operators Approved Screening Devices." Ms. Lee directed me to section "D" labeled Mouth Alcohol.

I have considered the evidence before me, and I accept the evidence from Ms. Lee that belching can cause an elevated result on the ASD.

With regard to credibility, Ms. Lee provided me with the case of *Scott v. the Superintendent* for my consideration. In support of her arguments Ms. Lee referenced, but did not provide, the cases of *Spencer v. Superintendent of Motor Vehicles*, and *Gillies v. Superintendent of Motor Vehicles*. Ms. Lee submitted that the officer is not presumed to have a credibility advantage over you, and this case must be determined impartially on the evidence. She noted that credibility is a finding of fact which must be reviewed on a standard of reasonableness.

I note that I have read them and am familiar with the principles set out in each case, and I am mindful of and have applied them in conducting this review.

Parts of your evidence raise questions in my mind. You said that you are ‘certain’ that your last burp was within 15 minutes of the second ASD test. However, you did not explain why you are certain of this. I also find it noteworthy that even though it had been hours since you had consumed any alcohol the officer detected a moderate odour of alcohol on your breath when he stopped you.

I do not find your claim that you burped moments before the second analysis to be credible. I find that the officer checked the box beside ‘yes’ for the question was the driver observed continuously from the time of driving or care or control. While I acknowledge that you may have been unaware that burping could impact the test results this is not the case with the officer as set out in the excerpt from the RCMP Resource Reading. I can conclude from this that it is more likely than not that the officer would ultimately watch for burping, and act accordingly.

You state that you did not think to tell the officer about your burping, despite your statement in your affidavit that this is a recently new medical condition that you are suffering from. It is also noteworthy, that given that you forgot your medication which worsens the symptoms I would think that this would be in the forefront of your mind.

Finally, in regard to the two “FAIL” ASD tests on two separate ASDs – both of which I have already found to be functioning properly on the night in question you have not convinced me that the test results are for any other reason than your BAC was not less than 80 mg%. In addition, I note that section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 16, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Kyla Lee, Acumen Law Corporation
Fax: 604-685-8308

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" however, that ground is not applicable to your situation because you did not receive a refusal IRP. I have considered all the grounds available to you.

On October 4, 2013, I contacted Paul Doroshenko to conduct the hearing. Mr. Doroshenko informed me that the file originally belonged to Kyla Lee, and that she had a more thorough understanding of your situation. Mr. Doroshenko asked for the hearing to be rescheduled so Ms. Lee could conduct the review. The hearing was re-scheduled to October 8, 2013.

At the beginning of the hearing Ms. Lee confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you advised of your right to a second analysis?

Based on the evidence before me, I do not find that I have sufficient evidence to indicate that you were advised of your right to a second analysis.

I am satisfied that you were not advised of your right to a second breath test analysis.

Having made this finding, I do not need to consider any further grounds in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

OCTOBER 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Dilraj Gosal. I proceeded with this review based on that confirmation.

Your lawyer argued that the investigating officer did not provide evidence that is required of section 215.41(3.1)(b) of the Act. He relied on the *Wilson* case as authority for this argument. I have read and considered *Wilson*, and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

On page seven of his submission, Mr. Gosal made a general statement saying it is a violation of the fundamental principles of natural justice and fairness, and procedural due process that the application form states that the enumerated grounds are the only grounds for review. He said the form seems to wrongly exclude arguments under the *Canadian Charter of Rights and Freedoms* (the "Charter"). I note that Mr. Gosal did not make any Charter arguments on your behalf. Further, the standard of review and the rules of evidence are different in an administrative review than in a criminal proceeding. The scope of the review is limited to the grounds as defined in section 215.5 of the Act. I am authorized to consider only those grounds that are directly related to the issues outlined below.

In Mr. Gosal's third argument, he stated that your name was misspelled on a fax sheet from this office. Your lawyer argued that the effect of this error is that I do not have jurisdiction over this matter; Mr. Gosal did not provide a legal authority to support this argument. While it may be offensive that someone in this office spelled your name wrong, there is nothing before me to indicate that you were prejudiced in any way by this clerical error. This matter is not relevant to the issues I am authorized to consider.

Mr. Gosal also noted that a box was checked on the application form indicating that your driving record was included in the disclosure documents. I agree that your driving record is not something I am authorized to consider in this review; however, it was not provided to me in disclosure, so your lawyer's argument is not relevant to this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative Text Hardcopy (the "Narrative"), Constable Logan indicated that a witness

called the police to report that a driver was swerving all over the road and hitting a curb several times. The officer said the witness identified the driver by providing a description of the driver's "very bright yellow shirt".

In the Report to Superintendent/Vehicle Impoundment (the "RTS/VI"), Constable Logan said the witness told the police that she saw the vehicle driving over lines and swerving and that she watched the driver exit the vehicle and stumble to pay for gas. The officer indicated that the witness maintained continuity of the driver until the police attended.

In the Report to Superintendent (the "RTS"), Constable Logan indicated that you were witnessed driving or in care or control of the vehicle at 0336 hours, on October 12, 2013.

In his written submission, Mr. Gosal argued that there is insufficient evidence to establish that you were driving or in care or control of the vehicle. He asserted that there is no direct evidence from "the alleged witness" noted in the officer's evidence. Mr. Gosal noted that the officer said the witness provided a statement, but the statement was not included in the disclosure documents. He argued that the officer's evidence from the witness is hearsay, so no weight should be given to it.

I disagree with Mr. Gosal on this point. Hearsay evidence is admissible in administrative proceeding such as this, as long as it is probative and reliable. The witness gave the police a specific description of the driver in question, identifying him as wearing a very bright yellow shirt. She also said she maintained continuity with the driver until police attended.

Your lawyer argued that the only description of the driver is the very bright yellow shirt. I find that a reasonable person would consider this to be an unusual detail; I find that it is more likely than not that the police did not mistake you for someone else in a very bright yellow shirt. While you are not required to provide any specific evidence, there is nothing before me to indicate that you were not wearing a very bright yellow shirt.

I agree with your lawyer that the officer did not provide any evidence that the person he identified as the driver was actually wearing a very bright yellow shirt. The officer's evidence is not comprehensive, but it follows a linear flow of events, starting with a witness alerting the police to a person who appeared to be driving while affected by alcohol and indicating that the witness maintained continuity of the driver until the police attended. I find it reasonable to infer that Constable Logan attended the place you were found as a result of the witness report. His evidence indicates that the witness waited for the police to arrive and identified you as the driver in question. While hearsay statements should be approached with caution, I am satisfied that in this case, the statements are reliable and probative.

Mr. Gosal cited the *Khelawon* decision to argue that the hearsay evidence should not be relied upon. Criminal cases such as this are instructive, but not determinative of administrative reviews. Your lawyer did not indicate how the hearsay rules in *Khelawon* apply in an administrative hearing. I am not persuaded to accept your lawyer's argument in this regard.

Mr. Gosal also argued that the presumption of care or control applies where the accused

occupied the driver's seat. He said this presumption is rebutted if the applicant establishes that he did not occupy the driver's seat for the purpose of setting the vehicle in motion. However, an argument about care or control of the vehicle is irrelevant, because I am satisfied that the witness saw you driving the vehicle, as set out in the officer's evidence.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, as set out in the officer's evidence.

Did the ASD register a "FAIL"?

In the RTS, Constable Logan said you provided a breath sample into an ASD and that the device registered "FAIL", as a result of the analysis. There is nothing before me to the contrary. I am satisfied that the ASD registered "FAIL" at 0343 hours, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative, Constable Logan indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis, but that you declined to take advantage of this opportunity.

Was the second analysis provided by the officer?

I am satisfied that the second analysis was not provided by the officer, because you did not request a second test.

Was the second analysis performed on a different ASD?

This issue is not relevant, because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that the ASD used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificate of a Qualified ASD Calibrator regarding the ASD used in your case indicates that the device was found to be functioning correctly and

was found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 9, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents was provided to you and your representative, Mr. Craig Sicotte. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?

- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0020 hours on October 9, 2013. The officer responded to a noise complaint, and arrived to your parked vehicle. You were identified as the driver of the vehicle, which was off at the time of the officer's arrival. The keys were found in the centre console/cup holder, and you then used the keys to start the ignition, enabling you to then roll the window down. You were identified with your BC driver's licence.

Mr. Sicotte made submissions on your behalf and sent your sworn affidavit and the case of *Lightfoot* in support. He submits that because your keys were not in the ignition, this is evidence the vehicle was not running, and you had no intention of moving the vehicle again that night. The case of *Lightfoot* stands for a necessary inspection as to the intentions of the person in control of the vehicle. In paragraph 18, the court determined that: "The intention of a driver is thus relevant to, but not determinative of, an assessment whether one has the care or control of a motor vehicle. . ."

Your affidavit contains the following:

- after dinner, the intention was to go to a friend's house;
- you were too early to enter your friend's house;
- around 11:00 pm, you parked the van you were driving;
- you provide the specific steps undertaken to park the van fully;
- you started drinking with your friends in the van, with the plan that you would then all walk to your friend's house after.

I follow the principle enunciated in *Lightfoot* in regards to your intent, and examine your evidence on this point. I am not fully satisfied of your intent however, in considering the following:

- you do not provide the address of your friend's house to fortify your evidence on this point;
- you do not provide the name of the friend whose house you were going to visit;
- you were waiting for your friend's parents to go to bed, though you do not state how you would ascertain this information.

I am not convinced on the veracity of your plan; the information you provide is non-specific in detail. I am therefore not convinced that you had no intention to drive the vehicle that evening.

I look to the other detail you provide to assess the risk involved in setting the vehicle in motion. The police initially attended at the location to respond to a complaint of loud music emanating from the van. While the officer did not report on the music's volume upon his arrival at the scene, I cannot ignore that evidence that at some point the music was playing loudly. In paragraph 3 of your affidavit you describe engaging the brake and shutting off the ignition, yet you then state you and friends sat in the van "for approximately 30 minutes listening to music." I reasonably infer that listening to music in a ^{s.22} involves engaging the ignition to some degree in order to power the car's audio. In paragraph 5 you state you removed the keys from the ignition; however you are not explicit in stating this occurred as soon as you started drinking.

In addition, the officer's evidence has him arriving at your vehicle and determining you were in care and control at 0020 hours. This is approximately one hour and twenty minutes after your estimated arrival time at that location. Listening to music involves some significant interaction with the vehicle, one that involves engaging the ignition, or even further turning the engine on to support battery function.

You have not provided evidence that satisfies me there was nothing to stop you from setting the vehicle in motion, this present ability to drive while affected by alcohol creates a risk of danger. I find the lack of a firm plan, combined with a risk of the vehicle being set in motion establishes evidence that you were in care and control of the vehicle when the officer encountered you.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that the ASDs registered "FAIL" at 00:25 and 00:32 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower result would prevail. He checked 'YES' to indicate that you had requested a second ASD test; the Occurrence Report 2 indicates he advised you at 0026.

I am therefore satisfied that the officer informed you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed on a different ASD?

I am satisfied that the second analysis was provided by the officer; you do not place this evidence into question.

In the Report, the officer lists ASD serial number 101687 for the second ASD test; this is separate and distinct from the first ASD used. I am satisfied that a different ASD was used.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". There is no evidence before me to the contrary; the penalty applied is therefore compatible with the lowest test result.

Were the ASDs reliable?

The officer provided Certificates of a Qualified ASD Calibrator for each ASD, in which L.E. Ewanyshyn certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, he certified that on October 1, 2013, he checked the calibration of ASD serial number 101698. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 29, 2013 and the service expiry date as January 11, 2014.

For the second ASD, he certified that on September 19, 2013, he checked the calibration of ASD serial number 101687. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 17, 2013 and the service expiry date as January 25, 2014.

There is no evidence to the contrary; I am therefore satisfied, based on the officer's evidence, that the ASDs were reliable at the time the officer used them to obtain samples of your breath.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 9, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Craig Sicotte
Sicotte & Henry
fax: 604-585-8964

October 29, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sukhbinder S. Nunrha. I have proceeded with this review based on that confirmation.

I acknowledge receipt of Mr. Nunrha's letter dated October 28, 2013.

Issues

There is one issue that is determinative of this hearing.

Was the ASD reliable?

After considering the evidence before me, I am not satisfied the second ASD was reliable.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

cc: Sukhbinder S. Nunrha
By Fax 604 594-8280

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 11, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Phil Cote. I note that Mr. Cote did not make submissions for this review; however, I have before me your one page submission.

You stated that the jurat in the Report to Superintendent (the “Report”) does not seem to be clearly signed, and that it looks like a roman numeral or numbers only. You indicated that it does not look like the neatly displayed signature of Constable Russell. While I acknowledge the signature in the jurat is a different style than Constable Russell’s, I am satisfied that the jurat contains a signature and therefore, the Report is properly sworn.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report, the officer indicated that you were driving or in care or control of a motor vehicle at 03:28 hours on October 11, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASDs registered a “FAIL” at 03:33 hours and 03:45 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that you were advised of your right to a second analysis on a different ASD and that the lower test result would prevail. In the Narrative, the officer reported that you stated you understood that you had an option but that you were scared and did not know what to do. The officer stated that you repeatedly asked him for advice and he repeatedly responded that he could not give you legal advice. The officer also stated that s.22 inally opted to his second test.”

You stated, “I was offered a second chance to blow [into] a different ASD”; however, you also stated that the officer threatened that if you did not blow the second time that he would give you the automatic \$500 IRP for refusing to blow. You stated that this consciously forced you to blow into the second ASD. You stated that your lawyers told you that “the officer is not to entrap [you] in [your] decision...”

I find your evidence to be somewhat conflicting because you said that you were “offered a second chance to blow” but also that the officer made threats about what would happen if you did not blow. I do not understand how you could deem the second test as being offered to you, but at the same time claim that the officer threatened you if you did not take it. As such, I find I am more persuaded by the officer’s sworn evidence that you were properly advised about the second analysis, and that you “opted” for the second test after the officer explained that he could not give you legal advice.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that you were provided with a second analysis and at 03:45 hours, and that the result of that analysis was a "FAIL".

You indicated that there was a 12 minute delay between the two ASD tests; therefore, the second test was not forthwith. You stated that your lawyers told you that there is a 6 minute window where you must blow in between the two tests.

Section 215.42 of the Act states that if a person registers a "WARN" or a "FAIL" on an ASD, that person has the right to "forthwith request" and be provided with a second analysis. There is no requirement under the Act for officers to "forthwith provide" the second analysis, nor are they bound by any time constraints, such as having to provide it within 6 minutes of the first analysis.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded two different serial numbers for the ASDs used in your case. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer submitted two Certificates of Qualified ASD Calibrator in which S/Sgt. Paul Milne certified that the ASDs used for your analyses were found to be within the recommended limits and functioning correctly when he checked their calibration on September 25, 2013. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Narrative, the officer stated that your speech was significantly slurred, your eyes were slightly glazed, you were very slow to respond to each of his questions, and he noted slow motor skills when you attempted to pass over your driver's licence. The officer reported that he noted a strong odour of alcohol and that you had difficulty answering his questions. He stated that for instance, when asked what you had been doing in Vancouver, you responded "Surrey, I'm going to my girlfriend's house". The officer stated that you admitted to having a few drinks and smoking a marijuana joint. The officer further stated that when asked to exit the vehicle, you used your right arm to stabilize yourself on the door, and then slowly and deliberately exited the vehicle. The officer reported that

you stumbled and swayed as you walked and that you swayed toes to heels as he spoke to you. The officer stated that you admitted that your last drink was about three hours prior.

You stated that the officer made a false accusation when he stated that you admitted to smoking a marijuana joint. You said that you do not smoke joints and the officer never asked you if you had used any marijuana substance. As well, you explained that you must naturally hold onto the door handle to safely exit the vehicle at any given time due to how high it is off the ground, and because

s.22 You indicated that your motor skills were not slow, that you were not disorientated, nor were you unstable with your balance at all. You said that you had no difficulty standing or walking. You indicated that the officer did not tell the truth in his evidence and he has painted an untrue picture of who you were that night.

I have considered your statements; however, I am not persuaded that the officer did not tell the truth in his evidence. I find it noteworthy that you did not provide me with any evidence with respect to your drinking pattern that night, nor did you explain why the officer would note a strong odour of alcohol if your last drink was three hours prior. Further, you did not deny that the ASDs registered a "FAIL". To the contrary, all you have done is deny the officer's evidence with respect to his observations of your indicia or provide an explanation for it.

I am mindful that I have already made a finding two different ASDs each registered a "FAIL" and that the ASDs were reliable. Further, under the Act, a "FAIL" reading on an ASD means that a person's BAC is not less than 80 mg% and I am satisfied that your indicia, as noted by the officer and which I accept, supports the "FAIL" test results.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 11, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the oral hearing I confirmed with your lawyer, Sarah Leamon, that full disclosure of the documents before me was provided to her. I have proceeded with this review based on that confirmation.

Ms. Leamon submits that aside from stating that you were swerving or drifting in your lane, the officer has not provided evidence that your ability to drive was affected by alcohol. She stated that there could be all kinds of reasons why a person would drift within their lane. She submitted and referred to the case of *Wilson v. Superintendent of Motor Vehicles* 2013 BCSC 1638 to support that the officer must provide evidence that he had reasonable grounds to believe that your ability to drive was affected by alcohol.

I have read and considered *Wilson* and I acknowledge Ms. Leamon’s submission with respect to the Court’s ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is

not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Ms. Leamon referenced the case of *Spencer v. Superintendent of Motor Vehicles*, and directed me to paragraph 63 where it states:

- Police are not deemed to have a credibility advantage and the case must be determined impartially on the evidence.
- The evidence is not to be unfairly parsed to create standards that are unknown to and unknowable by you.
- Such parsing as takes place, recognizes the deficiencies or gaps in the police record as well as those in your evidence.
- If there is insufficient evidence to decide the case, it must be resolved in favour of you, in line with the proper allocation of the burden of proof and the concept of a balance of probabilities.

I acknowledge Ms. Leamon's point, and I have proceeded with the review with *Spencer* in mind.

Ms. Leamon also referenced the case *R. v. Schultz* and indicated that the courts have held that the results of roadside screening devices are not to be utilized as evidence to incriminate drivers. This is because without the right to counsel, the ASD can only be used as an investigative tool to confirm or reject the police officer's suspicion that a driver might be impaired. However, the uncontested evidence in your case is that you did not provide a breath sample into an ASD. As such, I find Ms. Leamon's argument with respect to *Schultz* to be irrelevant in your case.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the constable reported that you were driving or in care or control of a motor vehicle at 00:55 hours on September 1, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Narrative, the officer indicated that the vehicle you were driving was swerving on the road within the lane, he stated that your speech was slurred, your eyes were glassy, you were stumbling when walking, there was a strong odour of liquor, and you said you had one beer. In the Report, the

officer stated that there was an odour of liquor on your breath, and you advised your last drink was at “2 o’clock”. The officer reported that he read you the ASD demand at 00:56 hours.

In your affidavit you stated that you consumed two glasses of wine at lunch, and you finished your last glass of wine around 2:00 p.m. You said that the officer asked you if you had consumed any alcohol and thinking back to the afternoon, you realized that you had consumed some wine at lunch and you answered “yes”. When the officer asked you when your last drink was, you truthfully answered that it was around 2:00 p.m. or so. You stated that your speech was not slurred, you said that you have never encountered the officer before, and he does not know how you normally speak or how your voice usually sounds. You also stated that you did not have a strong odour of liquor on your breath or person, and you did not stumble when you walked. You had no balance or coordination problems. You stated that you may have had glassy eyes that day due to the 14-day contact lenses you were wearing. You said that these lenses often cause your eyes to look glassy and irritated.

I have considered your evidence in which you have either denied or provided an explanation in response to the officer’s evidence with regard to the indicia he observed. However, I note that you did not address or deny the officer’s evidence that you advised him that you consumed one beer, yet for this review you have given evidence that you consumed two glasses of wine. You did not tell me that you told the officer the type or amount of alcohol you consumed; you only said that you realized you had consumed some wine at lunch and answered “yes” when asked if you had consumed any alcohol. Consequently, I do not know if you were dishonest with the officer at the roadside or if you have been dishonest in your affidavit for this review. As well, although you deny that there was a strong odour of liquor on your breath or your person as the officer reported, you did not specifically deny that there was “any” odour of liquor on your breath or person.

Further, I do not know what meaning you would like me to take from your statement that your speech was not slurred, and the officer does not know how you normally speak. Consequently, I do not know how your normal speech would lead the officer to “mistakenly” believe that you were slurring your words. Last, if you were with your daughter and her boyfriend who could have attested to your stated drinking pattern that day, I am left wondering why there is no supportive evidence before me from them.

I do not find your evidence to be very persuasive here, and I prefer the officer’s evidence with respect to his observations which led him to form his reasonable suspicion for the demand.

I am satisfied that the constable made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Narrative. The officer indicated that after giving you the ASD demand from memory, you stated “I won’t do it” and “I won’t give a sample”.

In your affidavit, you acknowledged that you told the officer you did not want to provide a breath sample.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative in the section titled “REFUSAL OR FAILURE TO PROVIDE BREATH SAMPLE” and the sub-section titled “Was the Driver informed that a refusal carried the same penalty as a “Fail” result?”, the officer stated “Yes”. In the sub-section titled “Did the Driver convey any reason why a sample was not provided?”, the officer stated “No”.

In your affidavit you stated that you asked the officer why you had to do the test, which appeared to make him very upset. The officer told you that you “just had to do it.” You told the officer that you were not impaired by alcohol, you did not understand why you had to do it, and he seemed angry with you. You told him that you were confused and you were simply trying to understand your options. You said that at that point the officer said, “if you refuse to provide a breath sample your car will be towed and you will get a driving prohibition.” When you asked what would happen if you provided a breath sample he stated, “well, if you ‘fail’ the test I can give you up to 120 days in jail.” You stated that you were shocked and afraid. You said that you have seen a lot of information in the news lately about how unreliable roadside breath tests are. You stated that because you consumed alcohol in the afternoon, you were worried that the device would show a ‘fail’. You stated that you could not risk going to jail and that based on what the officer told you, you told him you did not want to provide a sample.

Ms. Leamon submits that while the information provided to you by the officer may have been given in good faith, you relied solely on it and the possibility of spending 120 days in jail was terrifying to you. She stated that because of this you decided to take the 90-day IRP for refusing to provide a sample. Ms. Leamon provided and referred to the case of *R. v. Smith* to support that your prohibition should be revoked because of the information given to you by the officer, which caused you to refuse to provide a sample.

I have read and considered *Smith*; however, I am mindful that this is an administrative process and not a criminal proceeding. Further though, I am not convinced that the officer told you that he could give you up to 120 days in jail if you blew a “fail”. In his Narrative, the officer has provided evidence that he advised you that the penalties were the same for a refusal as they were for a “fail”, which is consistent with section 215.41 of the Act, and that you understood this. You have told me that the officer advised you that if you refused to provide a breath sample your car would be towed and you would receive a driving prohibition. It does not make sense to me that the officer would provide you with the correct penalties associated with a refusal, but then provide you with completely inaccurate penalties if you blew a “fail”.

I have also considered your statement regarding your concern about how unreliable roadside breath tests are, as you have seen in the news. When I consider this along with your alleged drinking pattern, I do not find your evidence to be very believable. I say this because you did not explain what, specifically, you saw in the news that would cause you to believe that two glasses of wine some 11 hours prior would cause the ASD to register a “fail”. I also note the officer’s evidence that you simply said “I won’t do it” and “I won’t give a sample”, and that you did not provide any reason why a sample was not provided. If your version of what the officer told you was true, then I would expect that you would have said something to him as to why you were concerned about providing a sample or why you would not provide a sample, such as that you were terrified of going to jail or that you were very concerned about the reliability of ASDs; however, that evidence is not before me.

IRP Review Decision

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In summary, I find that I have conflicting evidence before me with respect to how much and what type of alcohol you consumed, and I have unsupported evidence of your drinking pattern and what the officer allegedly advised you at the scene from the two people that were with you. I also have convincing evidence before me from the officer with respect to the indicia you displayed which supports that you were driving while under the influence of alcohol, and that you simply refused to provide a breath sample despite being advised of the proper consequences related to both a "fail" and a refusal.

I do not find your evidence to be credible and I prefer the officer's evidence.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Sarah Leamon
Fax: 604-370-2505

OCTOBER 16, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 28, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “fail” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Motor Vehicle Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a “fail”. Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer prior to your scheduled hearing. I have proceeded with this review based on that confirmation.

IRP Review Decision
Page 2

In your submission you stated that you require a driver's licence to transport yourself to and from work and to assist your parents with attending medical appointments. While I understand that a driving prohibition can result in hardship, in this review I am only authorized by the *Motor Vehicle Act* to consider and make decisions on the issues noted below.

Your lawyer, Lolita Rudovica, referred to the "Superintendent's Report on ASDs" (the ASD Report) in her submission. However, in accordance with the BC Supreme Court's decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the ASD Report which may have been disclosed to you and/or your lawyer is not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did 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 Report to Superintendent (RTS), Constable Reid indicated that on September 28, 2013, you operated or had care or control of a motor vehicle. In his Narrative Text Hardcopy (Narrative), the officer stated that at 03:15 hours, he was traveling south on Russ Baker Way in Richmond when he observed a vehicle speeding at almost double the speed limit. He pulled the vehicle over. You were identified as the driver, and your identity was confirmed by your driver's licence.

As there is no evidence before me to refute that of the officer, I am satisfied that you were a driver within the meaning of section 215.41, of the *Motor Vehicle Act*.

Did the ASDs register a "fail"?

Constable Reid indicated that he administered two ASD tests on you that morning; one at 03:20 hours and a second at 03:25 hours, both of which resulted in a "fail" reading.

In the absence of any evidence to the contrary, I am satisfied that the ASDs registered a "fail".

Were you advised of your right to a second analysis?

In section 7 of his RTS, Constable Reid indicated that after you failed the first ASD test, he advised you of your right to request a second test on a different ASD and that the lower of the two test results would prevail.

As there is no evidence before me to refute Constable Reid's evidence, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As indicated above, I am satisfied on the evidence before me that the officer provided you with a second ASD analysis.

Was the second analysis performed on a different ASD?

Constable Reid indicated in his RTS that he performed the first analysis using ASD serial number 040252, and used ASD serial number 101851 for the second analysis.

Based on the evidence, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicated that both ASD tests resulted in "fail" readings.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Along with his reports, Constable Reid submitted copies of two Certificates of a Qualified ASD Calibrator (Certificates), one for each of the two devices he used to perform your breath analysis.

For ASD serial number 040252, the Calibrator verified that on August 8, 2013, he checked the calibration of the device and found it to be within the recommended limits and functioning correctly. He recorded the calibration expiry date as September 5, 2013, and the service expiry date as November 7, 2013.

For ASD serial number 101851, the Calibrator verified that on August 8, 2013, he checked the calibration of the ASD and it was within the recommended limits and functioning correctly. He recorded the calibration expiry date as September 5, 2013, and the service expiry date as November 7, 2013.

IRP Review Decision
Page 4

I note that the officer has also sworn that he is a qualified ASD Operator and the ASDs used to perform your breath tests were functioning correctly.

In the absence of any evidence to the contrary, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

In his Narrative, Constable Reid stated that when he approached the driver’s side of your vehicle he detected the odor of liquor emanating from inside the cab when you rolled down the window. After confirming your identity he asked you to step out of your vehicle. He stated that he could still smell a strong odor of liquor emanating from you. When he asked you the time of your last drink, you denied consuming liquor and told him that you only take steroids.

In your submission, you stated that on the day in question, you did not have anything to drink; you were giving your very intoxicated friend, s.22 a ride home from the bar. You said that on the ride home, s.22 kept talking about drugs and said she wanted to use drugs. You said you used to be a drug user and this was upsetting you. You added that you spent a lot of money on laser treatments to stop drinking and using drugs. You said that the treatment worked and you do not drink alcohol at all. You enclosed a copy of an invoice and receipt for laser “Drug and Alcohol Main Package” treatments dated June 3, 2013.

You stated that one of the things you were taught to do when you have an urge to use is to spray something very unpleasant in your mouth which will eliminate the urge. You said that is what you did that evening; “prior to being pulled over [you] sprayed Fcuk Late at Night Him in [your] mouth about 15 times. This is a cologne.” You submitted a copy of an internet comment forum in which readers have posted comments about this product, highlighting a comment in which a writer stated that they didn’t bother with that particular scent because they have “found every Fcuk scent weak and loaded with alcohol.” You also submitted a copy of a print out from Wikipedia about alcohol based colognes, and highlighted a line which states that “colognes have about 3 – 5% perfume oil mixed with 80 – 90% alcohol.”

You also submitted a copy of an email from s.22 In her note, s.22 confirmed that you were dropping her off at home that night. s.22 also stated that, she was “extremely intoxicated at the time but believe[s] [she] remember[s] [you] spraying what seemed to be cologne.”

In considering your evidence, I note that:

- The officer indicated that he smelled the odor of liquor on you that night, not alcohol. I am not persuaded that an officer, trained to conduct impaired driving investigations, would mistake the odor of cologne for liquor.
- While you stated that you were trained to spray something unpleasant in your mouth when you felt the urge to use, it makes no sense to me that you would have been instructed to, or that you would have, sprayed a liquid containing alcohol into your mouth since you were receiving treatment for s.22

- I do not put any weight in s.22 statement, as she admitted that she was extremely intoxicated that night. I do not find her recollections to be reliable.
- Ms. Rudovica submitted that officers are trained to wait 15 minutes prior to conducting a breath test, if there is evidence of recent consumption. I assume Ms. Rudovica is referring to your claim of spraying cologne in your mouth that night. However, while you stated that you sprayed cologne in your mouth “about 15 times” “prior to being pulled over”, there is no evidence before me that you did this within 15 minutes of the time your breath tests were administered.
- The information you submitted indicating that colognes contain “80 – 90% alcohol” was taken from Wikipedia. I do not find Wikipedia to be a very reliable source for accurate information. Further, it is regarding colognes in general, not the specific brand or type that you alleged that you sprayed into your mouth that night.

Based on the points noted above, I do not find your evidence to be very compelling. I am not satisfied that mouth alcohol was a factor in your breath test results.

Section 215.41(2) of the *Motor Vehicle Act* states that a "fail" on an approved screening device indicates that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood. As I have already found the ASDs used in your case to be reliable, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

Your prohibition took effect on August 28, 2013. I note that as you have already served 14 days of the prohibition, you need only serve the remaining 76 days. Your prohibition recommences on October 17, 2013, and ends December 31, 2013. As a result of this prohibition, any driver's licences you may have in your possession will be cancelled, effective the day your prohibition recommences. When your prohibition ends you may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied for this review on a number of grounds that are not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of breath into an ASD. All grounds for review that apply to your case will be considered in this review.

In your written submission (the “Submission”), you state that, “pursuant to Section 215.42 of the *Motor Vehicle Act*, [you] had the right to request a second analysis to be performed with a different ASD than the one used in the first attempt.” On the Notice the investigating officer

alleged you were served with a 90-day refusal. The right to request a second test, on a different ASD, is not applicable in your situation because a suitable sample was not provided.

You submit that you have no negative history of bad driving. I have authority to consider a person's driving record in a limited capacity. The facts of your case do not fall within this capacity, therefore, I have not considered your driving record in this review.

You submit that you are s.22 are currently trying to locate work, and that the use of your vehicle is very important for seeking employment. You ask me to revoke your driving prohibition so that you can continue to seek gainful employment. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Boyce indicates that you were driving or in care or control of a motor vehicle at 0240 hours on September 1, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Boyce submits that he was conducting a roadblock on Alderbridge Way in Richmond when your vehicle approached. You were observed as the lone occupant and driver and your identity was confirmed with a British Columbia driver's licence.

In your Submission, you state that you were stopped at a roadblock on Alderbridge Way in Richmond and that Cst. Boyce told you to, "pull [your] car over to the right and get out...[you] complied."

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

Evidence in the RTS indicates that at 0241 hours, Cst. Boyce formed reasonable suspicion that you were driving or in care or control of a motor vehicle, with alcohol in your body. In the Narrative, Cst. Boyce submits that after encountering you at a roadblock he detected a strong

odour of liquor on your breath, observed that you had glassy, red, watery eyes, and a pale face. At 0242 hours an ASD demand was made on you. Following the demand he submits that you advised him that you did not speak English.

You indicate that you had dinner at 2000 hours and consumed one can of regular beer. You encountered Cst. Boyce at a roadblock where he asked you to pull your vehicle over and exit. After complying, you submit that Cst. Boyce read something to you but you told him that you did not speak English.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle, with alcohol in their body. Upon approaching your vehicle, Cst. Boyce detected a strong odour of liquor on your breath, observed that your eyes were glassy, red, and watery, and that your face was pale. After advising him that you did not speak English, a Cantonese speaking member, Cst. Liu, was requested on scene. Prior to his arrival, you spoke to Cst. Liu over the phone. After speaking with you, he advised Cst. Boyce that you fully understood what the situation was and that a sample of your breath was required.

Based on the evidence before me, I am satisfied that the peace officer made a valid ASD demand.

At 0243 hours, Cst. Boyce provided a demonstration to you on, "exactly how the test is administered and how a breath sample is provided." After completing the demonstration, he submits that you nodded your head in, "an approval or understanding." He directed the ASD toward your mouth and submits that you swatted his hand away, making contact. Following this, you spoke to Cst. Liu and he instructed you to provide a breath sample or that you would be served a 90-day prohibition from driving and a 30-day vehicle impoundment. Cst. Boyce attempted to re-administer the test and submits that you grabbed the ASD from him. He states that you used the ASD similar to a, "Saxophone on three occasions without ever attempting to blow into the machine." He also submits that you were laughing hysterically and did not take the *Criminal Code* demands or him seriously. You were advised that you had failed to provide a breath sample, without a reasonable excuse, and a refusal was deemed at 0255 hours.

In your Submission, you state that you spoke to Cst. Liu over the phone. You submit that he talked with you about Cst. Boyce's next steps but he did not provide you with instructions on how to blow or the procedure. You submit that the first time you tried to blow that you held the machine and Cst. Boyce's hand but it was swatted away by Cst. Boyce. The second time you attempted to blow, you assert that the ASD did not make a reading. On your third attempt, you state that it was your natural response to hold the machine and blow into it again, however, that when you proceeded to do so Cst. Boyce took the machine away and got mad.

I accept that Cst. Liu acted as an interpreter over the phone. On this point, you submit that he told you generally about taking the breath sample but did not explain detailed procedures. However, police evidence indicates that you fully understood what the situation was. I am persuaded by the evidence before me that the necessary information for you to understand that a breath sample was required was provided. I also note that you do not deny that Cst. Boyce

demonstrated how the test is administered and how a breath sample is provided prior to your first attempt. Considering this, I am satisfied that the information provided by Cst. Liu was complimented with a live demonstration by Cst. Boyce about how to provide a sample. The evidence before me indicates that during both explanations you did not impart that you did not understand.

You assert that Cst. Liu did not advise you that you were not allowed to hold the device and submit that when you held the ASD Cst. Boyce swatted it away. I note that police evidence indicates that you swatted away Cst. Boyce's hand. On this point, you indicate that on your second attempt to provide a sample of breath that you, "did not touch the hand or machine of Cst. Boyce." I feel that a reasonable inference can be made that by not handling the device on this attempt that you understood handling the ASD was not permitted. Subsequently, on your third attempt you held the ASD and submit that Cst. Boyce took the device away in anger. I feel that a reasonable inference can be made that you understood that you were not to handle the device and did. This caused Cst. Boyce to remove the ASD because you were failing to provide a sufficient sample. Further, your explanations of each attempt provide no explicit evidence that you placed your mouth around the ASD mouthpiece and blew. Instead, you submit that you never refused to provide a sample of your breath because you were abruptly interrupted on your first and third attempts and that the device did not measure a reading on your second attempt. However, later in your Submission you assert that the, "first two times [you] tried it could not produce a reading of WARN or FAIL. The third time [you] attempted to blow...Cst. Boyce suddenly got angry and took the machine away." You also submit that Cst. Boyce swatted the machine away on your first attempt yet claim that you were not given an adequate amount of time to blow. I feel that a reasonable inference can be made that if Cst. Boyce swatted the machine away, as you claim, that your ability to blow into the device would have ceased and the amount of time given to provide a suitable sample would be null.

I am persuaded by the evidence before me that during your three attempts to provide a suitable sample of your breath that you did not come in contact with the ASD mouthpiece. You submit that the ASD was abruptly taken from you twice, however, you also submit that on all three occasions the ASD did not provide a reading. Further, the evidence you provided regarding Cst. Boyce's behaviour (i.e. swatting, removing the device in anger) does not correspond with your arguments that you were not provided enough time to provide a sample and the device was faulty because it did not produce a reading of WARN or FAIL.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

I have no evidence before me that you advised Cst. Liu, at any point during the investigation, that you were having difficulty understanding what was required of you or that you did not understand Cst. Boyce's demonstration. Moreover, following this demonstration you nodded your head in affirmation; you do not refute this action. You also submit that you waited twenty minutes for Cst. Liu to arrive on scene and hoped that he would offer to administer the test in Cantonese, with on site instructions, but that he did not. I have no evidence before me that you advised Cst. Liu of your desire to conduct the test with him present or that you required on site

instructions in Cantonese. Instead, police evidence submits that on two separate occasions you imparted to Cst. Liu that you understood what was required of you and the consequences of failing to comply. I also note that Cst. Boyce asked you for your driver's licence, to pull your vehicle to the right, and exit the vehicle. Your Submission does not refute this. I feel a reasonable inference can be made that a language barrier was not so pronounced that you were unable to understand and comply with Cst. Boyce's instructions prior to him making an ASD demand on you. You assert that you found it difficult to communicate with Cst. Boyce, which led to a lot of miscommunication at the scene. I have no evidence before me that after advising Cst. Boyce that you did not speak English, that at any point during the investigation, you advised him or Cst. Liu that you required an interpreter on scene. This is supported by the fact that you, "tired to go along and comply with the instructions as best [you] could." I acknowledge that Cantonese is your first language, however, I am not persuaded that a language barrier impeded your ability to comprehend the live demonstration provided by Cst. Boyce on how the test would be administered and how a breath sample was provided. On a balance of probabilities, I am satisfied that you understood what was required of you in order to provide a suitable sample, you were told and understood the consequences of not providing a sample, and that you chose not to comply with the ASD demand on three occasions.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that your lawyer, John Chak, has received all of the disclosure documents. I will proceed with my review based on this confirmation.

In your application for review, you checked the boxes next to every review ground; however, since your IRP was served on the basis of an ASD “FAIL” result, the grounds associated with an ASD “WARN” result, and the grounds associated with a refusal to comply with the ASD demand, are not relevant to the issues before me. Similarly, as you received a 90-day IRP, I cannot consider the ground that your 7-day or 30-day prohibition should be reduced.

Your written review was scheduled for September 30, 2013, at 9:30a.m. To date I have not received any submissions from you or Mr. Chak. Consequently, I proceeded with the review with the material before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 0244 hours on September 17, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer reported that he was dispatched to River Rock Casino with regard to an impaired driver. The officer stated that he conducted a roadside stop of the reported driver and you were identified as the driver.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 0247 and 0301 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 24, 2013, he checked the calibration of ASD serial number 101468. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 21, 2013, and the service expiry date as August 2, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 13, 2013, he checked the calibration of ASD serial number 101854. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 11, 2013, and the service expiry date as February 1, 2014.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs and the corresponding results were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 17, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: John Chak by fax: [604] 282-7509

November 12, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on thirteen review grounds, five of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. I have proceeded with this review based on that confirmation.

Ms. Lee submitted that reasonable grounds to believe that an individual's ability to drive is affected by alcohol require both a subjective and objective element. She said that the officer must have a subjective belief that the driver's ability to drive is affected by alcohol and the subjective belief must be objectively reasonable. In support of her argument on this issue she provided the case of *R. v. Andree*.

Ms. Lee also made submissions with respect to the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*. I have read and considered *Wilson* and *Andree* and I acknowledge Ms. Lee's submission with respect to the Court's ruling in these cases. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the officer reported that you were driving or in care or control of a motor vehicle at 02:52 hours on October 19, 2013.

There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 02:54 hours and 03:01 hours, respectively.

There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), the officer indicated that you were advised of your right to a second analysis and that you requested one. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that you were advised of your right to a second analysis and you requested one.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 03:01 hours.

There is no evidence before me disputing that of the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two different ASDs were used for each. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD tests registered a "FAIL" result. There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificates for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on September 28, 2013, he checked the calibration of ASD serial number 101865. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 26, 2013, and the service expiry date as August 2, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 29, 2013, he checked the calibration of ASD serial number 100986. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 27, 2013, and the service expiry date as August 2, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 19, 2013. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Kyla Lee,
Fax: 604-685-8308



October 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that you received all of the disclosure documents. I have proceeded with this review based on this confirmation.

You applied for the ground ‘I had a reasonable excuse for refusing or failing to provide a breath sample’; however, that ground is not applicable to the type of prohibition that you were served by way of Notice. For your benefit, I have considered all relevant grounds in this review.

On your behalf your lawyer Mr. Gurjit Tiwana outlines the hardship this IRP imposes on you and your business. I am not authorized under the Act to consider hardship in arriving at my decision. I make my decision on this review on this issues as outlined below.

Your lawyer contends that the officer did not have grounds to make an ASD demand, and that the demand is not valid. He lists the following reasons for this assertion:

- the officer was not certain of the odour of liquor;
- an eye ailment describes your glassy eyes;
- your quiet, slow voice could be attributable to a language barrier;
- you were very tired at the time of the interaction with the officer;
- your driving behaviour was due to texting while driving;
- the officer didn't ascertain the time of your last drink;
- sufficient evidence of a demand must be made clear to a driver; and
- the officer made the demand when you were no longer in care and control of the vehicle.

Despite these submissions that the validity of the demand is at issue in this review, I conclude it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the officer's demand is not a stated ground in that section, meaning that it is not a ground of review on ASD "FAIL" IRPs. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL"?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Henderson – indicated that you were driving or in care or control of a vehicle at 2250 hours on September 17, 2013. Cst. Henderson provides in the occurrence report that: he was investigating a report of a caller identifying a possible impaired driver; he stopped your vehicle after observing it swerve to the side of the road and then back over the centre line of the road. Upon stopping your vehicle, he asked you to exit the vehicle, and then he identified you as the driver of the vehicle, confirming your identify with your driver's licence.

Mr. Tiwana confirms the detail of the officer's evidence where you described the reason for your driving behaviour to the officer: you were sending a text message on your phone at that time.

I accept this as confirmation that you were driving at the time the officer stopped your vehicle. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 2300 and 2317 hours.

Mr. Tiwana presents no evidence contrary to that of the officer on this point.

I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test.

Mr. Tiwana presents no evidence contrary to that of the officer on this point.

Based on this, I am satisfied that the officer advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'FAIL' at 2317 hours.

With no evidence to the contrary, and your statements describing two "FAIL" readings, I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

The officer records a separate ASD serial number for the second analysis that took place at 0111.

Mr. Tiwana presents no evidence concerning the ASDs on your behalf.

I am therefore satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator Jason Parker certified that on August 24, 2013, he checked the calibration of ASD serial number 100986. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 21, 2013 and the service expiry date as August 2, 2014.

For the second ASD, the qualified ASD Calibrator Iain Baird certified that on September 10, 2013, he checked the calibration of ASD serial number 101853. He found the ASD to be within the

recommended limits. He recorded the ASD calibration expiry date as October 8, 2013 and the service expiry date as June 12, 2014.

Mr. Tiwana submits that the officer did not proceed correctly by not ascertaining the time of your last drink, and therefore did not institute a fifteen-minute waiting period immediately after making a demand. This is despite the officer's observation of a bottle in your vehicle in the centre console. I infer this submission is made to draw attention to the officer's incorrect questioning and observation of indicia which may indicate the recent consumption of liquor. Mr. Tiwana does not provide that the lack of a fifteen-minute waiting period affected the test results in any manner; there is no evidence to suggest you had consumed anything in the immediate timeframe prior to the officer pulling your vehicle over and beginning his interaction with you.

I therefore find the ASDs reliable at the time the samples were taken, with no evidence established to contradict that of the officer on this point.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 17, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Gurjit Tiwana
Sandhu Tiwana
Fax: 604-598-3326

October 21, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 7, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that disclosure documents were faxed to your lawyer, Kyla Lee. I will proceed with the review based on this confirmation.

You checked the boxes next to five grounds on the application form. However, the ground associated with a refusal or failure to comply with a demand are not applicable to your situation. I will consider all grounds available to you in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Was the ASD reliable?

After considering the evidence before me, I am not satisfied the ASD was reliable.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator s.15

cc: Kyla Lee 604 685 8308

November 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

In the hearing, your lawyer, Don Muldoon, submitted that section 215.41(3.1) of the Act states:

- If, at any time or place on a highway or industrial road,
- (a) a peace officer makes a demand to a driver under the Criminal Code to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, **and**
 - (b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,
- (emphasis added)**

Mr. Muldoon submitted that the inclusion of the word “and” implies that the requirement is that both of these criteria are met. Mr. Muldoon provided *Wilson v. Superintendent of Motor Vehicles* and stated that there is no basis in law to distinguish the facts of *Wilson* from the facts of your prohibition. Mr. Muldoon stated that the officer has not provided any evidence to indicate that your ability to drive was affected by alcohol. Mr. Muldoon noted that the only indicium of impairment noted by the officer was the odour of liquor on your breath. Mr. Muldoon also noted that the officer indicates an odour of liquor from the vehicle, but does not account for the presence of the passenger.

I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground. I have considered all grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 0116 hours on October 13, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you performed a U-turn while approaching a road block and were subsequently pulled over. You were identified as the driver via your BC driver's licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 0119 hours and 0122 hours, both resulting in “FAIL” readings.

I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0120 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0122 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 093995 and your second sample of breath into ASD serial number 093987. The officer also provided the Certificate of a Qualified ASD Calibrator (the “Certificate”) for ASD serial numbers 093995 and 093987.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “FAIL” reading. The lowest analysis result was “FAIL”.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on September 25, 2013, he checked the calibration of ASD serial number 093995. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 23, 2013, and the service expiry date as November 19, 2013.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on

September 25, 2013, he checked the calibration of ASD serial number 093987. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 23, 2013, and the service expiry date as November 19, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on all grounds, many of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Philip Cote. To date, I have not received any submissions from Mr. Cote or from you. As such, I have proceeded with this review on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the officer indicated that he witnessed you driving or in care or control of a motor vehicle on September 13, 2013, at 20:41 hours.

There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 13, 2013, at 20:41 hours.

Did the ASD register a "WARN"?

In the Report, the officer indicated that you provided a sample of breath into an ASD at 20:44 hours and registered a "WARN". There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that the ASD registered a "WARN".

Were you advised of your right to a second analysis?

The officer's evidence is that you were informed of your right to a second test but you did not request one.

There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

As noted, I have made a finding that you were informed of your right to a second analysis but you declined it. On this basis, I am satisfied that a second analysis was not requested and therefore not provided by the officer.

Was the second analysis performed on a different ASD?

As there is only one breath analysis, and you did not request a second test, there was no requirement for the use of a second ASD.

Was the Notice served on the basis of the lower analysis result?

As there was only one breath analysis, I am satisfied that the Notice was served on the basis of the "WARN" result.

Was the ASD reliable?

The evidence provided by police in the Certificate of Qualified ASD Calibrator regarding the ASD used in your case indicates that the device was in good working order and that the result is reliable. Based on the evidence before me, I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your 3-day driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on September 13, 2013.

Adjudicator

cc: Philip Cote

Fax: 778-395-6226

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jason Tarnow. I have proceeded with this review based on that confirmation.

I have before me a British Columbia Driving Record Search. I do not have authority to consider a person's driving record in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the investigating officer indicates that you were driving or in care or control of a motor vehicle at 0008 hours on September 14, 2013. Further, in the General Occurrence Hardcopy - Synopsis - 1 (the "Synopsis"), the officer submits that at 0008 hours a Starlight Casino (the "Casino") staff member, s.22 reported an impaired driver in the Casino parking lot at 350 Gifford Street. s.22 indicated that the vehicle was driving around the parking lot, parked, and that the driver exited the car. In the General Occurrence Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer submits that surveillance cameras maintained continuity of the driver, as did security on the ground, as he parked the vehicle and began walking toward Gifford Street. In the Synopsis, the officer submits that the male went around the corner and that surveillance could not see him because of some bushes. However, at the point visual contact was broken the officer indicates that he had come off of Boyd Street onto Gifford Street and observed the male walking south on Gifford Street. Accordingly, he submits that he approached the male and s.22 confirmed that he was in fact the driver.

Mr. Tarnow writes that on September 14, 2013, just past midnight, you left the Casino on foot, heading towards a nearby location where you had arranged for your wife to pick you up. While walking towards your wife's vehicle, the officer drove towards you, exited his police cruiser, and commenced an IRP investigation. Accordingly, Mr. Tarnow submits that the officer's narrative commences with information received from s.22 and that his supplemental report/narrative is almost entirely hearsay, if not double hearsay. Referencing Paragraphs 17 and 18 of *Jacobs v. British Columbia (Superintendent of Motor Vehicles)*, 2013, BCSC 1353, Mr. Tarnow indicates that while hearsay evidence is admissible in administrative hearings, if considerable weight is given to it there should be some corroborative evidence to support it. As such, he submits that what would have permitted the officer to rely on the hearsay evidence of s.22 is if he had reviewed the surveillance video he indicates that he retained a copy of. Instead Mr. Tarnow submits that it is likely the officer simply retained the video but took no steps to verify the accuracy of the evidence provided by s.22 because the related date/time of the Synopsis is indicated as Saturday, September 14, 2013, at 0100 hours.

In *Jacobs*, Savage J. indicated that the adjudicator upheld the driving prohibition by relying on a hearsay statement from an unknown source contained in the officer's narrative report.

In the case before me the officer's evidence is that you were observed driving by s.22 who relayed his observations to police dispatch. I note that s.22 is named and his particulars (i.e. location, contact information) are included on page 1 of 15 in the Occurrence Report. Also different than *Jacobs*, in section 9 of the RTS, in response to how he established that you were a driver, the officer indicated, "Other (explained in narrative)." Accordingly, in the Synopsis and the Occurrence Report, the officer distinguishes evidence provided by s.22 from evidence he observed first hand. While I have considered Mr. Tarnow's submission that the officer relied on double hearsay, I note that the information provided by s.22 to police dispatch led the officer to your location on Gifford Street. This leads me to conclude that the information provided by s.22 to police dispatch and then to the officer was reliable.

On this point, Mr. Tarnow submits that there is no evidence as to the vantage point of s.22 other than from where he was watching there was an obstruction (i.e. bushes) in his sightline. However, the officer's evidence is that both video surveillance and security on the ground maintained continuity of you. Specifically, in the Occurrence Report, the officer indicates that s.22 on the ground that was, "following the driver on foot." Moreover, in the Synopsis, the officer addresses the fact that visual contact was broken by indicating that at that moment he had turned onto Gifford Street and observed you walking south on the same street.

Mr. Tarnow also submits that the officer provides no evidence as to the lighting and amount of people present in the Casino parking lot or on Gifford Street. I infer from these submissions that he would like me to find that s.22 may have mistaken another male for you and that all that can be said with certainty is that you were stopped by the officer on Gifford Street. On this point, Mr. Tarnow submits that had the officer reviewed the surveillance video that he indicates he retained a copy of this would have allowed him to corroborate the hearsay evidence provided by s.22 I have no evidence before me that the officer did not review the video, rather Mr. Tarnow suggests that because of the time indicated in his report that the officer would not have had time to view the video. Further, in the Occurrence Report, the officer indicates that, "Surveillance cameras maintained continuity of the driver, as did security on the ground, until the driver was stopped by Cst. SCOTT." I conclude from this evidence that surveillance video was not the sole means by which your movements were observed.

Moreover, in your Affidavit, you submit that your wife was waiting on Gifford Street when the officer approached you. Specifically, that you were within, "5 meters of [your] wife's location." I am left wondering why your wife has not provided any evidence for this review to support your claim. I also note that the officer does not provide any evidence that your wife was present when he encountered you on Gifford Street. I find it noteworthy that you would tell your wife to drive home without you, if you knew you were being questioned by the officer regarding your alcohol consumption that evening. Further, I find it odd that if the officer exited his police cruiser and began questioning you about your alcohol consumption, why at this point you did not explicitly state that you had walked directly from the Casino to Gifford Street to be driven home by your wife and had not been driving for hours. Although you submit that you were surprised by the officer's questions, I have no persuasive evidence before me that you were not driving at 0008 hours on September 14, 2013.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASD registered a “FAIL” at 0022 hours. There is no evidence before me to the contrary.

I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. Moreover, in the Synopsis, the officer indicates that at 0024 hours he read the right to a second sample, that you understood, and declined the second sample.

In your Affidavit, you deny ever being informed of your right to provide a second breath sample into a different device. You assert that had you been informed of this right and that the lower reading would prevail that you would have unequivocally accepted the opportunity.

I acknowledge that your Affidavit is sworn; however, you have not provided any persuasive evidence that you were not advised of your right to a second analysis. Aforementioned, the officer provided a time that you were advised of this right, indicated that you understood, and that you declined the second sample. On a balance of probabilities, I find it more likely than not that you were advised of your right to a second analysis and what this right entailed as indicated by the officer in the RTS.

Based on the evidence before me, I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

I have already made a finding that you were advised of your right to a second analysis and declined the second analysis.

Was the Notice served on the basis of the lower analysis result?

The officer's evidence is that one ASD test was administered the result of which was a “FAIL”.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted a Certificate of a Qualified ASD Calibrator in which Cst. J. Crowston certified that the ASD was found to be within the recommended limits when he checked its

calibration on August 28, 2013. Cst. Crowston also certified that to the best of his knowledge the ASD was functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASD used for your test was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 19 days of the prohibition, you need only serve the remaining 71 days. Your prohibition commences October 24, 2013. The prohibition ends at 2359 hours January 2, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

December 5, 2013

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s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with the review based on that confirmation.

In reaching my decision on this review, I must consider all relevant information provided to me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

There is one issue that is determinative on this review.

Did you fail or refuse to comply with an ASD demand?

There is no evidence to establish a refusal in this case; I am not satisfied you failed or refused to comply with an ASD demand.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Adjudicator

cc. Kyla Lee, Acumen Law Corporation
fax: 604-685-8308

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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 this confirmation.

In your written submission, you indicated that you were not drinking and driving and that you would never jeopardize your employment, as you have a wife and a s.22 son. You also stated that you have s.22 due to this IRP and are now struggling.

I acknowledge that a 90-day driving prohibition can have far-reaching and devastating implications for a person who needs to drive for various employment and personal reasons. However, in the context of this review the Act does not authorize me to consider an individual’s personal circumstances and employment needs. The issues that I must determine in this review are outlined in detail below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the constable reported that you were driving or in care or control of a motor vehicle at 19:30 hours on September 27, 2013. In the Narrative Text Hardcopy (the "Narrative"), the constable indicated that upon arriving on scene he observed a vehicle running and parked partially in the intersection. The constable also noted that he observed a male passed out in the driver's seat of the vehicle with the keys in the ignition. The constable indicated that he confirmed the identity of the male to be you by way of a pictured BC driver's licence.

There is no evidence before me contrary to that of the constable. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Narrative, the constable indicated the following:

- When you were advised to exit the vehicle you became verbally aggressive
- You had a strong odour of liquor emanating from your mouth
- You were confused and slurring your words when speaking
- You had no balance when attempting to stand on your own and when asked to walk you could not lift your feet
- Multiple empty beer cans and a half empty bottle of vodka were observed on the front passenger seat of the vehicle

The constable indicated in the RTS that at 19:30 hours he formed his reasonable suspicion that you had alcohol in your body, and that at 19:35 hours he read you the ASD demand.

There is no evidence before me to the contrary. I am satisfied that the officer made a valid ASD demand. I now turn to whether you failed or refused to comply with the demand.

In his Narrative, the constable indicated that after he read you the ASD demand the following events occurred:

- The constable asked you if you understood the demand and you stated "Fuck you"
- The constable advised you of the jeopardy of not providing a sample and when asked if you understood you again stated "Fuck you"
- The constable asked once again if you understood and you told him to "Fuck off"
- The constable indicated that you were given multiple opportunities, but the demand was refused

I have read and acknowledge your submission with respect to your statements that you took medication, you do not remember anything and that the constable smashed your head in your car giving you a concussion. However, on the specific issue of whether you failed or refused to provide a sample of your breath into the ASD I find your evidence and that of the constable to be consistent, in that after the constable made a valid ASD demand you did not provide a sample of your breath. Consequently, I am satisfied you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your written submission, you indicated that you are prescribed s.22 to help with your s.22 and that you s.22 You stated that on the morning of September 27, 2013, you took your pills before leaving for work and noted that you also took a "Gravol" to help with your upset stomach. You stated that you were headed up 10th Avenue in New West and had just passed Choice Market when you pulled over because you were going to run in and buy some water because you remembered that your stomach was feeling uneasy and you felt dehydrated. You stated you lit a cigarette to calm your nerves, but when you were half way done you started to feel weird and your arms were very heavy. You stated that you threw the cigarette out of your window and that is the last thing you remember. Further in your submission you stated that you came to in a s.22 at the Royal Columbian Hospital (the "Hospital"). You stated that you had a splitting headache and a lump on your forehead over your left eye. You indicated that you asked a nurse what happened and that she said the following:

You were charged with a DUI and you had smashed your head on the inside of your car when the officer was pulling you out, you have a concussion and we're just checking your brain to make sure it's nothing serious.

You stated "with the cop smashing [your] head on the inside of [your] car, he gave [you] a concussion and [you] were not able to walk or give a Breathalyzer test for this matter." You noted that the constable did not put in his Narrative that when he pulled you from your vehicle he hit your head and gave you a concussion. You indicated that you were dazed and confused from your medication and from your head being hit, so you asked how you could have answered any questions. You stated that you did not know where you were at the time, nor do you remember any of it. You indicated that you were not drinking and driving. You provided a note from s.22 indicating that you take s.22 as needed for s.22 You provided a printout of an email which contains signs and symptoms of a concussion, but I note that you did not make any reference to it or its relevance in your submission. You also provided a copy of a letter from your employer in which it confirms that you were s.22

I find it noteworthy that your evidence indicates that you do not remember anything after you threw your cigarette out of the window. Whereas, the constable provided a detailed account of the events which he recalls took place at the roadside on September 27, 2013. I also note that the constable was present at the scene and has presented compelling evidence which indicates to me he had a clear recollection of what occurred. In contrast, your evidence shows me that you do not recall any interaction with the officer.

I acknowledge your claim that that a nurse at the hospital told you that you hit your head in the vehicle when the officer was “pulling” you out of your vehicle and that you had a concussion. However, there is no evidence in the constable’s RTS or Narrative that you hit your head in your vehicle, nor is there any indication that the constable “pulled” you out of your vehicle. Rather, the constable indicated that when you were asked to exit the vehicle you became verbally aggressive and advised the constable to “Fuck off”. The constable stated that he “assisted” you out of the vehicle and observed that you were not able to stand without the constable’s assistance. The constable further noted that you were given multiple opportunities to provide a sample of your breath but the ASD demand was refused.

The constable’s evidence indicates that you advised him to “Fuck off” on more than one occasion, and that after the ASD demand was read to you, you continued to state to the constable “Fuck you”. While I can appreciate that you may have been ill and on medication at the time, on a balance of probabilities, it is reasonable to find these actions are indicative of a person who is being verbally aggressive and uncooperative, not of a person who is, as you claimed “dazed and confused” from medication and a concussion. Additionally, the constable indicated in his Narrative that you were released to EHS and transported to the Hospital due to your level of intoxication, not due to an injury such as hitting your head. Ultimately, after considering all of the evidence before me, I find the officer’s evidence more persuasive.

I find there is no compelling evidence before me that would lead me to conclude that you were incapable of providing a sample of your breath into the ASD. Nor is there any evidence before me that anything was preventing you from providing a sample of your breath into the ASD.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with a demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 27, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

NOVEMBER 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked three grounds listed on the application form; however, not all of these grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to

you. I proceeded with this review based on that confirmation.

In your written submission, you said you are taking great pride in your occupation, your customer service and being present for many volunteer programs held in the community. You noted

You also said that you intended to avoid what happened on the night in question. You stated that you know better than to drink and drive, you understand and respect the laws, and you also understand the severity of drinking and driving. You requested that the prohibition be reduced or removed.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Further, I am authorized to vary a prohibition under section 215.5(2) of the Act if I determine that you were prohibited from driving for a longer time period than the Act requires. Section 215.5(2) does not apply in your situation, so I am not authorized to vary the length of the prohibition.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Ekelund indicated that he witnessed you driving or in care or control of the vehicle at 0425 hours, on October 20, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Ekelund said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses.

In your written submission, you said there are no hard numbers to go along with the negative

rating indicated by a “FAIL” reading on an ASD. I agree that ASDs are not calibrated to provide a specific BAC in a person’s breath sample, but section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

I am satisfied that the ASDs registered “FAIL” at 0430 and 0435 hours, respectively, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the “Narrative”), Constable Ekelund indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the “Certificates”), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered “FAIL”. I am satisfied that the Notice was served on the basis of the lowest available result, which was “FAIL”.

Was the ASD reliable?

In your written submission, you said there have been publications concerning the accuracy of breathalyzer tests and their blood alcohol level ratings. I infer you are questioning the reliability of the devices used to analyze your breath samples. However, in an administrative review, it is not sufficient for an applicant to make ‘suggestions’ about what might have happened. You must put forth something other than suggestions in order to persuade an Adjudicator to accept your argument; evidence to support the suggestion is required. You did not provide any evidence that the ASDs used in this IRP investigation malfunctioned in any way.

In contrast, Constable Ekelund submitted two Certificates of Qualified ASD Calibrator (the Certificates) stating that Jason Bayer certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF (the “Calibrator”). The Calibrator stated that on the 5th day of October, 2013, he checked the calibration of the ASD with serial number 040220 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG210801, Expiry: 2014-04-17. This ASD was found to be within the recommended limits. It had a calibration expiry date of November 2, 2013 and a service expiry date of May 8, 2014.

The Calibrator stated that on the 24th day of September, 2013, he checked the calibration of the ASD with serial number 040233 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG210801, Expiry: 2014-04-17. This ASD was found to be within the recommended limits. It had a calibration expiry date of October 22, 2013 and a service expiry date of February 20, 2014. I note that the ASD serial numbers on the Certificates match the serial numbers of the ASDs referenced on the RTS.

Based on all the evidence before me, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

You said on October 19, 2013, you were downtown with a few friends for dinner. While at the restaurant you had two drinks, and because of this alcohol consumption, you decided to take a skytrain to a friend’s house to watch a movie. You arrived at your friend’s house at around 11 pm. You watched a movie and fell asleep until around 4 am. When you awoke, you felt suitable to drive back to Surrey, since your last drink had been at about 10 pm.

You drove up to the roadblock and the officer made an ASD demand. You complied with the demand and provided a breath sample into the ASD. You said you were shocked by the ASD results, although you continued to be co-operative with the officer.

In the Synopsis and the Narrative, Constable Ekelund’s evidence is that he detected a strong odour of liquor emanating from your mouth. He said you told him you had consumed one beer earlier in the evening. The officer’s evidence of the odour of liquor is consistent with the ASD results, but not consistent with what you told him or me about your consumption that night. I find it is more likely than not that your reported drinking pattern is unreliable.

While you may have felt suitable to drive, you did not provide any persuasive evidence that would cause me to doubt the “FAIL” readings on ASDs that I found to be reliable. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, you confirmed that you had received all of the disclosure documents before me. I proceeded with the review based on that confirmation.

In the oral hearing, you said you know that according to the letter of the law, hardship is not a consideration in these reviews. However, you wanted to explain that you have just started your own small business – s.22 and the financial consequences of receiving an IRP,

including the remedial programs will be very difficult for you. You requested that the penalties, such as ignition interlock requirement, be lessened and the impoundment be reduced to 15 days. You said you understand why the law is in place, but you said you did not intend to break the law.

I understand and appreciate that receiving an IRP can have serious consequences on a person's life. However, as I mentioned and you acknowledged in the oral hearing, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

In addition, I do not have the authority to vary the terms of the prohibition as you have requested.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Abendroth indicated that he witnessed you driving or in care or control of the vehicle at 0210 hours, on September 19, 2013.

In the oral hearing, you said there is a grey area of what constitutes "care or control" of a motor vehicle. You said you understand that the officer was doing his job, but you argued that you were not in care or control of your vehicle. You said you were lying across the driver's seat and passenger's seat and the vehicle was not running. You told me you had not been driving. You attended a Vancouver/Edmonton game and you had consumed about six beers. You said a friend dropped you off at the vehicle at about 1:30 a.m. and you were going to meet a girl who was going to pick you up. You also said you were feeling under the weather, so you had the windows open and were going to sleep.

You said about half an hour later you were feeling cold, so you curled up a bit. You say you know about the law of care or control and while you acknowledge being half in the driver's seat, you emphasized that your head and upper body were in the passenger seat. You said s.22 the girl who was picking you up, texted to say she was 15 minutes away. You acknowledged that the headlights were on, but you said you must have hit them with your knee. You said you

were found in that position about 15 minutes later. You told me you tried to do everything right. You do not question the ASD test results. You said the officers on scene were doing their jobs.

You said you should not have been in this scenario at all. You said you felt frustrated, since you tried to do the right thing. You believe you were not breaking the law – you had no intent or will to break the law, as you have too much to lose. The officer did not know your intention. You said your feet were not even on the floor.

You told me that s.22 and it really scared you. You said you did not even have a designated driver then. But this time, you did everything right. You said your big mistake was inadvertently kicking the lights on. The officer said he would not have noticed you if the lights had not been on.

There are some inconsistencies in your evidence that raise questions in my mind. You said s.22 was going to pick you up and that she texted to say she was 15 minutes away. At about the same point in your version of events, you said the police arrived 15 minutes later. There is no evidence before me that s.22 ever arrived. While you were not required to do so, I am surprised you did not include a statement from s.22 and/or the friend who dropped you off to confirm your evidence.

In addition, the officer's undisputed evidence is that you said you would walk home, rather than taking a taxi (or getting a ride from a friend). If you were within walking distance from home and you did not intend to drive, it seems odd that your friend would drop you off at the vehicle, rather than at home. You said you were not feeling well, which puts into question your intention to meet up with s.22 afterwards. These concerns cause me to question the reliability of your evidence. I prefer that of the investigating officer.

In the Narrative Text Hardcopy (the "Narrative"), Constable Abendroth said he observed a vehicle parked on the side of the road with the lights on and windows rolled down. He said he saw you passed out in the driver's seat with your head on the passenger seat. The officer said the engine was warm and the keys were in the ignition. He said you did not wake up until he opened the door. You said you had not driven the vehicle, which is inconsistent with the officer's evidence of noticing that the engine was warm. You said you are aware of what constitutes care or control and you said did everything right. However, you did not explain why you had the keys in the ignition or why you were not in the back seat.

You were at least partially in the driver's seat; the keys were in the ignition; there is no evidence before me that the vehicle was inoperable. According to the officer's undisputed evidence, you were close enough to walk home, so it would be a short drive. You say the lights were on because you must have kicked the switch. An inebriated individual who is found behind the wheel and has a present ability to set the vehicle in motion — without intending at that moment to do so — may nevertheless present a realistic risk of danger. Given my concerns with the reliability of your evidence, I find that if the police had not intervened, there was a realistic risk that you would drive the vehicle when you awoke, while still under the influence of alcohol.

Based on all the evidence before me, I am satisfied on a balance of probabilities that you were a

driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Abendroth said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 0220 and 0235 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative, Constable Abendroth indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records indicate you received full disclosure. You applied on two grounds, both of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

In your written submission you explained that you are aware of how serious an offence this is and how it strikes a very personal cord with you since you s.22 six years ago to a drinking and driving accident. You indicated that this was why you sought out a job with

s.22 and also why you want to open a s.22
s.22 You indicated that the intent of your letter is not to make excuses for your actions. However, while you realize that you made a horrible mistake and that nothing you say can or will change it, it is your hope that I might reduce the length of time in your roadside prohibition based on your driving record which shows you are a safe, courteous and responsible driver.

The scope of the review is limited to the grounds as defined in section 215.5 the Act. In this review, I can only consider and make decisions on the issues noted below. While I acknowledge and appreciate your situation, I am not authorized by the Act to consider hardship, personal circumstances, employment or transportation needs in this review. I am also unable to reduce the prohibition or consider your driving record.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 13, 2013, 03:34 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 13, 2013, 03:34 hours.

Did the ASD register a "FAIL"?

In the RTS the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

While you stated that you thought you were ok to drive, you admit that you were incorrect.

As noted above, the ASDs were reliable. Therefore, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your written submission, you stated that you are a self employed s.22 You rely on your vehicle to make a living and without it, you may have to close your business. You said you have never had any alcohol relate offences in your life and you have been the designated driver many times over the years.

I acknowledge the far reaching effects a driving prohibition can have on your circumstances; however, the Act does not permit me to consider your driving record or personal circumstance in making my determinations. The issues I can consider in this review are noted below.

You also stated that you were initially stopped for driving without your headlights on and provided an explanation for doing so. You said the vehicle you were driving was new to you and you indicated that you were not familiar with the controls.

I acknowledge your lack of familiarity with the vehicle you were driving. The officer's evidence is that he noticed you driving with only the daytime running lights illuminated and he observed you fail to signal twice and roll through stop signs. While this appears to be the reason he officer stopped you, the reason for the traffic stop is not an issue I must determine in this review.

Last, you provided details of the events of your day. You said you worked a total of 20 hours; six hours for you own business and 14 hours for a fundraiser event. You said your duties at the fundraiser included moving speaker cabinets and cables on and off stage and transporting vehicles. You said that most of the equipment had pop or liquor spilled on it which made contact with your shirt and pants.

I infer that you are suggesting an explanation for the odour of liquor detected by the officer. Observations such as this can contribute to an officer's reasonable suspicion that a person has alcohol in his or her body, which may lead the officer to make a valid ASD demand. However, the validity of the demand is not an issue in this review; it is relevant only in circumstances where a person fails or refuses to comply with a breath demand. As a result, factors that led the officer to make an ASD demand are not relevant to my considerations.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the officer reported that you were driving or in care or control of a motor vehicle at 03:37 hours on September 21, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASDs registered a “FAIL” at 03:40 and 03:44 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer’s evidence indicates that you were advised of your right to a second analysis. There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer’s evidence is that a second analysis was provided. There is no evidence to the contrary. Based on the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the Narrative Text Hardcopy (the “Narrative”) and the Certificates of an ASD Calibrator (the “Certificates”) the officer provided evidence that the second analysis was performed on a different ASD. There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer indicated that the result of both ASD tests was a “FAIL”. I am satisfied that the Notice was served on the basis of the “FAIL” result.

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

You said that twice you asked the officer for your BAC level but he never responded. I know of no requirement under the Act for an officer to provide a driver with a BAC level when breath samples have been provided on a roadside screening device.

You said that at 1:15 am on September 21, you had a burger and beer just after moving the final load of equipment out of the fundraising event. You said you are certain that your long day, two small meals, the clothes you were wearing and driving in an unfamiliar vehicle led the officer to believe you were impaired.

In considering the evidence before me, I find you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs, which I found to be reliable. Section 215.41(2) of the *Motor Vehicle Act* states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. Based on all the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On February 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me

Preliminary Matters

At the beginning of the oral review, I confirmed with your lawyer, Kyla Lee, that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed all of the evidence before me, I find there is one determinative issue in this review.

Was the ASD reliable?

After reviewing all of the evidence before me, I find that I cannot be satisfied that ASD serial number 101530 was reliable at the time of your second ASD test.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Records at this office indicate that the vehicle associated with this IRP has already been released. Since your IRP review is successful and the prohibition is revoked, you are eligible to have the towing and storage costs reimbursed by the Superintendent. To ensure the correct charges are refunded to you, **you must attach receipts and invoices with proof of payment** and you must also enclose a copy of this letter.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

s.15

Adjudicator

cc: Kyla Lee
Fax: (604) 685-8308



October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that you received all of the disclosure documents. I have proceeded with this review based on this confirmation.

Your application contained a copy of your driving record from ICBC. I make no reference to, nor do I consider, your driving record as part of the submissions or evidence in this review.

You applied on all grounds open on the application; however, some of those grounds are not applicable to the type of prohibition that you were served by way of Notice. For your benefit, I have considered all relevant grounds in this review.

Your counsel, Erik Albrecher, made submissions on your behalf in his letter dated October 3, 2013. He draws attention to the officer’s missing name entry on line 3 of the Report to Superintendent (the “Report”), and equates this to being a “fatal flaw”. He points to the Act requiring “a report, in the form established by the superintendent”, and states that the officer, in omitting this key information, is not complying with the legislated requirements. He refers to the case of *Murray* to submit that this

omission of a component of the Report is a failure to indicate who is swearing or affirming that document. He also submits that speculating who swore the document is “improper” as per the case of *Hart*.

The Report does not exist in isolation. On line 14 of the Report, it states: “The attached narrative report and other attachments consist of 9 pages and forms part of this sworn document.” Elsewhere in these other documents, I find: the Notice signed by the officer with his name and badge number present; the occurrence report/narrative, ending with his name, badge number and signature; the Notice of Impoundment and Impoundment Report containing that same information. The officer also identifies himself by name throughout these documents as well. I find this to be sufficient evidence to establish the fact that the same officer solemnly affirmed the Report, and provided it in the “form established by the superintendent.”

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”?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report, the investigating officer – Cst. Wise – indicated that you were driving or in care or control of a vehicle at 2355 hours on September 19, 2013. Cst. Wise provides in the occurrence report that he was working a counter-attack roadblock; you were seated in the driver’s seat when approaching the roadblock. You were then identified with your driver’s licence.

There is no evidence to the contrary; Mr. Albrecher made no submissions on this point. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided an ASD “FAIL” result at 0002 hours.

Mr. Albrecher presents no evidence contrary to that of the officer on this point.

I am satisfied that the ASD registered a “FAIL” result.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked ‘NO’ to indicate that you did not request a second test.

In the occurrence report, Cst. Wise states: “. . . driver stated she fully understood the right to second test and declined to provide a second sample of breath.”

Mr. Albrecher presents no evidence contrary to that of the officer on this point. Based on this, I am satisfied that the officer advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed on a different ASD?

As above, you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

The officer recorded the single test result as “FAIL”. You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a “FAIL” result.

Were the ASDs reliable?

The officer provided a ‘Certificate of a Qualified ASD Calibrator’ (the “Certificate”) in which an ASD Calibrator certified that he is qualified to perform this operation. This Certificate forms part of the sworn Report.

The qualified ASD Calibrator Amber Coldwell certified that on September 3, 2013, he checked the calibration of ASD serial number 072966. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as December 5, 2013.

I therefore find the ASD reliable at the time the sample was taken, with no evidence established to contradict that of the officer on this point.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Erik Albrecher
MN Law
Fax: 604-677-5560

October 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. I have proceeded with this review based on that confirmation.

At the time of this review I have yet to receive any submission from you or your lawyer. I have continued with this review based on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2315 hours on September 27, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over by the officer and were identified as the driver via your BC driver’s licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 2323 hours and 2330 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2326 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2330 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 100853 and your second sample of breath into ASD serial number 100854. The officer

also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 100853 and 100854.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 4, 2013, he checked the calibration of ASD serial number 100853. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 2, 2013, and the service expiry date as June 5, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 4, 2013, he checked the calibration of ASD serial number 100854. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 2, 2013, and the service expiry date as June 6, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Issues

Your lawyer, Mr. David Jenkins, has submitted on your behalf that the officer did not read the demand for a sample of your breath forthwith. Also the ASD test was not forthwith after the

demand. He provides authority for this submission: *R v. Duong*, *R. v. Boulanger*, *R v. Boutamine*, and *R v. Sood*.

Mr. Jenkins' submission concerns the validity of the demand. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am not satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review. Similarly, there is no authority to revoke because the test did not occur forthwith after the demand.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer – Cst. MacDonald – indicated that you were driving or in care or control of a vehicle at 0034 hours on October 28, 2013. Cst. MacDonald provides in the occurrence report that he observed your vehicle leaving the driveway at a residential address. Upon his arrival, Cst. MacDonald identified you as the driver of the vehicle, using your BC driver's licence for positive identification.

In the submissions prepared by your lawyer Mr. Jenkins, he makes no submissions specific to this issue.

I am therefore satisfied that you were driving at the time and date placed in to evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0048 and 0049 hours.

Mr. Jenkins provided no evidence on your behalf on this issue; I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, Cst. MacDonald indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the occurrence report, he notes this occurred at 0048 hours. He provides that you stated that you understood, and stated you wanted to provide a second sample.

There is no evidence to the contrary. Based on sworn evidence, I am satisfied that the officer advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it provided on a different ASD?

The officer's evidence in the Report is that he provided the second analysis on your request. In the occurrence report, after describing his reading of your right to a second analysis, he proceeded with this test at 0049. He used ASD serial number 100887, a different ASD from that of the initial sample.

In his submissions, Mr. Jenkins does not question the existence, or the result, of a second analysis. I therefore find this analysis occurring at 0049 to be the second analysis provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Cst. MacDonald recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASDs serial numbers 100889 and 100887 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

For both ASDs, the qualified ASD Calibrator, B.W. Davis, certified that on October 2, 2013, he checked the calibration. He found the ASDs to be within the recommended limits. He recorded the ASD calibration expiry dates as October 30, 2013 and the service expiry dates as August 28, 2014.

Mr. Jenkins made no submissions on this issue on your behalf. I am therefore satisfied of the reliability of each ASD.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 28, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

CC. David Jenkins
Heather Sadler Jenkins LLP
fax: 250-565-8001



October 21, 2013

s.22

c/o Boyle & Co.
201 – 100 Front ST
Penticton BC V2A 1H1

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On February 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?

- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following issue.

Was the ASD reliable?

Based on the evidence before me, I satisfied that the ASD was not reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Records at this office indicate that the vehicle associated with this IRP has already been released. Since your IRP review is successful and the prohibition is revoked, you are eligible to have the towing and storage costs reimbursed by the Superintendent. To ensure the correct charges are refunded to you, **you must attach receipts and invoices with proof of payment** and you must also enclose a copy of this letter.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

s.15

Adjudicator

cc: Kurt Froehlich
Boyle & Co. Lawyers
Fax: 250-492-4877

September 26, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 3, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the *Act*;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to Sacha Roudette at Carr Buchan & Company. I have proceeded with this review based on that confirmation, and acknowledge receipt of written submissions from Jeremy Carr.

Mr. Carr submits that this is a quasi-criminal administrative matter and that the burden of proof must be strictly enforced against the Crown. He states that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be "clerical" in

nature can only be resolved in favour of you. He also states that you have no burden of disproof in this hearing and that there is no evidence before me which satisfies the burden of proof. I acknowledge Mr. Carr's submission. However, I am mindful that this is an administrative process where issues are weighed on a balance of probabilities. As such, I will weigh any errors appropriately.

Mr. Carr referred to the cases of *Spencer v. Superintendent of Motor Vehicles* and *Gillies v. Superintendent of Motor Vehicles*. He stated that in *Spencer*, the judge held that the police are not deemed to have a credibility advantage, and the case must be determined impartially on the evidence. He stated that in *Gillies*, the court noted that credibility is a finding of fact which must be reviewed on a standard of reasonableness, and that an adjudicator must weigh the evidence to reach the conclusion. Mr. Carr did not provide me with these cases; however, I am familiar with them and have proceeded with this review with *Spencer* and *Gillies* in mind.

There is a recent court decision, *Buhr v. British Columbia (Superintendent of Motor Vehicles)* BCSC 2013 1443, in which the court ruled the Superintendent's Report on ASDs (the "Superintendent's Report") was inadmissible. Although unable to rely on the Superintendent's Report, pursuant to section 215.49 of the *Act* I can consider statements or evidence submitted by you (the applicant), the report of the peace officer, and other relevant documents and information forwarded by the peace officer in making my decision. As your lawyer has referred to the Superintendent's Report, the portion that is referred to forms part of your evidence in this review. I have not considered or relied on any other portions of the Superintendent's Report in making my decision.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Act*?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the *Act*?

The police evidence in the Report to Superintendent (the "Report") is that Officer Davis (the "officer") established you as driving or having care or control of a vehicle at 1:25 hours on August 3, 2013.

Mr. Carr submits that there is no evidence provided by the officer that you were driving erratically. He said that the officer stated that you were stopped because he observed that the vehicle had two files related to it involving liquor, and because the vehicle was registered to a female from Lillooet and there was a male driving. I do not disagree with Mr. Carr's

observations on this point; however, driving behavior is not an issue that I am by statute permitted to consider in this review.

As there is no evidence before me to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1) of the *Act*.

Did the ASD register a “fail”?

The police evidence in the Report is that you provided a breath sample for analysis on ASD number 042899 at 1:36 hours and the result of that sample was a “fail”. There is no evidence to the contrary before me.

I am satisfied that the ASD did register a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that the officer advised you of your right to a second test on a different ASD and explained that the lower of the two test results would prevail. He indicates on the Report that you did request a second ASD test. This is corroborated by evidence in the Narrative Text Hardcopy (the “Narrative”) which states that at 1:39 hours, the officer read you your right to request a second ASD test from the IRP booklet. He notes in the Narrative that you did understand.

Mr. Carr submits that your right to a second analysis was violated because of the thirteen minute delay between when the officer formed reasonable suspicion and when he recorded the time of your second ASD test. Mr. Carr refers to section 215.42(1) of the *Act*, which talks about a person’s right to a second breath analysis.

I acknowledge Mr. Carr’s submission, however, I note that the language at section 215.42(1) (a) and (b) of the *Act* indicates that a peace officer must inform a person of their right to “forthwith request” a second analysis before the Notice is served on that person. Essentially that means that before serving you with the Notice, the officer was required to inform you of your right to a second analysis and your “request” was required to be made “forthwith”. There is no requirement under the *Act* that the second analysis be provided forthwith.

I am satisfied that the officer did advise you of your right to a second analysis.

Was the second analysis provided by the officer?

The evidence in the Report is that at 1:42 hours, the officer conducted a second breath test. The result of this breath test was a “fail”. There is no evidence before me to the contrary.

I am satisfied that the officer did provide the second analysis.

Was the second analysis performed on a different ASD?

I have before me evidence from the Report which indicates that two ASDs were used for your breath tests on August 3, 2013, being ASD number 042899 and ASD number 100854. In

addition, as you will see below, I have two Certificates of a Qualified ASD Calibrator (the "Certificates") for ASDs bearing the serial numbers 042899 and 100854.

As there is no evidence before me to the contrary, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Both of your breath tests resulted in a "fail" and as such I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence provided by police in the Certificates indicates the following:

- ASD number 042899 and ASD number 100854 were checked for calibration on July 10, 2013, and found to be functioning correctly and within the recommended limits. The ASDs have a calibration expiry date of August 7, 2013.

I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

Mr. Carr submits that it was not objectively reasonable for the officer to rely on the ASD result without considering the possibility of contamination by mouth alcohol. He said the officer failed to ensure that the ASD sample was taken at least fifteen minutes after the time of your last drink. Because of this, the ASD test result is not accurate and therefore invalid.

Mr. Carr said you advised that at no time did you state that you were the designated driver or that you had consumed three beers an hour ago. Mr. Carr also stated "Rather, s.22 advises that he finished his last beer and was stopped by Cst. Davis within two [2] minutes."

I turn to the evidence supplied by the officer. At section 11 of the Report, in answer to the question "time of last drink", the officer wrote that you responded you were the designated driver and, after blowing a "fail", you stated you had three beers and the last one was an hour ago. In the Narrative the officer notes you first said you had nothing, that you were the designated driver and after you blew a "fail" you said "I had three beers, last one about an hour ago."

I find it noteworthy that although Mr. Carr states that you deny telling the officer you were a designated driver and that you consumed three beers an hour ago, from his submission it appears to me that you advised Mr. Carr, not the officer, that you were stopped within 2 minutes of finishing your beer. Therefore, even though you have denied the officer's evidence here, you did not provide me with any compelling evidence with respect to what you allegedly did say to the officer with respect to the time of your last drink. As such, when I weigh the officer's sworn evidence against a statement passed through your lawyer which lacks the necessary detail to persuade me otherwise, I prefer the officer's evidence on this issue. Therefore, based on the information you provided to the officer at the time, I find he was reasonable in relying on the results of the first test to conclude as he did and advise you of your right to a second test.

I note that Section 215.41(2) of the *Act* states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. As I have already made a finding that the ASDs are reliable, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the *Act*. You are prohibited from driving for 90 days.

Your prohibition took effect on August 3, 2013. I note that as you have already served 18 days of the prohibition, you need only serve the remaining 72 days. Your prohibition commences September 27, 2013. The prohibition ends at 23:59 hours on December 7, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jeremy Carr
By Fax 250 388-7327

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that disclosure documents were faxed to your lawyer, Howard Smith. I will proceed with the review based on this confirmation.

You checked the boxes next to all of the grounds on the application form. However, the grounds associated with a “WARN” result on an ASD and with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition. I will consider all grounds available to you in this review.

Your hearing was scheduled for October 17, 2013, at 10:00 a.m. I was advised by Appeals Registry that if Mr. Smith was not available to conduct the hearing, Paul Dutt would represent you. At 10:00 a.m. I contacted Mr. Smith’s office and was advised that s.22 I asked for Mr. Dutt and was given his cell number. I contacted Mr. Dutt at 10:00 a.m. and 10:08 a.m.

I left a message with Mr. Dutt at 10:08a.m. stating that I would revert the hearing to a written; and accept a written submission up to 12:00 a.m. Under section 215.48 (6) If a person requests an oral hearing and fails to appear on the date and at the time and place arranged for the hearing, without prior notice to the superintendent, the right to an oral hearing is deemed to have been waived by the person.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0011 hours on October 5, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that you demonstrated a wanton reckless disregard for public safety. He reported that he observed you racing with a second vehicle at alarming speed.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 0015 hours and 0022 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 14, 2013, he checked the calibration of ASD serial number 101825. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 12, 2013, and the service expiry date as October 31, 2013.

For the second ASD, the qualified ASD calibrator certified that on October 3, 2013, he checked the calibration of ASD serial number 101384. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as December 20, 2013.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 5, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Howard Smith by fax 604 535-7699

October 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Cory Armour. On October 17, 2013, I was notified that you would be representing yourself in this review. I have proceeded with this review based on that confirmation.

You submit that the investigating officer confirmed that you have an exceptionally spotless driving record and that you have not had a traffic infraction in over ten years. I do not have authority to consider a person's driving record in this review.

You submit that you do not have a single mark of course on your criminal record and that you are a very responsible member of society; not a criminal. I do not have jurisdiction to consider a person's criminal record in this review and only have authority to consider the issues below.

You indicate that it will be humiliating for you to have to inform your family and friends of your prohibition. Moreover, that your family relies on you to take your brother to planned activities and that this prohibition will take you through the holidays and into the new year with a huge burden of shame over your head. Further, you submit that your dog is recovering from multiple surgeries and requires the use of special scaffolding built for your vehicle. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances or transportation needs. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the RTS, the officer indicated that you were driving or in care or control of a motor vehicle at 0325 hours on October 5, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 0330 hours and 0334 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101834 and 101825, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Cst. Peter McLeod certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 3, 2013, and September 14, 2013, respectively. Cst. McLeod also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer indicates that after engaging in a brief conversation with you he detected a strong odour of liquor derived directly from your breath and observed your speech pattern to be drastically delayed and fully slurred. Further, he observed you to be drowsy, having considerable difficulty keeping your eyelids open, and that you swayed back and forth after exiting your vehicle. When you were asked how much liquor you had consumed, the officer indicates that your response was a half glass of wine and that you indicated your last alcoholic beverage was consumed at 11:30 pm.

Referencing a "mouth alcohol bias", you indicate that ethanol remaining in the mouth following a drink in the last 15 minutes or as a result of vomiting, GERD, burping or mouthwash may exaggerate breath test readings dramatically. On this point, you submit that when the officer asked you when your last alcohol beverage was consumed that you told him that you went to

bed at 11:30 pm, had a fight with your boyfriend when he woke you up on the phone, and that you had had about a half a glass of wine. Accordingly, you indicate that you had not been drinking other than the partial glass of wine consumed a few minutes prior and that there were issues with both breath tests because you were burping.

You indicate that your response to the time of your last alcoholic drink was, "At 11:30pm I went to bed, and then I had a fight with my boyfriend. He woke me up on the phone. I've had about a half a glass of wine." However, in the Occurrence Report the officer's queries with regard to the amount of liquor consumed and the time your last alcoholic beverage was consumed are indicated as being asked as two separate questions and in reverse order to your claimed response. The officer's evidence also indicates that you informed him you had been in a fight with your boyfriend when he first engaged in conversation with you. On this point, you submit that the officer was hurried in his actions and was not paying due attention to your responses. However, in the Occurrence Report the officer provides your alleged responses, in quotations, to each question posed during the investigation. There is no evidence before me that you advised the officer you felt the investigation was being hurried or he was not paying due attention to your responses.

Moreover, I find your claimed response regarding the time of your last drink to be misleading. Your evidence is that you informed the officer that you had gone to bed at 11:30 pm, were woken by a phone call from your boyfriend, and that you had had about a half glass of wine. This response indicates one time, 11:30 pm. There is no reference to 3:00 am or 3:19 am; times you rely on to formulate your argument that your ASD results were affected by mouth alcohol. I acknowledge the letter of support from your boyfriend, s.22 where he indicates that he called you just before 3:00 am. However, you wrote that s.22 placed the call to you around 3 am, yet in your recap of the timeline you indicate that he called you at 3:00 am; this is a discrepancy. Moreover, in his letter of support, s.22 submits that he saw you consume less than a full glass of red wine immediately as you were leaving with your coat already on. However, he does not provide a time that you left your house or a time that you consumed the less than full glass of wine.

You also provided evidence that in light traffic it takes just under 6 minutes to drive from your house to the location where your vehicle was stopped and that on the night in question there was literally no traffic. Accordingly, you assert that from the time you had consumed less than a glass of wine to the time after the second breath test, less than 15 minutes had passed. While I acknowledge your submission, you do not provide any evidence as to how you determined you left your house at 3:19 am. I also note that in the RTS the officer indicated your second breath test was conducted at 0334 hours (i.e. 3:34 am); 15 minutes from the time you claim to have consumed the wine and leave your house. Based on the evidence before me, you have not convinced me that your last alcoholic drink was finished less than 15 minutes before you provided a sample of your breath for analysis.

Moreover, you indicate that there was an issue with both of the breath tests because you were burping. Specifically, that the officer stated he was not sure why, "this isn't working", and that you told him you were burping from the wine you had just had. I feel a reasonable inference can be made that burping would be an observable behaviour and you have not provided any

evidence that the officer did not see you burping. I think it is unlikely that the officer would have omitted evidence that you were burping due to the consumption of wine a few minutes prior and proceed with the breath tests in light of this information. On a balance of probabilities, I am satisfied that your ASD results were not affected by mouth alcohol caused by burping.

Further, while I acknowledge your and s.22 explanations for the indicia allegedly observed by the officer, I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not how your observed behaviours can be explained by factors independent of being under the influence of alcohol. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg% and I have already made a finding that the ASDs were reliable. As such, I am satisfied that your BAC was not less than 80 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 5, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review, you applied on the ground that, “I did not refuse or fail to comply with the officer's demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the officer indicated you were being

prohibited from driving because an ASD test resulted in a "FAIL". Further, you applied on the ground that, "My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s)." While I acknowledge your submission, I do not have delegated authority to shorten or alter the terms of a 90-day IRP.

In your affidavit, you included the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013, BCSC 1638, and wrote that the "FAIL" reading on an ASD is not evidence in itself to issue an IRP or an immediate impound of a vehicle. Moreover, you submit that there is no evidence to indicate that your ability to drive was affected by alcohol. I have read and considered the *Wilson* case and I acknowledge your submissions with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

You wrote that you were in no way violating the *Criminal Code*. While I acknowledge your submission, an IRP is an administrative sanction and not a criminal process. This review is guided by the Act and as such, I have authority to consider the issues listed below.

In your affidavit, you submit that the RCMP continue to use impaired driving roadblocks, on behalf of the Superintendent of Motor Vehicles (the "Superintendent"), despite BC Supreme Court case law precedence that such roadblocks and the perceived authority of the Superintendent violates the [Canadian] *Charter of Rights [and Freedoms]* (the "Charter"). As such, you assert that the Superintendent is not above our, "fundamental rights as a human being. i.e. Charter of Rights and Freedoms." Moreover, you indicate that you have been deprived of your property for weeks through a direct act of Charter infringement. While I acknowledge your submissions, the scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues or to apply Charter remedies.

You indicate that all IRPs and impoundments are a direct violation of a BC Supreme Court judgment. As such, case law precedence will set aside these notices because the Superintendent and Act are not above the laws of the BC Supreme Court. While I acknowledge your submission, you did not name or disclose this judgment; therefore, it is not sufficient to simply make a suggestion without providing any supportive evidence.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 0249 hours on October 13, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 0254 hours and 0259 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 049868 and 101828, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator (the "Certificates") in which Cst. Peter McLeod certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 1, 2013. Cst. McLeod also certified that to the best of his knowledge the ASDs were functioning correctly.

You submit that when the officer told you to breathe into the first ASD that he advised you a few times that, "it didn't register", and that if you did not provide him with a sample that it was an automatic fail. You indicate that blew into the device again and it registered a "FAIL". Further, you wrote that the time between the ASD sample attempts, according to published best practice is 15 minutes. As such, you submit that the first ASD sample is flawed and may not have given an accurate reading because you made multiple attempts to provide a sample without a sufficient break and 15 minutes was not observed between these attempts, which may have caused previous contaminates to no "purge" from the device.

Aforementioned, a Certificate for the ASD used to conduct your first test was provided by the officer and indicates that the device was functioning correctly. Further, section 14 in the solemnly affirmed RTS indicates that any ASD tests referred to in the officer's report were conducted by a qualified ASD operator and that the ASD units used in your investigation were functioning correctly. Here, I have no compelling evidence before me that indicates an accurate reading will not be obtained if a sufficient break is not allowed during a person's attempt to provide a suitable sample. Further, there is no requirement under the Act for a peace officer to wait 15 minutes between attempts to allow the ASD to "purge" previous contaminates.

Based on the evidence before me, I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. I have proceeded with this review based on that confirmation.

Ms. Lee submits that your driving prohibition should be set aside because the officer's evidence does not establish that he formed the belief that your ability to drive was affected by alcohol or, if he did, that such belief was based on reasonable grounds. Ms. Lee provided me with a copy

of the case *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638 in support of her submission.

I acknowledge Ms. Lee's submission on this matter and I have read and considered the *Wilson* case . I acknowledge the Court's ruling, however, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that on October 14, 2013, at 23:37 hours, Officer Bentham (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The evidence in the Report is that at 23:39 hours and at 23:52 hours, the officer used ASD serial numbers 101239 and 101233 respectively to take a breath sample from you. The result of both of your breath tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101233 at 23:52 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates that ASD serial number 101239 and ASD serial number 101233 were checked for calibration on September 23, 2013, and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Kyla Lee
by fax 604-685-8308

OCTOBER 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 18, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “fail” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Motor Vehicle Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a “fail”. Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you prior to your scheduled hearing. I have proceeded with this review based on that confirmation.

IRP Review Decision
Page 2

On August 27, 2013, we received a fax from lawyer, Jennifer Currie, stating that she will not be representing you in this matter. I note that we received a written submission from you on August 27, 2013, and I have considered it in the review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did 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 Report to Superintendent (RTS), Constable Evans indicated that on August 18, 2013, at 03:20 hours, you were operating or had care or control of a motor vehicle. In his Narrative Text Hardcopy report (Narrative) the officer stated that at 02:36 hours he was dispatched to the parking area of 1660 Main Street in North Vancouver for a possible impaired driver called in by BC Ambulance Services (the Ambulance). The Ambulance followed a vehicle and the occupants noted that it was swerving all over its lane of travel. Constable Evans subsequently pulled the vehicle over, identified you as the driver and confirmed your identity via your driver's licence.

As there is no evidence before me to refute that of the officer, I am satisfied that you were a driver within the meaning of section 215.41, of the *Motor Vehicle Act*.

Did the ASD register a “fail”?

In his RTS, Constable Evans indicated at 03:27 hours, you provided a sample of your breath into ASD serial number 101836, the result of which was a “fail”.

In the absence of any evidence to the contrary, I am satisfied that the ASD registered a “fail”.

Were you advised of your right to a second analysis?

Constable Evans indicated that after you failed the ASD test, he advised you that you had a right to a second test on a different ASD and that the lower of the two test results would prevail. In his Narrative, he stated how he informed you of this right, in that at 03:32 hours he stated that he read you your right to a second test “verbatim from the prepared card”.

As there is no evidence before me to refute that of Constable Evans, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Constable Evans indicated in his RTS that you did not request a second ASD test. In his Synopsis – 1 report, the officer stated that “A second test was offered and declined by

s.22

In your submission you stated that when the officer informed you that you had a right to a second test, you were initially interested but the officer “insisted that [your] result would likely be the same because the machines are calibrated so correctly and convinced [you] not to take it. [You] didn’t even know [you] could take it on a separate device.”

In considering your statements, I note that section 215.42 of the *Motor Vehicle Act* states that: “(1) if an analysis of the breath of a person by means of an approved screening device under section 215.41(3.1) registers a warn or a fail, (a) the person has a right to forthwith request and be provided with a second analysis, and (b) a peace officer must inform the person of that right before the peace officer serves on the person the notice of driving prohibition.” In other words, while an officer is required to inform a driver that they have a right to a second ASD test, an officer is not obligated to inform a driver that the test must be on a different device or that the lower of the two breath tests will prevail.

Further, I do not find your claim that the officer told you that the machines are calibrated so correctly that the result would likely be the same, to be very credible. First, that statement does not make any sense to me as I am aware that the devices measure the level of alcohol in an individual’s blood. I am also aware that the second test is offered to verify the result of the first test and the amount of alcohol in the blood, not to determine whether the first device is in sync with the second device used in the testing.

Regardless, in your submission you admitted that the officer informed you of your right to a second analysis and that you declined the opportunity. I am satisfied that the second analysis was not provided by the officer because you waived this right.

Was the second analysis performed on a different ASD?

As stated above, I am satisfied that the second analysis was not performed on a different ASD because you declined the officer’s offer of a second breath test.

Was the Notice served on the basis of the lower analysis result?

The officer served the Notice because you blew a “fail” result on an ASD. As you only provided one breath sample that morning, I am satisfied that the Notice was served on the basis of the lower, and only analysis result.

Was the ASD reliable?

Constable Evans submitted a copy of a Certificate of a Qualified ASD Calibrator for the ASD he used that morning.

For ASD serial number 101836, the Calibrator verified that on August 5, he checked the calibration of the device and found it to be within the recommended limits and functioning correctly. He recorded the calibration expiry date as September 2, 2013, and the service expiry date as December 20, 2013.

In the absence of any evidence to the contrary, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

In his Synopsis – 1 Report, Constable Evans stated that the Ambulance followed your vehicle, watching you swerve in and out of your lane and pull into a parking lot, where you parked and “proceeded to stumble away from the car into a near by wooded area.” Constable Evans parked a short distance from the parking lot until you returned to the vehicle and began driving. When he pulled you over he noted a strong odor of liquor on your breath. The officer stated that when he asked you where you were driving from, you “had a hard time answering the question” and you stared at him blankly, with blood shot/glassy eyes. Constable Evans stated that he asked you twice before administering the ASD test if you had consumed any alcohol but you denied that you had been drinking.

In your submission, you stated that on the day in question, you attended a friend’s birthday barbeque around 5:00pm that evening. You said that around 10:00pm you picked a friend up from his girlfriend’s house and drove him home. You stated that after you dropped him off, you noticed that he left a “nearly empty” vitamin water bottle in your vehicle. After you dropped him off you noticed that he had left the bottle but “it was basically empty” so you figured he was done with it. You then went to two different drinking establishments, ending up at a club called the Celebrities Nightclub at around 1:15am where you met up with friends. You stated that you consumed a bottle of Budweiser beer and a shot of tequila “in approx. 5 minutes” at 1:30am. You stated that you s.22 and “having looked into blood alcohol calculators previously” you thought you would be under the legal limit.

On your way home you stated that just before the officer pulled you over, you were thirsty so you “took a big sip” and finished off your friend’s vitamin water. You said that it tasted “disgusting” and you did not realize that he had put vodka in his vitamin water until he told you that he had the next day. You said that when the officer asked you if you had been drinking that night you told him “no”. You said that you had just woken up and you were a little groggy and “hadn’t quite remembered the 2 drinks you had at the club” since you hadn’t intended to drink at all that night. You said he asked you if you knew why there was an odor of liquor in your vehicle but you told him you did not know why. You added that after you blew the “fail” he asked you again if you had been drinking but you panicked and said no again. You said that you remembered the two drinks you had at the club but you were scared and confused because there was no way you should have blown over in the first place.

In considering your evidence, I note that:

- Although the officer asked you at least twice if you had consumed any liquor that night you told him that you had not because you “forgot” about two drinks that you had consumed *not even two hours prior* to being pulled over. I am not persuaded by your claim that you did not recall consuming these drinks because you were groggy and because you were not planning on drinking that night as you alleged.
- Regarding your claim that you consumed the remainder of your friend’s vitamin water, I note that you stated that the bottle was “basically empty” yet somehow you managed to consume a “big sip” from the bottle just prior to being pulled over by police. With respect to your claim that the water contained vodka, I am not persuaded that you would not have realized the water contained liquor, as I am aware that liquor has a very distinct taste. Further, Constable Evans stated that you had a strong odor of liquor on your breath. If you had not consumed any liquor for almost two hours and you only had a “big sip” of water that contained vodka, I am not convinced there would have been a strong odor of liquor on your breath. Consequently, I do not find your evidence on this point to be very credible.

After carefully considering the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days however, as you have already served 18 days of your prohibition, you must serve the remaining 72 days. Your driving prohibition commences October 4, 2013. When your driving prohibition ends you may resume driving once you have obtained a driver’s licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that disclosure documents were given to you at the time of application. I will proceed with the review based on this confirmation.

You checked the boxes next to three of the grounds on the application form. However, the grounds associated with a 7-day or 30-day prohibition is not relevant to your circumstance. I will consider all grounds available to you in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 1927 hours on October 27, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that a vehicle was reported by three separate complainants as driving erratically. The officer reported that he located the suspect vehicle still on in your driveway. He reported that you were the sole occupant in the driver’s seat.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided a “FAIL” result at 1934 hours and 1937 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

In the Narrative the officer stated that he read you the Right to Request second ASD Test at 1936 hours from a Secondary ASD Demand Card. In addition, he recorded ‘yes’ for the question: Did driver understand the offer of the right to a second test?

I note that you applied on the ground that you were not advised of your right to a second test. However, you have not provided any compelling evidence to support that claim.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In your written submission you stated that "he made me blow a second time using the same device but replacing the mouth piece."

In the Report, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses.

In section 7 of his Report the officer checked the box beside 'yes' to show that he informed you of your right to a second test on a different ASD.

Based on the foregoing, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

You stated that prior to blowing into the device the officer demonstrated the unit by blowing himself the result was a "FAIL." You stated that you when you blew the result was also "FAIL." You stated that you conclude from this that the device was not performing properly or the officer and yourself consumed too much alcohol.

Here, I find that you were served with a Notice because the officer believed a sample of your breath on an ASD registered a "FAIL"; and, you were operating or had care or control of a motor vehicle. So, for the purpose of this review I will only consider whether or not the device was reliable with respect solely to your results.

In the Narrative, the officer's evidence is that he responded to three separate complaints that you were driving erratically. You do not dispute this. The officer stated that you were clumsy, he detected an odour of liquor and you had blood shot eyes.

I have also considered the Certificates:

For the first ASD, the qualified ASD calibrator certified that on October 1, 2013, he checked the calibration of ASD serial number 020570. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as January 9, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 1, 2013, he checked the calibration of ASD serial number 106547. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 29, 2013, and the service expiry date as April 3, 2014.

In the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

October 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 10, 2013, a peace officer served you with a Notice of Driving Prohibition (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.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

There is one issue which is determinative of this review.

- Did you have a reasonable excuse for failing or refusing to comply with a demand?

Having reviewed the evidence before me, I find that you had a reasonable excuse for failing to comply with the officer’s demand for a sample of your breath for analysis.

I am therefore 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.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

s.15

Adjudicator

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an

ASD test resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

In your written submission (the "Submission"), you submit that in the Report to Superintendent (the "RTS") the investigating officer indicates that you refused or failed to provide a breath sample. I acknowledge your submission, however, I am satisfied that this was a clerical error. On the Notice the officer indicates that you were served with a 90-day FAIL. Additionally, your Submission, the RTS, and Narrative Text Hardcopy (the "Narrative") indicate that two ASD "FAIL" readings registered. Further, you submit that the Notice of Impoundment indicates an incorrect date of, 2013-03-30, when you were stopped by the officer on August 30, 2013. I acknowledge your submission, however, I am satisfied that this was a clerical error, not vital in deciding your case. I feel that a reasonable inference can be made that the officer intended to record 2013-08-30 and mistakenly recorded 2013-03-30. Specifically, August 30, 2013 is indicated as the date of the stop in your Submission, on the Notice, in the RTS, the Report to Superintendent Vehicle Impoundment, and the Narrative. This is the conclusion I draw from the evidence before me.

You submit that you have been a responsible driver with no convictions or driving conditions for the past s.22 . I have authority to consider a person's driving record in a limited capacity. The facts of your case do not fall within this capacity, therefore, I have not considered your driving record in this review.

You submit that you are currently dealing with multiple stressors in your life. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including personal circumstances. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn RTS, the investigating officer, Cst. Milman, indicates that you were driving or in care or control of a motor vehicle at 1741 hours on August 30, 2013. Further, in the Narrative, Cst. Milman submits that at approximately 1740 hours he observed your vehicle fail to stop at a 3-way intersection at Hope River Road and Menzies Street and conducted a traffic stop.

In your Submission, you indicate that you were, “pulled over by the RCMP on Friday, August 30, 2013 at approximately 1741 [hours] on Hope River Road in Chilliwack, BC.”

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

Evidence in the RTS indicates that at 1746 hours, Cst. Milman made an ASD demand on you. At 1749 hours you provided a breath sample for analysis on ASD serial number 101641. The test result was a “FAIL”. Further, at 1800 hours you provided a second breath sample for analysis on ASD serial number 069351. The test result was a “FAIL”.

Based on the evidence before me, I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Narrative, Cst. Milman submits that following the first ASD “FAIL” result he provided you with the opportunity to provide a second sample. Evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail.

You state that after the first ASD test read “FAIL” you were advised by Cst. Milman that you, “could provide another breath sample, a second test.”

Based on the evidence before me, I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

Police evidence indicates that you requested a second ASD test and that at 1800 hours you provided a sample for analysis. The test result was a “FAIL” and you were shown the result by Cst. Milman.

Based on the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Milman indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 101641, with a temperature of 25 degrees Celsius and ASD serial number 069351, with a temperature of 27 degrees Celsius were used. These unique ASD serial numbers are corroborated by a Certificate of a Qualified ASD Calibrator for each of the two devices.

In your Submission, you acknowledge that the RTS indicates two ASD test results. However, you assert that you were not informed that the second test would be done on a different ASD, rather, that Cst. Milman assured you that a new mouthpiece would be used in the second test. You also indicate that you did not physically see two different ASDs. Accordingly, you argue that proper policies and procedures were not followed and that your rights as a motor vehicle operator were violated, according to Section 215.42 (2) of the Act.

I am satisfied that by referencing Section 215.42 (2) of the Act, you want me to infer that a second analysis must be performed with a different ASD than was used in the first analysis.

I acknowledge your submission that Cst. Milman did not inform you that your second breath test would be administered on a different ASD. However, on line 7 in the RTS, Cst. Milman indicates that you were informed that the second test would be administered on a different ASD. Aforementioned, a serial number and temperature for a second ASD are also indicated in the RTS. Moreover, the Certificate of a Qualified ASD Calibrator (the "Certificate") confirms that the serial number noted in the RTS (069351) is unique to this ASD. You do not provide persuasive evidence that a new mouthpiece was used, only that Cst. Milman assured you that a new mouthpiece would be used. You also indicate that you did not physically see two different ASDs, however, you do not provide persuasive evidence that the same ASD was used to conduct both breath tests. If I accept your argument that the same ASD was used to perform both breath tests, I must also accept that Cst. Milman provided you with false information during the investigation, swore false information to be true in the RTS, and knowingly provided a Certificate for a device that was not used in the investigation. I find it more probable that you were informed your right to a second ASD test included this test being conducted on a different ASD. I also find it more probable that Cst. Milman used ASD serial number 069351 to administer the second test, rather than replacing the mouthpiece on ASD serial number 101641 used to conduct your first test.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

Based on the evidence before me, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 101641 was checked for calibration on August 3, 2013, with a service expiry date of January 3, 2014 and calibration expiry date of August 31, 2013;
- Qualified ASD Calibrator, Gregory Robert Dykstra, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 069351 was checked for calibration on August 23, 2013, with a service expiry date of November 21, 2013 and calibration expiry date of September 19, 2013 and;
- Qualified ASD Calibrator, Gregory Robert Dykstra, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Milman. These signatures confirm that any ASD tests referred to in the investigation were conducted by a qualified ASD operator and that the ASD units used were functioning correctly.

Based on the evidence before me, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Cst. Milman indicates that at 1743 hours he formed reasonable suspicion that you were driving or in care or control of a motor vehicle, with alcohol in your body. Upon speaking with you, Cst. Milman noted a moderate odour of liquor coming from your breath. When asked if you had been drinking, he submits that you responded, "2 with lunch."

In your Submission, you indicate that Cst. Milman said he smelled alcohol and asked you to provide a breath sample to test alcohol levels. You admit that you had two beer with your lunch at 1200 hours but that you did not consume any more alcohol for the rest of the day. You also indicate that Cst. Milman stated, "You seem like a nice guy and you don't seem drunk but I must follow procedures." You assert that you thought because almost five hours had passed, you were fine to drive.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80 mg%. I have two ASD "FAIL" results before me and your own admission of consumption. I have already determined that the ASDs registered a "FAIL", the second analysis was performed on a different ASD, and that the ASDs used were reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.



October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the officer alleged you were being prohibited from driving because an ASD test

resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

In your written submission (the "Submission"), you assert that you have never had a previous record in s.22 of driving. I have no authority to consider a person's driving record in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Eeftink, indicates that you were driving or in care or control of a motor vehicle at 0150 hours on September 14, 2013. In the Narrative Text Hardcopy (the "Narrative"), Cst. Eeftink submits that he observed a s.22 pull off of Highway 20 into the Anaham Gas Bar (the "Gas Bar"). Further, on the first page of his handwritten notes Cst. Eeftink's first entry indicates, "was on Hwy 20", and on the last page he indicates, "saw driving at 150 hrs on road." In the Narrative, Cst. Eeftink submits that he pulled behind the vehicle and observed a sole occupant. He submits that the occupant exited the driver's side door and went around the vehicle away from him. Cst. Eeftink approached the individual and identified you as s.22 with a driver's licence.

You submit that s.22 called you at approximately 11:00 pm to say that he would be leaving the truck parked and keys inside at the Gas Bar on the reserve. You submit that at approximately 1:00 o'clock you were worried, so you went to the reserve and found the truck parked in front of the payphone at the Gas Bar. You went over to the truck, found that the door was open, sat on the seat, and opened your purse to look for change to use the payphone. You submit that you got out of the vehicle and proceeded to the payphone when a R.C.M.P. vehicle pulled up behind you. The officer asked you what you were doing and you told him that you were using the payphone and looking for s.22

In his letter of support dated September 23, 2013, s.22 submits that you did not have his vehicle on September 14, 2013. Specifically, that prior to going for some beers with friends, at approximately 11:00 pm, that he had the vehicle and parked it at a gas bar on the reserve. In an additional letter of support dated September 24, 2013, s.22 submits that on September 13, 2013, he was using the vehicle that you were assumed to be driving.

At approximately 11:00 pm, he phoned you at home and told you that he would leave the truck and keys under the seat at the Gas Bar.

In my view the two statements signed by s.22 dated September 23, 2013 and September 24, 2013, respectively differ in appearance. Specifically, the statements allegedly composed by s.22 do not appear to be written by the same person as the handwriting and signature are not consistent. As a result, I have given less weight to this evidence.

It does not make sense to me that you would willingly submit to an ASD test without questioning why you had to take one, if you had not been driving the vehicle. Further, you stated that after the prohibition was read and you were asked to take the second test, this was when you realized that Cst. Eeftink assumed you were driving, “and now knew how [you] could explain why [you were] there alone.” Although I think it is unlikely that you did not realize Cst. Eeftink assumed you were driving until that point, you did not provide me with any evidence of how you explained to him, “why [you were] there alone”, or that you were not driving.

I find that Cst. Eeftink’s evidence is that he observed a s.22 driving as it turned off of Highway 20. Specifically, that he saw a s.22 s.22 “driving at 150 hrs”, on Highway 20. Cst. Eeftink provides evidence that he observed the pick-up in motion and followed it into the Gas Bar. Further, he submits that he witnessed you as the sole occupant and that you exited the driver’s side door.

Cst. Eeftink’s evidence is detailed and convincing. He provides persuasive content including handwritten patrol notes and a Narrative that makes up part of his sworn report of the investigation. Conversely, I question the credibility of your account of that morning.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, Cst. Eeftink indicated that the ASDs registered a “FAIL” at 0203 hours and 0230 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Narrative, Cst. Eeftink submits that he read you your right to the second ASD test and that the lower of the two would prevail. Moreover, on line 7 in the RTS, Cst. Eeftink indicated that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, Cst. Eeftink indicated that you requested a second ASD test and that at 0230 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Eeftink recorded the serial numbers of the ASDs used for your tests as 073145 and 100865, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

I am satisfied that the Notice was served on the basis the "FAIL" result.

Was the ASD reliable?

Evidence indicated on the Certificates of a Qualified ASD Calibrator (the "Certificates") is as follows:

- ASD serial number 073145 was checked for calibration on September 9, 2013, with a service expiry date of December 4, 2013, and calibration expiry date of October 7, 2013;
- ASD serial number 100865 was checked for calibration on September 9, 2013, with a service expiry date of July 24, 2014, and calibration expiry date of October 7, 2013, and;
- Qualified ASD Calibrator, Sgt. Michael Andrew Hacker, signed the Certificates indicating the ASDs were found to be within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Ken Beatch. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Robertson and your lawyer's submissions, I find there is one determinative issue in this review.

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), and the Narrative Text Hardcopy, Constable Robertson indicated you were witnessed driving or in care or control of the vehicle at 0256 hours, on September 14, 2013.

Based on all the evidence before me in this specific set of circumstances, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 7, 2013. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

November 19, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 31, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative, Jennifer Currie. I have proceeded with this review based on that confirmation.

On November 13, 2013 I received a submission from Ms. Currie stating that she will no longer be acting as counsel for you in this review and that you will be making your own submissions.

At the time of this review I have yet to receive any submission from you. I have continued with this review based on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2130 hours on October 31, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over and were identified as the driver via your BC driver's licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2144 hours and 2153 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2150 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2153 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101846 and your second sample of breath into ASD serial number 101800. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 101846 and 101800.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on October 30, 2013, he checked the calibration of ASD serial number 101846. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 27, 2013, and the service expiry date as September 20, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 30, 2013, he checked the calibration of ASD serial number 101800. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 27, 2013, and the service expiry date as September 20, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 31, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 5, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served. Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Facts, Evidence and Analysis

I find there is one issue that is determinative of my review.

Was the ASD reliable?

I am not satisfied that the ASD result obtained from a sample of your breath was reliable.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

Records show that your vehicle was impounded and was released on September 6, 2013. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date the vehicle was eligible for release. **Original receipts and invoices** with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you.

s.15

Adjudicator

cc. Joseph Saulnier
Martland & Saulnier
fax: 604-687-6298

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 10, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on two grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

At the outset of your oral hearing your lawyer, Archie Kaairo, confirmed that he received full disclosure.

Mr. Kaairo indicated that you have no record of any other prohibitions on your driving record. He also indicated that you are at risk of losing your job because of this prohibition. He stated that you had concerns with regard to the imposed penalties, specifically the ignition interlock requirement.

I can appreciate that a 90 day driving prohibition can have far reaching implications for a person who needs to drive for employment and personal reasons. I can also appreciate your concerns regarding the imposed penalties. However, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. Further, I am unable to consider your driving record. In this review I can only consider and make decisions on the issues noted below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on October 10, 2013, at 02:40 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 10, 2013, at 02:40 hours.

Did the ASD register a "FAIL"?

In the RTS, the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of a Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 10, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Archie Kaairo
604-941-9174

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

you were a driver within the meaning of section 215.41(1);
the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
you were advised of your right to request a second analysis;
if requested, it was provided and performed with a different ASD;
the Notice was served on the basis of the lower analysis result; and,
the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

Cst. Obermayer, the investigating officer in this IRP, has provided detail in the Occurrence Report - IRP Narrative on his prior interactions with you, in particular prior driving offences involving alcohol. Your lawyer, David Greenbank, has submitted on your behalf that “This is character evidence and . . . should not be considered on this review.” For the purposes of this review, I make no reference to this evidence, and examine only the incident for which you were served the Notice on October 18, 2013.

Issues

The following are the issues in this review:

Were you a driver within the meaning of section 215.41(1) of the Act?
Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
Were you advised of your right to a second analysis?
Was the second analysis provided by the officer and performed using a different ASD?
Was the Notice served on the basis of the lower analysis result?
Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer — Cst. Obermeyer — indicated that you were driving or in care or control of a vehicle at 2307 hours on October 18, 2013. He provides in the IRP Narrative that:

- he was working at a road check traffic stop when he noticed a vehicle parked "approximately 150 feet to the west" of the roadblock area;
- the vehicle head lights were on, with the vehicle parked on the roadside;
- he observed "a lone male standing outside the vehicle at the rear corner on the passenger side";
- when speaking with the driver, he detected a "very strong and overwhelming odor of liquor emanating from s.22 breath";
- you (identified as s.22 throughout the IRP Narrative) informed him that a "buddy" was driving your vehicle, and then stopped, left the vehicle, and ran away.

An investigation ensued wherein Cst. Obermeyer attempted to locate the individual you state was driving the vehicle immediately prior to its stop near the roadblock. A police dog and trainer was called to search for the vehicle keys and the person driving, whom you state had left the scene. Cst. Obermeyer provides: "After an extensive parameter search the police dog did not locate the vehicle keys and confirmed that NO person had left from where the vehicle was parked."

To establish reasonable grounds that you were the driver of the vehicle observed parked near the roadblock, Cst. Obermeyer set out specific points in the IRP Narrative as evidence:

- a very short time of "10 seconds" from when your vehicle was observed stopped at roadside to when he attended that parking spot to investigate;
- you were the only person near the vehicle;
- you did not provide the name of the person you state was driving when asked by Cst. Obermeyer;
- your cell phone and a notepad were observed on the front passenger seat of the vehicle;
- the seat position was suited to your "body type";
- a police dog was unable to locate another person.

Through your lawyer, you provide three documents: submissions from your lawyer; an affidavit from s.22 your common-law wife; and your own affidavit sworn October 29, 2013.

Your lawyer provides a summary of the relevant sections of the Act, those which define "driver". He then states there is no evidence from the police of the vehicle being in motion, nor is there evidence of you occupying the driver's seat of the vehicle. He highlights portions of the officer's evidence as hearsay (that of the dog handler) and character evidence (Cst. Obermeyer's past dealings with you). He summarizes your affidavit in which you state you were "not operating the vehicle at the time that

it was pulled over and stopped.” You did not have the keys for the vehicle present, and on investigation the keys were not located. You also swear that you had no intention to drive.

s.22 affidavit sets out evidence that you returned home later in the evening after the incident, without the keys to the vehicle. She also provides that the driver’s seat “automatically moves back as far as it can” once the ignition is off.

To provide evidence that you did not operate the vehicle and had no intention to drive, you state:

- at the bar an acquaintance of yours named s.22 offered to drive you home in your car;
- s.22 drove your vehicle with you in the passenger seat;
- suddenly he stopped, and fled from the vehicle parked at the side of the road;
- a police officer approached the vehicle at that time and began an investigation;
- you told the officer that another person was driving and had fled the scene upon stopping.

Your evidence does not establish a firm identity of the person driving your vehicle, s.22. The officer notes that you were unable to name this individual at roadside. Your affidavit does not establish anything further in your relationship with this individual beyond your acquaintance at the bar, and I question why you would trust an individual not familiar to you to return you and your vehicle to your home on the evening in question. You are unable to physically describe s.22 and you also do not set out any effort you made to ascertain his identity after the evening in question. Given the weight of this prohibition and its penalties, this is surprising in its absence.

s.22 evidence does not add weight to your version of events; the only factual information she provides is on an automatic feature of the vehicle which does not provide detail to illustrate that another individual had driven the vehicle that evening.

Given Cst. Obermeyer’s detailed evidence in describing the investigation at roadside, and your lack of descriptive evidence to establish the identity of another person you state drove your vehicle, I attach greater weight to his evidence. He provided evidence on behalf of the dog’s handler- which I do not evaluate as hearsay because of Obermeyer’s direct observation - that an investigation ruled out the possibility of another individual having departed immediately prior to his interaction with you. Accepting his evidence that there was no other person present who was driving your vehicle, the location of the keys is immaterial in this consideration: there was no other way for you as the driver to proceed to the location without them; I infer with reason that you disposed of the keys beyond detection by the officers present at the scene. Cst. Obermayer observed your vehicle parked at the scene “in a location where there were no residences/nor driveways”; I conclude that his experience with roadblock operations led to his conclusion that you were the driver, having proceeded to that location, immediately prior to his observing your vehicle with you standing outside of it.

I am therefore satisfied on a balance of probabilities that you were a driver, having care and control of the vehicle, within the meaning of section 215. 41(1) of the Act.

Did the ASDs register “FAIL”?

In the Report, the officer indicated that you provided ASD “FAIL” results at 2338 and 2346 hours.

There is no evidence to the contrary on this point. I am satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the Occurrence Report he provided that this right was read to you at 2345 hours, and that you requested a second test.

Based on this, I am satisfied that the officer advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer, and was it performed on a different ASD?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD "FAIL" result at 2346 hours. This was performed on ASD serial number 101846, a different ASD from that of the first ASD analysis. He has provided two distinct ASD serial numbers, as well as a 'Certificate of a Qualified ASD Calibrator' for each ASD.

With no evidence to the contrary, I am satisfied that the second test was provided by the officer, and that he performed that analysis on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Was the ASD reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator, Robert Somerville, certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the both ASDs, Mr. Somerville certified that on September 27, 2013, he checked the calibration. He found the ASDs to be within the recommended limits. He recorded the ASD calibration expiry dates as October 25, 2013 and the service expiry dates as September 20, 2014.

You make no submissions and provide no evidence on this point; I therefore find the ASDs reliable at the time the samples were taken.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 18, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be

s.22

IRP Review

s.22

Page 5

considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. David L. Greenbank
Greenbank Murdoch & Company
fax: 604-941-6207

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 2, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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.

You applied on the ground that, “I was not advised of my right to a second test on an approved screening device (ASD).” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of breath into an ASD. All grounds for review that apply to your case will be considered in this review.

You state that you are, “begging [me] to please consider a lesser punishment than the 3 months.” I do not have delegated authority to shorten or alter the terms of a 90-day IRP.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the “RTS”), the investigating officer, Cst. Russell indicates that you were driving or in care or control of a motor vehicle at 1650 hours on September 2, 2013. Further, in the Narrative Text Hardcopy (the “Narrative”), Cst. Russell submits that a complainant, s.22 called police to advise that at 1640 hours a female driver had backed a vehicle over concrete curbing and that the rear wheels had come to a stop in a flower bed. s.22 witnessed the female as the sole occupant, advised police that she was slurring her words, and had a strong smell of liquor on her breath. s.22 observed the keys on the driver’s side floor and that the vehicle’s four-way flashers had been engaged. At 1650 hours, Cst. Russell arrived at the Quality Inn (the “Inn”) parking lot, located in the 21800 block of Loughheed Highway, and found you sitting in the driver’s seat. He inspected the vehicle and found keys laying on the floor between the gas pedal and the driver’s seat. He confirmed the keys were able to start the vehicle. Your identity was verified with a British Columbia driver’s licence.

You state that you, “should of never got into [your] car and driven” and that you remember trying to park you vehicle, putting the hazard lights on, and taking the keys out of the ignition. You also submit that your driver’s licence was not seized and you surrendered it at a motor vehicle branch. I acknowledge your submission, however, I note that police evidence does not indicate that your licence was seized. Cst. Russell submits that a driver’s licence was located in your purse and used to positively identify you. Based on the evidence before me, I am satisfied that your identity was confirmed by Cst. Russell and that by surrendering your licence, section 215(3)(c) of the Act was satisfied.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

Evidence in the Narrative indicates that at 1655 hours, Cst. Russell formed reasonable suspicion that you were driving or in care or control of a motor vehicle, with alcohol in your body. After responding to a complaint of a possible impaired collision, Cst. Russell found you leaning back in the driver’s seat and that you appeared intoxicated. Your face was flushed and a strong smell of liquor was detected coming from your vehicle. As he spoke to you, Cst. Russell

observed that you slurred your words. He confirmed that you were a suitable candidate for the IRP program and made an ASD demand on you at 1705 hours.

You submit that you consumed two glasses of red wine, along with six clonazepam (a muscle relaxer), prior to driving to the Inn.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle, with alcohol in their body. After arriving on scene of a reported possible impaired driver, Cst. Russell detected a strong smell of liquor coming from your breath, the smell of liquor emanating from your vehicle, observed that your face was flushed, and your speech slurred. When he advised you that you were being video recorded, he submits that you replied by stating, "who gives a shit, I'm drunk."

Based on the evidence before me, I am satisfied that the peace officer made a valid ASD demand.

In the Narrative, Cst. Russell submits that he assisted you in entering an ambulance and made an ASD demand on you shortly thereafter. He indicates that you did not respond and pretended to sleep. He attempted to wake you but you remained silent with your eyes closed. He proceeded to touch your shoulder, you opened your eyes, slurred several words, and closed your eyes. He then explained to you that should you refuse to provide a breath sample that you would receive that same penalty as if you blew a "FAIL" reading and that you attempted to sleep and did not respond. At 1706 hours, he removed an ASD, inserted a mouthpiece, and asked you to provide a breath sample. He submits that you observed the instrument and then closed your eyes to try and sleep. Accordingly, he deemed a refusal at 1706 hours.

You assert that you don't remember Cst. Russell and don't remember him asking for a breath sample. Accordingly, you assert that you were sleeping because of the pills (clonazepam) not because you were pretending to sleep and that you honestly wouldn't have refused anything from Cst. Russell, if you were awake.

Cst. Russell provides evidence that when he poked your shoulder you responded by opening your eyes. I acknowledge your admission that you consumed two glasses of red wine along with six clonazepam. However, I am persuaded by the evidence before me that this did not cause you to be incapacitated to the point of not being able to understand or comply with Cst. Russell's demand. The evidence before me suggests that you responded to Cst. Russell's touch and that you were able to speak. I also note that Cst. Russell indicates that ambulance attendants were present when he made the demand. I feel a reasonable inference can be made if these attendants felt that your condition was such that you could not respond that they would have advised Cst. Russell. I find it more probable that when an ASD demand was made on you and the ASD was presented that you chose not to comply by pretending to sleep and exaggerating the effects these substances had had on you at that point in time.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative, Cst. Russell indicates that after a refusal was deemed at 1706 hours, you were taken to Ridge Meadows Hospital as a precaution because you were trying to sleep.

You state that you, “never drink, EVER, but you decided to have a couple of glasses of Red wine...[and you] took 6 clonazepam.” I have no evidence before me as to how mixing red wine and clonazepam affects you, your ability to follow instructions or stay awake. I understand that you would like me to infer that it was the stress of an argument and the pain you were in that caused you to mix these substances. However, I am satisfied that it was your choice to consume these substances. You submit that you remember parking your car and that you stopped the vehicle the minute you felt you were going to sleep. However, police evidence indicates that you were awake for approximately ten minutes after s.22 witnessed your vehicle drive into a flower bed. Moreover, Cst. Russell submits that you advised him you were having family issues and that after he told you you were being recorded you replied, “who gives a shit, I’m drunk.” He also submits that he assisted you into the ambulance where the ASD demand was read. I have no evidence before me that you advised Cst. Russell, at any point during the investigation, that you had consumed alcohol and clonazepam or that you felt that you were going to fall asleep. Consequently, the evidence before me indicates that you were awake and coherent up until the ASD demand was made on you. You also submit that the next morning you remembered what you had done. I question if you remember what you had done why you would not remember your interaction with Cst. Russell. I have considered your submission that you were under the influence of alcohol and clonazepam, however, I am not persuaded by your evidence that this influence was marked enough to provide you with a reasonable excuse to fail or refuse to comply with the ASD demand.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 2, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

NOVEMBER 12, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, one of the grounds you checked on the application form was that you did not refuse or fail to comply with the officer’s demand to provide a breath sample. However, that ground is not applicable in your case, because of the reason for which you were prohibited. For your benefit, I have considered all grounds applicable to your situation. Records in this office confirm that full disclosure of the documents before me was provided to you. I proceeded with this review based on that confirmation.

In your written submission, you made reference to your rights under the *Canadian Charter of Rights and Freedoms*. I acknowledge your submissions, but the scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues or to apply *Charter* remedies.

You made submissions on the *Wilson* decision. I have read and considered *Wilson*; however, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act. I am authorized to consider only those grounds that are directly related to the issues outlined below.

You said you are passionate about your rights, and your hobby is studying various aspects of the law. For your information, you may wish to review a noteworthy decision of the BC Supreme Court that addresses the constitutionality of the IRP regime: *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639. The prohibition you received falls under section 215.43(1)(a). The court in *Sivia* addressed this part of the Act in paragraph 17:

“[17] Insofar as the regime operates with respect to motorists who allegedly blow between 0.05 and 0.08, I find that the ARP regime does not infringe s. 8 of the *Charter*.”

You commented on the vehicle being impounded, despite you not being the registered owner. In this situation, the officer impounded the vehicle under section 215.46(1). The Act requires a peace officer to impound a vehicle that is driven by someone with alcohol in his body. The registered owner may apply for a review of the impoundment, as set out in the instructions at the bottom of the Notice of Impoundment.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “WARN”, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), Constable Moore indicated that he witnessed you driving or in care or control of the vehicle on October 20, 2013, at 0050 hours. There is nothing before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “WARN”?

In the RTS, Constable Moore stated that you provided a breath sample into an ASD and that the device registered “WARN” as a result of the analysis. I am satisfied that the ASD registered “WARN” at 0057 hours, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the “Narrative”), Constable Moore indicated that he informed you of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was not provided by the officer, because you did not request it.

Was the second analysis performed on a different ASD?

This issue is not relevant, because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that one ASD used to analyze your breath registered “WARN”. In your written submission, you argued that it is impossible that you could know if you had the benefit of the lowest analysis, if the officer does not tell you the specific BAC that registers on the ASD. The administrative sanctions issued pursuant to section 215.41 of the Act are based on breath samples that fall within a specific BAC range. Section 215.41 (2) of the Act states that “WARN” means an indication on an ASD that the concentration of alcohol in a person’s blood is not less than 50 mg %. Accordingly, if your breath sample registered lower than 50 mg%, the result would fall within the PASS range. I am satisfied that the Notice was served on the basis of the lowest available result, which was “WARN”.

Was the ASD reliable?

Constable Moore submitted a Certificate of Qualified ASD Calibrator (the “Certificate”) stating that Robert Dale Somerville certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF (the “Calibrator”). The Calibrator stated that on the 1st day of October, 2013, he checked the calibration of ASD with serial number 101847 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG230402, expiry: 2014-10-30. This ASD was found to be within the recommended limits. It had a calibration expiry date of October 29, 2013 and a service expiry date of July 25, 2014. I note that the ASD serial number

on the Certificate matches the serial number of the ASD referenced on the RTS.

In your submission, you said the officer told you that he had administered over twenty tests with the ASD in question that night. You said you found this unsettling, as:

“[you are] aware of the many limitation[s] of the ASD used. One being, the device will have residual alcohol left over from previous successive uses in a short period of time. Another, being the half life effectiveness of the device with heavy use. Not to mention EEPROM bugs. The list is [quite] extensive.”

In *Johnson v. the Superintendent of Motor Vehicles*, 2002 BCSC 89, the court ruled that it is not sufficient for a petitioner (applicant) to make ‘suggestions’ about what might have happened. The applicant must put forth something other than suggestions, or hypotheticals, which would move an Adjudicator to be satisfied in his favour. Evidence to support the suggestion is required in an administrative review. You did not provide any evidence to support your suggestions noted above, or to indicate that the device used to analyze your breath sample malfunctioned in any way.

Based on all the evidence before me, I am satisfied on a balance of probabilities that the ASD was reliable.

Was your BAC less than 50 mg% even though the ASD registered a “WARN”?

In your written submission, you acknowledged that the ASD registered a “WARN” upon analyzing your breath sample. However, you were “completely skeptical that the device was performing correctly, and [your] understanding is ‘if [you] asked for another one’, [you] would give up some of [your] inalienable rights.” Based on these beliefs, you chose not to take advantage of the second ASD analysis. You said you went to a hospital as soon as possible to have “the most accurate form of tests”; however, you did not include a copy of the test results in your submission.

You did not provide any persuasive evidence that would cause me to doubt the “WARN” reading on the ASD that I found to be reliable. Based on all the evidence before me, I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your 3-day driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on October 20, 2013.

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, your lawyer, Sarah Leamon, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Ms. Leamon referenced the case of *Regina v Brigitte Schultz* 2009 BCSC 1521. She argued that the results of an ASD test cannot be used to incriminate a driver or to form the basis of the prohibition.

I acknowledge Ms. Leamon’s submissions; however, the scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues or to apply *Charter* remedies. The *Schultz* decision dealt with the use of an ASD result to prove a different charge under section 144(1)(b) of the Act. Additionally, the *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

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Ms. Leamon also referenced the case of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* and requested that I pay particular attention to paragraph 63 and Justice McEwan's recommendations with regard to basis on which hearings should be conducted.

I have read and considered *Spencer* and I am mindful of Justice McEwan's recommendations at paragraph 63. As previously noted, I will consider all relevant information before me in making my determinations.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 0232 hours on September 22, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer reported that he observed a vehicle driving around in a chaotic scene where more police officers were being requested due to the number of potentially intoxicated drivers that may decide to drive their vehicle impaired after waiting abnormally long for taxi service. He reported that he conducted a traffic stop and you were identified as the driver by providing your name, date of birth, and personal details which were compared to the police data base.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 0242 and 0250 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0250 hours.

IRP Review Decision
Page 3

I have no evidence before me to the contrary, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0250 hours.

I have no evidence before me to the contrary, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101794 and your second sample of breath into ASD serial number 039602. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101794 and 039602.

I have no evidence before me to the contrary, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading.

I have no evidence before me to the contrary, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

In his Narrative the officer reported that on the first ASD you received several "no go's" after not blowing correctly into the machine. The officer stated that he showed you that the machine was working properly, receiving a "000" reading, before administering the machine again.

The officer provided two Certificates of a Qualified ASD Calibrator:

For the first ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 101794. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as July 26, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 039602. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as July 25, 2014.

In paragraph 12 of your affidavit you stated that on your first attempt Constable Lau told you that you were not blowing hard enough. On your second attempt Constable Lau told you that your sample had not worked. In paragraph 13 you stated that you attempted a third time and again you were told that the breath sample had not worked. You told Constable Lau that you were blowing to the best of your ability. You stated that he blew into the device. He did not appear to do anything different. In paragraph 15 you stated that you blew into the device a fourth time; and again, you were told that

your breath sample was not working. In paragraph 16 you blew into the device and Constable Lau told you that the result was a “fail.” You stated that you were absolutely shocked.

In paragraph 18 you stated that you did not understand, you were not impaired, and you had s.22
s.22 Constable Lau seemed to sympathize with you and gave you a second chance. Again, the first attempt you were told the sample did not work. Again, you attempted to blow and the outcome was the same.. You submitted that this repeated over and over. You submit that you do not recall how many times you tried; however, you know you blew into it several more times.

Ms. Leamon submitted a paper labeled “Technical Information on the Operation and Calibration of ASDs in British Columbia.” Ms. Leamon directed me to the paragraph labeled “NOGO” and “VOID” messages. She submits that it reads the first two attempts will end in a “NOGO” and the third will end in a “VOID”. After a “VOID” the mouthpiece must be ejected to end the test sequence. She emphasized the requirement for a new mouthpiece.

Mr. Leamon argued that there is no evidence before me that the ASD ever displayed a “VOID” or that a new mouthpiece was ever inserted. She suggested that consequently, I must find that the officer’s evidence indicates that the device was not operating properly, so I cannot find the second ASD to be reliable.

Ms. Leamon provided six previous decisions of my colleagues for my consideration. I have read and considered the decisions of my colleagues provided by Ms. Leamon. I am not bound by previous review decisions which, in any event, are fact specific and dependent of specific findings of credibility made by the Adjudicator conducting each specific review.

When I consider all of the evidence before me, I note paragraph 14 of the officer’s sworn Report that states: “Any ASD tests referred to in this report were conducted by a qualified ASD operator and the ASD units were functioning correctly. The attached narrative report and other attachments consist of 10 pages and forms part of this sworn document.”

I find that you blew into the device several times to no avail, and the officer showed you that the instrument was functioning properly. The officer did not provide a step-by-step account of what took place sequentially, and his evidence does not necessarily include everything that occurred. An absence of evidence does not persuade me to believe that “VOID” never occurred or that a new mouthpiece was never inserted. It is also noteworthy that throughout your affidavit you claim that after every failed attempt Constable Lau told you that the “breath sample was not working.”

Based on all the evidence before me, I am satisfied on a balance of probabilities that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASDs registered a “FAIL”?

The investigating officer indicated that when he approached your vehicle he observed that all of your windows were open, he believed, in an attempt to rid the odour of liquor from the vehicle, and you were about to exit the vehicle before the police got to the scene. He stated that your response was, “at dinner time” to the question of when was your last drink. Further in the report the officer reported that you stated, “during dinner, throughout the day had 3.” He stated that you had an odour of liquor on your breath, a hoarse voice, and repeatedly asked for a break saying you s.22

In your affidavit, you stated that your reception dinner started at 6:00p.m. and you consumed three glasses of white wine throughout the evening.

In paragraphs 20 – 25 of your affidavit you denied that when Constable Lau stopped you, you had all of the windows down, you denied that you were about to exit the vehicle when he approached you, you denied having a hoarse voice, you denied that you purposely paused before answering questions, and you denied you had an odour of liquor on your breath/vehicle.

You provided character letters from eight of your s.22 which support your stated drinking pattern as well as you not being intoxicated when you left the wedding.

Although you deny all of the officer's observations with respect to the indicia he noted in his Narrative, there is no explanation before as to why you would repeatedly ask for a break other than the common sense inference that you were concerned about the result of the ASD.

In my view the officer's first ASD test and its "FAIL" result, was corroborated by a second ASD test on a different device, which also resulted in "FAIL". The officer has provided evidence that both the ASDs were functioning correctly. I find that the combined effect of two "FAIL" results, mutually corroborative, on correctly functioning devices, outweighs your evidence as to your drinking pattern on the relevant evening.

Consequently, based on the evidence before me, I am satisfied on a balance of probabilities that your BAC was not less 80 mg% even though the ASDs registered a "FAIL".

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Sarah Leamon, Acumen Law Corporation

Fax: 604-370-2505

September 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 9, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Mark Bussanich, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?

- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Was your BAC less than 80 mg% even though an ASD registered a “FAIL”?

I find that you have provided evidence to indicate that your BAC was less than 80mg% even though an ASD registered a “FAIL.”

I am satisfied that your BAC was less than 80 mg%.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

November 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review you indicated a number of grounds that are not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because an ASD test resulted in a “WARN”. All grounds for review that apply to your case will be considered in this review.

In your written submission, you indicate that your letter is being written to describe the events that took place on the evening of Thursday, October 8, 2013. However, on the Notice the investigating officer indicated that your prohibition was served on October 17, 2013. I also have before me a British Columbia Driving Record Search that indicates the violation and disposition date of a, "3DAY PROHIBITION MVA: Motor Vehicle Act", as 17OCT2013. Further, on page 1 of 4 of the officer's Narrative Text Hardcopy – Occurrence Report – 1 (the "Occurrence Report"), he indicates the related date as: Thursday, 2013-Oct-17. Therefore, I conclude that your reference to Thursday, October 8, 2013, with respect to your driving prohibition is a clerical error.

I have read the September 10, 2013, article you submitted titled, "Ian Mulgrew: B.C. court ruling punches new holes in impaired driving law." I acknowledge that you submitted this article to indicate that a "WARN" reading is not enough to justify an immediate driving prohibition because police must also have evidence of impairment. I infer that this article is referring to the British Columbia Supreme Court ruling of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*. As such, Justice Dley found that there are three pre-conditions that must be satisfied before a Notice can be issued. Specifically, the third pre-condition indicates that a peace officer must have reasonable grounds to believe, as a result of the screening device's analysis, that the driver's ability to drive is affected by alcohol. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

You submit that at no time did the officer advise you of another method (i.e. a stationary screening device or blood sampling) to confirm your inability to operate a motor vehicle. Further, I have read the March 13, 2013 article that you submitted titled, "Breathalyzer machines used by police are error-prone, leading forensic scientist says", in which the findings of forensic expert, Nizar Shajani, are discussed including his suggestion that more advanced machines at police stations should be used to determine a person's sobriety. While I acknowledge your submission and Mr. Shajani's claim, the IRP legislation allows a peace officer to obtain a sample of breath for analysis at roadside. Further, there is no provision in the Act that requires a peace officer to offer a driver the opportunity to submit to a blood test in an IRP investigation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the “RTS”), the officer indicated that you were driving or in care or control of a motor vehicle at 2028 hours on October 17, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “WARN”?

In the RTS, the officer indicated that the ASD registered a “WARN” at 2034 hours.

I acknowledge that the article discussing error-prone breathalyzers indicates that no numerical values are displayed on ASD and as such, a peace officer might not be able to determine that a test was unreliable.

Section 215.41(2) of the Act indicates that:

“**warn**” means an indication on an approved screening device that the concentration of alcohol in a person’s blood is not less than 50 milligrams of alcohol in 100 millilitres of blood.

Accordingly, no numerical data is required as per the legislation.

I am satisfied that the ASD registered a “WARN”.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that you did not request a second ASD test.

You wrote that when the officer asked you if you would like a second attempt that you told him that you were not going to waste his time as you knew that you were physically unable to repeat more attempts.

While I acknowledge your submission that you felt you were physically unable to provide a second sample to confirm the first “WARN” reading, I must make a finding as to whether a second analysis was provided by the officer. Accordingly, you do not refute declining your right

to request a second analysis. Further, under the Act, a peace officer is required to inform a person of their right to request a second ASD test; however, it is that person's choice if they wish to request a second analysis. Based on the evidence before me, I am satisfied that the officer informed of your right to request a second ASD test and that you chose to decline the right to request a second analysis.

I am satisfied that the second analysis was not provided by the officer because a second analysis was not requested.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that one ASD test was administered, the result of which was a "WARN". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

In the Occurrence Report, under the heading "First ASD Test/Result", the officer indicates that there was a delay in administering the ASD test because you indicated that you were s.22 and would have difficulty providing a sample. Further, he indicates that you were provided with three attempts before a sufficient sample was collected on the fourth attempt.

You submit that you attempted the screening device but had great difficulty obtaining a, "deep enough inspiration to blow." Accordingly, you submit that you instructed the officer that you were s.22 and that your breathing is impaired as a result. Consequently, after making a second attempt, you were again unsuccessful. On your third attempt, you took as deep an "inspiration" as possible but could not forcefully blow long enough without getting wheezy. However, you indicate that you were able to blow, "enough time length into the device", and it appeared to have worked but the officer indicated that it did not register. Following this, you reminded the officer that you were s.22 and as such, had difficulty getting enough air in. When the officer informed you that if you were unable to blow on your next attempt that you would be charged with failing to provide a sample, you told him that you were not refusing but were finding it physically impossible to do so. Accordingly, you indicate that at this point you were quite distressed, dizzy, burping from swallowing air, shivering, and that your heart was pounding.

Further, you question why the officer relied on the roadside screening device if he had reasonable grounds to believe that you were impaired, when it has been proven these devices have limitations (i.e. temperature and calibrating issues) and as such, can often be inaccurate. On this point, the article discussing error-prone breathalyzers indicates that Mr. Shajani has raised concerns that the current model of breath analysis machines do not record the devices calibration at the time the test is given and that these devices can lose their calibration at any time.

I acknowledge your submission that you currently s.22 with one of the side effects being a reduction of air flow through the bronchial tubes that affects your ability to inhale and exhale deeply. I have also reviewed the side effects and precautions listed in the Drugs.com and Mednotes documents you provided. However, I must make a finding on whether the ASD used to conduct your breath test was reliable, not how your ability to blow was compromised by medication you are currently prescribed.

In your submission, you indicate that on your third attempt to provide a sample that you thought the ASD had registered a reading but the officer informed you it did not. As such, you submit that you are concerned the screening device was not working properly. On this point, section 14 in the sworn RTS indicates that any ASD test referred to in the officer's report was conducted by a qualified ASD operator and that the ASD unit used in your investigation was functioning correctly. Further, the officer submitted a Certificate of a Qualified ASD Calibrator (the "Certificate") in which Robert Dale Somerville certified that to the best of his knowledge the ASD was functioning correctly. Moreover, while I acknowledge your submission that on your third attempt the device appeared to have been blown into for the correct length of time, I have no evidence before me that indicates an ASD must be blown into for a specific length of time in order for a reliable reading to register.

Further, you indicate that it has been proven that an ASD has limitations with regard to its temperature and calibration. While I acknowledge your submission, the Certificate indicates that the ASD calibration expiry date for the device used in your test as 2013-10-25. Your prohibition was served on October 17, 2013, therefore, I am satisfied that the calibration expiry date indicated on the Certificate is valid. With respect to Mr. Shajani's claim that the current model of breath-analysis machines do not record an ASD's calibration, the Act does not mandate that an ASD display the device's current calibration. Moreover, by signing the Certificate, Mr. Somerville certified that the ASD was found to be with the recommended limits when he checked its calibration on September 27, 2013. Referencing the article you provided discussing error-prone breathalyzers, BC Minister of Justice Shirley Bond stated that the OSMV requires devices to be checked every 28 days and that police are required to submit sworn reports and documentation on the calibration of the devices. Therefore, because Mr. Somerville checked the ASD's calibration on September 27, 2013, and the calibration expiry date indicated on the Certificate is 2013-10-25, I am satisfied that this falls within the 28 day requirement. Moreover, under section 215.47(e) of the Act an officer is required to submit information related to the calibration of any ASD used in an IRP investigation. By providing the Certificate, I am satisfied that the officer fulfilled the requirement to provide information on the calibration of the device used in your investigation.

Based on the evidence before me, I am satisfied that the ASD used for your test was reliable.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

The officer's evidence is that while speaking with you, he detected the odour of liquor and was satisfied that the odour was from your breath. When asked the time of your last drink, he submits that you indicated that you had had two beer with dinner but had stopped about an hour ago because you had to drive.

In your Submission, you wrote that you attended a family birthday celebration, arriving at a local pub/restaurant at approximately 1800 hours. At 1800 hours, you ordered a Stella and throughout the evening consumed appetizers, an entrée and one additional Stella, as well as dessert before leaving at approximately 2020 hours.

While I acknowledge that you weigh s.22 and consumed food throughout the evening, I have no evidence before me as to how alcohol is metabolized when your weight, height, and food consumption are considered. Further, while I acknowledge your submission that the time of your last drink indicated by the officer in the RTS is incorrect, I find that this evidence is not vital in making a decision in this review.

In the article discussing error-prone breathalyzers, Mr. Shajani claims that drivers could have alcohol in their mouth from burping and register a falsely high reading, as a result. On this point, I acknowledge your submission that you were burping from, “swallowing air on repeated attempts at inspiration.” The officer’s evidence is that he asked you the time of your last drink, which I infer indicates that he turned his mind to the possibility of mouth alcohol. Moreover, your evidence and that of the officer’s is that he observed you through multiple attempts to provide a sample. On this point, the officer provides no evidence that he observed you burping. Therefore, I think it is likely that if you were burping that he would have noticed and delayed the test.

While you may have felt that at no point during the evening that you were impaired, you did not provide any compelling evidence that would cause me to doubt the “WARN” reading on the ASD that I have found to be reliable. Section 215.41 (2) of the Act states that “WARN” means an indication on an ASD that the concentration of alcohol in a person’s blood is not less than 50 mg%. As such, I am satisfied that your BAC was not less than 50 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your 3-day driving prohibition and monetary penalty. Your prohibition took effect on October 17, 2013.

October 30, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 9, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" however, that ground is not applicable to your situation because you did not receive a refusal IRP. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your submission you state that you are a tradesperson who relies on your vehicle and you do not take driving for granted. While I understand and appreciate your situation, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. The scope of this review is limited to the grounds as defined by the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2145 hours on September 9, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over and were identified as the driver via your BC driver’s licence.

In your submission you state that the officer pulled you over and stated the reason for the stop was a burnt out tail light.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 2149 hours and 2207 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2158 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2207 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 039602 and your second sample of breath into ASD serial number 101794. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 039602 and 101794.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 039602. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as July 25, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 101794. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 1, 2013, and the service expiry date as July 26, 2013.

In your submission you indicate that the officer had two ASDs with him and not one as he states in his narrative. You state that you provided a sample into a second ASD but the officer told you that it was not calibrated. You state that the officer then had another ASD dropped off at the scene. You submit that all of the ASDs have the same calibration dates so there is a flaw in the readings.

I acknowledge your submission that you provided a second sample into an ASD that was not calibrated. However, the officer notes that you provided two samples of breath on two different ASDs, and he has provided calibration information for both of these units, and you have not

refuted the officer's evidence on this point. There is no evidence before me to indicate that because the ASDs were calibrated on the same day their readings were not accurate.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

The officer indicates in the Narrative that you indicated that you had finished two beers one hour prior.

In your submission you state, "(the officer) then asked if I had anything to drink which I truthfully answered yes 2 glasses of wine an hour before and a beer approx 5 min before he pulled me over." You state that your eyes were red from dry contacts and because you were tired. You further state, "yes I had three (3) drinks over an hour (hr) but I was by no means impaired."

I note that there is a disparity between your and the officer's version of events regarding both the timeline of your consumption, and the type of alcohol consumed. If I accept that your beer occurred five minutes prior to your interaction with the officer, the time of your last drink would be 2140 hours. This would mean that your first ASD analysis occurred within nine minutes, and your second analysis occurred within 27 minutes of consumption.

As noted in *Giesbrecht v Superintendent of Motor Vehicles*, it is accepted police practice to allow for 15 minutes from the time of the last drink until the ASD analysis to allow for the dissipation of mouth alcohol.

While there is a discrepancy with regard to your response to the officer at the time, the evidence before me indicates that the officer inquired as to the time of your last drink. From this, I infer that the officer was aware of the effects of mouth alcohol and made attempts to ensure that you provided a valid sample of your breath for analysis. On a balance of probabilities, I do not find it likely that if you responded to the officer that your last drink was five minutes prior to the traffic stop that he would administer the test regardless and make no note of it in his evidence. I also do not find it likely that if you informed the officer that you consumed two glasses of wine over an hour and a beer five minutes prior, that the officer would note that you stated, "2 beers an hour ago." As such, I do not find your version of events to be credible. Furthermore, I note that you provided a second sample of your breath at 2207 hours. I do not have any evidence to indicate that the result of your second ASD analysis was not reliable. You provided two samples of breath on two ASDs, both resulting in "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 9, 2013. Your review was extended on September 26, 2013. You have already served 20 days of your IRP and you have 70 days remaining. Your Prohibition ends on January 8, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

I acknowledge receipt of your written submissions. You explained that your husband works seven days a week to take care of his family, and you have a child

s.22

s.22 This makes it impossible for you to work, and it is very hard financially.

While I understand that it must be difficult to be without your car and driver's licence; under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

You said that you were not told you could go to the hospital and get a blood test and that when you asked the officer, he said it was too late. This sentence does not make sense. If you were not told you could get a blood test, I wonder how you could have asked the officer about it. You also said the officer should have informed you of your rights. However, there is no requirement within the Act for an officer to make blood tests available to a person who is undergoing an impaired driver investigation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that at 00:55 hours on September 18, 2013, Officer Mullen (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 01:01 hours and at 01:09 hours, the officer used ASD serial numbers 039603 and 101794 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. The evidence in the Narrative Text Hardcopy (the "Narrative") is that at 01:03 hours, the officer read verbatim from the IRP information card your right to request a second ASD test.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101794 at 01:09 hours. I am satisfied that the officer did provide the second analysis.

Was the Notice served on the basis of the lower analysis result?

Because both results were "fail" I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 039603 was checked for calibration on September 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 3, 2013, and a service expiry date of July 25, 2014.
- ASD serial number 101794 was checked for calibration on September 3, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 1, 2013, and a service expiry date of July 26, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You said that you arrived at your husband's shop at 12 midnight to pick up your husband and his friend. You were going to drive them both home because they had been drinking. When you arrived, you said they were not ready to go so you had one beer. You had a second beer half an hour later as they were still not ready to go. You said you left the shop and within five minutes an officer pulled you over. You said you told the officer you had two beers within the last 45 minutes and had just finished the second one a few minutes before you left. He conducted a BAC test and within ten minutes conducted a second one.

You wrote that the officer told you “you do not have the tell tale signs of what we normally see...” However, I note that he indicated in the Narrative that you were exhibiting the following signs of impairment: an odour of liquor on your breath, red glossy eyes, and your words were slow and slurred. He also stated that you were driving at inconsistent speeds and crossing the centre line. While I cannot comment on what the officer may have said to you at roadside about your indicia of impairment, it makes no sense to me that an officer would make such a statement to an individual exhibiting these indicia.

You said you read in the IRP paperwork that the officer said you were slurring and staggering and that’s not true. However, I cannot find any mention in the officer’s reports saying you were staggering.

The officer’s sworn evidence is that you told him you had one beer forty-five minutes ago. You told me, however, that you consumed two beers while at your husband’s shop. I note that you do not dispute the officer’s evidence on this point. This leads me to question the reliability of your evidence about your drinking pattern that night. I do not find your evidence to be very credible.

I am mindful that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. As I have already made a finding that the ASDs were reliable, I do not find your stated drinking pattern to be credible.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 18, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 3, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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 confirm that full disclosure of the documents before me was provided to your lawyer, Michael Shapray. I have proceeded with this review based on that confirmation.

Your written review was scheduled for 9:30 AM October 17, 2013. You were advised that all written information you wished to be considered should be provided to the Superintendent in advance of the review. No submissions were received from you or your lawyer, therefore I have proceeded with this review based on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 22:40 hours on October 3, 2013. In the Narrative the officer indicated that you were in the driver’s seat as you drove up to a roadblock and that you were identified via your BC drivers licence.

As there is no evidence to the contrary, I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASDs registered a “FAIL” at 22:43 hours and 22:50 hours, respectively.

As there is no evidence to the contrary, I am satisfied that the ASDs each registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report, the investigating officer checked the boxes indicating that you were advised of your right to a second test on a different ASD and that the lower ASD test result would prevail. In the Narrative Text Hardcopy (the “Narrative”), the officer indicated that you were informed of your right to a second test at 22:49 hours.

As there is no evidence to the contrary, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that a second analysis was conducted at 22:50 hours. In the Narrative, the officer stated that you provided a second suitable sample of your breath.

As there is no evidence to the contrary, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer indicated that two analyses were conducted and provided different ASD serial numbers for each one. According to the Report, the first analysis was conducted at 22:43 hours on ASD serial number 043876 and the second analysis was conducted at 22:50 hours on ASD serial number 039603. The officer also stated in the Narrative that two separate breath tests were conducted and noted the above ASD serial numbers for the respective tests.

As there is no evidence to the contrary, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer stated that both ASDs used to analyze your breath registered "FAIL" readings. This is corroborated by the officer's statements in the Narrative.

As there is no evidence to the contrary and the lowest analysis was a "FAIL", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

I have before me the Certificate of a Qualified ASD Calibrator for each of the ASDs used to obtain samples of your breath. For the first ASD, the qualified ASD calibrator certified that on October 3, 2013, he checked the calibration of ASD Serial number 043876 and found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as September 20, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 3, 2013, he checked the calibration of ASD serial number 039603 and found the ASD to be within recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 31, 2013, and the service expiry date as July 25, 2014.

The officer also solemnly affirmed that he is a qualified ASD operator and that the ASD units were functioning correctly.

As there is no evidence to the contrary, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. Having found the ASDs reliable and in the absence of any evidence to the contrary, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 3, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Michael Shapray
by fax: 604-590-5626



October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Phil Cote. I have proceeded with this review based on that confirmation.

In your IRP Application for Review, I note that your review was scheduled for September 26, 2013 at 0930 hours. At the time of the review, I had not received any submissions from you or Mr. Cote on your behalf. Accordingly, I have proceeded with this review with the evidence I have before me.

You applied for this review on a number of grounds that are not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an ASD test resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Byers, indicated that you were driving or in care or control of a motor vehicle at 2240 hours on September 17, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Cst. Byers indicated that the ASDs registered a "FAIL" at 2244 hours and 2251 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Narrative Text Hardcopy (the "Narrative"), Cst. Byers submits that at 2247 hours he advised you of your right to request a second ASD test and that you understood. Moreover, on line 7 in the RTS, Cst. Byers indicated that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, Cst. Byers indicated that you requested a second ASD test and that at 2251 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, Cst. Byers recorded the serial numbers of the ASDs used for your tests as 101550 and 101543, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS and Narrative indicates that both ASD test results were a "FAIL". The lowest analysis was a "FAIL".

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on two unique Certificates of a Qualified ASD Calibrator (the "Certificates") is as follows:

- ASD serial number 101550 was checked for calibration on August 22, 2013, with a service expiry date of November 21, 2013, and calibration expiry date of September 19, 2013;
- ASD serial number 101543 was checked for calibration on August 22, 2013, with a service expiry date of November 21, 2013, and calibration expiry date of September 19, 2013, and;
- Qualified ASD Calibrator, Leisa Rae Shea, signed the Certificates indicating the ASDs were found to be within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 17, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 8, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?

Was the second analysis provided by Cst. Fatallah and performed using a different ASD?

Was the Notice served on the basis of the lower analysis result?

Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer - Cst. Fatallah - indicated that you were driving or in care or control of a vehicle at 2120 hours on August 8, 2013. Cst. Fatallah, in the IRP Narrative, provides more evidence: he stopped your vehicle as it left a pub parking lot "to ensure driver sobriety." Upon stopping your vehicle, he observed you as the driver of the vehicle, and identified you by your BC driver's license.

In your statement, you confirmed that you were driving: "I immediately began driving because I wanted to get home."

I am therefore satisfied that you were driving at the time and date placed in to evidence by Cst. Fatallah. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, Cst. Fatallah indicated that you provided ASD "FAIL" results at 2133 and 2135 hours.

Your lawyer, Ms. Currie, provides that there were two ASD "FAIL" results; your own statement confirms these two ASD results, in paragraphs 49 and 51.

I am satisfied, therefore, that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, Cst. Fatallah indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the occurrence report, he notes this occurred at 2134 hours.

There is no evidence to the contrary; your statement paragraph 52 confirms Cst. Fatallah informing you of this right. I am satisfied, therefore, that Cst. Fatallah advised you of your right to a second analysis.

Was the second analysis provided by Cst. Fatallah, and was it performed using a different ASD?

Cst. Fatallah's evidence in the Report is that he provided the second analysis on your request, on ASD serial number 101546. In the IRP Narrative, he notes proceeding with a second sample, and showing you the result.

In her submission, Ms. Currie does not question the existence, or the result, of this second analysis. Your statement confirms these details by noting, in paragraph 52, that you had provided that second sample, and "The second screening device was located directly next to the officer and we proceeded with the second test right away."

I therefore find confirmed evidence that a second test occurred on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Cst. Fatallah recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

Cst. Fatallah provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASD serial numbers 101547 and 101546, which he used to test the samples of your breath. These Certificates, completed by Leisa Shea, form part of the sworn Report.

For the ASDs she certified that on July 24, 2013, she checked the calibration. She found the ASDs to be within the recommended limits. She recorded the ASD calibration expiry dates as August 21, 2013 and the service expiry dates as November 21, 2013.

Ms. Currie, on your behalf, and in summarizing your statement, notes that "the most likely explanation" for these two "FAIL" results is the fact that the officer did not wait a full fifteen minutes before conducting ASD tests. This is based on your statement wherein you assert that you had consumed alcohol less than fifteen minutes before the tests: "I believe the most likely explanation is that the "fail" readings were caused by mouth alcohol because the officer did the tests too soon after I finished my last drink." This is based on your dialogue with the officer, your version of which has him providing an estimate of "two minutes" being the exact duration of time since you had last sipped your drink before leaving the pub and being immediately pulled over.

In your version of events, Cst. Fatallah provided : "So that would have been about two minutes ago?" This was in reply to your answer to his initial query on 'how long ago' as "just now." When queried whether two minutes was accurate, your reply was "whatever you say."

Cst. Fatallah provides evidence on this point in the IRP Narrative: "Cst FATALLAH waited 13 minutes before administering the ASD test to ensure 15 minutes between time of last consumption and time breath sample taken."

You take issue with the establishment of two minutes as the margin of time, and do not dispute the passage of a thirteen-minute wait at roadside. Your submission is that this two-minute time

was suggested by Cst. Fatallah, and you did not at any point state that time to him. Ms. Currie notes your agreement to this at the time, in that you “did not want to create a problem” by mentioning otherwise to the officer.

The officer proceeded with a thirteen-minute wait after establishing recent consumption; the fact of this recent consumption was stated by you to him at roadside. This measure was taken by Cst. Fatallah, I infer with reason, because of your own admission, and the fact that you had just left a pub. You presented a definite statement to him on the point that consumption did occur recently, and your statement in response to his attempt to establish the exact time of your consumption — “whatever you say” — I find to be an expressed statement of agreement or approval. You presented no objection on this point to Cst. Fatallah at roadside, and I do not find it reasonable that you did not do so on the basis of being previously assaulted by officers, as you provide. Your recollection of your thoughts in paragraph 41 - “the officer’s approximation of two minutes since I finished my drink sounded about right” - likewise confirms that you were in fact agreeing to this estimation.

Further, in your statement you express your shock at both of the ASD results, yet your recollections of your reactions, and words stated, do not contain an attempt at clarifying when this most recent consumption did in fact occur.

I therefore find the evidence establishes as fact that a waiting period had occurred, initiated by the officer based on your admission of recent consumption to him. I make this finding on the basis of the timing of the first ASD test provided. You assert that the second ASD test also occurred within this fifteen-minute time period (paragraph 64); however, based on my finding that a requisite amount of time was observed by the officer before the first test, I give your evidence on this point no weight.

I therefore find the likelihood of mouth alcohol affecting the reliability of results on two functional ASDs to be negligible. I am therefore satisfied of the reliability of results obtained on the ASDs at roadside. I make this finding by examining the balance of probabilities, and establishing the fact that a requisite waiting period was initiated and completed by Cst. Fatallah at roadside.

Did the ASD register a “FAIL” as a result of your BAC exceeding 80 mg%?

Despite two ASD “FAIL” results, you maintain that you had one-half beer prior to driving. Your evidence is detailed on this assertion; this is corroborated by a server at the pub where you ordered food, in an email to you.

I have already established the fact that a fifteen-minute waiting period ensued upon your telling Cst. Fatallah of your most recent consumption. When considering the likelihood of two functioning, calibrated ASDs registering “FAIL” results with your BAC *under* 80 mg%, I consider the following in your account:

- there is no strict account for the rest of your day, in particular you do not provide convincing evidence that you had not consumed other liquor during the day — you detail arriving home before 6pm, then playing with your cat for approximately 3 hours.

- your single statement of “This half a bottle of Budweiser Light is the only alcoholic beverage I consumed on August 8, 2013” is not otherwise verified through corroborating evidence; by contrast, Cst. Fatallah provides sworn evidence that your BAC exceeded 80 mg% on this date, evidence obtained through a scientific, forensic procedure that is accepted by the legislation as an independent means of testing BAC;
- the email from s.22 at the pub, while supportive, provides a different detail from that found in paragraphs 25 and 26 of your statement - she notes handing you your food, in your version you had picked the food up off of the bar yourself and then left. I cannot attach much weight to her statement which is unsworn, and brief in detail. I also consider the number of orders and customers she would serve on any given day.

I have evidence recorded by Cst. Fatallah that you provided two ASD samples which both registered “FAIL.” I have found the ASDs to be functional, with reliable results, at the time they were used at roadside. I place greater weight on this evidence provided by Cst. Fatallah; you have not provided compelling evidence which otherwise explains the two “FAIL” results.

Decision

As a result of my findings, I confirm your driving prohibition, and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days; however, as you have already served 18 days of your prohibition, you must serve the remaining 72 days which commences on November 8, 2013. Your prohibition ends on January 18, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

Jennifer L. Currie
Stern Albert Shapray & Associates
fax: 604-590-5626

NOVEMBER 13, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 23, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

At the beginning of the hearing your lawyer, Danny Markovitz, confirmed that he had received all of the disclosure documents before me. I proceeded with the review based on that

confirmation.

In your affidavit, you said your job requires you to be able to operate different vehicles. You said you will automatically lose your employment, if you are required to install the ignition interlock device in order to drive.

I understand and appreciate that receiving an IRP can have serious consequences on a person's life. However, under the Act, I cannot consider a person's employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. Further, I cannot vary aspects of the IRP consequences, such as the ignition interlock remedial program. If you have questions about a program, you can contact our office at the number at the bottom of page one of this letter and ask to speak to someone about the specific program.

In paragraph four of your affidavit, you submitted evidence indicating that you s.22 and you use a medication daily. However, you did not explain the relevance of this information to the review, so I will not consider it as pertinent evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Carson indicated that he witnessed you driving or in care or control of the vehicle at 1955 hours, on October 23, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Carson said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 1958 and 2000 hours, respectively,

as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Carson indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In your affidavit, you said when Constable Carson asked about your alcohol consumption, you told him you had consumed "2 beers, 1 glass of wine and [you] had just had 1 mixed tequila drink that [you] had purchased at 17:49 hrs." I infer that "17:49" is a typographical error and that you meant to say you purchased the tequila at 7:49 pm or 19:49 hours. You said you had your last drink "just seconds before being stopped." You also said your last drink was the single ounce tequila shot, which you drank just prior to being stopped. You attached a credit card

receipt as exhibit “A” to your affidavit. The receipt indicates that someone made a \$15.50 purchase with a MasterCard at a liquor store on October 23, 2013, at 1949 hours. The receipt does not list what was purchased. You said it included a single-ounce tequila shot, which you consumed just prior to being stopped.

I have concerns with internal inconsistencies in your evidence (not including the erroneous time reference). You identified the drink you consumed just before being stopped as a mixed tequila drink and as a single-ounce tequila shot. In the oral hearing, your lawyer referred to a “tequila shooter”, which is consistent with your evidence of a “shot”, rather than a mixed drink.

Mr. Markovitz submitted a report from s.22 whose opinion I accept as authoritative. In paragraph five of s.22 letter, she lists your consumption history for October 23, 2013. She indicates that she was informed that you consumed one beer at noon, two more beers and a glass of wine at 4:45 pm, and a one-ounce tequila or “Skinny Margarita” at 7:49 pm. s.22 evidence includes details that you did not provide in your affidavit or, presumably, to the officer.

Your affidavit evidence is fairly consistent with that of Constable Carson, other than regarding the timing of your alcohol consumption that day. He said you told him your last drink was a “shot of tequila”. Your lawyer suggested that the officer was possibly confused by what you said to him about when you consumed the tequila. He also argued that none of the alcohol you consumed would have been in your system at the time of the ASD tests and that mouth alcohol was responsible for the ASD results.

While a peace officer usually bears the burden of proof, because he issued the notice of driving prohibition, case law indicates that the burden may shift to the driver to satisfy an adjudicator on a particular issue on a balance of probabilities: *Longstaff v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1594 at 30. On October 28, 2013, you applied for a review of the IRP, with the initial hearing scheduled for November 5, 2013. The hearing was re-scheduled to November 12, 2013. There were three weeks between receiving the IRP and the ultimate hearing date, during which you could obtain evidence to support your arguments. It raises questions in my mind as to why you did not provide an itemized receipt from the liquor store, nor explain the absence of such a receipt. You did not provide the name of the tequila drink you consumed, which could have cleared up the inconsistency between whether you consumed a shot or shooter or a mixed drink. If your last sip was “just seconds before being stopped”, it is reasonable to infer that the alcohol container would have been in the vehicle for your later reference. Instead, you argue that I should revoke the prohibition based on a non-descript invoice and inconsistent evidence of what you drank and what you told the police officer. I am not persuaded on a balance of probabilities to find your evidence to be reliable. As a result, I find it more likely than not that mouth alcohol was not responsible for the ASD results.

Section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 23, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Danny Markovitz
778-297-3131 (fax)

OCTOBER 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 24, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “fail” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the *Motor Vehicle Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on the ground that you did not fail or refuse to comply with the officer’s demand to provide a breath sample; however, that ground is not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a “fail”. In the interest of fairness, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you prior to your scheduled hearing. I have proceeded with this review based on that confirmation.

You speculated that “it was not suggested, asked or compelled by the constables” that you be taken to the detachment to be tested to determine your exact BAC that night, due to a “reliance on ASDs to perform the job, volume of work necessary to complete a full examination and lack of man power.” I acknowledge your statement; however, it is not for me to speculate as to why police chose to issue you an IRP on the night in question, rather than take you down to the detachment and charge you criminally instead.

You also asked that your spotless driving record be considered. However, under the *Motor Vehicle Act*, I am not authorized to consider an individual's driving record in a review of a 90 day driving prohibition.

In accordance with the BC Supreme Court's decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the “Superintendent's Report on Approved Screening Devices” which may have been disclosed to you is not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In his Report to Superintendent (RTS), Constable Byers indicated that on August 24, 2013, at 23:20 hours, you operated or had care or control of a motor vehicle. In his Narrative Text Hardcopy report, the officer stated that he followed a vehicle from the area of a local pub and stopped the vehicle several blocks away. You were identified as the driver of the vehicle and your identity was confirmed via your driver's licence.

As there is no evidence before me to refute that of the officer, I am satisfied that you were a driver within the meaning of section 215.41, of the *Motor Vehicle Act*.

Did the ASDs register a “fail”?

Constable Byers indicated in his RTS that at 23:24 hours and 23:29 hours on the night in question, you provided breath samples into two separate ASDs, the results of which registered a “fail”.

In the absence of any evidence to the contrary, I am satisfied that the ASDs registered a “fail”.

Were you advised of your right to a second analysis?

Constable Byers reported that after you failed the first ASD test, he informed you of your right to a second analysis, that the second test would be conducted on a different ASD and that the lower of the two test results would prevail.

As there is no evidence before me to refute Constable Byers' evidence, I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In his evidence, Constable Byers indicated that he administered a second ASD test on you that evening. In your evidence, you confirmed that you were provided with a second analysis.

Based on the evidence, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

As noted in his RTS, Constable Byers reported that he used ASD serial number 101543 for the first analysis and ASD serial number 101546 for the second analysis.

As there is no evidence to refute that of the officer, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As both ASD tests resulted in a "fail" reading, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Along with his reports, Constable Byers submitted copies of two Certificates of a Qualified ASD Calibrator (Certificates).

For ASD serial number 101543, the Calibrator verified that on August 22, 2013, she checked the calibration of the device and found it to be within the recommended limits and functioning correctly. She recorded the calibration expiry date as September 19, 2013, and the service expiry date as November 21, 2013.

For ASD serial number 101546, the Calibrator verified that on August 22, 2013, she checked the calibration of the ASD and it was within the recommended limits and functioning correctly. She recorded the calibration expiry date as September 19, 2013, and the service expiry date as November 21, 2013.

In your submission you stated that:

- The current recommendation is to use a wet bath standard to conduct calibration checks but BC uses a dry bath standard to check calibration and you question this.
- The ASD calibration test period used to be every 14 days but it's been changed to every 4 weeks. You stated that they must be calibrated more often or they are susceptible to falling out of calibration faster and more frequently.
- At least one lower mainland police detachment has been caught incorrectly filling out the calibration documents and you believe they should be checked by a supervisor but you do not see any such checks on the Certificates.
- Both ASD calibration certificates for the devices used to test your breath were due to expire less than three months from the night in question. You believe devices set to expire within this timeframe have a greater likelihood of error due to malfunction.

While you speculate that the proper procedures were not followed during the calibration checks on the devices used to conduct your breath tests, or that the ASDs could be inaccurate because they were due to be serviced in less than three months, there is no evidence before me to substantiate your claims. On the other hand, I have before me two Certificates in which Leisa Rae Shea has verified that she is a Qualified calibrator of the Alco-Sensor IV DWF and that the devices were found to be within the recommended limits and functioning correctly when a calibration check was completed on them two days prior to the date of this incident. Further, Constable Byers swore in his RTS, that your breath tests were conducted by a Qualified ASD operator and the ASDs were functioning correctly.

After carefully considering the evidence, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

In your submission, you stated that on the night in question you and two friends went to the One Twenty restaurant for something to eat. You shared an order of nachos and you consumed no more than two pints of beer while there. You were pulled over when you were taking one of your friends home just prior to 11:00pm.

You stated that the average elimination rate for individuals is 15 mg% per hour and that most people eliminate between 13 and 18 mg%, most at the higher end of this group. You speculate that your BAC would have been no higher than 25 mg%. You added that two witnesses stated seeing you drink no more than two pints of beer over a two hour period.

You provided copies of two statements; one from s.22 and one from s.22 individuals who said that they accompanied you to the pub that night. I note that both statements indicate that: they accompanied you to the pub on the night in question at 9:00pm; you shared a plate of nachos; neither s.22 witnessed you consume more than two beer; you left the pub at around 11:00pm to take s.22 home; you did not appear to be "under

the influence of alcohol”; that you were pulled over a couple of blocks away; that you answered all questions politely and you were not slurring; and, you exited the vehicle when asked. With respect to these statements, I find it curious that both statements mentioned the exact same points and in the exact same order, both used very similar language and both have been signed in the same manner: with their name appearing at the top, their address noted below that, then a phone number at the bottom. Due to these similarities, it appears to me that both statements may have been prepared by the same individual. Consequently, I do not put much weight in these statements.

Further with respect to your witness statements, I also note that both statements and your own submission, indicate that your friends were only with you, and can only attest to your drinking pattern, for two hours that night, between 9:00 and 11:00pm. While you indicated that you only consumed two beer while at the pub, I am mindful that you were only there for two hours and that you could have consumed alcohol prior to picking up your friends and arriving at the pub.

In considering the evidence before me, I do not find your drinking pattern evidence to be very persuasive. As noted above, I have already found the ASDs used to test your breath that night to be reliable.

With respect to your submission that there is a margin of error with the instruments used to test your breath, the Supreme Court of Canada in the case of *R v. Moreau*, 978 42 CCC (2nd) 525, made a ruling on this subject. The court determined that evidence to the contrary with respect to an individual’s blood alcohol reading must be evidence that establishes that an applicant’s blood alcohol level was not the same as indicated by the tests performed. The court further stated: “No evidence is evidence to the contrary if its only effect is to demonstrate in general terms the possible...fallibility of the instruments which are approved under statutory authority.” In other words, simply stating there is an error of margin in the testing equipment is not evidence your BAC was lower than the test results achieved.

After carefully considering the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

Your prohibition took effect on September 24, 2013. I note that as you have already served 18 days of the prohibition, you need only serve the remaining 72 days. Your prohibition recommences on October 17, 2013, and ends December 27, 2013. As a result of this prohibition, any driver’s licences you have in your possession will be cancelled, effective the day your prohibition recommences. When your prohibition ends you may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia.

s.22

IRP Review Decision

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Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

November 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

Your lawyer, David Milburn, calls the service of the Notice into question, noting the date of “2012/10/12” beside the peace officer’s signature to the left side. He states “this invalidates the service.” In analysis, I look to all of the other documentation provided by the officer, and the correct date of “2013-10-12” or variants thereof are noted throughout. In that same ‘Certificate

of Service' portion of the Notice, the officer noted "2013-10-12" as being the date that he served you with a copy of the Notice; I infer with reason that the peace officer did not complete any of the documentation for this IRP in the year 2012.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Gusic – indicated that you were driving or in care or control of a vehicle at 0256 hours on October 12, 2013. Cst. Gusic provides in the occurrence report that: a witness observed your vehicle parking partially up onto the sidewalk; you then fell asleep in the vehicle with the engine running. Upon his arrival, Cst. Gusic identified you as the driver of the vehicle, using your BC driver's licence for positive identification.

In the submissions prepared by your lawyer Mr. Milburn, he makes no submissions specific to this issue.

I am therefore satisfied that you were driving, at the time and date placed into evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0343 and 0349 hours.

Mr. Millburn provided no evidence on your behalf on this issue; I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, Cst. Gusic indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In the occurrence report, he notes specifically that he explained it one time, and then a second time "in plain language."

There is no evidence to the contrary. Based on sworn evidence, I am satisfied that the officer advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed on a different ASD?

The officer's evidence in the Report is that he provided the second analysis on your request. In the occurrence report, after describing his reading of your right to a second analysis, he specifies your four attempts, and the provision of a "FAIL" result. He notes ASD serial number 036926, a different ASD from that of the first analysis.

In his submissions, Mr. Milburn does not question the existence, or the result, of a second analysis. I therefore find this analysis occurring at 0349 to be the second analysis provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Cst. Gusic recorded the two test results as "FAIL". With two "FAIL" results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of a "FAIL" result.

Was the ASD reliable?

The officer provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASDs serial numbers 101516 and 036926 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

For the ASD 101516, the qualified ASD Calibrator, J. Schwenneker, certified that on October 8, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as November 5, 2013 and the service expiry date as March 19, 2014.

For the ASD 036926, the qualified ASD Calibrator, M Banich, certified that on October 1, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 29, 2013 and the service expiry date as June 28, 2014.

Mr. Milburn made no submissions on this issue on your behalf. I am therefore satisfied of the reliability of each ASD.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013.

s.22

IRP s.22

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Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. David G. Milburn
fax: 604-526-8056

October 21, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 2, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that you received all of the disclosure documents. I have proceeded with this review based on this confirmation.

You applied on the ground ‘I did not fail or refuse. . .’; however, this ground is not applicable to the prohibition type for which you were served the Notice.

Your counsel, Kevin Filkow, relies on the recent BC Supreme Court decision, *Wilson*, to outline the principle that an officer must show that a person’s driving ability is affected by alcohol, in order for a prohibition to stand. I look to the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.5(4) of the Act requires me to

revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether the officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

Mr. Filkow points to the officer's Occurrence Report, and highlights the officer's recording of the date of the incident therein to be "2013-10-03." Upon examining the evidence provided by the officer as a whole, I find the date of incident to be October 2, 2013, elsewhere throughout. I note also the report was prepared in the early a.m. hours of October 3, 2013 – this is found in the line on the Occurrence Report where the officer indicated 2013-10-03. Given that it is a single entry, and not repeated anywhere else in the officer's evidence, I give this evidence no weight, and find the date of the incident to be October 2, 2013; the incident and reporting by the officer stretched over the midnight hour, and I find in all likelihood the incident occurred the previous day, on October 2, 2013.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 2303 hours on October 2, 2013. You were directly observed driving, and identified by your BC Driver's licence.

Your lawyer made no submissions on this point on your behalf.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided two ASD "FAIL" results at 2317 hours and 2320 hours.

Your lawyer's statement does not provide evidence to contradict or question that of the officer on this point.

I am satisfied that the ASDs registered "FAIL" results. As per the Act, this indicates a BAC of not less than 80 mg%.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the occurrence report, he provided detail that this occurred at 2318 hours, and that this was read from an "IRP information card." He also provides that you understood the right to a second test.

There is no evidence to contradict that of the officer on this point; I am satisfied that the officer advised you of this right.

Was the second analysis provided by the officer, and was it performed on a different ASD?

I am satisfied that the second analysis was provided by the officer; you do not place this evidence into question.

In the Report, the officer lists ASD serial number 101851 for the second ASD test; this is separate and distinct from the first ASD used. I am satisfied that a different ASD was used.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". There is no evidence before me to the contrary; the penalty applied is therefore compatible with the lowest test result.

Were the ASDs reliable?

The officer provided Certificates of a Qualified ASD Calibrator for each ASD, in which I. Baird certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, I. Baird certified that on September 10, 2013, he checked the calibration of ASD serial number 101853. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 8, 2013 and the service expiry date as June 12, 2014.

For the second ASD, he certified that on September 10, 2013, he checked the calibration of ASD serial number 101851. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 8, 2013 and the service expiry date as November 7, 2013.

There is no evidence to the contrary; I am therefore satisfied, based on the officer's evidence, that the ASDs were reliable at the time the officer used them to obtain samples of your breath.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on October 2, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Kevin Filkow
Michaels & Filkow
fax: 604-270-3787

October 21, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". However, at the beginning of the hearing your lawyer, Mr. John C. Chak, told me that the only ground he wished to assert is "the result of the ASD is not reliable. For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing Mr. Chak, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 29, 2013, at 01:30 hours, Officer Kunnamkudath (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 01:34 hours and at 01:40 hours, the officer used ASD serial numbers 101852 and 101850 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101850 at 01:40 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were “fail”; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 101852 and ASD serial number 101850 were checked for calibration on September 12, 2013, and found to be functioning correctly and within the recommended limits. Both ASDs have a calibration expiry date of October 10, 2013, and a service expiry date of October 26, 2013.

Your lawyer submits that your driving prohibition should be revoked because the ASD test results are not reliable. He points to the ASD Accuracy Check Logs (the "Logs") that were provided for each of the two ASDs. Mr. Chak asserts that by looking at the bottom line of the Log for each ASD, it shows the date on which the ASD was checked for calibration. The next piece of information is the Dry Gas Alcohol Standard and the Lot Expiry Date. The next four entries across the bottom row for ASD serial number 101852 are "82", "84", "82" and "83". The next four entries across the bottom row for ASD serial number 101850 are "82", "84", "82" and "85". Mr. Chak asserts that because each set of four entries for each ASD do not match [i.e. that there are not four "82"s across the row], it is evidence that the ASDs are not calibrated properly and therefore the ASD test results are not reliable.

I acknowledge Mr. Chak's submissions on this point; however, I do not agree. There is no evidence before me to indicate that there cannot be an acceptable target range associated with the calibration check for ASDs. In addition, the officer affirmed that the ASDs used to test your BAC were functioning correctly.

I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: John C. Chak
by fax 604-282-7509

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, John Chak. I have proceeded with this review based on that confirmation.

For your benefit in this review I have considered all of the grounds of review which apply to your situation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

There is one issue which is determinative of this review.

- Did you fail or refuse to comply with an ASD demand?

Having reviewed the evidence before me, I do not have sufficient evidence to show that you failed or refused to comply with the ASD demand.

I am 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.

December 5, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

Your lawyer, Ms. Kyla Lee, provided case law to illustrate concepts of credibility and the assessment of evidence; these are principles which apply to this review process. She draws attention to specific principles from each case:

- *Spencer*: police are not presumed to have a credibility advantage and “the onus is on the officer to justify the prohibition on a balance of probabilities”;

- *Scott*: evidence must be assessed for internal consistency, consistency with other reliable evidence, and consistency with common sense and ordinary human experience;
- *Modhgill*: adjudicators on review cannot presume police accuracy with the evidence, especially in regards to “clerical errors.”

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the investigating officer -- Cst. Joyce -- indicated that you were driving or in care or control of a vehicle at 0253 hours on October 13, 2013. Cst. Joyce provides in his narrative report that he observed your vehicle not stopping when asked to do so by “a member . . . while on foot patrol.” He then identified you positively in the driver’s seat upon stopping your vehicle; he verified your identity with your driver’s licence.

Ms. Lee draws attention to the Report, line 2, and the omission on the part of Cst. Joyce of ‘date of driving or care or control’, in addition to no author indicated on line 3. She states the officer has “failed to establish on a balance of probabilities the date on which my client is alleged to have care or control of a motor vehicle.” This evidence is necessary to support the allegation contained in the Notice. From the case of *Wilson*, she submits that “it is not sufficient to rely on a statement contained in the Notice as evidence of that statement being true.”

In addition, she presents the other documents submitted by Cst. Joyce (his narrative report and vehicle impoundment report) as only indicating the date of preparation, not the actual date of the incident. She also presents other decisions by this office which were revoked due to conflicting officer evidence on dates and times recorded in evidence.

With the principles she presents above in mind, I find on a balance of probabilities that the date of the incident in question is October 13, 2013. This finding is made without a presumption of Cst. Joyce’s accuracy in recording evidence. Rather, as per *Scott*, I find his evidence internally consistent, and in line with common sense, enabling me to establish this date as fact. I make the same finding with the authorship of the Report; the evidence throughout establishes Cst. Joyce as the author.

The decisions of this office on other date and time evidentiary errors are distinguishable for the reason that they present a lack of internal consistency or conflicting evidence; the majority of them appear to lack the time of driving as an essential element of the evidence. I have no copies of the document relied on for these decisions to apply them strictly against Cst. Joyce’s evidence in this review.

I accept as fact that Cst. Joyce's observation of you driving your vehicle occurred on October 13, 2013. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0300 and 0301 hours.

Ms. Lee does not present other evidence to contradict that of Cst. Joyce. I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In regards to his informing you of the right, he included: "second test read from a police prepared card" and "driver understood and requested a second test."

There are no submissions on this point by you, or on your behalf. I am satisfied that the officer advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer, and was it performed on a different ASD?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'FAIL' at 0301 hours. He carried out this analysis on ASD serial number 061474, a separate unique identifying serial number from that of ASD used in the first analysis.

With no evidence to the contrary, I am satisfied that Cst. Joyce provided the second analysis on your request, and performed that second analysis on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator Chris Neid certified that on September 23, 2013, he checked the calibration of ASD serial number 055636. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 21, 2013 and the service expiry date as August 30, 2014.

For the second ASD, the qualified ASD Calibrator Amanda Bain certified that on September 25, 2013, she checked the calibration of ASD serial number 061474. She found the ASD to be within

the recommended limits. She recorded the ASD calibration expiry date as October 23, 2013 and the service expiry date as June 18, 2014.

You present no evidence to call the reliability of the ASDs into question. I am therefore satisfied of their reliability at the time they were used by Cst. Joyce to obtain sample of your breath for analysis.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 23, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Sarah Leamon, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Ms. Leamon submitted that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She based her argument on the case of *R. v. Schultz* (2009), saying that I should exclude the officer's evidence of the ASD results.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD “FAIL” result, is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge, s. 144(1)(b) under the Act. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under s.215.41 of the Act. Your prohibition was issued under this legislation.

Ms. Leamon also referred to the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, and the principles of administrative fairness. I am mindful of these considerations in my review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 1917 hours on August 23, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver’s licence.

In your evidence you submit that you driving home for approximately two minutes when you saw the flashing lights of the police vehicle in your rear view mirror.

While there is a discrepancy between yours and the officer’s evidence regarding the presence of a roadblock, I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 1919 hours and 1927 hours, both resulting in “FAIL” readings.

In your evidence you confirm that both ASD analyses resulted in “FAIL” readings.

I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 1924 hours.

In your evidence you state that the officer told you that you could do a second breath test to challenge the validity of the first. You state that because you did not believe the results of the first test and you knew that you were not impaired, you agreed to do so.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1927 hours.

In your evidence you confirm that you provided a second sample of your breath.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101848 and your second sample of breath into ASD serial number 101845. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101848 and 101845.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading.

I have no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 6, 2013, he checked the calibration of ASD serial number 101848. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 3, 2013, and the service expiry date as July 25, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 1, 2013, he checked the calibration of ASD serial number 101845. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 29, 2013, and the service expiry date as October 10, 2013.

I have no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a “FAIL”?

In the Report, the officer indicates that you were asked the time of your last drink at 1918 hours and you indicated that it was at “5:30 or 6:00.” In the Narrative, the officer states that you had a strong odour of liquor on your breath and person, you had red flushed cheeks, and glassy eyes. The officer indicates that you stated that you had consumed “two beers.” The officer states that, “(you) later admitted to having shared some pitchers of beer with friends and was unsure of how much (you) had to drink.”

In your submission you state that you played two rounds of golf during the day. You submit that after your second game you went to the clubhouse and shared some chicken wings and a jug of beer with your friends. You state that just before 7:00 pm you decided to settle up and leave the golf course. Your friend asked for his tab and you spent a few more minutes talking and settling the bill. You state that around 7:15 pm you finished the remainder of your beer and proceeded directly to your vehicle with s.22 You state that after two minutes of driving you were approached by the officer. The officer asked if you had consumed any alcohol that day, and knowing that you had finished a drink only moment prior to being pulled over, you panicked, but wanted to be truthful with the officer, so you answered “yes.” You state that you told the officer that you had two glasses of beer from a pitcher, but not wanting to admit to drinking and then immediately driving, you told the officer that your last drink had been around 5:00 or 6:30 pm. You submit that at the time you were unaware of the issue of mouth alcohol, and if you had known this, you would have certainly told the officer that you had finished a sip of beer immediately prior to encountering him. You disagree with the officer on a number of points. Firstly, you deny that you had red flushed cheeks and glassy eyes. You also state that you never told the officer that you were “unsure of how much [I] had to drink,” or that “it’s going to be a fail.” You also provided a receipt from the country club, which was printed at 6:58 pm and shows two orders of chicken wings and a jug of beer.

A statement from your passenger, s.22 confirms your events for the day, and submits that he saw you have two sleeves of beer from the pitcher, and some wings. s.22 states that he saw you finish your last sleeve just before you left the parking lot at approximately 7:15 pm.

In the hearing, Ms. Leamon submitted that the officer’s evidence occurs very quickly, with the entire timeline occurring within ten minutes. Ms. Leamon stated that you have provided significant evidence to indicate that your last drink was at 7:15 pm. Ms. Leamon submitted that it is the case that the officer did not allow for 15 minutes to elapse from the time of your last drink until the time of the ASD analyses. Ms. Leamon stated that it is reasonable that you did not want the officer to be unduly suspicious, and you did not know about the issue of mouth alcohol when you responded that your last drink was at 5:30 or 6:00 pm. Ms. Leamon stated that the officer’s belief that the results of the ASD analyses were not affected is of no consequence.

Ms. Leamon stated that the science behind the analyses is that if they are conducted within 15 minutes of consumption, then they are not reliable. Ms. Leamon also provided a number of previous decisions to illustrate that prohibitions with similar fact patterns are often revoked. Ms. Leamon noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion. Ms. Leamon also submitted a document titled *Resource Reading – Operators Approved Screening Devices* from the Forensic Laboratory Services RCMP, which states that “if the peace officer honestly believes that the motorist has engaged in the above

activity (recent consumption of alcohol) within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity.”

The time of your last drink is a matter to which only you have the knowledge. Your choice to be untruthful with the officer was your decision. The evidence provided by Ms. Leamon clearly states that the test should be delayed if the officer believes that the motorist has recently consumed alcohol. There is no evidence before me that the officer believed that you had recently consumed alcohol, and your response clearly indicated that you had not done so. Given the information available at the time, I do not see how the officer could have responded differently. I am mindful that you did not want to attract unnecessary suspicion by admitting to recently consuming your last drink; however I find this odd as you also state that you wanted to be honest with the officer, and you readily admitted to consuming alcohol. I do not understand why you would want to be honest with the officer in one aspect of your drinking pattern, but not in the other.

I note that in the previous decisions provided by Ms. Leamon, the officer was either aware of recent consumption but failed to delay the analysis, or failed to determine the time of last drink. As the officer inquired about the time of your last drink, and you provided a response which was greater than 15 minutes prior, I do not find these decisions to be relevant to your prohibition.

Based on the information available at the time, the officer was reasonable in relying on the results of the ASD analyses to conclude that your BAC was not less than 80mg%. Section 215.41(2) states that a “FAIL” reading on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%. I accept the ASD results as valid.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on August 23, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 3, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" however, that ground is not applicable to your situation because you did not receive a refusal IRP. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your submission you state that you were completely cooperative with the officer and you did everything that was asked of you. You state that you did not refuse or fail to comply with the demand for a breath sample. You state that this is your one and only mistake that you have made and it will not happen again. You state that you realize that it is terrible to drink and drive, and that the consequences are horrendous.

I understand and acknowledge your situation; however, I am not authorized to consider hardship or offence history in this review. I commend you for taking responsibility for your actions; however, the scope of this review is limited to the grounds as defined by the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2009 hours on October 3, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver’s licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided a sample of your breath at 2011 hours which resulted in a “FAIL” reading.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2017 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report and the Narrative that you did not request to provide a second sample of your breath.

Was the second analysis performed on a different ASD?

As you did not request to provide a second sample of your breath for analysis, the officer was not obligated to provide a second ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that your ASD analysis resulted in a "WARN" reading. The lowest analysis result was "WARN".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The qualified ASD calibrator certified that on September 27, 2013, he checked the calibration of ASD serial number 101800. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 25, 2013, and the service expiry date as September 20, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 3, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kris Pechet. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

There is one issue that is determinative of this hearing.

After considering all of the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Having made this finding I do not have to consider anything further

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

cc: Kris Pechet
by fax 604-519-6071

October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence before me, I find there is one issue that is determinative in this review.

Was the ASD reliable?

I am not satisfied that the ASDs were reliable.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

September 27, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On July 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review, you indicate two grounds for review. All grounds for review that apply to your case will be considered in this review.

In your written submission (the “Submission”), you state that the, “officer was being discriminating towards [you] because of [your] age and did not complete a thorough case.” Any complaints you may have regarding officer conduct during the investigation, must be made to the appropriate police authority.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), the investigating officer, Cst. Jarjoura, indicates that you were driving or in care or control of a motor vehicle at 0030 hours on July 12, 2013. Further, in the Narrative Text Hardcopy (the “Narrative”), Cst. Jarjoura submits that he was conducting patrols in the area (206 Street in Langley) due to complaints about impaired drivers at a house party. You were located in the driver’s seat of a vehicle, with the engine turned on. Your father was confirmed as the registered owner of the vehicle and your identity was verified with a s.22 British Columbia driver’s licence.

In your Submission, you state that on the night of July 12, you drove some friends to a house to hang out. When you arrived you asked your friend if you could stay the night, if you decided to drink, and that he said that would be fine. You put your car keys on the kitchen table and left them there. Later you went out to the vehicle to retrieve your girlfriend’s purse and decided to sit in the vehicle to have a smoke. At this point, you submit that a police officer pulled up beside the vehicle and asked you if you had been drinking. You responded, “no.” You submit that the officer claimed the vehicle was turned on and running because he saw the brake lights on when he pulled up. You advised him that the keys were not in the vehicle and that you probably had your foot on the brake while smoking. You assert that at, “no time did [you] have the intention or capability to set the vehicle in motion as the keys were not anywhere near the car and the car will not run unless the chipped key is in the ignition.” You submit that the officer refused to search the vehicle or your person for the keys. You indicate that the officer asked you if you were in care or control of the vehicle and that he did not properly explain what he meant when you asked. You also indicate that the ignition in the vehicle has been sticking. It will sometimes go all the way to the locked position when the key is turned off. As a result, the vehicle may sometimes turn on for two seconds, without the key, but it shuts off because the vehicle requires the key with the chip in the ignition to keep running.

I acknowledge your submission that you feel the officer did not properly explain care or control during the investigation; however, a proper explanation of this element is not an issue in this review. At issue is whether you had care or control of a motor vehicle in a manner that qualifies you as a driver within the meaning of section 215.41 of the Act.

You provide evidence that the vehicle can turn on for two seconds, without the key, but shuts off because it requires a chipped key in the ignition to keep running. However, you also state that the, “car will not run unless the chipped key is in the ignition.” This is a discrepancy in your evidence and causes me to question the credibility of your claim that the vehicle’s ignition was not running when the officer observed you seated in the driver’s seat. You have not provided persuasive evidence that the engine was not running for two seconds, as you claim it can, when

Cst. Jarjoura observed you in the driver' seat. I also have no evidence before me that when this malfunction occurs the engine shuts off within two seconds on every occasion. I prefer police evidence that when Cst. Jarjoura approached your vehicle he observed the engine to be on. On this point, you do not refute police evidence that you were sitting in the driver's seat and interacting with the vehicle in a manner that activated the brake lights.

Further, you state that the tow truck driver advised Cst. Jarjoura that the vehicle, "didn't need a key, but it does." I acknowledge your submission; however, I have no persuasive evidence before me that the vehicle will cease to operate if the keys are not present. You submit that the keys have an anti-theft system and that because of this the vehicle requires the key with the chip to operate. You do not provide evidence as to how this chip works or if the chip is reliable given that the vehicle is experiencing ignition irregularities. I also acknowledge your submission that you did not have the keys on your person or in the vehicle. However, I feel that whether or not the keys were present is not the issue. Rather, you provide evidence that indicates the vehicle does not require the keys be present for the ignition to be engaged. Even if the ignition is engaged briefly (i.e. two seconds), I am persuaded by the evidence before me that the vehicle could be set in motion without the keys present.

You assert that you had no intention to drive. Specifically, you provide evidence that you asked your friend if you could stay over night, if you decided to drink. You also deny consuming any alcohol that evening. If you chose to abstain from alcohol, as you claim, I feel a reasonable inference can be made that your ability to operate a vehicle would still remain had you chosen to consume alcohol. You also submit that you went out to the vehicle to retrieve your girlfriend's purse and decided to sit in the vehicle and have a smoke. I find it odd that a purse would be in an unlocked vehicle, that it required three people to retrieve the purse, and that you chose to smoke inside the vehicle on a summer evening.

Ultimately, I have evidence before me that the vehicle you were observed seated in the driver's seat of was operable and can run without the keys in the ignition or being present. In the Act the definition of a driver includes a person having care or control of a motor vehicle whether or not the motor vehicle is in motion. Based on the evidence before me, I am not persuaded that in the absence of the keys, the vehicle did not have the capability to be set in motion.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

Evidence in the RTS indicates that at 0031 hours, Cst. Jarjoura formed reasonable suspicion that you were driving or in care or control of a motor vehicle with alcohol in your body. Specifically, in the Narrative, he submits that you had a faint odour of liquor on your breath. When asked the time of your last drink, you responded, "I didn't have a drink."

In your Submission, you indicate that the officer told you he could faintly smell liquor on your breath and that you advised him you had been kissing your girlfriend who had been drinking. You also submit that you told the officer you had not been drinking.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle with alcohol in their body. Moreover, there is a relatively low threshold for the introduction of an officer's opinion that a person is suspected of having alcohol in his or her body. Cst. Jarjoura submits that he was patrolling the area after complaints of impaired drivers at a house party. Further, when he approached the vehicle an odour of liquor was detected on your breath. You do not refute that an odour of liquor was present; instead you provide an alternate explanation for its presence.

Based on the evidence before me, I am satisfied that the peace officer made a valid ASD demand.

In the Narrative, Cst. Jarjoura submits that following the ASD demand you responded by stating, "I refuse to provide a sample." When you were advised that a refusal carried the same penalty as a "FAIL", Cst. Jarjoura submits that you still refused to provide a sample of your breath. Consequently, a refusal was deemed at 0034 hours.

You do not refute this evidence in your Submission.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative, in response to the question, "Did driver convey any reasons why a sample was not provided (e.g. medical / physical limitations)?", Cst. Jarjoura submits that you indicated you were not driving, despite the fact that he repeatedly explained the care or control aspect of the offence.

In your Submission, you indicate that you refused to take a breathalyzer test because you told the officer that there was no possible way you could drive the vehicle without the keys, which were on the kitchen table, and that you had no intention of driving.

I have no persuasive evidence before me that you provided Cst. Jarjoura with a reasonable excuse for refusing to comply with the ASD demand. When asked to provide a sample of your breath, Cst. Jarjoura submits that you stated, "I refuse to provide a sample", and that you subsequently refused after being advised a refusal carried the same penalty as a "FAIL". You do not deny this evidence. Further, I have already determined that you were a driver within the meaning of section 215.41 of the Act and that Cst. Jarjoura made a valid ASD demand on you.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on July 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You checked the boxes next to four grounds on the application form. However, two of those grounds are not applicable to your situation. I will consider all grounds available to you in this review.

Records before me confirm that the disclosure documents were provided to you at the time of application. I will proceed with my review based on this confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent for the IRP (the "Report"), the officer indicated that you were driving or in care or control of a vehicle on September 20, 2013.

In your submission you admit that you were pulled over. You do not challenge that you were the driver. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Narrative, the officer reported that he could detect a slight odour of liquor on your breath which he confirmed once you were removed from the vehicle. The officer also reported your eyes were red and you spoke with a slur.

In your submission, you stated that your eyes were red from crying as your s.22 s.22 You submit that you did not consume any alcohol on "September 9, 2013". However, the vast majority of the officer's evidence suggests that this incident took place on September 20, 2013.

I find your denial of alcohol consumption does not outweigh the officer's evidence of an odor of liquor on your breath, in terms of that factor being the basis for his suspicion that you had alcohol in your body. I am satisfied the evidence before me shows on a balance of probabilities that the officer had a reasonable basis for his suspicion that you had been driving with alcohol in your body.

In his Report the officer reported that he formed his suspicion at 1925 hours, and issued the ASD demand at 1926 hours. I am satisfied the demand was made as soon as practicable after the officer formed his suspicion. I am satisfied that the officer made a valid demand at 1926 hours.

In the Report the officer reported "time of refusal" as 1926 hours. In the Narrative the officer reported that your response to the ASD demand was: "You have harassed me, no, no. I am not providing a sample."

I am satisfied that the officer's evidence establishes that you failed to provide a sample.

Decision

Did you have a reasonable excuse?

In your submission you stated that you s.22 s.22 . While I acknowledge that you may suffer from s.22 your evidence does not establish that your condition prevented you from providing a sample and complying with the officer's demand.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that the disclosure documents were faxed to your lawyer, Kyla Lee on September 30, 2013. I have proceeded with the review based on that confirmation.

You checked all of the boxes on the application form. However, the grounds associated with a “WARN” result on an ASD and with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition. I will however consider all grounds available to you in this review.

Ms. Lee submits that the evidence does not establish that Constable Jarjoura had reasonable and probable grounds to believe that your ability to drive was affected by alcohol. Ms. Lee enclosed a copy of a recent decision in the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638 and *R v Andree* [1990] B.C.J. No. 1869 to support her position. Ms. Lee submits that the prohibition is a nullity.

IRP Review Decision
Page 2

I have read and considered the cases. I acknowledge Ms. Lee's submission with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 0211 hours on September 21, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 0224 and 0227 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that you were advised of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded different serial numbers for the ASDs used to obtain samples of your breath. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

IRP Review Decision
Page 3

Was the Notice served on the basis of the lower analysis result?

As previously noted, both ASD tests resulted in a "FAIL" reading.

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator, in which Alison Lea Lambie and Corporal Patrick Davies certified that the ASDs bearing the serial numbers 101781 and 049861 were found to be within the recommended limits when they checked their calibration. They also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Kyla Lee 604 685-8308

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Sarah Leamon, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Ms. Leamon submitted that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She based her argument on the case of *R. v. Schultz* (2009), saying that I should exclude the officer’s evidence of the ASD results.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD “FAIL” result, is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge, section 144(1)(b) under the Act. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These

amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

Ms. Leamon also referred to the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, and the principles of administrative fairness. I am mindful of these considerations in my review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 0011 hours on September 22, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that he activated his flashlight for a vehicle to stop and he observed the vehicle to slow down and proceed past his location, but then slowly accelerate away as he walked towards it. The officer states that he pursued the vehicle and subsequently pulled it over. The officer states that you were identified as the driver via your BC driver’s licence.

In your submission you state that you saw the flashing lights of a police vehicle and as you began to pass you slowed down. You state that you continued to proceed on your way, driving towards home. You state that approximately 30 seconds later you were pulled over by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report, the officer indicates that you had the odor of liquor on your breath, and that you admitted consumption. In the Narrative, the officer states that he observed your responses to questioning to be slow and deliberate. The officer states that you indicated that you had a couple glasses of wine earlier, with your last drink “about a half hour ago.” The officer also states that he noted you to have an odor of liquor on your breath, and your eyes to be glassy. The officer states that he read the ASD demand to you verbatim and you indicated that you understood and would provide a sample.

In your evidence you note that you had two glasses of wine with dinner. You state that the officer asked you to step out of the vehicle. You state that the officer presented you with an ASD and told you that you would be required to blow into it. You deny ever telling the officer that your drink was “about half an hour ago,” and state that the officer never inquired as to the time of your last drink.

In the hearing, Ms. Leamon stated that there is no ASD certificate provided for the device used at the scene. Ms. Leamon stated that the officer has not provided any evidence to indicate that the device was properly calibrated. Ms. Leamon also stated that it is not possible to determine that the device used by the officer was in fact an Approved Screening Device. Ms. Leamon provided *Swaby v Superintendent of Motor Vehicles* and *Ema v Superintendent of Motor Vehicles* in support of her position. Ms. Leamon also provided a number of previous decisions to illustrate that prohibitions with similar fact patterns are often revoked. Ms. Leamon noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

I acknowledge that the officer has not provided a Certificate of a Qualified ASD Calibrator (the "certificate") for the device used at roadside. However, in the officer's evidence he states, "Cst. Johnston acquired ASD #35, serial number 101774, with Calibration Expiry of 2013-10-01 and Service Expiry of 2014-07-18 from the front seat of the police cruiser." I concur with Ms. Leamon that the information in the Narrative is insufficient to establish the details regarding the calibration of the ASD; however, I find that it is sufficient to establish that the device used was an approved device. As you did not provide a sample of breath for analysis, I do not find the calibration of the ASD to be relevant. The officer has provided evidence to indicate that the ASD was capable of accepting a sample of breath, and I note that in the Report, the officer indicates that all ASD analyses were conducted by a qualified operator and that the ASD was functioning correctly. I note that in the previous decisions provided by Ms. Leamon with regard to the absence of the Certificate were related to "FAIL" prohibitions, and therefore, I do not find them to be relevant.

I am satisfied that the peace officer made a valid ASD demand.

In the officer's Narrative he states that he explained to you how to provide a proper sample of your breath. The officer states that he noted a very small amount of air to be passing out of the exit port on the ASD, and he was encouraging you to continue to blow. The officer states that a reading of "NoGo" was displayed on the ASD. The officer states that you told him that you were trying, and that he presented the device to you again, and again the ASD displayed a "NoGo" reading. The officer states that the ASD then displayed "Void." The officer states that he stated to you that you must provide a sample of your breath, and that you stated that you did not think you would be able to. The officer states that you then started crying and got hysterical, stating that s.22 and that you now believed that you had the ailment. The officer states that he then demonstrated to you how to provide a proper sample, and obtained a reading from the ASD of "000." The officer states that he informed you that if a suitable sample was not taken you would be charged with a refusal, which carried the same penalty as a "FAIL." The officer indicates that you continued to go through high and low emotional outbursts, crying, talking of s.22 how you were fighting a bad cold and you didn't have the capability to blow. On your next two attempts, the officer states that you placed your lips partially on the mouthpiece, but blew lightly then stopped, and then blew just hard enough, then stopped. The officer states that he detected no air flow from the exit port of the ASD. The officer states that he informed you that you would be charged with a refusal at 0033 hours. The officer states that at 0050 hours, your husband came back to the officer's vehicle and asked if you could provide a sample, and the officer informed him that you could not.

In your evidence you state that at no point on September 22, 2013, did you tell the officer, or anyone else, that you did not want to provide a breath sample or that you were refusing to

provide a breath sample. Ms. Leamon stated that there is no evidence that you were not attempting to provide a sample, such as blocking, or not blowing.

I acknowledge that you never stated to the officer that you were refusing to provide a breath sample; however, the evidence before me indicates that you provided minimal air into the ASD, despite repeated coaching from the officer. I do not find that blowing lightly, or blowing and then stopping, indicates that you were attempting to provide a suitable sample of breath for analysis. The evidence before me indicates that the ASD began to register a sample of your breath, but you stopped blowing before a sample was obtained. I do not have any evidence before me to indicate that you provided a suitable sample of your breath for analysis.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your evidence you state that you attended your doctor's office because you have been

s.22

s.22 You state that you blew into the device to the best of your ability and that you blew until you were out of breath. You state that after this incident you went to see your doctor again and you were bumped up on the list for specialist consultations. You state that after seeing the specialists, you have discovered that s.22

s.22

In the hearing, Ms. Leamon stated that you had a legitimate medical excuse for failing to comply with the ASD demand. Ms. Leamon stated that you were vocal with the officer about what was going on at the time, and you told the officer that you were trying to provide a sample of your breath. Ms. Leamon noted that the officer indicates that air was escaping the exit port, but that it was not sufficient to register a sample. Ms. Leamon stated that it cannot be held against you that you did not provide medical evidence, as the medical system is slow, and the specialist was not able to provide an official report in time.

You have provided evidence to indicate that you s.22, and that you were s.22 I acknowledge Ms. Leamon's submission that you were not able to obtain a specialist's report in time for this review, therefore, I accept that you have provided evidence that you suffer from s.22 and have visited the doctor to assist you in this regard.

With regard to your attempts to provide a sample, I note that the officer states in his Narrative, that you would blow lightly into the ASD and then stop, despite being coached to continue blowing. The officer indicates that the proper method to provide a sample of your breath was demonstrated to you by both the officer and your husband. I note that there is no mention in the officer's evidence that you appeared to be short of breath at the time, or that you were struggling to breathe. I acknowledge your statement, "At all times on September 22, 2013, when I attempted to provide a breath sample, I was truly attempting to do so. I was unable to provide a valid sample due to my physical condition." In contrast, the officer states, s.22 blew lightly then stopped," and, s.22 again placed her lips to the mouth piece, blew just hard enough, then stopped...Cst. Johnston detected no air flow from the exit port of the ASD." I

note that the officer does not state that you ran out of breath, or that you could no longer provide a sample, but specifically that you stopped blowing.

I acknowledge your submission, "After some time, and after numerous attempts at providing a breath sample, Constable Johnston simply began to walk away from me. He said, out loud, "this is a refusal." The officer's evidence is that you attempted to provide a sample of your breath four times, and that a total of eighteen minutes passed from the time of the ASD demand to the time you were deemed to have refused. I note that the officer was willing to provide you with further attempts to provide a sample of your breath, but, s.22 continued to state she couldn't provide a sample of breath." The officer notes, s.22 stated to s.22 to just blow into the ASD, s.22 continually repeated her reasons for not providing a breath sample." I am satisfied that the officer provided you with ample opportunity to provide a sample of your breath.

I find it reasonable that your husband would be aware of your medical conditions, and therefore, I find it odd that he would urge you to provide a sample, and go so far as to demonstrate how to provide a sample himself, if he was also aware that you were unable to provide a sample due to your medical condition.

Based on the evidence before me, I am not compelled by your submission that you were physically unable to provide a sample. There is no evidence before me that you were short of breath at the scene or that you were having difficulty breathing at the time. I find that your behavior towards the ASD (blowing lightly and then stopping) is indicative of a person who is not attempting to provide a sample of breath.

I note that in the previous decisions provided by Ms. Leamon, the adjudicator was provided with medical evidence stating that the driver was unable to provide a sample. You have not provided evidence to this effect.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Sarah Leamon
fax: 250 370-2505

OCTOBER 2, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “WARN”, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Sheremetta and your submissions, I find there is one determinative issue in this review.

Was the ASD reliable?

In the Report to Superintendent (the “RTS”), Constable Sheremetta indicated that you provided a breath sample into an ASD with serial number “10166”. However, the officer did not provide a Certificate of a Qualified ASD Calibrator for this ASD. There is no evidence before me regarding the calibration of the ASD used to analyze your first suitable breath sample, therefore, I cannot be satisfied that the first ASD was reliable. Having made this finding, I do not need to consider other issues.

Decision

As a result of my findings, I revoke your driving prohibition and monetary penalty, as required by s. 215.5(4) of the Act.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

A refund of the fees and penalties relating to this IRP has been authorized and will be sent to you in approximately 6 – 8 weeks. If you have any outstanding fines or debts owed to the province of British Columbia your refund may be used to help offset those debts.

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review, you indicated one ground for review. All grounds for review that apply to your case will be considered in this review.

s.22

You requested that I find the woman's name (who you were with during the investigation) in the police report and urged me to contact Mid Island Towing to ask if specific items were in your vehicle. This review is conducted based on the information disclosed at the time of the hearing. As the applicant it was your responsibility to submit all evidence that you wanted to be considered in this hearing prior to the hearing date. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), Cst. Amirault indicates that you were driving or in care or control of a motor vehicle at 0323 hours on September 1, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Boucher submits that your vehicle was observed parked, running with its lights on, in a vacant lot on Grace Street. Cst. Boucher submits that you were found in the driver's seat and turned off the vehicle when police pulled in behind the vehicle and activated the emergency lights. You had one passenger, were confirmed as the vehicle's registered owner, and were identified with a British Columbia driver's licence.

You submit that Cst. Boucher made an error in the Narrative because your vehicle was not running and your lights were not on. You also indicate that you had your wallet on you and that the driver's licence number noted in the Narrative s.22 is not your driver's licence number s.22. You submit that you had a pillow, two duvets, and a bottle behind the driver's seat to urinate in, that the passenger's seat was fully reclined, and you were parked well off the road on private property. Accordingly, you were not going to drive and intended to sleep in your vehicle. You also assert that Cst. Amirault did not find you passed out in your vehicle and that you were rolling a cigarette when he opened your vehicle's door.

I acknowledge your submission that your vehicle was not running and your lights were not on. Police evidence indicates that you turned your vehicle off when police pulled in behind your vehicle. You also provided evidence that you had several items in your vehicle indicative of using it as a place to sleep. I acknowledge this, however, I have no persuasive evidence before me that you were not seated in the driver's seat, you were sleeping or that your vehicle's keys were not in your possession. On this point, you submit that you were not passed out and were rolling a cigarette when the RCMP drove up behind you.

I also acknowledge that Cst. Boucher noted s.22 in the Narrative and that this number does not correlate with your driver's licence number. The evidence before me indicates that your identity was confirmed by police. Namely your name, address, date of birth, and correct driver's licence number are indicated on the Notice. I accept that the incorrect driver's licence

number was noted in the Narrative, however, I am satisfied that this information is not vital in determining if you were a driver with the meaning of section 215.41 of the Act.

Further, the definition of a highway in the Act includes every private place or passageway to which the public, for the purpose of parking or servicing vehicles, has access or is invited. You submit that you were parked well off the road on private property. I am satisfied that the location you parked your vehicle (i.e. a vacant lot on Crace Street) falls under the definition of a highway.

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

Evidence in the RTS indicates that at 0325 hours Cst. Amirault formed reasonable suspicion that you were driving or in care or control of a motor vehicle, with alcohol in your body, after detecting an odour of liquor on your breath. Further, Cst. Boucher's Narrative submits that you admitted consumption of three to four drinks at a bar. When asked the time of your last drink, he submits that you responded by swearing at police and stated that your last drink was at, "11 o'clock this f*ucking morning you asshole."

You submit that you don't believe any officer smelled alcohol on your breath and that no one took the time to smell your breath. You also note that in the RTS, Cst. Amirault indicates that you, "declined to answer", the time of your last drink. On this point, you assert that, "lieing (sic) face down with [your] arms twisted behind [you] and a knee or two in [your] back it really didn't seem to matter."

I acknowledge your argument that you do not believe any officer smelled alcohol on your breath. However, I note that you also submit that you are, "not saying that [your] breath did not have any scent of alcohol", and that you think it is a standard excuse used to justify further action. The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle, with alcohol in their body. Moreover, there is a relatively low threshold for the introduction of an officer's opinion that a person is suspected of having alcohol in his or her body. In the Narrative, Cst. Boucher submits that you admitted to consuming three to four drinks at, "11 o'clock" that morning; evidence you do not refute.

Based on the evidence before me, I am satisfied that the peace officer made a valid ASD demand.

Evidence in the RTS indicates that an ASD demand was made on you at 0325 hours. In the Narrative, Cst. Boucher submits that you did not exit your vehicle after being asked numerous times to do so. Accordingly, police had to pull you out of the vehicle. You were arrested for impaired driving, cursed at police while being read the ASD demand, and refused to listen to the

demand. Cst. Boucher submits that you were aggressive and that when police tried to sit you up to administer the ASD you, “tensed up and remained on [your] stomach.” He also indicates that you were informed that refusing to provide a sample carried the same penalty as a “FAIL” reading and that you continued to yell and not listen to police. Accordingly, Cst. Amirault deemed a refusal at 0328 hours.

You indicate that when Cst. Amirault opened your door that you were rolling a cigarette and that he told you to, “step or get out of the vehicle.” You submit that you told him to just hang on and that he continued to insist that you exit the vehicle. When you finished rolling the cigarette, you put it in your mouth, and Cst. Amirault slapped it from your mouth. He proceeded to grab you and pull you from the vehicle. You submit that you were forced to the ground face down, with your arms behind you, and a knee or two in your back. You emphasized that when you were told that refusing to provide a sample carried the same penalty as a “FAIL” reading that you said you would blow. Specifically, that when you were shoved against the front of a van, handcuffed and told you were under arrest, you began yelling, “I said yes!” I also have before me a letter from s.22 who submits that in the early morning hours of September 1, 2013 she woke to noise outside of her mother’s apartment on Crace Street. She could hear a man yelling profanities and observed five police vehicles in the empty lot across the street. She states that it seemed like the man was being bullied and police were trying to accuse him of not cooperating when he was trying hard to make a point that he was. On this point, she submits that the man then stopped yelling profanities and began yelling over and over, “I said yes.”

You submit that you told Cst. Amirault to wait while you finished rolling a cigarette and that he asked you to exit your vehicle numerous times; police evidence confirms this. Accepting this, I am persuaded that you understood police instructions to exit your vehicle and that you chose not to comply resulting in you being forcibly removed. Police evidence indicates that you were arrested for impaired driving and cursed at police while being read the ASD demand. You admit that you began to use nasty language and swore profusely at the officers. Considering this, I am persuaded that you chose not to be compliant when having the ASD demand made on you. I also note that you submit when you were told that refusing to provide a sample carried the same penalty as a “FAIL” that you said you would blow. I am satisfied that this submission proves that you understood that an ASD demand had been made on you and that you also understood the consequences of refusing to provide a sample of your breath.

I acknowledge s.22 submission that she heard a man yelling, “I said yes”, however, I note that she also submits that it was, “dark to really see much of what was happening.” This evidence persuades me that s.22 cannot confirm that it was you yelling or what you were yelling, “I said yes”, in response to. I also do not have submissions before me from your female companion or additional witnesses that confirm you advised officers that you would blow prior to being informed that you were being served with a refusal.

I also note that you do not refute police evidence that you tensed up, remained on your stomach and, “told police off and to blow [you]”, when they attempted to sit you up to administer the ASD. You submit that you were advised that refusing carried the same penalty as a “FAIL” reading, were shoved up against a van while handcuffed, and then began yelling, “I said yes!” You also state that, “when officer [Amirault] informed [you] that [you] would be charged for refusing to

provide a breath sample [that you] repeatedly told him that [you] would blow.” I note these statements contradict.

I do not have any evidence before me that your ability to listen to or understand police instructions was compromised. You do not deny swearing at police and admit that you were not compliant because you were handcuffed and being subdued. I acknowledge that you were under arrest, however, I am satisfied that police provided you with the opportunity to comply with their instructions and you chose not to.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative, Cst. Boucher indicates that you, “did not disclose [any] reasons medical/physical regarding providing a sample”, and were confrontational and belligerent.

You question why you would accept an automatic fail when providing a breath sample could do no less.

I have no persuasive evidence before me that you provided officers with a reasonable excuse for failing or refusing to comply with the ASD demand.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.



October 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that your lawyer Albert King received all of the disclosure documents. I have proceeded with the review based on this confirmation.

You applied for all grounds in this review; some of them are not applicable for the type of prohibition that you were served by way of Notice. For your benefit, I have considered all relevant grounds in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?

- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer -- Cst. Vaughn -- indicated that you were driving or in care or control of a vehicle at 0105 hours on September 14, 2013. Cst. Vaughn provides in the occurrence report that: he stopped your vehicle for failing to signal a lane change. Upon stopping your vehicle, he identified you as the driver of the vehicle.

In your statement you provide: "At approximately 1:00 a.m. I was driving over to a friend's house."

I am therefore satisfied that you were a driver within the meaning of section 215. 41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0108 and 0111 hours.

In your statement you describe the officer's advising you "that I had failed the previous test", which I assume to be the first ASD result. You then state: "I could blow into a breathalyzer a second time which I did."

You do not describe the result of the second ASD; nor do you dispute the officer's evidence on this point.

I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test.

On this point, you state:

After I blew into the first breathalyzer the police officer went back to his car for a minute or two and then came back and advised me that I had failed the previous test and that I could blow into a breathalyzer a second time which I did.

Based on this, I am satisfied that the officer advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'FAIL" at 0111 hours.

With no evidence to the contrary, and your statements describing two "FAIL" readings, I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

The officer records a separate ASD serial number for the second analysis that took place at 0111.

You state: "I could not tell because of the darkness if the officer used the same machine or a different machine for the second test."

I do not find this to be an affirmative statement; my interpretation is that it serves to cast doubt on the officer's sworn evidence on this point.

The officer has provided consistent evidence that two different ASDs were used: two distinct ASD serial numbers, as well as a 'Certificate of a Qualified ASD Calibrator' for each ASD. He provided evidence in the occurrence report which confirmed the serial numbers of ASDs used.

I am therefore satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Were the ASDs reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator N.E. Smith certified that on August 21, 2013, he checked the calibration of ASD serial number 066128. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 18, 2013 and the service expiry date as December 20, 2013.

For the second ASD, the qualified ASD Calibrator N.E. Smith certified that on August 21, 2013, he checked the calibration of ASD serial number 101390. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 18, 2013 and the service expiry date as September 20, 2013.

Mr. King provides an opinion of forensic expert Carolyn Kirkwood, which in his words "raises a substantial concern regarding the proper operation of the Alco Sensor Screening Device." In a section of her report titled 'The Use and Operation of the Approved Screening Devices', Ms. Kirkwood identifies the ASD used as an Alco-Sensor IV DWF, then provides that it was calibrated on September 14, 2013. Respectfully, this is a factual impossibility, yet in section 'C' of her report at point 3 she lists the calibration date of August 21, 2013.

She provides the criteria for PASS - WARN - FAIL; however there is no source for this knowledge. On a "FAIL" result, I rely on the Act, s. 215.41(2); the amount of BAC is defined in the Introduction of this decision.

She goes on to introduce the concept of “mouth alcohol”, stemming from burping or very recent liquor consumption, still present in the mouth. To ensure accuracy, an officer, in her opinion, should wait for fifteen minutes to “ensure the elimination of “mouth alcohol””.

I note Cst. Vaughn’s evidence in the occurrence report: “Const. VAUGHN asked s.22 if he had any liquor within the last 15 minutes with s.22 saying “no”.” In your statement this is not addressed, and there is therefore no evidence to suggest a real possibility of “mouth alcohol.” You make no statement that very recent liquor consumption could have called the results of the ASDs into question. Cst. Vaughn, therefore, having asked the question, then proceeded correctly based on the answer you gave him at roadside.

Mr. King introduced the case of *R. v. Johnston* (2007), from which he draws the principle that “where there is no evidence of recent calibration the results cannot be relied upon.” I have read the case and find the factual premise different from the facts of your IRP: in *Johnston* there was no evidence when the instrument was last calibrated; in this IRP, the officer has included the Certificates, which satisfies me that the devices were recently calibrated. I find this evidence is present, and has even been cited by Ms. Kirkwood in her examination of ASD results in this case.

Mr. King provides in his submission that the difference in recorded temperatures between the two ASDs calls the proper operation of the ASDs into question. You include this as item 16 in your statement as well. There is no evidence to suggest why this is problematic to the operation of the ASD; the opinion of Ms. Kirkwood makes no reference to the temperature of the ASDs at roadside.

I therefore find the ASDs reliable at the time the samples were taken, with no evidence established to contradict that of the officer on this point.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

On this point, you detail the following in your statement:

- you were at a golf tournament that day and had some drinks there -- between 1:00 pm and 7:00 pm you “drank 6 cans of Bud light beer”;
- at 9:00 pm to 11:15 pm you drank two drinks, one glass of beer and one glass of wine, at Brown’s Social House;
- you “worked at s.22

In section ‘G’ of her report, Ms. Kirkwood outlines factors that “may slow the absorption of the alcohol from the stomach and small intestine.” These include: amount and type of food; rate of consumption of the beverage, and drugs diseases and emotional states.

Ms. Kirkwood proceeds to calculate your BAC based on your stated consumption. At point 5 of section ‘C’ of her report, she notes: “I will assume that s.22 commenced drinking at 1:00 pm September 13, 2013 and that he finished drinking at approximately 11:00 pm September 13, 2013.”

Ms. Kirkwood is quite clear in establishing that she is calculating a BAC based on two assumptions: she is relying on your stated drinking pattern; she is assuming a “relatively constant” elimination rate of 15 mg% per hour.

In regards to both of these assumptions, it is difficult to establish them as fact when I consider the following:

- you provide no evidence on your rate of consumption that day; it appears that Ms. Kirkwood's calculations are based on a constant elimination rate which is itself based on many variables;
- Ms. Kirkwood notes that your drinking pattern was described to her by Mr. King – I will assume for the purposes of this review however, that she was referred to your sworn statement that I have before me;
- your sworn statement and the submissions by Mr. King do not provide evidence on the other factors that affect absorption of alcohol: your food intake that day; and your rate of consumption of beer throughout the day. Ms. Kirkwood's calculation appears to not take this into account, though she does list them as factors which affect absorption;
- consumption of six beer – at whatever rate – is a significant amount, and there is no evidence to explain more fully the factors that affected the elimination rate from your body in this case. Ms. Kirkwood provides that this rate may vary in individual cases by as much as 10%.

For these reasons, I cannot establish as fact the calculated BAC that Ms. Kirkwood arrives at – she is relying on assumptions to arrive at her conclusions, which I cannot do in deciding matters on a balance of probabilities.

I also look to the officer's evidence, wherein he recorded your statement of "4 hours ago" in answer to his question of when you finished drinking; he noted symptoms -- slurring your words, and a "very strong odour of liquor" -- which are consistent with a higher BAC. You do not address the officer's record of your symptoms, except to note that acquaintances say that you do "mumble" when you talk. You do not address your response to the officer's question as recorded in his evidence in your statement, if only to deny it.

On a balance of probabilities, I accept that two ASDs registered "FAIL" results; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%. The evidence you present does not outweigh that of the officer in presenting two ASD "FAIL" results.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Albert King, Q.C.
King Sutton
Fax: 250-753-6123

October 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on three grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with the review based on that confirmation.

I note that in the Certificate of Service section of the Notice, the officer indicated that he served you on August 28, 2013. However, the remainder of the officer's evidence indicates that the incident occurred on August 29, 2013, and you acknowledge that you encountered the officer on August 29th. Therefore, I am satisfied that the officer made a clerical error in the Notice and that you were served on August 29, 2013.

In your written submission you stated that you have never been the cause of a vehicle accident, you have never been pulled over for unsafe driving or drinking, and you have never been a trouble to any law enforcement agency. However, under the Act I do not have the authority to consider your driving record or whether or not you have a history with law enforcement. The scope of the review is limited to the grounds as defined in the Act.

From your submission, it appears you take issue with how the officer came to form his reasonable suspicion to issue you a demand for a breath sample and how that demand was read to you, which relates to the validity of the demand. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

You submit that you were subjected to ASD tests without being informed that you had a constitutional right to request a lawyer. On this point, I do not have the jurisdiction to decide any constitutional issues.

You have provided a substantial amount of information to support your review; some of which is not pertinent to the issues I must consider. As such, from this point forward I will only address your submissions that are specific to the issues noted below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 20:40 hours on August 29, 2013.

In your submission you acknowledged that you were driving the vehicle on August 29th just prior to when the officer approached you.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 20:52 hours and 20:55 hours, respectively.

You did not dispute the "FAIL" results; however, you indicated that in the Report the officer documented that he used an ASD at 20:46 hours. I disagree, as the time of 20:46 hours is recorded in section 4 of the Report as the time the officer gave you the ASD demand.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second analysis on a different ASD, and that the lower result would prevail.

You acknowledged that both officers recommended you take the second test.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that a second analysis was provided to you. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded the serial numbers of the ASDs used as 101383 and 101395. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

In the Narrative, the officer indicated that during the first ASD test you provided six insufficient samples before finally providing a valid suitable sample. Further, the officer indicated that during the second ASD test you provided one insufficient sample and then one suitable sample.

The officer provided Certificates of a Qualified ASD Calibrator (the "Certificates") for the ASDs bearing the serial numbers 101383 and 101395. In the Certificates, Norman Eric Smith certified that the ASDs were found to be within the recommended limits when he checked their calibration on August 21, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly.

You provided some information relating to ASDs within your submission, which appears you acquired through internet searching and is from an unknown source. I say this because you did not tell me from whom or where you obtained the information. Further, I find the manner in which you presented this information and any related arguments, if they were made at all, to be confusing. Considering this, I will address the information and related submissions as best as I can in the review; however, I note that there is no evidence before me that you have provided me with information that has come from an expert in the ASD field.

You have indicated that the RCMP's internal documents indicate that the ASD has an error factor of +/- 10 mg%. However, although I am mindful that this is an administrative hearing and not a criminal proceeding, I refer to the case of *R. v. Moreau* 42 CCC (2d) 525. In this case the judge held that when the argument of the inherent accuracy of the breath test instrument is subject to a possible margin of error, it is not evidence to the contrary.

You have asked me to take notice that the ASD service expiry dates are 2013-09-20 and 2013-10-01. You stated, "this is when they have to be shipped off for new parts as they are no longer reliable". I agree that these are the service expiry dates that are recorded in the Certificates, but there is no compelling evidence before me regarding what transpires with ASDs when they reach their service expiry date. Furthermore, I do not understand how this is relevant to your case as your breath samples were obtained on August 29th which is prior to the service expiry dates.

Your evidence is that for the first test the officer only conducted three ASD attempts "but it did not work". You attempted to explain to the officer that your s.22 and that you were blowing as hard as you could. You indicated that the officer called another member on his cell phone, and this member arrived a few minutes later and administered a test on another ASD. You included a s.22 and you stated that you "do not have the capacity to make a device like this work." As well, it appears you take issue that the officer did not mention that another member was called to the scene and that your first ASD test had to be done on another device because the first device "did not work".

I acknowledge the medical information you provided, as well as your opinion that you s.22 s.22 to provide a proper breath sample into an ASD. However, the officer's evidence which you did not deny is that, eventually, you did provide two samples that each registered a "FAIL". I also acknowledge that your evidence conflicts with that of the officer's with respect to how many times you attempted to provide a sample, and that the officer did not provide evidence that another member was called to the scene and provided another device. However, in my view, I do not need to make a credibility finding here as nothing turns on this in the review. One of the issues before me is "Did the ASD register a "FAIL"?", and I have already made a finding that both ASDs registered a "FAIL". Another issue before me is whether your second analysis was performed on a different ASD, and I have already made a finding that your two ASD tests were performed on different ASDs.

With respect to the reliability of the ASDs, I find there is no evidence before me which leads me to conclude that they were not functioning properly.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Narrative, the officer indicated that when asked the time of your last drink you stated, "about 5 minutes ago". The officer reported that he formed his reasonable suspicion for the demand at 20:41 hours, and that you provided breath samples at 20:52 hours and 20:55 hours.

As previously noted, you stated that the officer documented that he used an ASD at 20:46 hours, but that is actually the time he reported that he read you the ASD demand. You also stated that the officer documented that you had last consumed alcohol 5 minutes prior to the test; however, I disagree. In my view, based on the evidence in the Narrative, the officer formed his reasonable suspicion for the demand at or about the same time you advised him that you consumed your last drink "about 5 minutes ago", which was at 20:41 hours. Therefore, as you have not provided any additional information for this review as to when your last drink was, I am left to conclude that it was at about 20:36 hours. You stated that if you understand the ASD operator's manual correctly, the device should not be used for at least 15 minutes after the last drink.

Although you did not provide me with a copy of the ASD operator's manual, I am familiar with the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506. In *Giesbrecht*, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. Based on the times I have noted above, I find it more likely than not that your breath samples were taken 16 minutes and 19 minutes, respectively, after you last consumed alcohol.

You also stated that you wear dentures, so the beer you were drinking was present in your mouth. However, you did not provide me with any compelling evidence to convince me that your dentures would trap the alcohol in your mouth for longer than 15 minutes after your last drink.

Based on the evidence before me, I am satisfied that mouth alcohol did not affect the test results.

Last, you submit that you have a medical anomaly which s.22 You wonder if this affected the ASDs. Further, you submit that metabolic rate may play a role in the ASD accuracy, and on August 29th you consumed no food. However, I must advise you that it is not sufficient to simply make suggestions about what might have affected the ASD results, without providing evidence to support your claim.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%, and I have already made a finding that the ASDs were reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 20 days of the prohibition, you need only serve the remaining 70 days. Your prohibition commences October 25, 2013. The prohibition ends at 23:59 hours on January 3, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 14, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 24, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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

On November 1, 2013, this office faxed your lawyer, Albert King, ten pages of disclosure documents which included a fax cover sheet. The fax cover sheet stated that the written review was scheduled for November 6, 2013, at 9:30 am. Additionally, the fax cover sheet indicated that if written submissions were to be made, they were to be received at this office by the scheduled review time. To date I have not received any written submissions from you or Mr. King. As such, I have proceeded with this review on the evidence before me.

You applied on three review grounds, two of which are not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent ("RTS"), the officer identified you as the driver of the vehicle, and recorded the time and date of driving or care or control of the vehicle as 22:00 hours, on October 24, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that you provided a sample of your breath into an ASD at 22:08 hours and 22:21 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the officer on this point.

I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the officer's with regard to this issue.

I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 22:21 hours.

There is no evidence before me disputing that of the officer.

I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 072493, and the serial number for the second ASD as 066128.

There is no evidence before me contrary to the officer's on this issue.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded in the RTS and Narrative that both results registered as "FAIL" results.

There is no evidence before me that refutes the officer's evidence on this point.

I am satisfied that the Notice was served on the basis of the "FAIL" result, since each result was the same.

Was the ASD reliable?

In the RTS, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of a Qualified ASD Calibrator (the "Certificates") for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on October 16, 2013, he checked the calibration of ASD serial number 072493. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 13, 2013, and the service expiry date as December 20, 2013.

For the second ASD, the qualified ASD calibrator certified that on October 16, 2013, he checked the calibration of ASD serial number 066128. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 13 2013, and the service expiry date as December 20, 2013.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 24, 2013.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 24, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

Adjudicator

cc: Albert King

Fax: [250] 753-6123

October 16, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

A peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to 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 ASDs 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?
- Were the ASDs reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2357 hours on August 26, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), the officer submits that he observed a vehicle hit a curb when turning southbound onto Highway 19A from Departure Bay Road. He noted that the vehicle's right tail light was burnt out and initiated a traffic stop at Waddington Road/Street.

In your written submission (the "Submission"), you indicate that you were travelling southbound on the highway when a vehicle abruptly came into your lane, cutting you off. You submit that you had no choice but to swerve to avoid a collision and assert that you did not hit a curb. Accordingly, you suspect that the officer pulled you over because of a burnt out tail light, not based on erratic driving indicative of impairment.

While I acknowledge your submissions the reason why your vehicle was stopped is not an issue I must consider in this review. Further, you do not refute driving when your vehicle was stopped by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "WARN"?

In the RTS, the officer indicated that the ASDs registered a "WARN" at 0058 hours and 0105 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "WARN".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101386 and 101388, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "WARN". Accordingly, the lower analysis result was a "WARN". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer's evidence is that he explained the ASD procedure to you. On your first attempt to provide a sample, you did not seal your lips around the mouthpiece, blew poorly, and a "NOGO" reading was displayed. The officer explained again how to provide a suitable sample. On your second attempt, you made a noise simulating blowing, a "+" was displayed on the ASD, and there was no air flow coming out from the device. The officer then demonstrated how to blow and you subsequently blew a "WARN" at 0058 hours. A second, different ASD was prepared and at 0105 hours, you blew a second "WARN".

Conversely, you indicate that the result of the ASD is not reliable.

In your Submission, you do not refute the officer's evidence regarding your blowing behaviour. Further, I do not have any persuasive evidence before me that the functionality of either ASD used for your tests should be questioned. On this point, section 14 in the sworn RTS indicates that any ASD tests referred to in the officer's report were conducted by a qualified ASD operator and that the ASD units used in your investigation were functioning correctly. Moreover, the officer submitted Certificates of a Qualified ASD Calibrator in which Norman Eric Smith certified that the ASDs were found to be within the recommended limits when he checked their calibration on August 21, 2013. Mr. Smith also certified that to the best of his knowledge the ASDs were functioning correctly.

Based on the evidence before me, I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 50 mg% even though the ASDs registered a "WARN"?

The officer's evidence is that upon approaching your vehicle he noted a mild odour of liquor coming from within the vehicle, that you avoided eye contact, and were careful not to breathe out toward him. When asked if you had drank any alcoholic beverages before driving, you stated, "No." Once you had exited the vehicle the officer noted an odour of liquor coming from your mouth. When asked again if you had had anything to drink you stated, "No." However, when the officer advised you that he could smell liquor on your breath, he indicates that you admitted to drinking a few drinks prior to driving, with the last drink being five minutes before driving. After being advised that you were being detained for an impaired driving investigation, the officer submits that you stated you were having panic and anxiety attacks. Accordingly, you started spitting and burping and told him that you, "just burped."

The officer's evidence further indicates that you were escorted to the back compartment of the police vehicle but requested to get out as you were having anxiety attacks. You stated that you were panicking because you knew you would lose your licence and were supposed to camp with your son the following day. The officer advised you that because you had burped there would be a fifteen minute waiting period before the ASD test would be administered. It was at this point that you began blaming the officer for not understanding your personal situation, current panicked situation, and claimed not to understand what was going on.

It was again explained to you that you were being investigated for impaired driving and that you would have to provide a suitable sample of your breath into an ASD. The officer submits that you continued burping, delaying the ASD test. After a clear fifteen minutes without burping had passed the ASD was prepared and you were requested to provide a breath sample. You burped again claiming you were having panic attacks. The officer informed you that if you continued with your behaviour that you would be charged with a refusal to provide a sample. After another clear fifteen minutes had passed without you burping, the ASD procedure was explained, and the first ASD test was started.

In your Submission, you write that on August 26, 2013, you attended a fantasy football draft at a friend's house. You arrived at approximately 5:30 pm and left at approximately 11:45 pm. During that time you consumed three Growers coolers and one Budweiser beer. At approximately 8:00 pm, you ate a large dinner and snacked on chips and cookies afterwards. You assert that you did not intentionally delay the ASD test and that you were not making yourself burp but were gassy from the large dinner. Moreover, you indicate that your anxiety and panic attack was not staged and that you suffer from severe anxiety issues due to an s.22 You submit that the basis for review I should consider is that the officer did not wait fifteen minutes between the ASD tests. Specifically, that the first test was at 12:58 am and the second test, 1:05 am. You also submit that you were not over the legal limit and that the "WARN" readings were due to residual mouth alcohol.

There is no requirement under the Act for the officer to have waited 15 minutes between ASD tests purely as a matter of course. However, based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15

minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of residual mouth alcohol.

In your Submission, you indicate that the officer's recollection of the amount you had to drink is incorrect. I acknowledge the conflicting evidence; however, you admit that there may have been a mild odour of liquor on your breath because you had consumed beer approximately five minutes prior to driving. By providing this evidence, I infer that you would like me to find that your ASD tests results were affected by residual mouth alcohol. The officer's evidence is that because you had advised him that you had consumed your last drink five minutes prior to being stopped that a fifteen minute waiting period would be required. Further, the officer provides evidence that you had burped or were burping on three separate occasions and that following each burping episode he waited a clear fifteen minutes before attempting to administer the first ASD test. I note that you do not refute this evidence nor have you provided any evidence that you burped or were burping during the first test or between the first and second test. Accordingly, it is more likely than not that mouth alcohol was not a factor on the ASD results.

While you may have believed that you were not over the legal limit, you did not provide any compelling evidence that would cause me to doubt the "WARN" readings on the ASDs that I have found to be reliable. Section 215.41 (2) of the Act states that "WARN" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 50 mg %. As such, I am satisfied that your BAC was not less than 50 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your 3-day driving prohibition and monetary penalty. Your prohibition took effect on August 27, 2013.

October 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to Carr Buchan & Company. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?

- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following issue.

Were you a driver within the meaning of section 215.41(1) of the Act?

Based on the evidence before me, I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

You may go directly to the location where the vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 10, 2013, the date the vehicle was eligible for release. You are responsible for any storage costs beyond that date, and you should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that disclosure documents were faxed to your lawyer, Albert King. I will proceed with the review based on this confirmation.

You checked the boxes next to all of the grounds on the application form. However, the grounds associated with a “WARN” result on an ASD and with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition. I will consider all grounds available to you in this review.

Mr. King argued that the officer waited ten minutes for the first ASD; therefore, the test was not forthwith as the law requires. To support his position Mr. King provided the case of *R v. Grant* S.C.R. 139.

IRP Review Decision
Page 2

The officer's evidence shows that there was not an ASD on hand; therefore, I do not find 10 minutes an unreasonable length of time before the ASD arrived.

Mr. King argued that you should have been read a right to counsel under section 10(a) and (b) of the *Charter* because the officer had reasonable and probable grounds regarding an impaired driving offence not simply a reasonable suspicion that you had alcohol in your system.

I have considered Mr. King's submissions; however, this review is an administrative process and not a criminal proceeding. The scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues or to apply remedies under the *Charter*.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 2053 hours on September 27, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that he observed you while driving in the same direction. He stated that you seemed to not know what was going on around you and you just stare ahead. He reported that you were driving slowly and when the officer activated his emergency lights to pull you over you did not stop you just drove away. The officer reported that since the traffic stop was initiated you drove for 500 meters before coming to a complete stop.

In your affidavit you provide an explanation for the braking, and you dispute the time the officer had his light on prior to pulling you over.

You do not challenge that you were the driver.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 2105 hours and 2120 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 18, 2013, he checked the calibration of ASD serial number 083680. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 16, 2013, and the service expiry date as August 16, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 18, 2013, he checked the calibration of ASD serial number 101395. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 16, 2013, and the service expiry date as October 23, 2013.

Mr. King argued that the serial number for the first ASD is not accurate when compared to the Certificate of Qualified Approved Screening Device Calibrator. Further, Mr. King argued that the first ASD registered a temperature of 13 degrees and the second ASD registered a temperature of 21 degrees. Mr. King argued that something is clearly incorrect regarding the proper functionality of the ASD.

In considering these issues; first, I acknowledge that ASD devices have a six digit serial number; however, leading zeros may not be recorded in the Certificate. Second, as per the *Buhr v. British Columbia* (Superintendent of Motor Vehicles) 2013 BCSC 1443 at paragraphs 29 & 30, the judge

IRP Review Decision
Page 4

refers to the ASD operator's manual that was in evidence, which states that "a test could not be initiated if the temperature was below 10 degrees or above 40 degrees.

Further, in the Report, the officer swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

You stated that you told the officer that you consumed your last beer twenty minutes ago. However, you submit that he should have asked you: "Did you drink any of the Rock Star while driving". You stated that you took a huge gulp of the Rock Star vodka cooler a few moments before you were stopped. You deny that you had slurred speech; you stated that you were very tired when you dealt with the officer.

The evidence before me indicates that the officer asked you what time you finished your last drink, and this demonstrates to me that the officer was aware of the requirement to inquire about your drinking pattern particularly as to when your last drink was. Moreover, this indicates to me that the constable more likely than not turned his mind to the possibility of mouth alcohol and the 15 minute waiting period. Further, I note that the officer observed you travelling in the same direction as him at 2050 hours. The first test was taken at 2105 hours (15 minutes later) and the second test was taken 30 minutes after he observed you driving. Consequently, while you may have had a drink from the cooler I am not persuaded that mouth alcohol was a factor in your breath test results.

Section 215.41(2) of the *Motor Vehicle Act* states that a "FAIL" on an approved screening device indicates that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood.

As I have already found the ASDs used in your case to be reliable, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Albert King by fax 250 753 6123

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you. Records confirm that your lawyer, Albert King, received full disclosure. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?

- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted that he identified you as the driver of the vehicle and that he observed you driving. He recorded the date of driving or care or control as September 29, 2013, the time of driving or care and control as 00:25 hours, the time of reasonable suspicion as 00:28 hours and the time he read you the ASD demand as 00:28 hours. In the Narrative the officer noted that on September 29, 2013, at approximately 02:25 hours you drove through a road block in your s.22. The officer stated that you were the only occupant in the vehicle. The officer indicated that at approximately 02:28 hours he formed the suspicion that your ability to operate a motor vehicle may be impaired by alcohol. The officer stated that at approximately 02:28 hours he read you an ASD demand and you blew a "fail" at 02:31 hours. He stated that at approximately 02:36 hours he read you the right to a second test and at 02:38 hours you blew a "fail" on the second ASD test. The officer noted that he served the Notice of Driving Prohibition at approximately 02:55 hours. On the Notice of Driving Prohibition the officer indicated that he formed reasonable and probable grounds at 02:28 hours.

In your written submission you stated that you do not know the time of care and control. However, you do know that you called 911 at 12:17 am because you thought s.22

s.22

Mr. King questioned the time of driving or care and control as sworn by the officer in the RTS. He also questioned the other times in the RTS. He submitted that your IRP be set aside.

In considering the officer's evidence, I note that there is no evidence before me to indicate that there were any issues or delays during the investigation. I also note that the sequence of events appears to be straightforward. Therefore, in my view, it is reasonable to conclude that the time of driving/care or control, the time of reasonable suspicion, and the time the officer read the ASD demand as noted in the RTS are written incorrectly. Section 215.49(1) of the Act states that in making my decision I must consider the report of the peace officer delivered under section 215.47(d) and other relevant information provided by the peace officer with the report. As such, I must consider both the RTS and the Narrative. When reading the Narrative in conjunction with the RTS, I interpret the times and sequence of events as follows:

- Time of driving or care or control 02:25 hours
- Time of reasonable suspicion 02:28 hours
- Time ASD demand read 02:28 hours
- Time of first ASD test result 02:36 hours
- Time of second ASD test result 02:38 hours
- Served Notice at 02:55 hours

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 29, 2013, at 02:25 hours.

Did the ASD register a "FAIL"?

In the RTS, the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of a Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

You stated that you believe that you did not exhibit any symptoms of impairment of alcohol or drugs and you should not have provided two "fails" on the ASD if they were properly operating. You explained that you took at least two big tablespoons of cold medication that contained alcohol just before you drove.

I note that you have not provided any evidence to suggest that the ASDs were not operating properly. While you stated that the cold medication you took contained alcohol, there is no evidence before me to indicate the ingredients of the medication or how it would affect the ASD results. Further, while you stated that you believe you did not exhibit any symptoms of impairment, I note the officer's evidence is that you had an overpowering odour of liquor coming from your breath and that your speech was very slurred. I find these observations inconsistent with your claim that you had a beer and a glass of wine at dinner.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 29, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Albert King
250-753-6123

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 10, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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 six grounds. For your benefit, I have considered all the grounds available to you. Records at this office indicate that disclosure was provided to your lawyer, Jeremy Carr.

Mr. Carr stated that an adjudicator must not assume from the existence of a demand that a demand was properly formed.

The grounds upon which I may review your driving prohibition are restricted to those set out in the Act. Despite the submission that the validity of the demand is an issue in this review, I conclude that it is not. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in

section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Mr. Carr noted that Justice McEwan held in *Spencer v. British Columbia (Superintendent of Motor Vehicles)* that the police are not deemed to have a credibility advantage and that the case must be determined impartially on the evidence. He further noted that as in *Gillies v. British Columbia (Superintendent of Motor Vehicles)* “credibility is a finding of fact which must be reviewed on a standard of reasonableness”.

Although Mr. Carr did not provide me with either decision, I acknowledge these points and I have proceeded with the review with these in mind.

Mr. Carr submitted that this is a quasi-criminal administrative matter and that the burden must be strictly enforced against the Crown. He stated that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be “clerical” in nature, can only be resolved in favour of you. He also stated that you have no burden of disproof in this hearing and that there is no evidence before me which satisfies the burden of proof.

I acknowledge Mr. Carr’s submission; however, I am mindful that this is an administrative process and as such, issues are weighed on a balance of probabilities, not beyond a reasonable doubt as they are in the criminal courts. Moreover, I will weigh any errors appropriately.

Mr. Carr also indicated that you took issue with the material presented by Constable Rowan, particularly its truthfulness and accuracy. Mr. Carr stated that you believe that the minimal evidence provided by Constable Rowan is a significant exaggeration and distortion of the facts alleged.

While I understand Mr. Carr’s submission, I note that other than the issues, which I have dealt with throughout this review under the appropriate sections, neither you nor Mr. Carr have provided me with any further information as to what other specific issues you have with the evidence provided by the officer.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on October 10, 2013, at 01:55 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 10, 2013, at 01:55 hours.

Did the ASD register a "FAIL"?

In the RTS, the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

Mr. Carr stated that you advised that the officer did not show you the ASD results.

There is no requirement in the Act that an officer must show a driver the results of an ASD test. In any event, in considering the evidence before me, I prefer the officer's sworn evidence over Mr. Carr's unsworn hearsay evidence.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test on a different ASD. He also checked the box to indicate that he told you that the lower result would prevail.

Mr. Carr noted that there was a 12 minute delay between the tests. He argued that Constable Rowan violated your right to "forthwith" request and be provided with a second test.

My understanding is that once a person is advised of their right to a second test, their request for a second test must be made forthwith. It is also my understanding that there is no requirement that the second test must be provided forthwith. The officer's evidence is that after you provided a "FAIL" he explained to you your right to a second test and you advised that you wanted to provide a second sample. In my view, I find that the officer met his obligations under the Act.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".
There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

I find there is no compelling evidence before me that would lead me to question the ASD results. I am satisfied that the ASDs registered a "FAIL" as a result of your BAC exceeding 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 10, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Jeremy Carr
250-388-7327



November 1, 2013

Driver's Licence # s.22

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP)- No. s.22

Introduction

On October 20, 2013 a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* requires me to confirm your prohibition, along with 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 *Motor Vehicle Act* requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following issue:

Did you have a reasonable excuse to fail or refuse to comply with a breath demand?

Your lawyer Mr. Green submits you had a reasonable excuse for failing to comply with a breath demand due to your medical condition. This is verified through evidence you have provided for this review.

On review, and assessing this evidence against that of the officer, I am satisfied that you had a reasonable excuse for failing to comply with a breath 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.

You may go directly to the location where the vehicle is impounded for the immediate release of the vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including **November 1, 2013**, the date the vehicle was eligible for release. You are responsible for any storage costs beyond that date, and you should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15

Adjudicator

cc. John Green, Green & Helme Lawyers
fax: 250-361-9181

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy G. Carr. I have proceeded with this review based on that confirmation.

Mr. Carr referred to the cases of *Spencer v. Superintendent of Motor Vehicles*, *Gillies v. Superintendent of Motor Vehicles* and *Costain v. Superintendent of Motor Vehicles*. He stated that in *Spencer*, the judge held that the police are not deemed to have a credibility advantage,

and the case must be determined impartially on the evidence. He stated that in *Gillies*, the court noted that credibility is a finding of fact which must be reviewed on a standard of reasonableness, and that an adjudicator must weigh the evidence to reach the conclusion. He points out that pursuant to *Costain*, an adjudicator is required to carefully and conscientiously weigh the evidence, and to provide a reasonable justification for his or her choice. Mr. Carr did not provide me with the above-noted cases; however, I am familiar with them and have proceeded with this review with *Spencer*, *Gillies* and *Costain* in mind.

Mr. Carr submits that your driving prohibition should be revoked because the officer did not observe you driving and therefore his evidence does not establish that he formed reasonable suspicion that you had alcohol in your body and operated a motor vehicle within the preceding three hours. Mr. Carr has referred to four criminal cases to support this submission, being *R. v. Geraghty*, *R. v. Ference*, *R. v. Hemery* and *R. v. Smith*.

I acknowledge Mr. Carr's submission on this matter and note that the cases he referred to are criminal cases, which are instructive but not determinative of an administrative review. The standard of proof is beyond a reasonable doubt in a criminal case, while it is on a balance of probabilities in an administrative review such as this.

Mr. Carr submits that this is a quasi-criminal administrative matter and that the burden of proof must be strictly enforced against the Crown. He states that the facts justifying a prohibition must be proved and cannot be assumed by me and that any errors deemed to be "clerical" in nature, can only be resolved in favour of you. He also states that you have no burden or disproof in this hearing and that there is no evidence before me which satisfies the burden of proof. I acknowledge Mr. Carr's submission. However, I am mindful that this is an administrative process where issues are weighed on a balance of probabilities. As such, I will weigh any errors appropriately.

Mr. Carr said that you advised that at no time were you shown the ASD test results. I am not aware of any provision in the Act that stipulates a police officer must show the results of an ASD test to the person taking the test.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that on October 27, 2013, at 03:02 hours, Officer Scott (the "officer") established you as a driver or having care or control of a vehicle.

The officer's evidence in the Narrative Text Hardcopy (the "Narrative") is that he was on duty in full police uniform, driving a marked police vehicle situated at the Canadian Tire parking lot located at 3933 Cedar Hill Road. The officer said that while parked at the Canadian Tire parking lot, he noted a vehicle enter the parking lot and park on the opposite side of the lot. Approximately one minute after the vehicle had been stopped, the officer noted the passenger door open and a female leaned her body out of the vehicle and vomited on the asphalt. The officer proceeded over to the vehicle and identified you as the driver. The officer said that while speaking with you, he noted you were displaying indicia of alcohol impairment and there was a strong odour of liquor emanating from your breath. As well, you admitted to consuming a significant quantity of liquor. The officer read you the ASD demand after confirming that your last drink was at approximately 02:00 hours. Two ASD tests were conducted, both resulting in a "fail" reading. After serving you with the IRP paperwork, the officer offered to contact a taxi for you and your passenger. You both decided to leave the scene on foot.

Mr. Carr submits that at no time did the officer observe you in care or control of your vehicle. Mr. Carr said that it is impossible that the officer observed you driving your vehicle at 3:02 a.m. because you had called Call My Driver driving service at 2:57 a.m. He states that you advised him that you were already parked in the parking lot waiting for the driving service when you observed the police vehicle enter the parking lot and park. He said you further advised him that at no time did you drive after having consumed alcohol, nor did you have any intention of driving. You further advised Mr. Carr that you told the officer all of the above.

Mr. Carr has provided me with a statement from William Impey, the owner of Call My Driver. Mr. Impey indicates that you requested driving services from Call My Driver on October 27, 2013, at approximately 2:57 a.m. He said you advised you were waiting in the parking lot located at 3933 Cedar Hill Road. He further states that when his driver arrived, the police were on the scene. Mr. Carr also provided me with a copy of a text message which he states Mr. Impey received from the driver. Mr. Carr has also provided me with a statement from s.22 your passenger. s.22 said she was with you throughout the day and that you did not drive after consuming alcohol. She said that you had no intention of driving, had called Call My Driver and were waiting in your vehicle for the driver to arrive when the police officer arrived on the scene.

I acknowledge that Mr. Carr would have me rely on the statements from Mr. Impey and s.22 s.22 and conclude that you were parked in the parking lot with no intention to drive and were merely waiting for the driver service. However, I have difficulty concluding this because there is no explanation before me regarding how you arrived at the parking lot. I acknowledge that the onus is on the officer to support his reasons for issuing the driving prohibition. However, I note that there is no evidence before me as to the events which led up to you being parked in the parking lot.

In considering the copy of the text message, it appears to say "cops have s.22 and told us we won't be needed." I find the text message to be of limited value to support your claim that you called for a driving service on the night in question. It does not indicate a date or a time in the message, and there is no way to identify who sent the message to whom.

I turn now to a consideration of the statements of Mr. Impey and s.22 I find it noteworthy that, because the structure and length of both typed statements are similar, they appear to have been prepared by the same person. In addition, I question why Mr. Impey did not prepare his statement using his company's letterhead and/or attach his business card to the statement. In relation to s.22 typed statement, I question whether her recollection

of the events can be clear given that she was feeling unwell to the point where she vomited on the asphalt. In contrast, I have the officer's sworn statement that he observed you drive into the parking lot and park your vehicle. The officer's evidence is that he observed your vehicle for approximately one minute before s.22 leaned out and vomited on the asphalt.

In considering the evidence before me, I find I give less weight to the typed statements from Mr. Impey and s.22 for the reasons outlined above. Ultimately, you have not persuaded me that the officer did not observe you drive your vehicle into the parking lot or that you had no intention of continuing to drive.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 03:07 hours and at 03:11 hours, the officer used ASD serial numbers 101251 and 101252 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101252 at 03:11 hours.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The police evidence in the Report is that your first ASD test was conducted on ASD serial number 101251 and your second ASD test was conducted on ASD serial number 101252.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were "fail"; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator indicates that ASD serial number 101251 and ASD serial number 101252 were checked for calibration and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Jeremy G. Carr
By Fax 250 388-7327

September 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

On your application for review you requested a written review. Your application indicates that your written review was scheduled for September 16, 2013, at 9:30 a.m. Additionally, your application for review indicated that if written submissions were to be made, they were to be received at this office by the scheduled review time. To date I have not received any written submissions from you. As such, I have proceeded with this review on the evidence before me.

You applied on three review grounds, one of which is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the 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 Occurrence Report (the “Report”), the officer indicated that he observed the vehicle leave the parking lot at the corner of Douglas Street and Boleskine. The officer observed that the vehicle was driving very slowly onto Douglas and making a slow left turn onto Boleskine. The officer followed the vehicle as it turned right onto Harriet Road and noted that the turn was very wide and the vehicle was then driving on the far side which was considered to be the wrong side of the road. The officer stated that at 01:01 hours a traffic stop was conducted with the vehicle.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that you provided a sample of your breath into ASD serial number 101251 at 01:05 hours, and that the sample registered a “FAIL”. Further, the officer indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the officer on this point. I am satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second test. He also noted that he advised you the second test would be on a different ASD, and that the lower test result would prevail. The officer recorded in both the RTS and the Report that you did not request the second test. The Report indicates that in response to being informed of your right to a second ASD test you advised the officer that you did want to provide a second sample of breath.

I have not been provided with any evidence which is contrary to the officer's with regard to this issue. I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

As noted above, I have made a finding that you were informed of your right to a second analysis but you declined it. On this basis, I am satisfied that a second analysis was not requested by you and therefore not provided by the officer.

Was the second analysis performed on a different ASD?

As there is only one breath test analysis, and you did not request a second test, there was no requirement for the use of a second ASD.

Was the Notice served on the basis of the lower analysis result?

As there was only one breath test analysis, I am satisfied that the Notice was served on the basis of the "Fail" result.

Was the ASD reliable?

In the RTS, the officer swore that the ASD test was conducted by a qualified ASD operator and that the ASD unit was functioning correctly. The officer also provided a Certificate of a Qualified ASD Calibrator (the "Certificate").

In the Certificate the qualified ASD calibrator certified that on August 9, 2013, he checked the calibration of ASD serial number 101251. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 6, 2013, and the service expiry date as December 14, 2013.

There is no evidence before me to suggest that the ASD used in your case was not functioning properly on September 1, 2013, at the time of your ASD test.

I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a "WARN" as a result of your blood alcohol concentration (BAC) being not less than 50 milligrams of alcohol in 100 millilitres of blood (50 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate you received full disclosure. I have proceeded with this review based on that confirmation.

You applied on one ground. For your benefit, I have considered all the grounds available to you.

In your written submission you stated that you were pulled over for speeding. You indicated that the officer gave you a ticket for speed relative to conditions rather than a traditional speeding ticket. You questioned whether this was a sign of weak evidence of your actual speeding or if the speeding was a reliable accusation. You also took exception with the officer's claim that you were overly cooperative during the stop. Further, you made reference to the recent case of *Wilson v. Superintendent of Motor Vehicles*. You stated that police must find reasonable causes to suspect and come to the conclusion that a driver was actually impaired in their ability to operate a motor vehicle.

I have read and considered *Wilson* and I acknowledge the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground. With respect to the officer's grounds for stopping you, in this administrative review I do not have the jurisdiction under the Act to engage in a review of that matter.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted you were a driver or had care or control of a motor vehicle on September 30, 2013, at 03:44 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 30, 2013, at 03:44 hours.

Did the ASD register a "WARN"?

In the RTS the officer noted that there were two tests and he recorded both results as "WARN". Further, he indicated that he showed you the results of both tests.

You noted that there was a lag of at least 8 minutes between being pulled over and being given the ASD test. You stated that past rulings in British Columbia have declared that a four minute delay may render ASD results inadmissible.

IRP Review Decision
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I am not aware of any past rulings in British Columbia that have declared a four minute delay may render ASD results inadmissible. I do not find an eight minute delay from the time you were pulled over to when you provided your first result to be an issue in this review.

I am satisfied that the ASDs registered a "WARN".

Were you advised of your right to a second analysis?

The officer indicated that he informed you of your right to a second test and indicated to you that the lower test result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "WARN".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "WARN" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

You stated that on September 29, 2013, you began experiencing heartburn and stomach symptoms. You explained that you discovered you had food poisoning following a medical review. After throwing up a number of times you were diagnosed on Thursday with an advanced case of gastroenteritis. You indicated that at the time you were pulled over you had been experiencing symptoms of heartburn and nausea associated with the first stage of gastroenteritis. You believe that this caused a falsely high warn reading on your ASD test. You

stated that burping and other gastrointestinal issues are known to cause inaccurate ASD readings. You also stated that you took herbal mouth spray to reduce stress symptoms prior to being pulled over. You indicated that the herbal spray is preserved in 27 percent brandy which could affect the reading. You expressed your concerns that you have been punished based on a potentially faulty and potentially misused device.

I find your statements that you were experiencing symptoms of heartburn and nausea unconvincing. I note that there is no evidence in the officer's report that you were experiencing these symptoms. With respect to your claim that you used herbal mouth spray prior to being pulled over, I note that you did not provide supporting evidence to indicate the ingredients of the spray. I also note that you did not state how the spray would adversely affect the ASDs. While you expressed your concerns regarding potentially faulty and misused devices, you have not provided any evidence to support your statements. With regard to your statement that the ASDs were due to be service on October 6, 2013, I note that this incident occurred on September 30, 2013, which was six days prior. I find it unlikely that either result was affected by mouth alcohol. I also find it unlikely that two separate ASDs malfunctioned and produced results that did not accurately reflect your BAC.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on September 30, 2013.

This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 19, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

Having reviewed the evidence before me, I do not find that I have sufficient evidence to indicate that you were a driver or in care or control of a motor vehicle.

I am satisfied that you not a driver within the meaning of section 215.41(1), of the Act.

Having made this finding, I do not need to consider any further evidence in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.

October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" however, that ground is not applicable to your situation because you did not receive a refusal IRP. I have considered all the grounds available to you.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0155 hours on September 14, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were observed pulling out of a parking stall, the officer states that your vehicle paused for about thirty seconds and then drove back into the stall. The officer states that she approached the vehicle and you were identified as the driver via your driver's licence.

In the hearing you stated that you were out and had been drinking. You stated that you left the establishment and went out to your car and had a cigarette. You stated that you contacted your brother who was going to come and pick you up. You stated that your vehicle was not parked properly and to avoid having it towed you backed it up and re-parked it. You stated that you were not driving and you did not intend to drive as your brother was coming to pick you up. You stated that at no time did you leave the parking lot.

In order to be considered a "driver" you must have care or control of a motor vehicle on a "highway" as defined by the Act. The Act defines a highway as:

- (a) every highway within the meaning of the *Transportation Act*,
- (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and
- (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited

I find that the parking lot satisfies the definition of a "private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited." As such, I am satisfied that you were on a "highway."

With regard to driving or care or control of a motor vehicle, in your hearing you indicated that you only backed your car up to fix your parking job and you did not have any intention to drive or to leave the parking lot. I am mindful of your intention; however, as you were in the driver's seat and the car was in motion, I am satisfied that you were in care or control of the vehicle. I do not find that I have any evidence to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report and in the Narrative that you provided a sample of your breath at 0205 hours which resulted in a “FAIL” reading.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0207 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates that you declined your right to request a second test.

I have no evidence before me to the contrary. I am satisfied that the second analysis was not provided by the officer.

Was the second analysis performed on a different ASD?

The officer indicates that you did not request a second ASD analysis; therefore, the officer was not required to provide you with a second ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates that you provided one sample of your breath, resulting in a “FAIL” reading. Your lowest ASD result was “FAIL.”

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The qualified ASD calibrator certified that on August 19, 2013, he checked the calibration of ASD serial number 101244. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 16, 2013, and the service expiry date as February 20, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 17, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing, you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

You told me that with regards to your driving behavior, you were not making last minute decisions as the officer noted in the Narrative Text Hardcopy (the "Narrative"). You said you were angry at your passenger and trying to get her home. When I telephoned you to tell you

about extending the due date on this decision, you told me that the officer said he pulled you over because the vehicle's headlights were not on. I also note that you sent me some information that talks about an officer having reasonable grounds to believe a person's ability to drive is affected by alcohol.

I acknowledge your submission on this matter, however, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The evidence in the Report to Superintendent (the Report) is that Officer Nickel (the "officer") established you as a driver or having care or control of a motor vehicle on August 17, 2013 at 01:04 hours. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 01:08 hours and at 01:13 hours, the officer used ASD serial numbers 033299 and 061463 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail". There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 061463 at 01:13 hours. I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail” I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 033299 was checked for calibration on July 23, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of August 20, 2013, and a service expiry date of June 26, 2014.
- ASD serial number 061463 was checked for calibration on July 30, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of August 27, 2013, and a service expiry date of June 18, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

You said that the ASD test results are unreliable because the officer did not wait the required fifteen minutes before administering the tests to allow for the elimination of any residual mouth alcohol.

You said the officer’s evidence is incorrect in terms of the time of your last drink. The Narrative indicates that you told the officer that the time of your last drink was approximately one hour prior to driving. You said you ordered your last drink one hour prior to driving, but had set it aside and were dancing and drinking water. You said you had the last few sips of your drink and walked out of the bar.

Some of your evidence is contradictory. You told me you had a few drinks throughout the night, but then later told me you had four beers between 6:00 p.m. and midnight. You said you finished your drink five minutes before you left the bar, but then said you drank the last few sips and walked out. You said you are unsure of exactly what time you left the bar – it was maybe 12:00 or 12:30. I question how you could be unsure what time you left the bar, but you can say that your last drink was five minutes before you left the bar, that it took five minutes to walk to your friend’s car and that you were pulled over after driving for two minutes. Lastly, I note that you said you left the bar at either midnight or 12:30 and were pulled over within two minutes. However, the police evidence indicates that you were pulled over at 01:04 hours. This does not coincide with you leaving the bar at either 12:00 or 12:30. Consequently, since I do not find your evidence regarding your drinking pattern to be very reliable, I have given it little weight in this review.

I acknowledge that both you and s.22 say that the officer told you that you should have blown a “warn”. However, I cannot comment on whether or not the officer said that. I also cannot comment on how impaired you feel you were on that night. I rely on the fact that you provided two “fail” ASD breath tests on separate ASDs that I have already found to be functioning reliably. In addition, I am mindful that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days.

Your prohibition took effect on August 17, 2013. I note that as you have already served 19 days of the prohibition, you need only serve the remaining 71 days. Your prohibition commences October 10, 2013. The prohibition ends on December 19, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

November 14, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 25, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Acquired

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that you received full disclosure of the documents before me. I have proceeded with the review based on these confirmations.

You applied on one review ground; however, that ground is not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all the grounds available to you.

In your written submission, you stated that you accepted the mistake you made and promised to never repeat it in the future. You provided context for the events which occurred that evening. You explained that you felt confident that the time you waited between your last drink and when you drove was enough. You noted that you are grateful for any amount of grace and forgiveness you may receive in this review. To illustrate your character and involvement in the community, you provided photos and letters of reference from your family, friends, and colleagues. I also recognize that you have submitted a copy of your driving record for consideration.

The five reference letters you provided were from

s.22

I have carefully reviewed each letter and note that each letter indicates you to be of good character and very involved within your community and willing to give of yourself to others. However, while I recognize and commend you for being a valued and active member of your community in good standing, I do not have the authority to revoke a driving prohibition based on your good character, nor can I alter the terms. Moreover, in the context of this review the Act does not authorize me to consider an individual's driving record. The issues that I must determine in this review are outlined in detail below

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent ("RTS"), the officer identified you as the driver of the vehicle, and recorded the time and date of driving or care or control of the vehicle as 03:22 hours, on October 25, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that you provided a sample of your breath into an ASD at 03:25 hours and 03:28 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the officer on this point. I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the officer's with regard to this issue. I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that a second breath test was completed at 03:28 hours.

There is no evidence before me disputing that of the officer. I am satisfied that the second test was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial number for the first ASD as 101232, and the serial number for the second ASD as 055634.

There is no evidence before me contrary to the officer's on this issue. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded in the RTS and Narrative that both results registered as "FAIL" results.

There is no evidence before me that refutes the officer's evidence on this point. I am satisfied that the Notice was served on the basis of the "FAIL" result, since each result was the same.

Was the ASD reliable?

In the RTS, the officer solemnly affirmed that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The officer provided a Certificate of a Qualified ASD Calibrator (the "Certificates") for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on October 21, 2013, she checked the calibration of ASD serial number 101232. She found the ASD to be within the recommended limits and functioning correctly. She recorded the ASD calibration expiry date as November 18, 2013, and the service expiry date as August 30, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 23, 2013, he checked the calibration of ASD serial number 055634. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 20, 2013, and the service expiry date as June 26, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 25, 2013. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 25, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

September 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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. As such, I have proceeded with this review on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did 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?

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the officer reported that you were driving or in care or control of a motor vehicle at 1939 hours on September 5, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer reported that when he attended 2090 Dion Road he observed a grey Hyundai pulling away from the house. The vehicle was stopped and you were identified as the driver.

In your written submission you stated that you were backing up your vehicle to park on the street.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

The officer reported that:

- you an odour of liquor on your breath
- your speech was slurred
- you had blood shot eyes
- your statements were repetitive
- you were visibly intoxicated and upset

The officer indicated in the Report at 1939 hours he formed his reasonable suspicion that you had alcohol in your body, and he read you the ASD demand.

In your written submission you deny that you were intoxicated and you provided a plausible explanation for your eyes being bloodshot and you also stated that you have a speech problem.

While I acknowledge that you may not believe you were intoxicated; the threshold for an ASD demand is relatively low. For an ASD demand a police officer must have a reasonable suspicion that a person has alcohol in his or her body, and that he or she has been operating or has had care or control of a vehicle.

Based on the evidence before me I am satisfied that the officer made a valid ASD demand.

I now turn to whether you failed or refused to comply with the demand.

In his Narrative, the officer indicated that after he read you the ASD demand at 1939 hours the following events occurred:

- At 1950 hours you kicked the ASD out of the officer's hand and yelled, "Fuck you."
- The officer informed 7-8 times that a refusal carried the same penalty as a "FAIL" result
- You yelled profanities and cried; later you stated that you understood
- The officer reported that you were very uncooperative and emotional

There is no evidence before me that indicates to me that after the officer made a valid ASD that you provided a sample of your breath.

Consequently, I am satisfied you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You attribute your refusal to your frame of mind and the officer's tone of voice. While I acknowledge that you were clearly upset and emotional this is not a reasonable excuse for refusing to comply with the ASD demand.

Consequently, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 5, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 3, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the oral hearing I confirmed that full disclosure of the documents before me was provided to your representative, Mikhael Magaril. I have proceeded with the review based on that confirmation.

In accordance with the BC Supreme Court’s decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, the “Superintendent’s Report on Approved Screening Devices” (the “Report”) which was disclosed to your representative is not

admissible in this review hearing and, accordingly, I have not relied upon the Report in making my decision.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), the officer indicated that you were driving or in care or control of a motor vehicle at 22:09 hours on August 3, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 22:11 hours and 22:18 hours, respectively.

Mr. Magaril submits that because the Report is not before me, there is no evidence that the ASDs in this case were calibrated to register a “FAIL” as per the definition of “FAIL” within the Act.

Section 215.41(2) of the Act states that a “FAIL” result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. Therefore, I find it reasonable to infer from this that ASDs are calibrated to display a “FAIL” reading when a person's BAC is not less than 80 mg%.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Narrative, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

IRP Review Decision
Page 3

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers for the ASDs used as 101218 and 101219, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator in which Chad Ryan Lucash certified that the ASDs used in your case were found to be within the recommended limits when he checked their calibration on July 8, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly. In the RTS, the officer recorded both ASD temperatures at the time of the tests as 25 degrees Celsius. He also indicated that the ASD tests were conducted by a qualified ASD operator and the ASDs were functioning properly.

Mr. Magaril submits that because the Report is not before me, there is no evidence that ASDs produce reliable results at the temperatures recorded in the RTS. He also submits that in section 8 of the RTS, the officer failed to identify the type of ASD used. He acknowledged that there is a Certificate of Qualified ASD Calibrator (the "Certificate") for the second device; however, he stated that if the device used was an Alco-Sensor FST, then we do not have a certificate.

In the case of *Buhr v. Superintendent of Motor Vehicles*, at paragraph 29 the judge refers to the ASD operator's manual which states, "a test could not be initiated if the temperature was below 10 degrees Celsius or above 40 degrees Celsius." I note that in your case the recorded temperature of both ASDs was 25 degrees. Therefore, I am satisfied that the ASDs were within the range of accepted operating temperatures.

With respect to the second device, I note that in the Certificate the calibrator ticked the box to indicate that he is qualified to calibrate the "Alco-Sensor IV DWF", as opposed to the "Alco-Sensor FST". Further, in the Certificate the serial number is recorded as 101219, which is the

same serial number recorded in section 8 of the RTS. As such, I am satisfied that it is more likely than not that the ASD used for your second test was an Alco-Sensor IV DWF.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 12 days of the prohibition, you need serve the remaining 78 days. Your prohibition commences November 8, 2013. The prohibition ends at 23:59 hours on January 24, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.



October 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

Ms. Roudette provided principles from two contemporary cases which guide the adjudication process:

- *Spencer*: police are not deemed to have a credibility advantage;
- *Gillies*: “credibility. . . must be reviewed on a standard of reasonableness -- adjudicators must weigh evidence

I am mindful of these principles and have applied them in conducting this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the investigating officer – Cst. Paetz – indicated that you were driving or in care or control of a vehicle at 2323 hours on September 1, 2013. She provides in the occurrence report that: she observed your vehicle approach a road check, and you were identified as the driver of the vehicle by your BC driver’s licence.

In the submissions prepared by your lawyer Ms. Roudette, she makes no submissions specific to this issue.

I am therefore satisfied that you were driving at the time and date placed in to evidence by the officer. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided an ASD “FAIL” result at 2325 hours.

This result is not specifically challenged by your lawyer. Although she does state that s.22 advises that at no time was she shown the test result,” I find this statement not so definitive as to nullify other submissions she makes on the “FAIL” result registering on the ASD, discussed below.

With no evidence to the contrary, I am satisfied that the ASD registered a “FAIL” result as indicated in Cst. Paetz’s evidence.

Were you advised of your right to a second analysis?

In the Report, Cst. Paetz indicated that she advised you of your right to a second test on a different ASD, and that the lower test result would prevail. She checked ‘NO’ to indicate that you did not request the second test. In the occurrence report, she notes specific details:

- Cst. Paetz read IRP and right to second test with second test on different instrument verbatim from the pre-printed card. s.22 declined a second test.

Ms. Roudette has provided the following on your behalf:

- Cst. Paetz did not provide your exact words on declining, nor did she provide your reasoning for doing so;

- Cst. Paetz did not advise you of the second test, therefore at no time did you decline a second test;
- because your right to request a second test was violated, the ASD result was not accurate;
- alternatively, your “right to have the lower of the first and second results govern” was also violated.

These submissions by Ms. Roudette are not verified nor bolstered by direct evidence from you; minus this evidence, there is no direct version of events to contrast against that of the officer. Your recollection of the events at roadside is not provided; there is no provision for your comments to the officer, your reactions to the ASD “FAIL” result, nor any questions you may have had.

Based on the sworn evidence provided by Cst. Paetz, I am satisfied that she advised you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed using a different ASD?

Above, I have determined that you did not request the second analysis. I therefore find the single ASD analysis to have occurred at 2325 as indicated by Cst. Paetz in the Report.

Was the Notice served on the basis of the lower analysis result?

Ms. Roudette has submitted that your right to have the lower analysis result govern was also violated. Based on my finding above on the weight of evidence presented in this review, I find that you had declined the offer of a second test, as presented in the sworn evidence of Cst. Paetz. With a single result obtained, I am satisfied that the Notice was served on the basis of that single result, here being “FAIL”.

Was the ASD reliable?

Cst. Paetz provided a ‘Certificate of a Qualified ASD Calibrator’ (the “Certificate”) for ASD serial number 034750, the ASD she used to test the sample of your breath. This Certificate forms part of the sworn Report.

For the ASD 034750, the qualified ASD Calibrator, Chris Neid, certified that on August 28, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 25, 2013, and the service expiry date as July 19, 2014.

Ms. Roudette presents evidence which calls the reliability of the ASD into question. She provides, on your behalf, that you told Cst. Paetz of your visit to your friend’s house, where you had finished consuming a beer within the immediate five minutes prior to the ASD analysis. In addition, you had mouthwash present in your vehicle which you had used just before you left your friend’s house. She provides an article from the *Journal of the American Medical Association* to show that use of mouthwash immediately prior to the stop “most certainly contaminated the ASD result.” Also, a delay of at least fifteen minutes was necessitated by your telling Cst. Paetz of this very recent consumption, a principle stemming from *R. v. Mastromartino*.

Assessing credibility on your version of events versus that recorded by the officer, as above, I give the hearsay evidence presented by your counsel less weight; there is no direct evidence which illustrates an alternate dialogue that took place between you and Cst. Paetz. Cst. Paetz, by contrast, has provided sworn evidence throughout. Her evidence is sufficient in detail to note that

you were returning from visiting friends in Rutland, as well as your direct statement of “two hours ago” to answer the prompt of “last sip of liquor.”

Cst. Paetz has provided a Certificate to establish the fact that the ASD was properly calibrated. There is no compelling evidence to suggest the reliability of the ASD could otherwise be called in to question.

Decision

As a result of my findings, I confirm your driving prohibition, and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days; however, as you have already served 22 days of your prohibition, you must serve the remaining 68 days which commences on October 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Sacha Roudette
Carr Buchan & Company
fax: 250-388-7327

OCTOBER 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On June 16, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, one of the grounds you checked on the application form was that you did not refuse or fail to comply with the officer’s demand to provide a breath sample. However, that ground is not applicable in your case, because of the reason for which you were prohibited. For your benefit, I have considered all grounds applicable to your situation.

IRP Review Decision

Page 2

Records at this office confirm that full disclosure of the documents before me was provided to you. I proceeded with this review based on that confirmation.

In your written submissions, you disputed the evidence of the officer's Narrative Text Hardcopy (the "Narrative"), regarding statements made by an emergency room nurse. You also questioned the officer's evidence that you had a red face and watery eyes. These are matters that can contribute to an officer's reasonable suspicion that a person has alcohol in his or her body, which may lead the officer to make a valid ASD demand. However, the validity of the demand is not an issue in this review; it is relevant only in circumstances where a person fails or refuses to comply with a breath demand. As a result, factors that led the officer to make an ASD demand are not relevant to my considerations.

You included your parking stub in your submission, and said it indicates you were parked at 6:19 pm. The parking stub you submitted does not contain any legible information, but even if it did, you have not explained how this information is relevant to your review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Ilioi indicated that he witnessed you driving or in care or control of the vehicle at 2046 hours, on June 16, 2013. There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Constable Ilioi said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 2053 and 2057 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative, Constable Ilioi indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses.

When you applied for an extension to the review deadline, you submitted a written statement dated August 13, 2013. Your last sentence in that submission was that the police officer did not provide a separate ASD for your second breath test. I note you did not indicate this as a ground on your application form nor did you mention it in your written submission dated September 9, 2013.

Based on all the evidence before me, I am satisfied on a balance of probabilities that it is more likely than not that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In your written submissions and attachments, you explained that you experienced a severe and painful medical condition on June 16, 2013. You indicated that you tried to treat the problem by

flushing and swabbing the affected region with isopropyl alcohol throughout the day. You also acknowledged that you consumed two beers throughout the day. The officer's evidence in the Narrative is that you had a red face, watery eyes, you slurred your words, and were unsteady on your feet. You explained this by saying you just had very uncomfortable and painful s.22

You said after receiving the IRP, you did research and discovered that alcohol can be absorbed anally. You said you believe that this and the blood loss you suffered from the s.22 caused the "FAIL" result on the ASDs. It is not sufficient for an applicant to make 'suggestions' about what might have happened. You must put forth something other than a suggestion or hypothetical in order to persuade an adjudicator to accept your argument. The statement that research exists on this subject is not enough. Evidence to support the suggestion is required in an administrative review.

On the last page of the copy of the Narrative you submitted, you underlined the phrase "he was deemed to be too intoxicated to...". You also asked the question: "Why did the hospital just complete treatment on me if I was [too] intoxicated"? You did not say what else you expected them to do in this situation. The officer's evidence is that the hospital staff reported you to the police, because they believed you were intoxicated and about to drive.

I find you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs, which I found to be reliable. Section 215.41(2) of the *Motor Vehicle Act* states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. Based on all the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 90 days. Your prohibition took effect on June 16, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 27, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records before me confirm that the disclosure documents were made available to you. I will proceed with my review based on this confirmation.

You applied for a review on reasons which are not applicable to your prohibition: you did not request a second test, and no ASD was used in the officer’s investigation. The Notice of Driving Prohibition was served on you on the basis of a refusal to provide a sample of breath for analysis.

You stated that you need a licence to provide for your family, and that you are “an upstanding member of the community”. These are considerations I cannot make in this review; I am not authorized to consider hardship or one’s character.

You submitted a news story on the recent BC Supreme Court ruling on *Wilson*. In regards to that ruling, section 215.5(4) of the Act requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had ‘a reasonable ground to

believe your ability to drive was affected by alcohol' is not a reason for review in section 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the officer – Cst. Scherpenisse – indicated that you were driving or in care or control at 2131 hours on September 7, 2013.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report, the officer indicated that he formed his suspicion at 2136 hours and read the ASD demand at 2137 hours. He checked the box to indicate that you had an odour of liquor on your breath, and in the narrative report, he provided detail that he observed you having watery and bloodshot eyes, as well as a smell of liquor emanating from inside your vehicle. Upon your exiting the vehicle, and standing beside the officer at roadside, he confirmed this odour as coming from your breath.

In the narrative, he also provided that s.22 replied that he did not have any" when he asked you the question on alcohol consumption "today." Upon you exiting your vehicle and speaking to the officer directly at roadside, the same question was asked again, and to record your answer the officer notes: s.22 again replied that he had none."

In the narrative the officer also provides evidence of your driving without headlights on, and upon running your plates when pulled over, he discovered that the plates on your vehicle were registered to a different vehicle. He notes you "acting odd" during his interaction with you, and your slow responses to his questions.

Your submitted statement dated September 19, 2013, is in response to Cst. Scherpenisse's narrative. You take issue with specific details in the narrative in regard to the officer's making of a demand:

- the officer asked you about your consumption "tonight" as opposed to "today";
- the officer did not ask you understood;

- he described you as odd and taking time to answer – you refer to this as being thoughtful before answering.

I make the following observations on each of the first two points above:

- the question of whether the officer asked about consumption “tonight” or “today” is moot when I consider the evidence of your subsequent statement to the officer regarding a drink “6 hours ago”, a statement on which you make no submission on this review;
- in regards to your understanding of the demand read to you by the officer, your statement: “I did not feel Cst. Scherpenisse was at all justified in his demand for a breath sample.” stands as acknowledgment that you did understand his reading of a demand to you. Likewise, your statement: “I exercised my right to refuse” shows a refusal in response to a demand. Your use of the term ‘demand’ indicates your understanding that something specific was being asked of you at that time.

I now address two other specifics of the officer’s observations, and his record of those details: your driving behaviour; and the officer noting an odour of liquor from you. In the context of an investigation, one started by a dangerous driving action, and in combination with an observed odour of liquor coming from your breath, I find it reasonable for the officer to include the detail that your behaviour and slowness in responding was odd. Your reply on this review (“I like to think before I speak”) starts from the assumption that this observation by the officer exists in isolation. It does not, and the officer included this observation as part of the whole evidence used to form reasonable grounds for a demand.

I apply the same rationale to your statement “The smell of alcohol is not an indicator of impairment” – the officer’s detection of an odour of liquor was not the single observation, and was used in combination with other observable indicators.

All of the above detail – the odour, your responses and actions, as well as driving behaviour – I find to be sufficient grounds for the officer to form suspicion that you had alcohol in your body while operating a vehicle. I am therefore satisfied that the officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Report. The officer checked the box to indicate that you refused. He recorded the time of refusal as 2137 hours. In the narrative, the officer stated that when asked if you were going to provide a sample, you replied you were going to decline. This was confirmed two more times, with the third confirmation “yes” coming after the officer informed you the penalty was the same as that of impaired driving.

In point 5 of your statement, you refer to your action as a refusal: “It was only after I refused to blow that Cst. Scherpenisse told me of the punishments I would receive as a result.” I find this to be explicit acknowledgement that your action was a refusal, and an understanding on your part that the officer preceded with the matter as such. With the officer confirming your refusal two more times verbally – evidence which I accept as fact – the time for you to provide that sample had effectively ended.

I am satisfied that you refused to comply with the ASD demand.

Did you have a reasonable excuse?

On your application, you checked 'I had a reasonable excuse. . .' as a ground for review. In your statement, you provide: "Cst. Scherpenisse advised me of my right to refuse . . . [he] rushed my judgment and so I exercised my right to refuse. . ."

I have already made a finding on the officer assessing your understanding, and part of the rationale for my making that finding was that you understood that a demand for a sample of your breath was put to you. It is not in keeping with the basic premise of a 'demand' that you would have a 'right to refuse.' I infer from your terminology on this point that you are asserting your 'choice' to refuse; however, it is incorrect to label it a 'right to refuse', no such right exists in law.

I find your reference to a 'right to refuse' does not constitute a reasonable excuse for refusing. You are not explicit in presenting this as such; I therefore give your evidence on this no weight.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 7, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 24, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 80 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you prior to the review date. I have proceeded with this review based on that confirmation. You submitted written information on September 6, 2013. The time for providing a decision in this review was extended on September 12, 2013 to October 15, 2013. In reaching my decision in this written review I have considered all of the relevant information available to me.

You checked off all of the Grounds for Review on the Application for Review form. Some of those grounds are not applicable to your situation because of the reason for which you were prohibited. For your benefit in this review I have considered all of the grounds which apply in your circumstances.

Issues

The issues considered in this review are:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?
- Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

The officer’s evidence is that on August 24, 2013 at 2230 hours a left-turning vehicle was stopped for failing to use the left-turn lane. You were its driver identifying yourself with your driver’s licence.

Your evidence is that on August 24, 2013 you were stopped by the police

I am satisfied that on August 24, 2013 at 2230 hours you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “FAIL”?

The officer’s evidence is that at 2232 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a “FAIL.” At 2247 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a “FAIL.”

Your evidence is that the results of both ASD analyses were “FAIL.”

I am satisfied that each of the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

The officer’s evidence is that you were advised of your right to provide a second sample of your breath for analysis, that a different ASD would be used, and that the lower ASD result would prevail.

There is no evidence to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer’s evidence is that you provided a second breath sample into an ASD for analysis.

Your evidence is that you provided a second test.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 101149. The second sample of your breath was analyzed by an ASD with serial number 072220.

There is no evidence to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Two samples of your breath for analysis were provided into two different ASDs. The result of the analysis of each of the two samples was a "FAIL." The lowest analysis result was a "FAIL."

There is no evidence to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The first analysis of your breath was performed on an ASD with the serial number 101149. Constable Novakowski provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 28, 2013. This ASD had a Calibration Expiry Date of August 25, 2013 and a Service Expiry Date of September 21, 2013.

The second analysis of your breath was performed on an ASD with the serial number 072220. Constable Novakowski provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on August 20, 2013. This ASD had a Calibration Expiry Date of September 17, 2013 and a Service Expiry Date of October 31, 2013.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable Novakowski swore that your ASD tests were performed by a qualified ASD Operator and that the ASDs were functioning correctly.

There is no evidence to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

The officer's evidence is that there was a strong odour of liquor in the vehicle and on your breath. Your eyes were red and bloodshot. You were asked if you had any liquor to drink and you stated "no." After the analysis of your second breath sample you stated that you had not

had a drink since you were on your boat earlier. There was a delay between the time of your first ASD analysis at 2232 hours and your second analysis at 2247 hours because a second ASD had to be delivered to your location.

Your evidence is that when you were stopped you advised the officer that you had not been drinking. You had been suffering from s.22 for a month. As you were exiting the highway into Kamloops you rinsed your mouth with Listerine containing 21.6% alcohol spitting it out the driver's side window. Some of it landed on your truck. The strong smell of the Listerine is like "mint-like paint thinner/strong rubbing alcohol." After you provided two breath samples which registered "FAIL"s you asked to go to the station for a more detailed test or a blood test but the officer refused to take you. The actual time between the first and the second ASD tests was 8-9 minutes because you recorded your dealings with the officer on your phone. The person you were going to meet, s.22 video-recorded you inter-action with the police. She confirms that the police dealings with you took approximately nine minutes. In her statement dated September 5, 2013 she says that she was going to meet you and was talking to you on the telephone as you approached Kamloops. She heard you gargling mouthwash, heard wind noise like when vehicle windows are down for a few seconds and heard you spitting out the mouthwash. She video- recorded you dealings with the police. This video shows 8 minutes between the two ASD tests. After you were given your prohibition you came over and hugged and kissed her and she could still taste mouthwash in your mouth. The taste of mouthwash has been a regular occurrence since your s.22 in the couple of week prior to the date of her statement. You provided a letter from s.22 dated September 6, 2013 confirming that you had s.22 when you saw him on s.22 You also provided product information for Listerine Antiseptic Mouthwash showing that it contains 21.6% alcohol

You submit that the ASDs falsely registered "FAIL" readings because there was residual mouth alcohol due to the alcohol in the Listerine containing which you used within 15 minutes of providing your breath samples. The ASD tests are not reliable. The timeline provided by the officer is in error because only 8 minutes, and not 15, passed between your first and second ASD tests. It would have been impossible for the officer to obtain your second breath sample at 2247 hours and fill out your Notice at the same moment.

The Act does not obligate an officer to take a driver to the police station for any type of testing. I draw no inference from the officer's refusal to do so. I also note that the Notice does not state that it was filled out at 2247 hours; that is the time the officer had reasonable ground to believe that you had care or control of a motor vehicle with a BAC over 80 mg%. The officer's narrative says you were served with the Notice at 2307 hours. It is likely that the officer completed the Notice sometime between 2247 and 2307 hours.

When I consider the evidence of s.22 the following observations are important. She did not witness you gargling or spitting our mouthwash. She is interpreting noises that she heard over the telephone as you gargling, opening a window, and spitting something out. She did not witness any of these actions. Her interpretation may be based on what you told her you were doing. It is also unlikely that you would still have the taste of mouthwash in your mouth when you kissed her over 40 minutes after you had used it. She notes that the taste of mouthwash in your mouth has become a regular occurrence in the couple of weeks prior to the date of her statement. It seems likely that she is generalizing her experience during that period and is not differentiating her general memory that you tasted like mouthwash with her specific recollection of the evening when you received your IRP. In these circumstances I cannot rely

on her evidence and can give it little weight.

I accept that when your vehicle was stopped there was a strong odour of liquor in it and that you had a strong odour of liquor on your breath. I am satisfied that the officer, who is a qualified ASD operator, smelled the odour of liquor and not the odour of the Listerine which you have described smelling like "mint-like paint thinner/strong rubbing alcohol." You were the vehicle's only occupant; the only source of this odour could have been from your person. There is no evidence that you had consumed alcohol in your vehicle, or that there was open liquor in your vehicle. The most likely cause of this odour was as the result of your consumption of liquor prior to driving. Although you initially denied consuming alcohol, you later admitted to drinking alcohol on your boat. I am satisfied that by asking you the time of your last drink the officer was considering the issue of recent consumption of alcohol and the possibility that you might have residual mouth alcohol requiring a 15 minute elimination period for this mouth alcohol to dissipate prior to obtaining breath samples from you.

When considering your evidence that you had used Listerine, spitting it out of your window as you approached the exit off the highway, some of which ended up on the side of your truck with the evidence in light of the evidence of the presence of, and nature of, the odour of liquor in the truck and on your person, which I accept as accurate and reliable, I am inexorably lead to the conclusion that your evidence is unreliable and cannot reasonably be accepted. I therefore reject your evidence. I consider it likely that you did not use Listerine within 15 minutes of providing your breath samples.

I am satisfied that there was no requirement for the officer to provide an elimination period for the dissipation of residual mouth alcohol prior to obtaining your breath samples. The ASD results were not affected by residual mouth alcohol and accurately measured your BAC. The ASD tests are confirmed as valid.

Sub-section 215.41(2) of the Act states that "fail" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 80 milligrams of alcohol in 100 millilitres of blood." The Act provides certain consequences for a person who provides a breath sample resulting in a "FAIL" indication on an ASD. The Act refers to "FAIL" results on ASDs and not BAC levels. In your case, I have concluded that both breath samples you provided resulted in "FAIL" results on each of two ASDs. Sub-paragraph 215.5(4)(b)(iii) of the Act states that a driving prohibition must be revoked if I am satisfied that the ASD did not register the "FAIL" as a result of your BAC being not less than 80 mg%. There is no evidence in this review on which I could conclude that your BAC was less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty and vehicle impoundment, as required by s. 215.5(1) of the Act. I note that as you have already served 18 days of the prohibition, you need only serve the remaining 72 days of the prohibition which commences October 16, 2013. The prohibition ends December 26, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to

participate in the Responsible Driver Program and Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 16, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Albert King. I have proceeded with this review based on that confirmation.

I note that you changed the date in paragraph 2 of your statutory declaration from September 16 to September 15, 2013. You did not change the date in paragraph 5 of your statutory declaration and I cannot determine whether or not you intended to do so. For the purposes of this hearing, I have accepted the date of September 15, 2013, as the date you intended to provide throughout your statutory declaration.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The evidence in the Report to Superintendent (the “Report”) is that Officer Guineau (the “officer”) established you as having care or control of a vehicle on September 16, 2013 at 00:12 hours.

Evidence from the Narrative Text Hardcopy (the “Narrative”) is that the West Shore RCMP received a call from a witness about a possible impaired driver in the parking lot of the Tim Horton’s on Jacklin Road. The witness said the male driver (later identified as you) had pulled in beside him in the parking lot and struck up a conversation before walking into the restaurant. The witness said the male driver smelled very strongly of alcohol.

The Narrative goes on to say that the officer and Officer Seutter attended and observed your vehicle parked unoccupied in the Tim Horton’s parking lot. At 00:12 hours, you exited the Tim Horton’s and walked to your vehicle. You entered the vehicle and the officer observed that the lights of the vehicle came on. A traffic stop was initiated and the officer noted that the keys were in the ignition, the vehicle was running and you were in the driver’s seat.

Your lawyer has submitted that your driving prohibition should be set aside because you were not in care or control of a motor vehicle when confronted by the officer. Mr. King has provided me with a copy of *R. v. Hannemann* and *Vandermeer v. The Superintendent of Motor Vehicles* in support of his submission. Mr. King ends his submission by saying “this matter be set aside and s.22 Driver’s licence and right to drive in British Columbia be reinstated.” I am not aware of a s.22 in this matter and assume that Mr. King is referring to you.

I note that the *Hannemann* case is criminal law, which is instructive but not determinative of administrative reviews. This review is decided on a balance of probabilities, unlike a criminal standard, which is beyond a reasonable doubt. Mr. King points out that in the *Vandermeer* case, the Judge concluded that sitting in the driver’s seat with the keys on one’s possession is not enough to place someone in care and control of a motor vehicle.

You said you had been out for the evening on September 15, 2013, had been drinking some beers and had two shots of tequila right before you left the bar. You were not in any way, shape or form affected by the alcohol you drank. As you were driving to the top of the Malahat where s.22 you decided to stop for something to eat at the Tim Horton's. After you had eaten something, you decided that you should not be driving and you phoned your cousin to come and pick you up. You said that as you sat in the parking lot waiting for your cousin to arrive, you recall talking to a man who got in the car beside you to leave the coffee shop. You said you turned your vehicle on to keep warm but had absolutely no intention to drive as you felt you were impaired. You were sitting in your car to keep warm and waiting for your cousin. You explained that the emergency brake was on and to move the vehicle you would have had to depress the brake and push the safety button to put it in gear. You also said that you told the RCMP at the scene, and particularly the officer, that you had no intention to drive and were waiting for your cousin to come and pick you up.

I note several inconsistencies in the evidence before me and must therefore consider all the evidence and determine based on a balance of probabilities which is the more likely to be true.

I turn to the Narrative wherein the witness indicated that you struck up a conversation with him "before" you walked into the restaurant. You said this conversation took place "after" you had eaten and exited the restaurant. However, I note that the officer's evidence appears to support that given by the witness. The officer said that when he arrived at the Tim Horton's he observed that your vehicle was unoccupied. He observed you to exit the Tim Horton's and enter your vehicle. There is no mention in the officer's observations of you having a conversation with anyone.

I turn to Exhibit "A" of your statutory declaration. You said that you called your cousin to come and pick you up. You indicated that Exhibit "A" shows a copy of your cousin's telephone log with calls you made to him from the parking lot of the Tim Horton's late in the evening. The log shows an outgoing call at 5:58 p.m. and two incoming calls at 11:27 p.m. and 11:35 p.m. All the calls appear to be made or received on September 15, 2013. However, in my view there is no way for me to determine that this is in fact your cousin's telephone log. I find that Exhibit "A" does not help to establish that you called your cousin to come and pick you up prior to police arrival.

I turn to Exhibit "B" of your statutory declaration. This is an email from your cousin which you say is self-explanatory confirming that you called him. In the email, your cousin said you called him to pick you up and that you would wait in your car for him. He said you called a second time, not long after that. You told him the police confronted you, and advised him that your car was being towed and you were being arrested. I cannot reconcile the times both you and your cousin said you placed those calls – at 11:27 p.m. and 11:35 p.m. – with the time that the officer served you with the IRP documents, being some time after 00:29 hours on September 16, 2013. I question how you were able to advise your cousin that your vehicle was being towed when that event had not yet transpired.

In addition, the Narrative indicates that at 23:48 hours the RCMP received a call from a witness about a possible impaired driver. The witness reported that you struck up a conversation with him before you entered the restaurant. When the officer arrived at 12:12 a.m., he observed you to exit the restaurant, enter your vehicle and start the engine. Again, you said you made calls to your cousin to come and pick you up at 11:27 and 11:35 p.m.; however, I find the timing difficult to accept. Both of the calls you said you made to your cousin, allegedly to come and pick you

up, were made before the call from the witness to the RCMP. Consequently, I do not find your evidence that you called your cousin to come and pick you up, and that you had no intention of driving, to be very credible.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 00:16 and at 00:29 hours, the officer used ASD serial numbers 072210 and 072209 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 072209 at 00:29 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail” I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 072210 and ASD serial number 072209 were checked for calibration on August 29, 2013, and found to be functioning correctly and within the recommended limits. Both of these ASDs have a calibration expiry date of September 26, 2013, and a service expiry date of October 24, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 16, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Albert E. King
By fax 1-250-753-6123

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 27, 2013, a peace Corporal served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

Acquired

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate that you identified Sacha Roudette as your lawyer in this matter. On October 30, 2013, this office faxed to the number which you provided, Ms. Roudette 31 pages of disclosure documents which included a fax cover sheet. The fax cover sheet stated that the written review was scheduled for November 5, 2013, at 9:30 am. Additionally, the fax cover sheet indicated that if written submissions were to be made, they were to be received at this office by the scheduled review time. To date I have not received any submissions from Mr. Leven or you with regards to your IRP. As such, I have proceeded with this review on the evidence before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the Corporal and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative Text Hardcopy (the “Narrative”), Corporal Hill (the “Corporal”) noted that he observed a vehicle speeding and subsequently pulled the vehicle over, as he was advised by dispatch that there had been a report that that vehicle was being driven by an impaired driver. The Corporal identified you as the driver of the vehicle and noted that that you were behind the wheel and the only occupant of the vehicle. In the Report to Superintendent (“RTS”), the Corporal indicated that you were driving or in care or control of the vehicle at 02:12 hours on October 27, 2013.

There is no evidence before me contrary to that of The Corporal. Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the Corporal indicated that you provided a sample of your breath into an ASD at 02:19 hours and 02:22 hours, respectively. Further, he indicated that he showed you the results of the tests.

There is no evidence before me that contradicts that of the Corporal on this point.

I am satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

In the RTS, the Corporal indicated by checking boxes that you were informed of your right to request a second test, that the lower ASD test result would prevail, and that you requested the second test.

I have not been provided with any evidence which is contrary to the Corporal's with regard to this issue.

I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the Corporal?

In the RTS, the Corporal indicated that a second breath test was completed at 02:22 hours.

There is no evidence before me disputing that of the Corporal.

I am satisfied that the second test was provided by the Corporal.

Was the second analysis performed on a different ASD?

In the RTS, the Corporal recorded the serial number for the first ASD as 101333, and the serial number for the second ASD as 072214.

There is no evidence before me contrary to the Corporal's on this issue.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The Corporal recorded in the RTS and Narrative that both results registered as "FAIL" results.

There is no evidence before me that refutes the Corporal's evidence on this point.

I am satisfied that the Notice was served on the basis of the "FAIL" result, since each result was the same.

Were the ASDs reliable?

In the RTS, the Corporal solemnly affirmed that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. The Corporal provided a Certificate of a Qualified ASD Calibrator (the "Certificates") for each ASD used.

For the first ASD, the qualified ASD calibrator certified that on October 25, 2013, he checked the calibration of ASD serial number 101333. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 22, 2013, and the service expiry date as September 13, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 25, 2013, he checked the calibration of ASD serial number 072214. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 22, 2013, and the service expiry date as September 13, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 27, 2013.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed

s.15

Adjudicator

cc: Sacha Roudette

Fax: [250] 388-7327

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 18, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device (ASD) registered a "fail" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that full disclosure of the documents before me was provided to her. I confirm I have received Ms. Lee's submissions consisting of 29 pages.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Was the ASD reliable?

After considering the evidence before me, I am not satisfied the ASDs used for your breath tests were reliable.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

s.15
Adjudicator

cc: Kyla Lee
By Fax 604-685-8308

OCTOBER 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jeremy Carr. I proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), Constable Schneider indicated that he witnessed you driving or in care or control of the vehicle on September 13, 2013, at 2010 hours. There is nothing before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the RTS, Constable Schneider indicated that he noticed an odour of liquor on your breath and that you admitted to having consumed alcohol. In the Narrative Text Hardcopy (the “Narrative”), he said he asked you the time of your last drink of alcohol, because he detected an odour of liquor on your breath. The officer said you denied having consumed alcohol and suggested that the odour came from your husband in the passenger seat. Constable Schneider said he asked you to exit the vehicle, so that he could isolate the odour. In the Narrative he said: “While now standing at the police vehicle, writer still detected an odour of liquor on her breath when she spoke and again asked when her last drink was. s.22 now stated that it was 5 hours ago then changed her answer to ‘about 6:30,’ and that she had two glasses of wine.” He also said you were slurring your words as you spoke.

Mr. Carr argued that Constable Schneider did not have reasonable suspicion to issue an ASD demand, so the demand was invalid. Your lawyer said the *Criminal Code* authorizes an officer to make an ASD demand if he has formed a reasonable suspicion that a person has alcohol in her body and has operated a motor vehicle within the preceding three hours. Mr. Carr said you told him that the only question Constable Schneider asked you was whether you had recently consumed alcohol and that you answered truthfully in the negative. Mr. Carr suggested that this establishes the officer had insufficient grounds to make an ASD demand. He listed four criminal cases to support this argument, but he did not provide copies of these cases or explain how they support his argument.

Mr. Carr also stated that Cst. Schneider asked about the time of your last drink after he made the ASD demand. In making his point, your lawyer quoted from the officer’s evidence, so I infer he relied on the Narrative, not what you told him in making this assertion. When I read the Narrative, however, it is clear that Mr. Carr misinterpreted the officer’s evidence. In the second paragraph on page one of the Narrative, Constable Schneider said he “...again asked when her

last drink was.” He gave your response and then said he suspected you had alcohol in your body and he made an ASD demand from a card.

In considering the evidence before me, I find you have not provided any direct evidence for my consideration. Your lawyer provided a submission on your behalf, which I accept as unsworn hearsay evidence; also, he misinterpreted the officer’s evidence. In making my determination, I considered, but applied less weight to the hearsay evidence your lawyer submitted on your behalf and more to the officer’s sworn statement. Based on all the evidence before me, I am satisfied on a balance of probabilities that the peace officer made a valid demand. I now turn to whether you failed or refused to comply with the demand.

Mr. Carr argued that according to the Narrative, you repeatedly tried to provide a breath sample, but the device registered “VOID” or “NOGO”. He asserted that “there is no evidence whatsoever that [you] made any attempt to thwart the results.” I disagree. Midway through the second paragraph on page one of the Narrative, the officer indicated that he gave you instructions on how to provide a suitable breath sample. He said he told you to “take a deep breath in, put [your] lips on the mouth piece and blow until [he] tells [you] to stop.” He said you placed your lips on the mouth piece and provided a sample of breath that was very weak and lasted one second. Constable Schneider said he instructed you on how to provide a suitable sample again, and he also demonstrated how to do it. He said your next attempt lasted two seconds long and again, was very weak. After your second attempt, Constable Schneider said he explained how to blow again and had you repeat his instructions back to him. He said it took you five times to repeat them back properly, but you reiterated his instructions properly. The officer said the device “timed out and read VOID”, so he inserted a new mouth piece and gave you a third attempt to comply with the demand. He characterized your next attempt to provide a sample as being very weak and stopping after two to three seconds. The officer said he read you a refusal warning from a card and explained the consequences of not providing a proper breath sample. He said you told him you understood, but his evidence indicates that you did not change your behaviour. Based on the officer’s detailed evidence, I find he gave you sufficient directions and allowed you approximately 13 minutes to comply with the demand, but you failed to follow his instructions. There is no compelling evidence before me to the contrary. I am satisfied that you failed or refused to comply with a valid ASD demand.

Did you have a reasonable excuse?

Mr. Carr said you told him that Constable Schneider had an aggressive manner that terrified you and that his bullying attitude made you not trust that the officer would record the ASD results fairly. Mr. Carr included a statement signed by your husband, s.22 said he was a passenger in the vehicle and witnessed all events between you and the officer. Your husband agreed that the officer’s manner was very aggressive and accusatory. I understand that police scrutiny can be unsettling, but it is not a reasonable excuse to fail or refuse to comply with the demand.

Mr. Carr made two other arguments that I infer he is relying on to establish that you had a reasonable excuse to refuse or fail to comply with the demand. First, he argued that there is no

evidence that the ASD used in this IRP investigation was an approved screening device under regulation, or that the service and calibration was up to date. I disagree with your lawyer. Constable Schneider identified the ASD used in your case on the RTS as being an Alco-Sensor IV DWF with serial number 101217. He also submitted a Certificate of a Qualified ASD Calibrator (the "Certificate"), which demonstrates that the ASD with this serial number was found to be within the recommended limits and was functioning correctly. The Certificate indicates that the device was within its calibration and service expiry limits when it was used in this IRP investigation. The officer's evidence in the Narrative supports that of the RTS and the Certificate, all of which, Mr. Carr received in disclosure.

Mr. Carr also argued that you had a right to a second analysis. He quoted the relevant legislation, which clearly states that a person has a right to request and be provided with a second analysis, if the person has already provided a breath sample that registered warn or fail on a first ASD. There is no evidence before me that you provided a suitable breath sample that registered on the ASD, so you were prohibited for failing or refusing without reasonable excuse to comply with a demand. This argument is irrelevant to the prohibition you received.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 13, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 8, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?

- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Was the ASD reliable?

I do not have any evidence before me to indicate that ASD serial number 101233 was properly calibrated.

I am satisfied that the ASD was not reliable.

Having made this finding, I do not need to consider any further grounds in this review.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Richard Hewson. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 13, 2013, at 01:50 hours Officer Routley (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 01:59 hours and at 02:10 hours, the officer used ASD serial numbers 61463 and 101045 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASDs registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101045 at 02:10 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both ASD test results were “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 061463 was checked for calibration on August 28, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 25, 2013, and a service expiry date of June 18, 2014
- ASD serial number 101045 was checked for calibration on September 8, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of October 6, 2013, and a service expiry date of November 22, 2013.

Your lawyer refers to the Certificate for ASD 101045 and signed by Barbara Holley. He submits that the Certificate does not certify that she is an ASD Calibrator, or that she is actually qualified to calibrate anything. He notes that the boxes next to the words Alco-Sensor IV DWF and Alco-Sensor FST are left blank, with no explanation. Because the boxes next to the ASD type are blank, Mr. Hewson submits that there is no evidence that the second sample taken on ASD serial number 101045 is reliable. Mr. Hewson referred me to the case *R. v. Modhgill* 2012 BCSC 1971 to assert that I am not allowed to start an assessment of this matter with a presumption of accuracy. He also referred me to *Swaby v. British Columbia (Superintendent of Motor Vehicles)* 2012 BCSC 1612 to assert that I am not allowed to treat the fact that the second ASD registered a fail reading as some evidence that it was properly calibrated.

I do not disagree with Mr. Hewson that the boxes next to the ASD type are blank on the Certificate signed by Barbara Holley. However, she has signed her name above the line indicating that she is a Calibrator, and her Registration Number and PIN Number are also noted immediately to the right of her signature. In addition, Ms. Holley has signed the Certificate in which she certifies that she is an ASD Calibrator and qualified to calibrate either the Alco-Sensor IV DWF or Alco-Sensor FST. The Certificate notes the ASD serial number, the ASD Service Expiry Date, the ASD Calibration Expiry Date and the date on which the ASD was checked for calibration. In the Narrative, the officer has referred to the demand as an ASD demand and to the device as an ASD. Further, in section 8 of the Report, the officer identifies that ASD serial number 101045 is an Alco-Sensor IV DWF.

I note that the Act's Approved Screening Device Regulation states that for the purposes of sections 215 and 215.41(2), the following devices are prescribed (a) Alcolmeter S-L2; (b) Alco-Sensor IV DWF; (c) Alco-Sensor FST. Since the Certificate for ASD serial number 101045 has a checkbox for either the Alco-Sensor IV DWF or the Alco-Sensor FST, it is logical to conclude that ASD serial number 101045 falls into one of those categories. It is also reasonable to conclude based on the evidence that Ms. Holley is certified to calibrate, and did calibrate, that ASD on September 8, 2013.

Based on the evidence, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

^{s.15}
Adjudicator

cc: Richard Hewson
by fax 1-250-558-9935

SEPTEMBER 24, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 3, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked three grounds listed on the application form; however, not all of these grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to you. I proceeded with this review based on that confirmation.

In your written submission, you said you are moving to s.22 and that you need to be able to get your vehicle there. You will also need your vehicle to get to and from work, s.22 I understand and appreciate that receiving a 90-day driving prohibition can have serious consequences on a person's life. However, under the Act, I cannot consider personal circumstances, transportation or employment needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

You included a character reference from s.22 in your submission. While this letter does not directly address the issues in this review, I will consider this reference when weighing your credibility, if necessary.

You included three pages of information from Acumen Law Corporation, but you did not explain the relevance to your circumstances. Two of the pages refer to Client numbers s.22 s.22 I reviewed these client situations and determined that they are all distinguishable from your circumstances, based on different fact patterns.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Dobbs indicated that he witnessed you driving or in care or control of the vehicle at 0220 hours, on September 3, 2013.

You addressed the officer's observation that you drove the wrong way on a one-way street, by saying that many people have done this without being under the influence of alcohol. You said you strongly feel that this small mistake should not have led the officer to believe you were intoxicated. In the Occurrence Report-1 (the "OR"), Constable Dobbs described your driving behaviour as a "Background Event" that drew his attention to the vehicle. He did not say this led him to believe you had alcohol in your body.

As there is no evidence to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, Constable Dobbs said you provided breath samples into two ASDs and that the devices both registered “FAIL”, as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered “FAIL” at 0229 and 0240 hours, respectively, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the “Narrative”), Constable Dobbs indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the “Certificates”), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered “FAIL”. I am satisfied that the Notice was served on the basis of the lowest available result, which was “FAIL”.

Was the ASD reliable?

Constable Dobbs submitted a Certificate stating that Bruce James Sakai Brydon certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Constable Brydon stated that on the 28th day of August, 2013, he checked the calibration of the ASD with serial number 033300 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG230402, Expiry: 2014-10-30. This ASD was found to be within the recommended limits. It had a calibration expiry date of September 25, 2013 and a service expiry date of June 18, 2014.

Constable Dobbs also submitted a second Certificate stating that Chris Neid certified that he is

a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Mr. Neid stated that on the 26th day of August, 2013, he checked the calibration of the ASD with serial number 101233 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG230402, Expiry: 2014-10-30. This ASD was found to be within the recommended limits. It had a calibration expiry date of September 23, 2013 and a service expiry date of August 14, 2014.

I note that the ASD serial numbers on the Certificates match the serial numbers of the ASDs referenced on the RTS that were used to analyze your breath samples. Based on all the evidence before me, I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

You described your activities on the night in question. You said you had a very big meal and consumed one drink at around 9:45 pm. You went out with a few friends who had already had numerous drinks, but you said you "held off." At around 12:30 am you had another beer. You said in total, you had two drinks over the course of four hours or so. When two of your friends started arguing, you decided to drive everyone home.

When the officer pulled you over, you said he told you he could smell alcohol coming from the vehicle. You said this made sense, since your three friends had been drinking heavily all night. However, the officer had you step out of the vehicle and asked you a few more questions. In the OR, the officer said he could smell a strong odour of liquor on your breath. He also said you seemed very nervous and you mixed up the order of words in your sentence. You said you did this because your nerves were rising.

You had an explanation for driving the wrong way down a one-way street and for mixing up your words when speaking to the police officer; however, you did not comment on his evidence that you had a strong odour of liquor on your breath, other than to say you only consumed two drinks in four hours. You did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on two ASDs I have found to be reliable. Section 215.41 (2) of the Act states that "FAIL" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 80 mg %.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 3, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving

s.22

IRP Review Decision

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prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Ken Walker. I have proceeded with this review based on that confirmation.

Your IRP Application for Review indicates that your written review was scheduled for October 2, 2013, at 9:30 am. At the time of the review, I had not received any submissions from you or Mr. Walker on your behalf. I have proceeded with this review with the evidence I have before me.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the “RTS”), the officer indicated that you were driving or in care or control of a motor vehicle at 0156 hours on September 20, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 0201 hours and 0207 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “FAIL”.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 032555 and 101279, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Therefore, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Cst. Howard Morine certified that the ASDs were found to be within the recommended limits when he checked their calibration on September 4, 2013. Cst. Morine also certified that to the best of his knowledge the ASDs were functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 31, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied for this review on the ground that “I did not refuse or fail to comply with the officer’s demand to provide a breath sample”; however, that ground is not applicable to your situation because you provided samples of your breath.

At the beginning of the hearing you confirmed that you received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

In the hearing, you offered an explanation for the strong odour of liquor the officer smelled in your vehicle. You said that when leaving the casino, a Native gentleman bumped into you and spilled his drink on you. You also provided an explanation for the reason your eyes appeared red. You indicated that after leaving the casino you sat in your car and cried for awhile because of your s.22 medical condition.

These are matters that relate to the issue of whether the officer had a reasonable suspicion that you had been driving with alcohol in your body. This issue, in turn, relates to the issue of whether the officer made a valid ASD demand. However, the validity of the demand is an issue I must consider only in circumstances in which a driver has failed or refused to comply with the officer's demand. In your case, because you complied with the officer's demand, the validity of the demand is not an issue I must consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 01:39 hours on August 31, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicated that he observed you proceeding through a red light at the intersection of Lansdowne Street and 4th Avenue before he initiated a traffic stop of your vehicle. He identified you as the driver by your BC driver's licence.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 01:43 hours and 01:50 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report the officer ticked the boxes indicating that he informed you of your right to a second analysis on a different ASD and that the lower of the two results would prevail. In the Narrative, the officer stated that at 01:48 hours, he read you the “ASD Result blurb from the card. Cst. SCHERPENISSE then read s.22 the Right to a Second Test from the card. When asked if [you] understood, [you] replied ‘I believe so’. When asked if he wanted to provide a second sample of [your] breath, [you] replied ‘yes’”.

You said that your right to a second test was not read to you and you were not aware that the lower test would prevail. You said you did not request a second test.

The most compelling evidence before me is the officer’s evidence. The officer’s sworn evidence provides an exact time that he informed you of your right to a second test and I find this to be very persuasive evidence that he did indeed do so. Given that you provided more than one breath analysis on more than one ASD, I find it more likely than not that the officer informed you of your right to a second analysis, that you requested a second analysis, and that the second analysis was provided by the officer.

I am satisfied that you were advised of your right to a second breath test analysis and that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the Narrative, and in the Certificates of a Qualified ASD Calibrator (the “Certificates”), the officer provided evidence that two distinct ASDs were used for two analyses.

You said the officer’s evidence is misleading and untruthful because the Report indicates that there were only two tests, but there were actually four tests. You stated that your first three tests were conducted on the same ASD, while the fourth test was conducted on a different ASD. You stated that the third test was “higher” than the first two; yet you repeatedly told me that you were not shown the results of any of the tests so I find these two statements to be contradictory and therefore unreliable.

In considering your assertion that the officer’s evidence in the Report is misleading and untruthful regarding the number of tests he conducted, I found the Narrative to provide a more detailed explanation of his investigation which indicates that more than two attempts were made to provide the two valid results noted in the Report.

The officer’s evidence indicates that it took four attempts to obtain the first valid breath sample from you which he said was conducted on the ASD with serial number 101147. I note that this serial number is consistent with the officer’s evidence in the Report for the first “FAIL” result. The officer indicated that he believed your unsuccessful attempts were due to the fact that you had gum in your mouth which was blocking the mouthpiece. You confirmed that you were chewing gum and that the officer requested that you remove it.

With respect the second ASD, the officer's evidence is consistent with your evidence that it took one attempt for you to provide a valid breath sample on a second ASD. The officer said he used ASD 072221 for your second valid sample. I find this to be consistent with his evidence in the Report.

Therefore I do not find the Report misleading or untruthful. I find that the officer recorded the results of the two valid samples he obtained from you in the Report.

Based on the evidence before me, I am satisfied that the second analysis was performed on a different ASD from the first test.

Was the Notice served on the basis of the lower analysis result?

In the Report and the Narrative, the officer indicated that the result of both ASD tests was a "FAIL". I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicate that the devices were found to be functioning correctly and were found to be within the recommended limits.

You said that while providing your fourth breath sample you blew so hard that you vomited in your mouth but you did not tell the officer at the time. You said you contacted him by phone at a later date and told him that you vomited while providing a breath sample. He told you that you should have mentioned it to him at the time, but you did not indicate to me what he said or why it was relevant to your case.

The evidence before me is that you successfully provided a breath sample into the second ASD and it seems to me that vomiting and breathing air out through your mouth are competing activities; meaning that one would interfere with the other. On a balance of probabilities, I find it unlikely that you could vomit in your mouth while providing a breath sample without the officer noticing or plugging the mouthpiece with vomit. Consequently, I am not persuaded that you vomited into your mouth while successfully providing a breath sample.

Based on all the evidence before me, I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 31, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

SEPTEMBER 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 31, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- 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, Don Muldoon, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Your lawyer has provided me with the case *Helgesen v. British Columbia (Superintendent of Motor Vehicles)* 2002 BCSC 1391. Relying on *Helgesen*, Mr. Muldoon submits that I am required to consider what constitutes a reasonable excuse by considering cases decided in the context of the criminal law and the *Charter of Rights and Freedoms* (the “Charter”). Paragraph 15 of *Helgesen* goes on to say that this is correct “but only insofar as an alleged Charter breach is embedded in the reasonable excuse. With respect to Mr. Muldoon, there is no Charter breach imbedded in what you say is your reasonable excuse for failing to comply with an ASD demand.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that Officer Scherpenisse (the "officer") established you as driving or having care or control of a motor vehicle at 21:09 hours on August 31, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Narrative Text Hardcopy (the "Narrative") the officer indicated that at approximately 20:53 hours on August 31, 2013, a tow truck driver reported that he had been following a vehicle which was later identified as your vehicle. He observed the vehicle to be all over the road, going into oncoming lanes on corners and almost hitting several no posts.

The officer indicated that he located your vehicle and pulled in behind you as you drove. He observed that on several occasions you could not make a smooth turn on the corners and seemed to jerk the wheel back to get the vehicle going in the direction you wanted it to go. After conducting a traffic stop, the officer approached your vehicle and spoke with you. The officer noticed an empty wine bottle on the passenger rear floor of your vehicle. You explained that it was from the night before and you had not had anything to drink since. At this point, the officer said he had moved closer to your window and was able to smell a strong odour of liquor emanating from your breath.

At approximately 21:10 hours, the officer formed his suspicion that you had alcohol in your body at the time of driving. He returned to his vehicle and obtained an ASD. At approximately 21:11 hours, the officer read the ASD demand to you from memory.

As there is no evidence before me to the contrary, I am satisfied that the peace officer did make a valid ASD demand.

After making the ASD demand on you, the officer said he explained how to provide a sample of your breath. He then put the ASD to your mouth and directed you to blow. He said you put your lips at the end of the mouthpiece and pretended to blow. The ASD was still flashing "TEST" which is how he knew there was no air going through it. The officer said he explained that you had to put the mouthpiece into your mouth with your lips touching the plastic stop and then blow until told to stop. The officer put the ASD back up to your mouth but said you put the

mouthpiece in your mouth only to your teeth. The officer said he explained again about putting the mouthpiece all the way in your mouth. He said you eventually did and you again pretended to blow. The word "TEST" was flashing on the ASD. At this point, the officer said he warned you that if you continued in the same manner he would treat your actions as a refusal, which carries the same penalty as being deemed impaired. The officer gave you one more try at blowing into the ASD and said you again pretended to blow.

At this point the officer asked you to step out of your vehicle. He said he would give you one more opportunity to provide a sample of your breath. At this point you began talking about s.22 and that you were devastated by it. The officer asked if you were going to provide a sample of your breath. You replied "no". The officer asked if you are refusing to provide a sample of your breath. You replied "yes".

When the officer provided you with another opportunity to provide a breath sample, you told him you did not know what you should do. You then explained that although you had not had a drink in ten years, that night you came across a serious accident when you drove through Merritt. You said you turned around and went back to Merritt, rented a hotel room, bought a bottle of wine and drank the entire bottle. You then decided to drive to Kamloops to be with your family. You left the hotel room and started driving. At this point in the evening, the officer said he asked you several more times if you wanted to provide a sample of your breath. You kept saying you did not know what to do.

Mr. Muldoon argues that your refusal to comply with the ASD demand was not clear and unequivocal. He says this position is supported by the fact that there is no time noted on the Report for time of refusal. He has provided me with the case *R. v. Kosteniuk* [1981] B.C.J. No. 479 to support his position that your third refusal should have been considered in isolation.

I agree with Mr. Muldoon in that there is no time of refusal noted on the Report. However, the Narrative does state that at 21:30 hours the officer advised you that he was treating this as a refusal. You had already said you were not going to provide a sample and when given further opportunities, you did not. With respect to *Kosteniuk*, I note that the circumstances of this case are different than yours. *Kosteniuk* is a criminal law case wherein the driver had been taken to cells and then denied access to a lawyer after requesting to speak with one.

The officer asked if you were refusing to provide a sample of your breath. In my view, your answers to his questions were clear and unequivocal. In addition, I find that you failed to make a sincere effort to provide an adequate breath sample.

Based on a consideration of the evidence before me, I am satisfied that you did fail or refuse to comply with the ASD demand.

Did you have a reasonable excuse?

Mr. Muldoon submits that your reasonable excuse for failing to comply with the ASD demand flows from your emotional state, which rendered you unable to make a decision. He has provided me with a statement from your cousin s.22, a note from s.22 as well as several criminal law cases to support this position. While I have considered the contents of these cases and the principles set out in them, I am mindful that these decisions are made in a setting markedly different than this review. The standard of proof and rules of evidence in

criminal proceedings are very different than in administrative reviews such as this. While I acknowledge these decisions, I am not bound by them.

You said that the sight of the accident in Merritt triggered a severe emotional reaction for you. When you were stopped by police you were emotionally very unstable and talked with the officer about the s.22 You were crying and having a difficult time. You said you tried to blow into the ASD but the officer told you you were not doing it right. You were not capable of making any decision and you were emotionally paralyzed. You said you never intended to refuse to provide a sample and were neither mentally nor emotionally capable of making any decisions.

I find your blowing behavior to be consistent with someone who was not making a sincere effort to provide a breath sample. In addition, although you said you were unable to make a decision about what to do, you had already answered the officer's questions clearly and unequivocally about whether you were going to provide a sample. When given several opportunities to provide a sample, you did not do so. I also note that you first told the officer that you had not been drinking but later admitted to consuming a bottle of wine prior to driving.

I note with interest your response to the officer when he served you with the IRP paperwork. He explained the documents to you in detail, including the review process. The officer said you stated you understood and would not appeal the IRP as you were in the wrong.

I do not dispute that you were dealing with strong emotions in response to seeing the car accident you witnessed en route to Kamloops, together with the s.22 However, I find that your emotional state did not provide you with a reasonable excuse for failing to comply with a valid ASD demand.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on August 31, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

CC: Don Muldoon
By fax 604-974-8888

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition ("Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing you confirmed that you had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 1, 2013, at 01:20 hours Officer Scherpenisse (the “officer”) established you as a driver or having care or control of a motor vehicle.

As there is no evidence before me to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 01:24 hours the officer used ASD serial number 101147 to take a breath sample from you and the result of your ASD test was a “fail”.

As there is no evidence before me to the contrary, I am satisfied that the ASD registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence in the Report is that after your first ASD test, the officer explained to you your right to a second analysis and also explained that the lower of the two test results would prevail. This is corroborated in the Narrative Text Hardcopy (the “Narrative”) which states that at 01:27 hours the officer read you your right to request a second ASD test.

As there is no evidence before me to the contrary, I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

The police evidence in the Report is that at 01:30 hours, the officer conducted a second ASD test. The result of this ASD test was a “fail”.

As there is no evidence before me to the contrary, I am satisfied that the officer did conduct the second ASD test.

Was the second analysis performed on a different ASD?

The Report indicates that ASD serial number 101147 was used to conduct your first ASD test and ASD serial number 072221 was used for your second ASD test. Part of the police evidence

includes Certificates of a Qualified ASD Calibrator (the "Certificates") for ASDs bearing the serial numbers 101147 and 072221.

The Narrative indicates that at 01:22 hours, the officer formed the suspicion that you had alcohol in your body at the time of driving. The officer returned to his vehicle and obtained an ASD. The officer said he used ASD serial number 101147 with a calibration expiry date September 17, 2013, and an operating temperature of 26 degrees. After conducting the first ASD test, the officer had you sit in the back seat of his vehicle while paperwork was completed. The Narrative goes on to say that at 01:30 hours, the officer used ASD serial number 072221 with a calibration expiry date of September 25, 2013, and an operating temperature of 24 degrees to conduct a second ASD test.

You told me that the officer did not use a different ASD to conduct the second test. You said he did not leave your side and had the second device in his hand.

The Report and the Narrative both reference two different ASDs that were used on the night in question. In addition, police evidence includes two Certificates, referenced below. The Narrative provides details about what transpired, and when, during the officer's investigation; however, it is not necessary for the officer to account for each and every step he took. It seems clear to me that at some point during his investigation, the officer obtained a second ASD.

Based on a consideration of the evidence before me, I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Because both ASD test results were "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates indicates the following:

- ASD serial number 101147 was checked for calibration on August 20, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 17, 2013, and a Service Expiry Date of October 31, 2013.
- ASD serial number 072221 was checked for calibration on August 28, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 25, 2013, and a Service Expiry Date of October 31, 2013.

In addition, the officer said that he knew both ASDs were working properly as he tested them on himself at the beginning of his shift.

As there is no evidence before me to the contrary, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

You told me that you had been at the bar for three or four hours and had been drinking water the entire time you were there. You were surprised when the two ASD tests resulted in a “fail”. You said the bartender and wait staff know you at this bar because when you go, you only drink ice water. You also provided me with written statements from s.22 both of whom say they saw you drink only water while at the bar. In addition, you are relatively new to the Kamloops area and are still getting to know all the one-way streets.

The officer said he observed you turn from the centre lane onto 5th Avenue and that you drove in the oncoming lane for a short distance before going into the proper lane. You did not stop your vehicle right away when the officer put on his emergency lights and he had to blast the emergency siren twice before you pulled over. When you did, the officer observed you to have bloodshot and watery eyes and noted a strong odour of liquor from inside your vehicle. The officer said you had a hard time focusing and you were looking past him. When the officer asked you how much alcohol you had to drink, you replied that you had been drinking water all night and said the bartender could verify this. Prior to making the ASD demand, the officer said he leaned into your vehicle and was able to determine that the odour of liquor was emanating from your breath. Later on in his investigation, after the second ASD test resulted in a “fail”, the officer asked you when you had your last drink. You replied about forty-five minutes ago.

I find the inconsistency of your answers to the officer, along with your driving behavior and odour of liquor on your breath, leads me to question the reliability of your evidence. You first told the officer that you drank only water all night. You then told him your last drink was forty-five minutes ago. Although s.22 both say they only saw you drinking water, I cannot rely on whether they observed you continuously and uninterrupted for the entire evening.

I note that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%, and I have already made a finding that the ASDs are reliable.

Based on a consideration of the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 26, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 8, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a "WARN" as a result of your blood alcohol concentration (BAC) being not less than 50 milligrams of alcohol in 100 millilitres of blood (50 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (ASD);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records indicate you received full disclosure.

You applied on one ground. For your benefit, I have considered all the grounds available to you.

In your written submission you stated that the reason the officer pulled you over was not because he suspected you were impaired, rather it was because you had not turned on your night time lights. You stated that you believe there is no evidence, either independent of, or in conjunction with the 'warn' reading, that suggested your ability to drive was affected by alcohol. You stated that your parents also concluded that your ability to drive or react in anyway was not adversely affected by alcohol. You believe the fines are unnecessary and harsh as no *Criminal Code* was broken.

Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground. With respect to your concerns regarding the fines, IRP penalties are administrative penalties under the Act and are unrelated to violations under the *Criminal Code*.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted you were a driver or had care or control of a motor vehicle on September 8, 2013, at 03:04 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 8, 2013, at 03:04 hours.

Did the ASD register a "WARN"?

In the RTS the officer noted that there were two tests and he recorded both results as "WARN". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "WARN".

Were you advised of your right to a second analysis?

The officer indicated that he informed you of your right to a second test and indicated to you that the lower test result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "WARN".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "WARN" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

While you stated that you believe that the ASD results were not reliable or conclusive, I note that you have not provided any evidence to support your statements. As such, I find the officer's evidence more convincing.

I am satisfied that the ASDs were reliable.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

You stated that to your parents you seemed normal, responsive and completely coherent. You explained that you had been wearing your contacts from Saturday morning until Sunday morning and that this causes your eyes to redden and become sore.

The issue before me is not your level of impairment, rather the issue is was your BAC less than 50 mg% even though the ASD registered a "WARN". In considering the evidence before me, I find no compelling evidence that would lead me to question the ASD results.

I am satisfied that the ASDs registered a "WARN" as a result of your BAC exceeding 50 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on September 8, 2013.

This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the 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 proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Lafleur and your submissions, I find there is one determinative issue in this review.

Was the ASD reliable?

In the Report to Superintendent (the “RTS”), Constable Lafleur indicated that you provided a breath samples into ASDs with serial numbers 055635 and 101244. However, there is no evidence before me regarding the calibration of the ASDs used to analyze your breath samples, therefore, I cannot be satisfied that the ASDs were reliable. Having made this finding, I do not need to consider other issues.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver’s licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver’s Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including October 28, 2013. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.



October 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Ms. Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Ms. Lee relies on a recent BC Supreme Court decision, *Wilson*, to outline the principle that a person's ability to drive must be shown to be affected by alcohol in order for a prohibition to stand. I rely on the interpretation of the legislation in this review with regards to the superintendent revoking a prohibition: s. 215.5(4) of the Act requires me to revoke an IRP if I am satisfied of any of the specific grounds set out in that section. Whether an officer had 'a reasonable ground to believe your ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

She also provided the case of *Scott* and referred to the principles enunciated by the court in *Spencer*, to underline the concepts of credibility which apply in this review process. From *Scott*, evidence must be assessed for consistency and reliability, with legitimacy; from *Spencer*, the allegation in a prohibition sets out what an officer must prove in his evidence. I am mindful of the principles as stated by the court, and apply them herein.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer — Cst. Ostapenko — indicated that you were driving or in care or control of a motor vehicle at 2330 hours on October 4, 2013. In the Synopsis he provided as evidence, he described an initial call from a report on you leaving the casino in Coquitlam, then his following your vehicle. Upon stopping your vehicle, you were identified by license as the driver of the vehicle.

In paragraph 8 of your affidavit you describe driving with your friend s.22 and you detail being stopped by the officer as well.

With your evidence similar to that of the officer on this point, I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register a "FAIL"?

In the Report, the officer indicated that the ASDs registered "FAIL" at 2335 and 2345 hours, respectively.

In paragraph 12 of your affidavit you describe the initial "FAIL" result; in paragraph 15, in reference to the second test result, you state "Constable Ostapenko told me that I had failed the test."

I am therefore satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower result would prevail. He checked ‘YES’ to indicate that you had requested a second ASD test; the Occurrence Report 2 indicates he advised you at 2340, and that he read the prompt from an “IRP booklet.”

In paragraph 15 of your affidavit you describe Cst. Ostapenko telling you this information, and how you “accepted his offer.”

I am therefore satisfied that Cst. Ostapenko informed you of your right to a second analysis.

Was the second analysis provided by the officer, and was it performed on a different ASD?

Your affidavit paragraph 15 describes Cst. Ostapenko providing the second analysis to you, after he “went to his police vehicle and got another machine.” This verifies Cst. Ostapenko’s evidence on this point; he notes ASD serial number 077910 was used for the second analysis, and this is a different ASD from that used in the first analysis.

Ms. Lee points to an apparent error on the Report completed by the officer: the time of the second analysis reads ‘2245’, which is approximately one hour prior to the officer’s interaction with you. In the Occurrence Report 2 he provides a time of 23:44 as being the time of the second analysis, and common sense allows me to infer reasonably that the apparent time error does not detract from all of the other evidence presented by Cst. Ostapenko.

I am therefore satisfied that the second analysis was provided by the officer, and that it was carried out using a different ASD.

Was the Notice served on the basis of the lower analysis result?

I am satisfied that the Notice was served on the basis of the lower analysis result. Cst. Ostapenko recorded the two test results as “FAIL”. Your affidavit confirms this evidence. With two “FAIL” results being the only test result obtained on two ASDs, I am satisfied that the Notice was served on the basis of the lowest result available, which was “FAIL”.

Were the ASDs reliable?

Cst. Ostapenko provided a ‘Certificate of a Qualified ASD Calibrator’ (the “Certificates”) for ASDs serial numbers 101894 and 077910 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

The qualified ASD Calibrator, R. O’Rourke, certified that on September 12, 2013, he checked the calibration of ASD serial number 101894. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 10, 2013 and the service expiry date as October 23, 2013. He also certified that on September 27, 2013, he checked the calibration of ASD 077910. He found the ASD to be within the recommended limits. He

recorded the ASD calibration expiry date as October 25, 2013 and the service expiry date as August 21, 2014.

You have placed the reliability of the ASD results into question by providing evidence that you had a drink of whiskey within fifteen minutes of providing your first sample of breath. The drink was provided by the person accompanying you that evening, s.22 and you state that this "sip of whiskey" occurred "just before 11:30 p.m." You provide detail on this alcohol consumption immediately prior to Cst. Ostapenko's taking a sample of your breath:

- you told Cst. Ostapenko "Yes. I had one a couple hours ago." in answer to his question about your last drink;
- you were in a hurry to get your friend s.22 home;
- you had consumed your last drink two hours earlier;
- you "did not realize" that he needed to know the time of a last sip of alcohol, not thinking this mattered;
- you were surprised by both ASD results, not believing the "results of the first machine" and "astounded" that a second ASD provided a "FAIL" result;
- you question the times provided by Cst. Ostapenko in the Report.

You state: "The Report says that the second test was done ten minutes after the first one. That is absolutely not the case." This evidence, while assertive, does not outweigh that of Cst. Ostapenko on this point; his evidence establishes the fact that a second test did occur, after some period of time which you verified with your description of him obtaining a second ASD from his vehicle. You deny his version of events, in particular the timeline, yet I find you are unable to provide an alternate timeline, in clearer terms, to verify your denial. Without this detail, I am unable to attach more weight to your evidence. s.22 also asserts the event "took fewer than ten minutes" yet does not provide accuracy to match or exceed that of Cst. Ostapenko on this detail. Your affidavit indicates he "drank significantly more" than you did; his own words are provided in his affidavit: "I was intoxicated." I find these statements diminish his credibility significantly.

On review, I scrutinize the evidence provided by Cst. Ostapenko in a similar manner; Ms. Lee has submitted that his alternate times provided in different areas of the evidence call his whole account into question. She underlines the principle enunciated in *Modhgill* which states that reasoning must not be presumptive. Mindful of this, I do not find the inaccuracy in the Report to nullify the other evidence he presents. In Occurrence Report 2 he presents a linear time pattern for six different events during the investigation; Occurrence Report 1 provides more detail on his observations and conclusions.

In regards to what you claim to be a questionable process due to your immediate consumption of whiskey from a flask, you state your surprise, and your disbelief of both test results, yet you do not explain why you did not express this surprise and disbelief to the officer at roadside. You do not concretize your evidence by providing any statement, expression, or reaction you made to Cst. Ostapenko at roadside; your evidence thus remains in the realm of the abstract.

This is in contrast to the previous decision from this office, s.22 which provided tangible evidence that consumption of alcohol occurred immediately prior to the officer's interaction with the driver, in the form of photos and objective third party evidence.

In addition, even without knowledge of mouth alcohol and the effects of a recent drink on breath analysis results, I do not find your answer of “two hours ago” to be entirely accurate in answer to Cst. Ostapenko’s asking you the time of your last drink. An officer is asking you about alcohol consumption, a query which requires a strictly accurate answer; it strains credibility to accept that you thought a very recent drink did not matter. You provide no valid reason why you did not answer truthfully.

Ms. Lee provides a previous decision of this office, s.22 to demonstrate a similar fact pattern where a driver did not disclose a recent sip of beer. I find this decision distinguishable for a differing reason, where there was tangible evidence that consumption of alcohol occurred immediately prior to the officer’s interaction with the driver, in the form of photos and objective third party evidence.

I therefore find the ASDs, and the test results obtained, to be reliable at the time samples of your breath were analyzed by Cst. Ostapenko at roadside.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

You provided that you had a double scotch, finishing at 2120 hours. You also state that you had consumed a sip of whiskey immediately prior to Cst. Ostapenko obtaining samples at roadside. You stress: “I knew the alcohol I had drank earlier was gone from my system.” and “I was not impaired by alcohol.”

Your affidavit contains statements which express your surprise and disbelief of the test results. There is no record in Cst. Ostapenko’s evidence of you expressing doubt, questioning the process, or stressing your pattern of consumption to him; the evidence he prepared is diligent in recording your other statements to him.

You do not address your lack of protest or expression of surprise at the results in your affidavit. As above, your credibility in presenting your version of events that evening is diminished. To verify you provide the affidavit of s.22 however, by his own admission he was intoxicated at the time of the interaction with the officer, and in your words “behaving somewhat belligerently.”

Your statement acknowledges two “FAIL” results on two ASDs; I accept that as fact. Without a clear understanding of your pattern of consumption that evening, I cannot attribute these “FAIL” results to anything other than a concentration of alcohol in blood being not less than 80 mg%, as per the Act.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 5, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.22

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s.15

Adjudicator

cc. Kyla Lee
Acumen Law Corporation fax: 604-685-8308

SEPTEMBER 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 2, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Philip Cote. I proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), Constable Duran indicated that he witnessed you driving or in care or control of the vehicle at 2130 hours, on September 2, 2013.

Your lawyer argued that you were not in care or control of the vehicle at 2130 hours, as set out in the officer’s evidence. He cited the case of *R. v. McLachlan* as an authority for his argument. In *McLachlan*, the drivers in the respective cases were found asleep in the driver’s seat of the vehicles. In contrast, Constable Duran’s evidence is that he witnessed you driving a vehicle that he pulled over. Mr. Cote said you were “observed in [your] vehicle with the ignition off, slumped over in the driver’s seat, keys in the ignition, and asleep.” Mr. Cote did not say who observed you this way and there is no evidence before me to support this assertion.

In the Narrative Text Hardcopy (the “Narrative”), Constable Duran stated that he and Constable Burtman were dispatched to a reported suspicious circumstance. Constable Duran said he:

“attended to 272 St/16 Ave where there was a 4 Way Stop, and observed a head Westbound from the 4-Way Stop.”

s.22

s.22

Cst DURAN believed he had Reasonable Suspicion to pull the truck over, and pulled the Ford F150 over at 271 St/16 Ave.”

You were identified as the driver of this vehicle. I find that your situation is distinguishable from the facts in *McLachlan*.

Mr. Cote argued that you were not driving or in care or control of the vehicle at 2130 hours, as stated by the officer in the RTS. On page two of the Narrative, the Constable Duran said at 2130 hours he believed he had reasonable grounds to believe that you had consumed liquor and were intoxicated. He based this on observations that followed the discussions he had with your wife and with you, as well as seeing you exit the vehicle.

I agree that due to the time it would take to have the interactions with you and your wife, it is

unlikely that the officer witnessed you driving and made these observations within one minute. However, it is unclear at what point Constable Duran looked at his cell phone. I also note that the officer said that after speaking with your wife, he approached you and you were still behind the steering wheel with the engine turned on; you were still in care or control of the vehicle.

I find the officer's detailed Narrative indicates that the investigation proceeded routinely; in addition, there are no other times before me. Based on all the evidence, I am satisfied on a balance of probabilities, that you were a driver within the meaning of section 215.41(1) of the Act at approximately 2130 hours on September 2, 2013.

Did the ASD register a "FAIL"?

In the RTS, Constable Duran said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 2132 and 2137 hours, respectively, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy (the "Narrative"), Constable Duran indicated that he informed you of your right to a second breath test analysis. Mr. Cote argued that the officer served the Notice prior to informing you of this right. I find that Mr. Cote has misconstrued the officer's evidence. Your lawyer said the officer informed you that you were prohibited from driving because you were too drunk to drive. Mr. Cote said: "At this point in time the Officer has served s.22 with a driving prohibition." This is not what the officer's evidence says. On the third page of the Narrative, the officer explains how you provided a suitable breath sample at 2132 hours that registered a "FAIL" on the first ASD. In the fourth paragraph on page three Constable Duran said he asked you if you wanted to provide a second breath sample, as you would not be allowed to drive, since he you were too intoxicated by liquor, so your licence would be suspended under the IRP. He noted that you said "no" and yelled at him so loudly that he could not read you your right to a second test.

In the next paragraph, Constable Duran said he waited for you to calm down and asked again if you wanted to provide another breath sample and he advised you that the lower reading of the two would be taken into account and that you were not facing criminal charges. He indicated that you agreed to do a second analysis, and at 2137 hours, your breath sample registered a "FAIL" on the second ASD.

Mr. Cote argued that the officer did not sufficiently explain that the lower of the two readings would prevail. I agree that Constable Duran's words could have been misunderstood, but since you took advantage of your right to a second analysis, his language did not prejudice you in any way.

In the next paragraph, the officer told you that paperwork had to be administered and he

advised you to sit down. I find it clear that the Notice had not yet been served on you and I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the constable stated that both ASDs used to analyze your breath registered "FAIL". I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Was the ASD reliable?

In the RTS, Constable Duran indicated that you provided breath samples into two ASDs with serial numbers 049864 and 101769, respectively. The officer also provided Certificates for ASDs with these same serial numbers. The Certificates both state that Corporal Patrick Davies certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF (the "Calibrator"). The Calibrator said that on the 29th day of August, 2013, he checked the calibration of ASD with serial number 049864 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG301501, Expiry: 2015-01-15. This ASD was found to be within the recommended limits. It had a calibration expiry date of September 26, 2013 and a service expiry date of April 22, 2014.

The Calibrator stated that on the 26th day of August, 2013, he checked the calibration of ASD with serial number 101769 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG301501, Expiry: 2015-01-15. This ASD was found to be within the recommended limits. It had a calibration expiry date of September 23, 2013 and a service expiry date of June 5, 2014.

Mr. Cote argued that Constable Duran's evidence in the Narrative provides different information about the ASDs compared to his evidence in the RTS. I agree that in the Narrative, he identifies the ASDs used to analyze your breath as "#17" and "#30", respectively.

For ease of reference, I have transferred the evidence from the relevant documents into the following two tables:

1st ANALYSIS	ASD ID #	Time of test	Temp	Other
RTS	s/n 049864	2132	25°	No time of temp reading
Narrative	#17	2132	26°	25° degrees initially
Certificate	s/n 049864	n/a	n/a	n/a

2nd ANALYSIS	ASD ID#	Time of test	Temp	Other
RTS	s/n 101769	2137	27°	Only one temp. reading
Narrative	#30	2137	27°	Only one temp. reading
Certificate	s/n101769	n/a	n/a	n/a

In the Narrative, the officer indicated that prior to the first analysis, he “pulled from the trunk of his patrol [car] ASD #17, inserted the plastic mouth piece into ASD #17 and gave instruction to [you] to blow into the instrument. The temperature reading was 25 degrees [Celsius] and shown to [you].” He then said that you did not provide a sufficient breath sample on your first attempt, so he gave you additional instructions. Constable Duran said he “then administered a second ASD test to [you] at 2132 hrs, and the temperature reading was 26 degrees Celsius.”

The officer’s evidence about the second ASD analysis is that you provided a suitable breath sample on your first attempt. I infer that he had no cause to refer to the ASD temperature more than once for that analysis.

I find it reasonable to infer that it is more likely than not that when filling out the RTS, the officer recorded his initial temperature observation from the Narrative or his notes (which are not before me). I also note that in the Narrative, the officer did not identify the devices as “serial number” 17 and 30, so the reference in the Narrative must be to a different labeling method used by the Langley RCMP. I agree that it would have been preferable for the officer to use one identifier consistently throughout the documents; however, given that the times, temperatures and test results can be reconciled, I am satisfied on a balance of probabilities that the officer was referring to two specific ASDs throughout his submissions.

Based on all the evidence before me, I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 2, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your

s.22

IRP Review Decision
Page 6

driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Philip Cote
778-395-6226 (fax)

NOVEMBER 12, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 21, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- 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, Christopher D. Drinovz, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

I acknowledge receipt of the statement of s.22 in which he states that you had been working on your wife, s.22 truck on October 21, 2013. s.22 says that while you were working together, he did not observe you to consume any alcohol. I also have your daughter, s.22 statement in which she states that you arrived at her house around 6:00 p.m. on October 21st with your wife and your step-daughter, s.22 says you had dinner together and then you left her house at approximately 8:00 p.m. s.22 s.22 says she does not believe that you were impaired.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the Report) is that on October 21, 2013, at 21:00 hours, Officer Duran (the “officer”) established you as driving or having care or control of a motor vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did 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 valid demand was made on you, and whether you failed or refused to comply with that demand.

The officer’s evidence in the Narrative Text Hardcopy Occurrence Report – 1 (the “first Narrative”) is that s.22 advised him that she had observed you consume a large amount of beverage liquor throughout the whole day. s.22 told the officer that you were too intoxicated by alcohol to drive. The officer said when he engaged with you at roadside, you had a strong odour of beverage liquor from your breath and person, and you had walked in a wobbly manner (swaying from side to side) and had to brace your hand on the patrol car to keep upright.

The officer’s evidence in the Narrative Text Hardcopy Occurrence Report – 2 (the “second Narrative”) is that when you rolled down the driver’s side window, he could see that you had glossy eyes and he heard you talk in a slurred manner. The officer said he did not immediately smell beverage liquor because you had smoked a cigarette and it was a strong smell of tobacco from inside the truck. The officer asked if you had consumed any alcoholic drinks and you replied “a few”. The officer asked you how much alcohol you had to drink and you replied four to five drinks of Rye. The officer said you told him that the time of your last drink was 1 to 1.5 hours earlier. The officer said he believed he had reasonable grounds to make the ASD demand based on the smell of liquor on your breath, your slurred speech and glossy eyes, and your trouble getting your licence out of your wallet.

The officer indicated in the first Narrative that at 21:03 hours he read the ASD demand to you from the Charter card.

I am satisfied that a valid ASD demand was made on you.

I now turn to the issue of whether or not you failed or refused to comply with the demand. In the first Narrative, the officer said that you were given three chances to provide a breath sample into the ASD and you blew a “no go” each time. The officer said that you were given instructions on how to blow into the ASD. He performed a test on the ASD and clearly demonstrated to you how to wrap your lips tightly around the mouth piece and blow air through it. When you first

attempted to provide a suitable breath sample, the officer indicated that you failed to properly seal your lips around the mouth piece and instead you blew around it. The officer said he could not feel any air exiting the exhaust port of the ASD. The officer said he informed you how to properly provide a suitable breath sample two more times, and you repeated the same actions as before. The officer said he observed you on all three attempts to puff out your cheeks without exhaling from deep within. The officer said he inserted a different mouth piece for each attempt. The digital readings for the second and third attempts were a “no go”. The officer said he did not see any serious attempts to provide a suitable sample. He said that he explained in detail three separate times that a “refusal” carried the same penalty as blowing a “fail”.

You said that when the officer pulled you over, you exited the vehicle on his request. You said the officer had information from s.22 that you had been drinking all day. You said when the officer asked you to blow into the ASD, you sealed your lips as best as you could, made your best efforts and blew as hard as you could. You said you told the officer he could take you down for a blood test, but the officer said “we don’t do that”. You said you blew two more times and it still didn’t work.

Your evidence is that you tried to the best of your ability to provide a sample. Whether or not you made a sincere effort to provide a breath sample, it is an undisputed fact that there were no valid breath samples obtained from you. Therefore, by your actions, you failed or refused to comply with the officer’s demand to provide a suitable breath sample.

Based on a consideration of the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Narrative, the officer has indicated that you did not convey any reasons why a sample was not provided. The officer said he could not feel any air exiting the exhaust port of the ASD, and he observed you on all three attempts to puff out your cheeks without exhaling from deep within. He said he did not see any serious attempts to provide a suitable sample.

Both you and your wife told me that you informed the officer that you have trouble breathing. You said you sealed your lips as best as you could and blew as hard as you could into the ASD.

Your lawyer provided me with some information on s.22 which I have reviewed. I note that the information provided is from Wikipedia and is therefore not from a reliable medical source. However, your lawyer also provided me with a medical report from s.22 after your referral visit to him on s.22 indicates that you have settled in a s.22 and says that you do not like taking medications. He prescribed a puffer for you to use every four hours as needed. s.22 indicates that you were diagnosed s.22 s.22 indicates on page 2, under “Physical Examination” that s.22

You told me that your lungs are “buggered up” and that you “can’t blow out a match”. You smoke two to three packs of cigarettes a day, have trouble breathing and can’t take deep breaths. You said you have seen a number of doctors and specialists and have been told to quit smoking. You also said that you have trouble walking due to a bad hip as a result of being

I have considered what you told me, and read and considered the medical evidence you provided. Although I accept the opinions of s.22 I cannot conclude from his report that you would be incapable of providing a breath sample into a roadside screening device. In addition, given that your daughter said you had no trouble speaking, you had the capacity to engage in an argument with s.22 and then smoke a cigarette, I am unconvinced that you were physically unable to comply with the officer's ASD demand and provide a suitable breath sample. I find it noteworthy that although you said you were trying your best, the officer said he could not feel any air exiting the exhaust port of the ASD.

I understand and accept that you may have health issues; however, I am not convinced that your medical issues are the reason you failed or refused to comply with the ASD demand. Rather, I find that it was more likely than not a lack of willingness on your part to comply with the demand than it was the inability to provide a sample.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 21, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15
Adjudicator

CC Christopher D. Drinovz
By fax 604-852-5194

October 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 4, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Paul Doroshenko, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 0115 hours on October 4, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over for speeding, and were identified as the driver via your BC driver’s licence.

In your affidavit you confirm that you were pulled over by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 0117 hours and 0121 hours, both resulting in “FAIL” readings.

In your affidavit you submit that after each of your ASD analyses, the officer informed you that you had failed.

I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0121 hours.

In your affidavit you state, “Constable Olson told me that I could perform a second breath test, to challenge the validity of the first.”

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0121 hours.

In your affidavit you state, "A few minutes later, Constable Olson presented me with another device. He told me to blow into it. I complied."

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101776 and your second sample of breath into ASD serial number 101786. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101776 and 101786.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 17, 2013, he checked the calibration of ASD serial number 101776. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 15, 2013, and the service expiry date as July 18, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 25, 2013, he checked the calibration of ASD serial number 101786. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 23, 2013, and the service expiry date as November 23, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state that you had dinner with your friend, s.22 at the Cactus Club, and while at dinner you did not consume any alcohol. You state that after dinner, you and s.22 went to the "Town Hall Public House" and arrived around 12:30am. You state that while at the pub you and s.22 both had a pint of Guinness. You state that as you went to leave the pub you finished the last of your beer, and noted the time to be 1:10am. You submit that when you encountered the officer you were nervous and thrown off by his line of questioning. You state that based on advice that you had received from friends in the past, you denied consuming alcohol to the officer. You submit that the time that passed between your last sip of beer and the time of your encounter with the officer was no more than five minutes. You state that you were not aware of the effect of mouth alcohol, and if you had been made aware, you would have informed the officer that your last drink was immediately prior.

You have also provided statements from s.22 submits that he was with you for the duration of the evening and that you consumed one Guinness beer each, and departed after 1:00am. s.22 confirms that you had one drink at the pub and departed shortly after 1:00am. You have also provided a screen shot from the Pub computer indicating that you purchased two pints of Guinness.

In the Narrative, the officer indicates that you attempted to relay a story of where and how you spent the evening that made no sense to the officer. The officer states that you were argumentative, verbally uncooperative, and evasive in your answers. The officer notes that you had the strong odour of liquor on your breath and person, as well as blood shot eyes. The officer indicates that when you were asked the time of your last drink, you advised that you never consumed any alcohol.

In the hearing, Mr. Doroshenko submitted that the officer obviously knew that you were not being truthful when you responded that you had not consumed alcohol, as he had already smelled the odor of liquor on your breath. Mr. Doroshenko also submitted that you were under no obligation to be truthful to the officer at the time. Mr. Doroshenko stated that as you had not been read your 10(b) rights, and as you had not been advised of your right to counsel, you are not responsible for your responses to the officer's line of questioning. Mr. Doroshenko submitted that until you have been detained and advised of your right to counsel, in a criminal setting, nothing that you say could be used against you. Mr. Doroshenko further expanded to state that in previous decisions, deceit toward the officer at the time has been used to impact the credibility of applicant's subsequent submissions, but that this is not acceptable. Mr. Doroshenko stated that, unlike your responses to the officer at the time, your affidavit must be truthful or you run the risk of perjury. Mr. Doroshenko submitted that it is not sufficient for the officers to be "willfully blind" with regards to mouth alcohol. Mr. Doroshenko submitted that the officer clearly knew that you had consumed alcohol, but did not take the necessary steps to ensure that you provided an accurate sample. Mr. Doroshenko stated that it would be easy for the officer to inform you of the impacts of mouth alcohol and clarify the time of your last drink.

Mr. Doroshenko also provided *Scott v Superintendent of Motor Vehicles* to state that there is no presumed baseline of police competency, and to emphasize the methods for determining credibility defined by the court. Mr. Doroshenko also provided a number of previous decisions to illustrate that prohibitions with similar fact patters are often revoked. Mr. Doroshenko noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

I have considered Mr. Doroshenko's submission; however, I do not find it to be reasonable. The IRP is not a criminal proceeding, and therefore at no point is the officer required to provide you with your 10(b) rights. I do not understand why Mr. Doroshenko submits that there is an onus on the officer to provide you with further information and to make further inquiries, if you are not required to answer them truthfully. By this logic, even if the officer explained the effects of mouth alcohol to you, you would still not be required to answer the questions truthfully, and therefore the explanation would accomplish nothing. I do not understand how the explanation of mouth alcohol would alter your obligation at the scene and require you to be truthful with the officer. I acknowledge your statement that if the officer had explained the issue of mouth alcohol, that you would have informed him that your last drink was immediately prior; however, you also state, "Remembering advice that I have received from friends in the past, I told the officer that I had not been drinking. Although I had just finished a beer immediately prior to encountering Constable Olson, I told him, "no" because I was relying on the advice of others."

The officer is not required to explain the effects of mouth alcohol to you, and your statement makes it clear that you did not intend to be truthful with the officer at the time.

You have provided evidence to indicate that your last drink was immediately prior to leaving the pub. The statements from s.22 confirm that you departed the pub shortly after 1:00am. In your submission you state that you finished the last of your beer and immediately departed the pub. You state that you checked the time and it was 1:10am. I note that the screen shot from the pub also indicates two Vodka drinks ordered at 12:20am. I note that in your evidence you submit that you arrived at the pub around 12:30pm. You do not address this in your evidence. Mr. Doroshenko suggested in the hearing that this does not affect your credibility as you are not required to explain the drinks, and the screen shot supports your claim that you consumed one pint of Guinness. I note, however, that you submit that your friend joined you after 1:00am and you chatted for approximately five minutes before asking for the check and departing. I note that the screen shot from the pub indicates that the "Time Out" for your check was 1:00am. The fact that the check indicates that two drinks were ordered prior to your stated arrival at the pub, and that it was completed prior to the time claim to have requested it causes me to question the timeline of your evidence.

Regardless of the timeline evidence, I do not find it reasonable that the officer can be required to delay the analysis based on information that was willfully withheld at the time. I do not have any evidence before me to indicate that the officer is required to explain the effects of mouth alcohol to you, and your choice to be untruthful with the officer was clear as you were following previous advice. There is no compelling evidence before me that the officer was required to delay the analysis at the time. There was no evidence before the officer that the results of the ASD analyses were not reliable. I accept the ASD results as valid.

I note that in the previous decisions provided, the officer was made aware of the time of the previous drink, but continued with the ASD analysis regardless. This is not the case in your situation, and as such, I do not find them to be similar to your prohibition.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on October 4, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Paul Doroshenko/Sarah Leamon
fax: 250 370-2505

NOVEMBER 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Stephen Price, confirmed that he had received all of the disclosure documents before me. I proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence of Constable Olson and your lawyer's submissions, I find there is one determinative issue in this review.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Based on all the evidence before me in this particular set of circumstances, I am not satisfied that your BAC was not less than 80 mg%. 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 November 18, 2013. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 7, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review you indicate a number of grounds that are not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an ASD test resulted in a “WARN”. All grounds for review that apply to your case will be considered in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “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 AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 1645 hours on October 7, 2013. Further, in the Narrative Text Hardcopy – Synopsis – 1 (the “Synopsis”), the officer indicates that he observed you not wearing a seatbelt while driving eastbound on 32 Avenue and 264 Street in Langley. Accordingly, he stopped your vehicle on Fraser Highway at 266 Street and informed you of the reason for the stop.

You wrote that you always wear your seatbelt and that the only reason the officer stopped you is because he saw you leaving a drinking establishment. Accordingly, you assert that you were not driving abnormally and that you were wearing your seatbelt.

While I acknowledge your submissions, the reason why your vehicle was stopped is not an issue I must consider in this review. Further, you do not refute driving when your vehicle was stopped by the officer.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “WARN”?

In the RTS, the officer indicated that the ASDs registered a “WARN” at 1658 hours and 1703 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a “WARN”.

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 101777 and 101775, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "WARN". Accordingly, the lower analysis result was a "WARN". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Alison Lea Lambie certified that the ASDs were found to be within the recommended limits when she checked their calibration on September 17, 2013, and September 25, 2013, respectively. She also certified that to the best of her knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

In the Synopsis, the officer submits that he observed that your eyes were bloodshot, your face was flushed, and he detected a strong odour of liquor from your mouth. Further, in the Narrative Text Hardcopy – Occurrence Report – 1, the officer indicates that when you were asked the time of your last drink that you indicated you had consumed two Budweiser beers ten minutes ago.

You submit that you s.22 and are out in the elements at all times. As such, you infer that this would account for the officer's observations that your eyes were bloodshot and your face was flushed. Moreover, you indicate that you were diagnosed with s.22 that directly affects the colour of your skin and condition of your eye colour. You also indicate that your speech was normal and you did everything that the officer asked of you. On this point, you submit that the officer gave you a sobriety test, which you passed without a problem but that he failed to include this in his statement. Further, you

provide evidence that you are s.22 and that you feel there is no way two bottles of beer would affect your ability to drive or function normally. Accordingly, you submit that both results were a "WARN", not "FAIL" and in your eyes these results do not imply impairment.

I acknowledge your explanations for the indicia observed by the officer; however, in this review I must make a finding on whether your BAC was less than 50 mg% even though the ASD registered a "WARN", not how indicia can be explained by factors independent of being under the influence of alcohol. Further, while I acknowledge your submission that you passed a sobriety test, sections 215.41(3.1) (a) and (b) of the Act do not list a roadside sobriety test as a component of reasonable grounds to believe that a person's ability to drive is affected by alcohol. Therefore, it is not an issue that I am by statute permitted to consider in this review.

Moreover, I have no evidence before me as to how alcohol is metabolized when your height and weight are considered. You also questioned why the officer allowed you to walk home and did not impound your vehicle, if he thought you were impaired. While I acknowledge your submission, an IRP is an administrative sanction and as such, once a person is served with the Notice they are free to leave the scene of the investigation. Moreover, in the case of a 3-day prohibition it is at the officer's discretion to impound a person's vehicle.

While you may have believed that you were not impaired by alcohol, you did not provide any compelling evidence that would cause me to doubt the "WARN" readings on the ASDs that I have found to be reliable. Section 215.41 (2) of the Act states that "WARN" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 50 mg%. As such, I am satisfied that your BAC was not less than 50 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your 3-day driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on October 7, 2013.

November 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

The officer has provided two documents titled, "Narrative Text Hardcopy." I note that one version indicates, "Synopsis – 1" and the other, "Occurrence Report – 1." For the purposes of this review I will refer to these documents as the "Synopsis" and the "Narrative".

In the hearing, Mr. Harris stated that the name of the police officer is listed on the Notice and Report to Superintendent (the "Report") only as "Parmar." Mr. Harris stated that this is not sufficient as there are a number of officer's with the last name "Parmar" in the RCMP. Mr. Harris submitted that the Report must be properly sworn and attributed to a particular person in order to be valid. Mr. Harris reference the decision *Murray v. Superintendent of Motor Vehicles* in support of his position.

I have considered the evidence before me and I respectfully disagree with Mr. Harris. I note that in both the Synopsis and the Narrative the officer provides his full name, Cst. Sukhwinder Parmar, and provides an RCMP badge number which is consistent throughout the evidence. I acknowledge Mr. Harris' submission that the officer has only provided, "Parmar" on the Notice and Report; however, I do not find that this renders the Report invalid. The evidence before me indicates that Cst. Sukhwinder Parmar conducted the investigation, and I do not find it likely that a different officer, also named Parmar, then signed and swore the documents.

Mr. Harris also submitted that the officer incorrectly served you with a "FAIL" prohibition, when the evidence clearly shows that you refused to provide a second sample. The second analysis is not a demand, but a right to request. If you do not wish to provide a second test, it does not constitute a refusal, as you provided a "FAIL" sample of your breath, and the second test exists to allow you the opportunity to challenge the result of the first. Your prohibition was based on the first "FAIL" sample, and not your refusal of the opportunity for a second.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0022 hours on October 12, 2013. In the Synopsis the officer indicates that you were pulled over for a traffic violation and were identified as the driver via your BC driver's licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report and in the Narrative that you provided a sample of your breath at 0035 hours which resulted in a "FAIL" reading.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0036 hours. In the Narrative, the officer indicates that you were read the right to request a second test from a prepared card.

In the hearing, you stated that you were not advised that the second analysis would be completed on a different ASD. You stated that there was not a second ASD present, and that this was why you wished to speak to a lawyer. You stated that if the officer had explained to you that the second analysis would be done on a different machine, you would have requested to provide a sample.

I acknowledge your submission that the officer did not advise you that the second analysis would be performed on a different ASD. I note that the officer indicates in the Report that you were advised that the test would be completed on a different ASD, and that the lower result would prevail. The officer also indicates that he read the right to request to you from a prepared card. On a balance of probabilities, I find it more likely than not that the officer advised you that the second test would be provided on a different ASD. Regardless, I note that section 215.42 of the Act states:

- (1) If an analysis of the breath of a person by means of an approved screening device under section 215.41 (3.1) registers a warn or a fail,
 - (a) the person has a right to forthwith request and be provided with a second analysis, and
 - (b) a peace officer must inform the person of that right before the peace officer serves on the person a notice of driving prohibition.
- (2) A second analysis performed under this section must be performed with a different approved screening device than was used in the first analysis.
- (3) If a person provides a sample of breath for a second analysis in accordance with this section, the lower of the first and second analysis results governs for the purposes of section 215.41 (3.1).

The Act states that if the second test is requested, it must be performed on a different ASD, but does not state that the officer is required to advise you of this fact.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The evidence before me indicates that you did not request to provide a second sample of your breath for analysis.

Was the second analysis performed on a different ASD?

As you did not request to provide a second sample of your breath for analysis, the officer was not obligated to provide a second ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that your ASD analysis resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The qualified ASD calibrator indicates in the Certificate that on September 29, 2013, he checked the calibration of ASD serial number 106330. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 27, 2013, and the service expiry date as February 27, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.



October 2, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 11, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you and your lawyer, Sarah Leamon. I have proceeded with this review based on that confirmation. To date, Ms. Leamon has not made submissions on your behalf. However, I received your written submission on September 26, 2013. I have considered it in making my determinations.

In your submission, you said you made a major error in judgment by drinking any amount of liquor and driving. If you could go back in time, this would not have happened. You indicated that this

prohibition has already changed your life as you have experienced the embarrassment of telling your family and friends. I acknowledge your regret for your actions.

Additionally, you drew my attention to the Notice of Vehicle Impoundment and the Notice and stated that the person who completed the documents failed to put your full name on the Notice of Vehicle Impoundment. You said that judging by the badge number and signature, Cst. Desrochers filled out both tickets. You said that one would assume that she could have filled out your name properly on both forms as well as labeling Alexander Avenue correctly, instead of referring to it as a street on one form. You also said that the street where you are “supposed to live on both reports does not match so the rest of the reports legitimacy must be taken into question”.

As I understand your position, you have taken issue with:

- the officer’s omission of your middle name on the Notice of Vehicle Impoundment;
- the officer’s interchangeable use of the words ‘avenue’ and ‘street’; and
- the officer’s use of different addresses for your place of residence.

While I acknowledge your submissions with respect to the officer’s attention to detail on these points, nothing in this case turns on those details and they are not relevant to the issues I must determine. Consequently, I am not persuaded that these differences creates any prejudice against you in this case nor do they cause me to question the “legitimacy” of the officer’s evidence as you suggested it should.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the investigating officer reported that you were driving or in care or control of a motor vehicle at 03:24 hours on September 11, 2013.

In your submission, you stated that you were “in fact in control of [your] vehicle on the morning of September 11th, 2013”. You said you were accompanied by s.22

Based on the evidence before me, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “FAIL”?

In the Report, the officer indicated that the ASD registered a “FAIL” at 03:31 hours.

You did not dispute that the ASD registered a “FAIL” or the time of the result. However, you indicated that you believe there is a discrepancy between the “Narrative: Occurrence Report” and the “Narrative: Synopsis”. You said that in addition to the obvious spelling errors, both documents are said to be a narrative text of statements made by Cst. Desrochers and “there are blatant misalignments as if she was confused at how many attempts were made”.

In considering your submissions, I have read and considered both the Narrative Text Hardcopy Synopsis (the “Synopsis”) and the Narrative Text Hardcopy Occurrence Report (the “Occurrence Report”). In the Synopsis, the officer stated, “First test did not go through (No Go). Mouth piece changed, and first test with lecture at 0331 (25 degrees) indicated a FAIL”. In the Occurrence Report, the officer stated, “the first time s.22 blew in ADS (sic), no results – showed “no go”. s.22 tried again and showed “no go” again. Cst. DESROCHERS explained to s.22 he had to do constant blow, then changed the mouth piece. First test was then administered”.

While the wording of the documents is not exactly the same, I find they convey essentially the same information; that it took more than one attempt for you to provide a valid sample and that the officer provided you with instructions of how to provide a sample. Further, on the whole, I find the Synopsis to be more of a summary of the events and the Occurrence Report to be a more detailed account of the officer’s investigation. Therefore, I do not agree that the officer appears to be confused with respect to how many attempts it took for you to provide a valid sample.

Based on the evidence before me, I am satisfied that the ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Occurrence Report, the officer’s evidence is that you were informed of your right to a second analysis at 03:34 hours from memory and she provided the wording she said she used. In the Report, the officer indicated that she informed you of your right to a second analysis on a different ASD and that the lower of the result would prevail. She also checked the box indicating that you did not request a second analysis.

You indicated that after the first test was administered, the officer stated, “You have a right to test again, and if you get a lower result the lower result will prevail. Do you want to do a second test?”. You said you refused to be tested again, and told the officer you wanted to talk to a lawyer first.

You also said that the Report contains a check mark in the box indicating that you were informed of your right to a second test on a different ASD but this is completely false. You quoted the words the officer noted in the Occurrence Report and said, “if these indeed were exact words, I feel like it would be hard for most people to understand fully or correctly”. In my view, it sounds like you are questioning whether or not the officer actually used these words, yet you provided the

words you said she used when she informed you of your right to a second test, and I find them to be almost word for word the same so I find your statement on this point to inconsistent.

You said there was no mention of a second machine locally or another machine at the police station. You indicated that because the machine did not register a result on the first two attempts, you were left with the logical conclusion that the machine had some sort of defect and you did not want to be tested on that machine. You said you waived your right to a second analysis because you had not properly been advised that the second test would be done on a second ASD.

Your friend, s.22 provided a statement in which he indicated that the first two times you blew into the device, it did not register a result. He said the mouth piece was changed before you were tested a third time which yielded a result. s.22 also stated that he heard the officer inform you that you could take a second test and that the lower result would prevail. He confirmed that you refused the second test.

Section 215.42(1) of the Act sets out the duties of a peace officer with respect to a driver's right to a second test. It states that the officer must inform the driver of their right to a second test before the driver is served with the Notice. It also states that the second test must be conducted on a different ASD from the first and that the lower of the two results prevails. The Act does not require a peace officer to inform a driver that a different ASD would used for the second test.

The officer's own words in the Occurrence Report with respect to the second test do not say that she informed you that the second analysis would be on a different ASD than the first test. While she has indicated in the Report that she did inform you about the use of a different ASD, I accept your evidence that she may not have done so. If you were concerned at the time about the use of the same ASD for the second test, it seems reasonable to me that you would voice your concerns to the officer. However, there is no evidence before me that did so or that you asked any questions to clarify how the second test would be conducted.

Your own words and those of s.22 convey to me that you were informed of your right to a second test and that the lower of the two results would prevail. On that basis, I find that the officer fulfilled her statutory requirement under the Act with respect to the second analysis.

Based on the evidence before me, I am satisfied that you were advised of your right to a second breath test analysis but you declined to exercise your right.

Was the second analysis provided by the officer?

As noted, I have made a finding that you were informed of your right to a second analysis but you declined it. On that basis, I am satisfied that a second analysis was not requested and therefore not provided by the officer.

Was the second analysis performed on a different ASD?

As there is only one breath analysis, and you did not request a second test, there was no requirement for the use of a second ASD.

Was the Notice served on the basis of the lower analysis result?

As there was only one breath analysis, I am satisfied that the Notice was served on the basis of the “Fail” result.

Was the ASD reliable?

The officer provided a Certificate of an ASD Calibrator (the “Certificate”) which indicates that the device used in your case was found to be functioning correctly and to be within the recommended limits. Paragraph 14 of the officer’s sworn Report states that the ASD tests were conducted by a qualified ASD operator and that the ASD unit was functioning correctly.

As previously noted, you indicated that you were left with the logical conclusion that the machine had some sort of defect because the machine did not register a result on the first two attempts. I infer from this statement that you believe there was something wrong with machine and not the way you were blowing into the machine. However, you did not provide any persuasive evidence to support your stated belief. Consequently, as I have a Certificate before indicating that the ASD was functioning correctly and found to be within the recommended limits, I cannot conclude that the ASD used in your case was unreliable.

I am satisfied that the ASD was reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 11, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Your hearing was scheduled for October 23, 2013, and to date I confirm that I have not received any submissions on your behalf.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

There is one issue that is determinative of this hearing.

Was the ASD reliable?

After considering the evidence before me, I am not satisfied the ASD used for your breath test was reliable.

Having made this finding I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including the date of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (ASD) registered a “FAIL” as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records confirm that your lawyer, Kyla Lee, received full disclosure. I have proceeded with this review based on that confirmation.

Ms. Lee argued that there is no evidence before me that your ability to drive was affected by alcohol. She further argued that an officer must not only have a subjective belief that a driver's ability to drive is affected by alcohol, but that the belief must be objectively reasonable. In support of her position she provided me with a copy of *Wilson v. Superintendent of Motor Vehicles* and *R. v. Andree* and she submitted that your prohibition is a nullity. Ms. Lee stated that "Although this tribunal has, in the past, taken the position that it cannot revoke a prohibition despite an absence of reasonable grounds to believe a driver's ability to drive is affected by alcohol, this is not a correct interpretation of the law." Ms. Lee states that there is no difference between an IRP which is revoked on the basis of an unsworn Report to Superintendent, which is also not a ground for review in section 215.5(4).

I have read and considered the *Wilson* and *Andree* cases and I acknowledge your lawyer's submission with respect to the Court's ruling in these cases. I disagree with Ms. Lee's assertion that this tribunal has in the past incorrectly interpreted the law. Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. I note that whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. As such, I find I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 22, 2013, at 01:59 hours.

There is no evidence to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on September 22, 2013, at 01:59 hours.

Did the ASD register a "FAIL"?

In the RTS, the officer noted that there were two tests and he recorded both results as "FAIL". Further, he indicated that he showed you the results of both tests.

There is no evidence to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer checked the box to indicate that he informed you of your right to a second test. He also checked the box to indicate that he told you that the lower result would prevail.

There is no evidence to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

The officer noted that he performed a second test.

There is no evidence to the contrary. I am satisfied that you were provided with a second breath test analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that the second analysis was performed using a different ASD.

There is no evidence to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

As previously noted, the officer recorded both results as "FAIL".

There is no evidence to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The evidence provided by police in the Certificates of a Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were within the recommended limits and functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Kyla Lee
604-685-8308

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device ("ASD") registered a "FAIL" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sarah Leamon. I have proceeded with this review based on that confirmation.

In her written submission, Ms. Leamon raised the issue of a violation of your rights pursuant to sections 8 and 10(b) of the *Charter*. Ms. Leamon attached copies of *R v. Suberu*, *R. v. Collins*, *R. v. Conway*, *R v. Grant*, and *Hunter v. Southham Inc.* for my consideration. It is my position, however, that the Superintendent when conducting an IRP review does not decide questions of law and is not a court of competent jurisdiction. Therefore, the case law supplied by Ms. Leamon does not apply to this review and the Superintendent cannot grant any *Charter* remedies in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 22, 2013, at 21:01 hours, Officer Campbell (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did an ASD register a “FAIL”?

The police evidence in the Report is that at 21:05 hours and at 21:08 hours, the officer used ASD serial numbers 104882 and 104893 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 104893 at 21:08 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “fail” reading.

I have no evidence before me to the contrary and as such I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 104882 and ASD serial number 104893 were checked for calibration on August 29, 2013, and found to be functioning correctly and within the recommended limits. Both of these ASDs have a calibration expiry date of September 26, 2013, and a service expiry date of August 21, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Sarah Leamon
by fax 604 370-2505

November 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 25, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

I acknowledge receipt of Ms. Lee's submissions which include your Affidavit, two pages of ASD Resource Reading from the RCMP, and copies of *R. v. Kirton*, *R. v. Bensmiller*, *R. v. Seivewright*, *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, *Scott v. British*

Columbia (Superintendent of Motor Vehicles), and *Hathaway v. British Columbia (Superintendent of Motor Vehicles)*. Although she did not provide me with a copy of the case, Ms. Lee advised that she is also relying on *Spencer v. British Columbia (Superintendent of Motor Vehicles)*.

I have read the *Scott*, *Hathaway* and *Spencer* cases and I am mindful of what I must consider in conducting this review

With regard to the recent case *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, Ms. Lee submits that it is appropriate in your case to revoke your driving prohibition because the investigating officer has not provided evidence to establish that your ability to drive was affected by alcohol. I have read and considered the *Wilson* case and I acknowledge your lawyer's submissions with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that on October 25, 2013, at 22:39 hours, Officer Campbell (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The police evidence in the Report is that at 22:46 hours and 22:52 hours, the officer used ASD serial number 103012 and 103023 respectively to take a breath sample from you and the result of both of your ASD tests was a "fail". There is no evidence before me to the contrary.

I am satisfied that the ASD registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 103023 at 22:52 hours.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence from the Narrative Text Hardcopy (the "Narrative") is that he read you your right to have a second ASD test from the purple OSMV. As indicated above, paragraph 7 of the Report indicates that the officer did inform you of your right to a second test on a different ASD. Referring to the Narrative once again, I note that the officer indicated that you did understand the information he provided to you because you said 'go ahead give me the test'.

You said in paragraph 17 of your Affidavit that you are "absolutely certain" that you blew into the same machine for both tests. You go on to say in paragraph 23 that you do not know why the officer recorded a different serial number for the second device and that he must be mistaken in his evidence. In paragraph 24 you said that you have now learned that you had a right to a second test on a different machine and, had you known that you were allowed to blow into a different machine, you would have asked the officer to use a different machine for your second ASD test.

Although in paragraph 24 of your Affidavit you said you have "since learned" that you have a right to a second test on a different machine, I find it noteworthy that you do not dispute that the officer informed you of your right to a second test on a different ASD as he has indicated in section 7 of the Report. In paragraph 15 of your Affidavit, you said that the officer explained that you had the option of taking a second test and if you got a lower reading that result would be the one he would go with. I find it difficult to believe that if the officer explained your right to a second test and that the lower of the two test results would prevail, that his explanation would not also include that your second test would be on a different ASD. For these reasons, I am not persuaded that you just learned your right to a second test is on a different ASD.

You also said you are certain the officer used the same machine for both ASD tests; however, I find I rely on the fact that, although the ASD serial numbers are not written down in the Narrative, there are two different serial numbers for two separate ASDs written down at sections 6 and 8 of the Report. I also have two Certificates of a Qualified ASD Calibrator (the "Certificates"), each of which is for an ASD with serial numbers that match the ones written down in the Report. In addition, I find it noteworthy that there is a six minute delay between the first and second ASD tests. In my view, the six minute delay likely accounts for the time the officer took to prepare the second ASD.

After considering the evidence before me, I am satisfied that the second analysis was performed on a different ASD and I do not find your evidence to be very credible.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates that ASD serial number 103012 and ASD serial number 103023 were checked for calibration on October 22, 2013, and found to be functioning correctly and within the recommended limits.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

Your lawyer submits that the ASD test results are not reliable because of the presence of mouth alcohol and for this reason your driving prohibition should be revoked. Ms. Lee referred me to the *R. v. Kirton*, *R. v. Bensmiller* and *R. v. Seivewright* cases to assert this submission. However, I note that these are criminal cases and are therefore instructive but not determinative of administrative reviews. This review is decided on a balance of probabilities, unlike a criminal standard, which is beyond a reasonable doubt.

You said that you went to the Highwayman Pub to pick up nachos to bring home for you and your girlfriend. You arrived at the pub at approximately 9:30 p.m., and placed and paid for your order of nachos at that time. You said that you drank alcohol while you waited for your order, being one ounce of Crown Royal and ginger ale at 9:30 p.m. You said that about ten minutes before your nachos were ready, you ordered a second Crown Royal and ginger ale. Your nachos were ready at close to 10:40 p.m. Once your nachos were ready, you said you still had a small amount of Crown Royal and ginger ale left in your glass. You downed the last of the drink before immediately leaving the pub and getting into your vehicle to take the nachos home. You said you travelled for three blocks and for fewer than two minutes before the traffic stop. You deny that you were speeding. You said you told the officer that you had a few drinks in the time you were waiting for your nachos, but did not give the officer a time that you drank. You did not think it was important to provide the last time that you took a sip of alcohol.

The officer’s evidence is that he followed your vehicle doing 70 km/h in a 50 km/h zone. The officer said you were cooperative and followed police direction, and had a mild odour of liquor on your breath as you spoke. He said that in response to the question “time of your last drink” you stated that you had a few drinks about an hour ago.

In considering the evidence before me, I note that you said you downed the last of your Crown Royal and ginger ale before immediately leaving the pub. However, the officer said he could smell a mild odour of liquor on your breath which, in my view, is not consistent with recent

consumption. Also, I find it noteworthy that you told the officer you had “a few drinks”, but you told me you had two drinks. In my view, a few is more than two.

While you denied giving the officer a time, he stated in his Narrative that when he asked you the time of your last drink you told him you had a few drinks about an hour ago. I note that the officer swore in his report that he is a qualified ASD operator and I am satisfied that by asking about your consumption he had turned his mind to the possibility of mouth alcohol. I am familiar with the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506. In *Giesbrecht*, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. I do not find your claim that the officer proceeded with the ASD tests without your answer to the question about the time of your last drink to be very credible. In my view, the officer had no reason to wait for fifteen minutes prior to administering the ASD test and proceeded based on the information you provided to him that your last drink was about an hour ago. Ultimately, I do not find your evidence to be very credible and I am not persuaded that you finished your last sip of alcohol immediately before leaving the Highwayman Pub.

You said you knew you were not over the limit and were not impaired by alcohol and felt fine to drive; however, I note that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. Your BAC was tested on two different ASDs, both of which I have already found to be functioning properly.

Based on a consideration of the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 25, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Kyla Lee
by fax 604-685-8308



November 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 15, 2013 a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Kyla Lee, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

In your IRP Application for Review, you indicated three grounds for review, two of which are not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of your breath into an ASD. All grounds for review that apply to your case will be considered in this review.

Ms. Lee provided the case of *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 676, and referred to *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1311, to underline the concepts that police do not have a presumed

credibility advantage and that there is no presumed baseline of police competence and reliability. I am familiar with these cases and have kept them in mind when reviewing the facts of your case.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 1912 hours on September 15, 2013. Further, in the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer submits that she was travelling southbound on Gladwin Road when she observed a vehicle with s.22 turn right onto the same road, proceed to the far lane southbound, and enter into oncoming traffic almost causing a head on collision. A vehicle stop was initiated and you were observed by the officer sitting in the driver's seat.

In your affirmed affidavit, you indicate that on September 15, 2013, at approximately 7:00 pm, that you were driving to your house and made a right turn onto Gladwin Road. You submit that you pulled into the far lane because you wanted to make a left turn ahead; however, that you did not pull into the oncoming lane of traffic.

While I acknowledge your evidence and that of the officer's conflict with regard to your driving behaviour, the reason why you were stopped is not an issue I must consider in this review. Further, you do not refute driving when your vehicle was stopped by the officer.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

In the Occurrence Report, the officer's evidence is that you denied being impaired continuously; however, that she detected an odour of liquor from your breath, observed that you had red, bloodshot eyes, slurred speech, and were stumbling on your feet at roadside. When you were asked the time of your last drink, she indicates that you denied being impaired and stated that you were just a bad driver. However, after you were taken into custody, you became emotional, pleading to be let go, and apologizing multiple times. Further, the officer submits that you confessed that you had had two drinks and that your last drink was Canadian Club whiskey at

7:00 pm. On this point, she indicates that an almost empty bottle of the same liquor was located in your vehicle's console.

Conversely, you submit that you met with friends between 3:30 pm and 4:00 pm and had one drink. After being stopped by the officer, you were asked if you were drunk. You submit that you told the officer that you were not drunk and had only had one drink.

The *Criminal Code* gives authority to a peace officer to demand a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle with alcohol in their body. In the Occurrence Report, the officer indicates several indicia consistent with being under the influence of alcohol including an odour of liquor from your breath and slurred speech. Moreover, you admitted to consumption and as such, I am satisfied that the officer made a valid ASD demand.

I am satisfied that the peace officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Occurrence Report. The officer submits that you stated that you had no issues providing a breath sample, yet she indicates that you were given five attempts to provide a sample, all with the same results. Specifically, that you would not continue to blow when told multiple times how to do so. She also indicates that you tried to put gum from your mouth onto the mouthpiece and then lied about having gum. Further, the officer indicates that it was explained to you in great detail that a refusal carried the same penalty as a "FAIL". She submits that you stated you understood; however, that you continued not to blow into the mouthpiece and did not know why it was not working for you.

You submit that the officer asked you to step out of your vehicle and blow into a roadside breathalyzer. Accordingly, you told her that you had no problems doing this and would comply with her request. However, when she held up the machine and asked you to blow into it the following occurred:

- you tried to blow;
- the officer told you that you were not doing it properly;
- you tried again;
- the officer told you again that you were not doing it properly and told you how to blow;
- a male officer blew into the air to demonstrate how to blow into the machine;
- you tried again to blow but the machine still would not accept your breath;
- after your third attempt, the officer changed the tip on the machine and told you to do the test properly;
- the officer advised you that if you failed to do the test properly that you would be receiving more penalties;
- you tried again but the machine did not work;
- you were trying your best, the officer gave you a fifth try, and you blew the best that you could;
- the officer stopped you and told you that you had failed, and;
- after you tried the final time to blow, the officer asked you to spit out the gum you had in your mouth.

Ms. Lee submits that in section 6 of the RTS, the officer indicated that an ASD result was shown to you. Moreover, in section 7 of the RTS, the officer indicated "NO" to the three questions posed. Aforementioned, you submit that following your fifth attempt to provide a sample that the officer told you that you, "had failed." Accordingly, Ms. Lee submits that there is some evidence to indicate that you did not refuse and that a sample may have been obtained and not recorded by the officer.

While I have considered these submissions, I have no persuasive evidence before me that either a "WARN" or "FAIL" was produced. Here, in section 5 of the sworn RTS the officer indicated that you refused or failed to provide to provide a breath sample, recording the time of refusal as 1915 hours. Further, although you submit that the officer advised you that you had, "failed", I note that she did not specifically say that a "FAIL" had registered on the ASD. Therefore, based on the evidence before me, I think that it is unlikely that a sample was obtained and not recorded by the officer.

In your affidavit, you acknowledged the officer's evidence that you told her your last drink was at 7:00 pm; however, you submit that you did not say this and that the officer never asked you the time of your last drink. Further, referencing the RTS Vehicle Impoundment, Ms. Lee submits that police evidence indicates that you informed the officer that you had consumed two drinks of Canadian Club whiskey. Because the officer located an almost empty bottle of the same alcohol in your vehicle's console, Ms. Lee submits that the officer should have turned her mind to the possibility that you may have not been truthful about the time of your last drink and asked additional questions in this regard.

Accordingly, referencing paragraph D in a resource reading for operators of ASDs, Ms. Lee submits that if an officer honestly believes that a person has consumed alcohol within the last fifteen minutes, that they should delay the ASD test fifteen minutes and explain the reason for the delay. She submits that the officer's evidence indicates that you stated your last drink was at 7:00 pm, exactly fifteen minutes prior to the ASD demand being made on you at 7:15 pm. Therefore, because the officer did not wait until 7:16 pm (i.e. a clear fifteen minutes) and effectively turn her mind to the need to wait an additional one minute, Ms. Lee submits the result of the ASD unreliable. On this same issue, Ms. Lee referenced two informal studies conducted by the RCMP toxicology division. Accordingly, she indicates that in a study conducted on November 7, 2005, it took almost thirty minutes for mouth alcohol to dissipate when gum was chewed during the tests. Moreover, in a study conducted on November 8, 2005, after gum was removed from the mouth it took fifteen minutes for residual mouth alcohol to dissipate.

While you provided evidence that the officer did not ask you the time of your last drink, Ms. Lee submits that the officer should have turned her mind to the possibility that you may have not been truthful about the time of your last drink and asked further questions on this issue. However, I note that your submission and Ms. Lee's submission contradict. Further, while I acknowledge Ms. Lee's submissions regarding the possibility that mouth alcohol may have made the result of the ASD unreliable, the evidence before me indicates that a sample was not obtained. Therefore, I have not considered her submissions that the officer should have waited a clear fifteen minutes before conducting the ASD test or that the gum in your mouth may have "exaggerated" the effects of mouth alcohol as I find mouth alcohol is not a relevant issue in your situation.

Further, referencing paragraph 18 of *Ema v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 47, Ms. Lee submits that the officer's evidence with respect to you trying to put gum on the ASD mouthpiece is inconsistent. Specifically, that you would have not been able to block the mouthpiece with the gum and continue blowing, simultaneously.

While I acknowledge Ms. Lee's submission, I find that the officer's evidence does not indicate that you were exhibiting both of these behaviours at the same time.

Based on the evidence before me, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

Ms. Lee submits that in the RTS the officer indicated that the ASD demand and refusal both occurred at 1915 hours and that in the Occurrence Report the officer indicates that you were, "given five attempts all with the same results." Referencing the RCMP Memorandum on the "Proper Operation of the ASD" (the "Memo"), Ms. Lee submits that it is impossible to obtain the same result five times in a one minute sequence. Specifically, that if a person does not provide a suitable sample in one minute that the ASD will timeout and display a "VOID" reading. Additionally, during each one minute testing sequence, a person has a maximum of three attempts to provide a suitable sample. Accordingly, she submits that because the officer indicates that you were given five attempts all with the same results, that this proves the ASD was not functioning properly. On this point, you submit that you were doing your best to follow the officer's instructions and provide a sample each time, however, that you could not because the ASD was not working properly.

While I have considered Ms. Lee's submissions, the officer's evidence explicitly refers to "results", not ASD "readings" as indicated in the Memo. As such, I find that when referring to "results" the officer was indicating that despite being told multiple times how to provide a proper sample, that you gave the same result of not continuing not to blow. Specifically, that when referring to "results" the officer was referring to your actions and blowing behaviour, not an ASD reading.

Further, section 14 in the sworn RTS indicates that any ASD test referred to in the officer's report was conducted by a qualified ASD operator and that the ASD unit used was functioning correctly. Moreover, the officer provided a Certificate of a Qualified ASD Calibrator in which Kiranpreet S. Chahal certified that the ASD was found to be within the recommended limits when he checked its calibration on August 20, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly. Therefore, I find it more likely than not that the officer is trained and qualified to operate an ASD and that the ASD used by the officer was functioning properly and therefore, reliable.

Ms. Lee referenced *Modhgill v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1971, to submit that while adjudicators are not bound to follow earlier decisions, they are obligated to distinguish the facts of the case before them, so as to permit a different conclusion. Accordingly, she provided three successful review decisions dated

February 6, 2012, August 5, 2011, and October 10, 2012, respectively. However, each of these decisions reference "NOGO" readings and I have already made a finding that when referring to "results" the officer was not referring to ASD readings. Moreover, the officer did not reference any "NOGO" readings in her evidence. Therefore, I find that the facts in these cases can be distinguished from the facts before me.

Aforementioned, your evidence and that of the officer's indicates that you had gum in your mouth while attempting to provide a sample. As such, Ms. Lee submits that there was no obligation under the law for you to comply with the ASD demand because the officer showed a lack of understanding of the ASD testing process and did not follow the proper procedures to ensure the test result was reliable. However, there is no evidence before me that you advised the officer that you did not comply because you felt that she was incompetent with regard to operating the ASD or administering the test. Therefore, I am not satisfied that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. I note that as you have already served 18 days of the prohibition, you need only serve the remaining 72 days. Your prohibition commences November 7, 2013. The prohibition ends at 2359 hours January 17, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 31, 2013

s.22

AMENDED REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 14, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that you received all disclosure in this matter. I have proceeded on this review based on this confirmation.

Mr. Ford made submissions which analyze the officer’s demand, finding it unlawful and in violation of the *Charter*. Under s. 215.5(4) of the Act, the validity of the demand is not an issue on an ASD “FAIL” review. I have no jurisdiction to grant *Charter* remedies in this review.

He also posits the ASD “FAIL” results were used by the officer to form a belief that your ability to drive was affected by alcohol. Whether an officer had ‘a reasonable ground to believe your

ability to drive was affected by alcohol' is not a reason for review in s. 215.5(4); there is no statutory authority for me to revoke a prohibition on this basis.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer indicated you were driving or in care or control of a vehicle at 2230 hours on August 14, 2013. He provides in his Synopsis that a complainant, at 2220 hours, stated you exited the casino, and the vehicle "became lost in the casino parking lot, making circles. . .then proceeding to the parking garage where attempted to find an exit." The complainant observed the vehicle exit the parking lot, then enter into another parking lot, then park at the nearby White Spot restaurant. The officer located the vehicle parked at this location, and identified you as the driver of the vehicle while you were seated in the driver's seat.

In your affidavit, paragraph 3, you confirm driving your vehicle from the casino and driving to the restaurant parking lot. You also detail the officer's vehicle arriving "right behind" your vehicle in the same parking lot.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register a "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 2232 and 2242 hours.

Your affidavit does not address the evidence of the officer directly on this point. Mr. Ford's submissions similarly do not question that there were two ASD "FAIL" results as detailed in the officer's evidence. He provides: s.22 does not argue that the two ASDs employed produced fail results upon receiving samples of s.22 s breath."

I am satisfied that the ASDs registered "FAIL" results.

Were the ASDs reliable?

The officer provided Certificates of a Qualified ASD Calibrator in which R. O'Rourke certified that he is a qualified to perform this operation. These Certificates form part of the sworn Report.

He certified that on July 24, 2013, he checked the calibration of ASD serial number 077540. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as August 21, 2013, and the service expiry date as February 1, 2014.

In a separate Certificate, he certified that on August 10, 2013, he checked the calibration of ASD serial number 097934. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 7, 2013, and the service expiry date as February 1, 2014.

Your counsel, Mr. Ford, made submissions based on the reliability of the first ASD result:

- the officer's evidence is that you and friends were just coming from the concert at the casino and had a few drinks; in your affidavit, you assert this means: "that I had just finished those drinks." Mr. Ford draws attention to this dialogue as it shows that the officer should have allowed fifteen minutes to pass to ensure "complete dissipation of any residual alcohol" from your mouth.
- the officer did not follow the common allowed time of fifteen minutes in this situation, where 12 minutes (from time of driving to time of first test), added to 2 minutes (for your walk to the car, and a very short driving time) establishes a total time of "less than 14 minutes" since your last drink. On this point he relies on your recollection: "I left as soon as I finished my last beer."
- regardless of what the officer recorded as your second statement regarding consumption of liquor that evening (that you "hadn't had anything to drink tonight"), he had "clear notice of recent consumption", and Mr. Ford uses this point to reiterate his submission that ample time should have been granted by the officer to allow for residual alcohol to dissipate. With no delay, Mr. Ford submits, the officer could not have objectively relied on the result of the first analysis.

Mr. Ford introduces criminal case law to illustrate the obligations on an officer to ensure accuracy of test results. *R. v. Mastromartino* provides guidelines on an officer's belief of test accuracy, and the reasonableness of that belief; *R. v. Bensmiller* shows a subjective belief must be objectively reasonable; *R. v. Rij* shows a patron immediately leaving a bar, and recent consumption, as being a "live issue" which the officer "was obligated to resolve."

With these principles in mind, on each of these points raised by Mr. Ford, I consider the following, in the same order as above:

- I find the evidence you present on this point to be non-specific. You don't provide details of your consumption over the course of the concert. I find your wording "I just had a few drinks" to be imprecise, and it is implausible that you had *just* finished *drinks* (plural) immediately before your interaction with the officer. I find the officer's proceeding on taking a sample reasonable, and infer with reason that he ascertained your statement to be synonymous with 'I merely had a few drinks', that is to say, you had not over-consumed that evening; this is in line with his recording of your exact words "a few drinks during the concert". "Had" is a less specific point in time than "finished", and certainly contains different connotations. In addition, in your affidavit you do not provide

the exact time you left the casino, even though you place great emphasis on a strict fifteen-minute necessary waiting period.

- the officer provides that the complainant and witness, s.22 observed other driving actions: you were lost in the parking lot; you were driving circles in the parking lot, and then proceeding to a parking garage, where you “attempted to find an exit.” Also you proceeded to the parking area of Home Depot; presumably this and the parking garage of the casino are separate other areas. You do not address this evidence as it appears in the Synopsis. I look specifically to its inclusion, and with the need for accuracy on the timeline – stressed by your counsel – find it adds a significant increment to the timeline in question. In any event, I find it adds a level of detail that your evidence on this point lacks. Mr. Ford presumes that s.22 advised the police “either at the time s.22 s.22 was driving or had just finished driving.” With this presumption in mind, I find your route to White Spot was not so direct as to have taken place within one minute.
- given my finding above, I do not find that the officer had “clear notice of recent consumption”, and therefore was reasonable in administering the ASD without delay, and without doubting the result’s accuracy. I find the your non-specific statement to the officer at roadside did not lead to his misunderstanding, as you submit on review. You present no evidence that shows you attempted to clarify what you meant for the officer at roadside.

I am therefore satisfied, based on the officer’s evidence that the ASD results were reliable at the time the samples were taken, and the officer was justified in relying on those “FAIL” results.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the Synopsis, he provided detail that this occurred at 2239 hours, and that this was “read directly from police issued charter card.” He also provides that you understood the offer of a second analysis. He checked ‘YES’ in the Report to indicate that you requested a second ASD test.

I am satisfied that the officer advised you of your right to a second analysis; neither your affidavit nor the submissions dispute the evidence of the officer on this point.

Was the second analysis provided by the officer?

In regards to the provision of the second analysis, your lawyer has questioned whether your right to a second analysis was denied due to a “tainted” first ASD result. I am satisfied the officer had a reasonable belief that the first ASD result was reliable. He therefore informed you of your right, and proceeded with a second analysis, based on your request, and his belief that a first test was carried out with a reliable result.

I am satisfied the officer provided a second analysis at 2242 hours.

Was the second analysis performed on a different ASD?

The Report contains the detail that ASD serial number 097934 was used for the second test at 2242 hours; this is a separate serial number than that of 077540, the ASD used in the first test.

You state no evidence to the contrary. I am therefore satisfied that the second analysis was performed on a different ASD from that used in the first analysis.

Was the Notice served on the basis of the lower analysis result?

Both the Report and the Synopsis contain the officer's evidence that both ASD test results were "FAIL". With no evidence otherwise, I am satisfied that the Notice was served on the basis of the lowest analysis result, here being "FAIL".

Decision

As a result of my findings, I confirm your driving prohibition, and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days; however, as you have already served ~~46~~ **15 days** of your prohibition, you must served the remaining ~~74~~ **75** days which commences on November 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

Cc. Matthew J. Ford
Epp Cates Oien
Fax: 250-828-6697

October 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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 a number of grounds that are not applicable to your review due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to Paul Del Rossi, although submissions were received from William Jessop. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

Cst. Johnston ("the officer") indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0126 hours on September 15, 2013. In the three page Narrative Text Hardcopy (the "first Narrative") the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver's licence.

In your evidence you state, "On September 15, 2013 at 1:30am I was stopped by Cst. Johnston at a roadside check in Langley, British Columbia."

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report, the officer indicates that you had the odour of liquor on your breath and that you admitted to consuming alcohol. The officer indicates that he read the ASD demand at 0130 hours. In the first Narrative, the officer states that upon speaking with you he noted a very strong odour of liquor emitting from your breath, that you had watery/glassy eyes and that you were slurring your words. The officer states that when you exited the vehicle he observed you to be unsteady on your feet. The officer states that he read the ASD demand to you verbatim from a prepared card.

In your evidence you state that the officer produced an ASD and asked you to blow into it.

I am satisfied that the peace officer made a valid ASD demand.

In the first Narrative, the officer describes your interaction as follows:

- He obtained ASD #55 serial number 106326 and explained to you how to provide a proper sample of your breath into the ASD.
- He placed a new mouthpiece into the ASD and it read a temperature of 26 degrees.
- He instructed you to blow into the ASD when the word "TEST" was displayed.
- You blew very lightly into the ASD, but then stopped blowing altogether, and he observed this as there was no air exiting the ASD's exit port.
- The result of your first attempt was "Nogo."
- He was coaching and urging you to blow hard and to continue to blow before the "Nogo" display.
- He warned you that you would be charged with a refusal if you did not provide a sample.
- He urged you to give a breath sample but you again blew very lightly and then stopped, resulting in another "Nogo" reading.
- He then ejected the mouthpiece and placed a new one into the ASD.
- Two other officers were in attendance and Cst. Willems demonstrated to you how to provide a proper sample by blowing into the ASD himself. The officer observed the ASD to be working perfectly.

- After the demonstration he inserted another new mouthpiece into the ASD and you were again cautioned that you would be charged with a refusal and that it carried the same penalty as a fail.
- You provided two more “Nogo’s.”
- At 0135 hours the officer determined that you had failed to provide a suitable breath sample.
- You stated that you were not refusing, but the officer informed you that not providing suitable samples of your breath constituted a refusal.
- You were then read the refusal prohibition verbatim from “the approved” card.

In the four page Narrative Text Hardcopy (the “second Narrative”), in response to the question, “did driver fail to provide a breath sample (e.g. words and/or actions described in detail)?” the officer writes, “Yes, s.22 made no attempt to ever provide a sample of his breath. s.22 would place his lips on the mouthpiece and very softly blow into the ASD, but would then either stop or suck back on the mouthpiece.”

In your evidence you state that:

- You placed your lips around the mouthpiece of the ASD and blew as hard as you could.
- The officer told you to blow harder and you advised the officer that you were blowing as hard as you could.
- The officer removed the mouthpiece and asked you to blow again.
- You placed your lips around the mouthpiece and blew as hard as you could a second time.
- The officer advised you that you would be charged with a refusal if you did not provide a suitable sample.
- You told the office that you were doing your best to provide a sample.
- You blew into the ASD for a third time as hard as you could.
- The officer told you that by not providing suitable samples it was a refusal and that you were now being charged with a refusal.
- You told the officer that you were, “not refusing to blow.”
- At all times during your interactions with the officer you made your best efforts to blow into the ASD.
- At no time did you refuse to provide a breath sample, and at all times you complied with the directions of the officer on how to use the ASD.

Mr. Jessop states that there is no sworn evidence to indicate which ASD was used. Mr. Jessop concedes that in the Narrative the officer states that he used ASD #55 serial number 106326, but that the officer was working a roadside check that evening and he would have conducted many stops and many ASD tests that evening. Mr. Jessop states that nowhere in the officer’s sworn evidence does it state that he used that specific ASD. Mr. Jessop states that if I accept that the officer used ASD serial number 106326, there are no certificates of calibration with respect to the ASD, and therefore there is no evidence that the ASD was calibrated and in proper working order. Mr. Jessop states that without the certificates, the ASD cannot be shown to be reliable, and therefore, the “Nogo” and “Void” readings which lead to the determination that you had deemed to have refused are not reliable.

Mr. Jessop submits that in your affidavit you state that you made the best possible efforts to blow into the ASD and at no time was there an outright refusal. Mr. Jessop states that the officer concedes that you refused by virtue of the “Nogos” and “Voids” on the ASD. Mr. Jessop states that in these circumstances your evidence ought to be preferred as there is no sworn evidence before me as to what ASD was used, or that the ASD was in working order. Mr.

Jessop states that if those results are deemed unreliable, then the refusal cannot stand. Mr. Jessop states that your evidence supports the contention that you did not refuse or fail to comply with the officer's demand. You state that you blew as hard as you could and complied with the directions of the officer.

First, I respectfully disagree with Mr. Jessop that there is no sworn evidence with respect to the ASD used by the officer. The officer indicates in the Report, "The attached narrative report and other attachments consist of 7 pages and forms part of this sworn document." I am satisfied that the information contained in the both of officer's Narratives form a part of his sworn evidence.

With regard to Mr. Jessop's submission that the ASD results are not reliable, I acknowledge that the officer has not provided a Certificate of a Qualified ASD Calibrator (the "certificate") for the ASD used at roadside. However, in the officer's evidence he states, "Cst. Willems then demonstrated to s.22 on how to provide a proper breath sample, by blowing into the ASD. Cst. Johnston observed the ASD to be working perfectly." Further, the officer indicates in the Report, "any ASD tests referred to in this report were conducted by a qualified ASD operator and the ASD units were functioning correctly." The officer has provided evidence to indicate that the ASD was capable of accepting a sample of breath, and I am satisfied that the officer has provided sufficient, sworn evidence to indicate that the ASD was functioning properly at the time.

Further, the officer states that at no point did you attempt to provide a suitable sample of your breath and that you either blew very lightly, stopped blowing, or sucked back on the mouthpiece. You state that you tried your best at all times to provide a sample and that you were blowing as hard as you could. However, I find that blowing very lightly, stopping blowing, and sucking back on the device is behavior that is more consistent with someone who is purposely avoiding providing a suitable breath sample.

The uncontroverted evidence is that you did not provide a suitable sample into an ASD which I am satisfied was functioning correctly. I find that this supports the officer's version of events. Based on the evidence before me, I find the officer's version of events to be more credible.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

There is no evidence before me that you had a reasonable excuse to fail to provide a suitable sample of your breath.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving

prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: William Jessop

fax: 604 590-5626

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing, your lawyer G. Jack Harris, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 22, 2013, at 22:52 hours, Officer Ridder (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 22:56 hours and at 23:01 hours, the officer used ASD serial numbers 103016 and 103013 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 103013 at 23:01 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 103016 and ASD serial number 103013 were checked for calibration on September 2, 2013, and found to be functioning correctly and within the recommended limits. Both of these ASDs have a calibration expiry date of September 30, 2013, and a service expiry date of July 25, 2014.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

Your lawyer submits that the ASD test results are not valid due to the possibility of the existence of residual mouth alcohol. He said that the use of the word “about” in your response of “about fifteen minutes” when asked what time your last drink was should have triggered the officer to wait fifteen minutes before administering the first ASD test.

I acknowledge Mr. Harris’ argument on this point; however, I do not agree. I note that the officer was conducting impaired driving enforcement in the area when he observed you to exit the liquor store. The officer followed your vehicle, noting that you drifted towards the centre line on three occasions over an approximately 300 metre span of roadway. After the officer initiated a traffic stop and was speaking with you, he noted that you had a strong odour of liquor emanating from your breath, very watery glassy eyes, your movements were very lethargic when getting your insurance papers from the glove box and your driver’s licence from your wallet. In my view, the officer acted reasonably based on the information you gave to him that you had last consumed alcohol about fifteen minutes ago.

I rely on the fact that you provided two “fail” ASD breath tests on separate ASDs that I have already found to be functioning reliably. In addition, I am mindful that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: G. Jack Harris, Q.C.
by fax 604-859-1375

October 11, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the grounds that "I did not refuse or fail to comply with the officer's demand to provide a breath sample;" and, "My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s);" however, these grounds are not applicable to your situation due to the reason for which you were prohibited. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your submission you state that you are s.22 and you really need your licence and your vehicle. You state that you have a good driving record and have had no problems. You state that you need your licence for picking up and dropping off your child at school and activities.

While I understand and appreciate your situation, I am not authorized to consider driving history, hardship, personal circumstances, employment or transportation needs in this review. The scope of this review is limited to the grounds as defined by the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 1952 hours on September 22, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over and were identified as the driver via your BC driver’s licence.

In your submission you state that you were pulled over by the officer for a burnt out tail light.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 1955 hours and 1958 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 1957 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1958 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 103013 and your second sample of breath into ASD serial number 103016. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 103013 and 103016.

In your submission you state, "The Constable then asked me to step out of the vehicle and take the breathalyzer twice on the same ASD." You also state, "A second APD member came to scene and I was denied another breath test."

While you claim that the officer used the same ASD for both analyses, the officer has provided convincing evidence that a different ASD was used in the second analysis. The officer has recorded two separate ASD serial numbers in the Report and has provided two distinct Certificates of a Qualified ASD Calibrator, each bearing a serial number that corresponds with those recorded in the Report. I find the evidence from the officer to be more compelling.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 2, 2013, he checked the calibration of ASD serial number 103013. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 30, 2013, and the service expiry date as July 25, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 2, 2013, he checked the calibration of ASD serial number 103016. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 30, 2013, and the service expiry date as July 25, 2014.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 26, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, Sarah Leamon, confirmed that she had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Ms. Leamon submitted that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She based her argument on the case of *R. v. Schultz* (2009), saying that I should exclude the officer's evidence of the ASD results.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD “FAIL” result, is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge, section 144(1)(b) under the Act. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

Ms. Leamon also referred to the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, and the principles of administrative fairness. I am mindful of these considerations in my review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 1842 hours on September 26, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over by the officer and were identified as the driver via your BC driver’s licence.

In your submission you state, “While driving along, I noticed the flashing lights of a police vehicle in my rear view mirror. I pulled over in a timely manner.”

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 1849 hours and 1908 hours, both resulting in “FAIL” readings.

In your evidence you submit that the officer informed you that you “failed” the breath analysis on both samples.

I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 1904 hours.

In your evidence you state, "Constable Theoret told me that I could perform a second breath test, using a different machine, to test the validity of my first test."

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 1908 hours.

In your evidence you confirm that you provided a second sample of your breath.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101628 and your second sample of breath into ASD serial number 101633. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101628 and 101633.

In your evidence you state, "Constable Theoret presented me with a second machine and told me to blow into it."

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on September 22, 2013, he checked the calibration of ASD serial number 101628. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 20, 2013, and the service expiry date as July 8, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 1, 2013, he checked the calibration of ASD serial number 101633. He found the ASD to be within the

recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 29, 2013, and the service expiry date as December 31, 2013.

I have no evidence before me to the contrary. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your evidence you state that while at lunch you ate a small meal and drank two pints of draft beer. You state that you were pulled over by the officer and you and the officer chatted at the roadside for four to five minutes. You state that you remained in your vehicle smoking a cigarette at this time. You state that you were thrown off by the officer's line of questioning regarding whether you had "two beers" or "a couple of beers," and not wanting to be untruthful, and because you were nervous by the officer's line of questioning, you responded "two-ish beers." You state that the officer asked you to exit your vehicle, and immediately before doing so, you extinguished your cigarette. You state, "The time that passed between the last drag of my cigarette and the time that I blew into the first roadside breath testing machine was no more than three minutes." You state that at no point did the officer ask you to extinguish your cigarette, and you simply put it out before you exited the vehicle because you had finished smoking.

In the hearing Ms. Leamon stated that the officer notes that you were smoking, and was obviously aware of your recent cigarette. Ms. Leamon stated that the officer's evidence indicates that he formed his suspicion while talking to you for three minutes, and that there is two minutes between the time you exited your vehicle, and the time that you provided your sample. Ms. Leamon stated that as the results of the analysis were not reliable due to cigarette smoke, the prohibition should be revoked. Ms. Leamon also stated that the officer does not note any indicia of impairment.

Ms. Leamon provided two documents in support of her position. Ms. Leamon drew my attention to the first document titled, Resource Reading – Operators Approved Screening Devices, which states, "Do not allow subject to blow smoke into device; wait 3 minutes after smoking. Presence of smoke in breath sample can cause inaccurate readings and damage device." Ms. Leamon also provided an email dated September 24, 2012 between Paul Doroshenko and Michael Rosland. The email signature indicates that Michael Rosland is affiliated with the RCMP Forensic Science and Identification Services in the Toxicology Services Section. In the email, Mr. Rosland states that there was a time when the instruction was to wait three minutes, but the current instruction/recommendation is to wait five minutes after smoking before providing a breath sample into an ASD.

Ms. Leamon also provided a number of previous decisions to illustrate that prohibitions with similar fact patterns are often revoked. Ms. Leamon noted in *Modhgill v British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

In the Narrative, the officer states, "the driver had a cigarette which completely burned, and was asking to put it out." From this statement, I infer that you had a cigarette lit when interacting with the officer, and were asked to put it out. The officer states that he suspected that the cigarette may have been used as a masking agent. The officer's evidence indicates that this interaction occurred at approximately 1845 hours. The officer indicates that you provided your first sample of breath at 1849 hours.

I acknowledge your submission that no more than three minutes passed from the time of your cigarette before your first ASD analysis. I also note that there is a discrepancy in the evidence before me regarding whether the officer is required to allow for three or five minutes to pass before administering the ASD analysis. I acknowledge that the evidence before me indicates that your last cigarette was within five minutes of the analysis and the documents provided indicate that "the presence of smoke in breath sample can cause inaccurate readings and damage device." However, with regard to the evidence before me, I find the Resource Reading document to be more reliable than a casual email between "Mike" and "Paul." The evidence before me indicates that at least three minutes passed from the last drag of your cigarette, until the ASD analysis. Regardless, I note that your second sample of breath occurred at 1908 hours, 17 minutes after your first test. I do not have any evidence before me to indicate that the result of the second test was not reliable. Both of your ASD analyses resulted in "FAIL" readings, and section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

As the second sample of your breath was clearly not affected by cigarette smoke, I do not find the previous decisions provided by Ms. Leamon to be relevant.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 26, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Sarah Leamon
fax: 604 370-2505

October 30, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Ms. Leamon submitted that your ASD results cannot be admitted into evidence because, in the absence of your right to counsel, the police may only use the ASD results as an investigative tool and not as the basis for your prohibition. She based her argument on the case of *R. v. Schultz* (2009), saying that I should exclude the officer's evidence of the ASD results.

I have no authority under the Act, to consider whether or not being issued an IRP based on an ASD "FAIL" result, is a contravention of your *Charter* rights. The *Schultz* decision dealt with the use of an ASD result to prove a different charge, section 144(1)(b) under the Act. This *Schultz* decision predates the amendments to the Act which were proclaimed on June 15, 2012. These amendments permit the police to rely on ASD results to issue a driving prohibition under section 215.41 of the Act. Your prohibition was issued under this legislation.

Ms. Leamon also referred to the decision in *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, and the principles of administrative fairness. I am mindful of these considerations in my review.

In the hearing, Ms. Leamon submitted that there is no evidence that your ability to drive was affected by alcohol. Ms. Leamon provided the decision, *Wilson v Superintendent of Motor Vehicles* in support of her position. In your affidavit you deny the indicia of impairment noted by the officer. You state that you did not have slurred speech, glossy eyes, or the odour of liquor on your breath. You also state, "My ability to operate a motor vehicle was not affected by alcohol on September 7, 2013."

I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0531 hours on September 7, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you arrived at a roadblock and were identified as the driver via your BC driver's licence.

In your affidavit you confirm that you were driving when you encountered the police roadblock.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0533 hours and 0544 hours, both resulting in "FAIL" readings.

In your evidence you confirm that you provided two samples of your breath, and that the ASDs displayed the word "FAIL."

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0540 hours.

In your affidavit you confirm that you were offered the right to request a second test.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0544 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101982 and your second sample of breath into ASD serial number 101966. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101982 and 101966.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 101982. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 18, 2013, and the service expiry date as September 19, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 10, 2013, he checked the calibration of ASD serial number 101966. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 7, 2013, and the service expiry date as November 20, 2013.

In the hearing, Ms. Leamon submitted that ASD serial number 101966 expires on the same day as your prohibition. Ms. Leamon stated that the result from an expired ASD is not reliable and therefore cannot be used to uphold your prohibition.

Ms. Leamon also provided a number of previous decisions to illustrate that prohibitions with expired Certificates are often revoked. Ms. Leamon noted in *Modhgill v. British Columbia (Superintendent of Motor Vehicles)* that adjudicators are not bound to follow earlier cases but are obliged to distinguish them so as to permit a different conclusion.

I have considered Ms. Leamon's submission and the evidence from the officer. Common sense suggests that, based on the 24-hour clock, the ASD calibration expires at 2359 hours on its Calibration Expiry Date. You provided your breath samples on September 7, 2013, prior to the end of day time of 2359 hours. I am satisfied, on a balance of probabilities that when you provided this breath sample the ASDs were reliable. As I do not find that the ASD Certificate was expired, I do not find the previous decisions provided by Ms. Leamon to be relevant.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your affidavit you state that you on September 6, 2013, you drank three bottles of beer, with your last drink around 11:00pm. You state that you got up early to go to the golf course for a fundraiser you were assisting with. You state that you did not feel affected by the alcohol you had consumed the night prior. You state that you were not impaired by alcohol on September 7, 2013.

I am mindful of your submission; however, I do not have any evidence before me to cause me to question the results of the ASD analyses. The evidence before me indicates that you provided two samples of your breath on two different ASDs, both resulting in "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 7, 2013. Your review was extended on September 26, 2013. You have already served 18 days of your IRP and you have 72 days remaining. Your Prohibition ends on January 10, 2014.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Sarah Leamon
fax: 604 370-2505

October 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 15, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on all of the grounds, some of which are not applicable to your situation because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with the review based on that confirmation.

In your written submission you asked for an early release of your vehicle from the impound lot, or an early return of your driver's licence. You also indicated that you wish to avoid the ignition interlock requirement and stated that the cost of everything is overwhelming. From your submission, it appears that you also want me to consider your driving record. However, under the Act I do not have the authority to consider hardship or your driving record, nor can I alter the terms of the driving prohibition. The scope of the review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 04:42 hours on September 15, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 04:45 hours and 04:55 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second analysis on a different ASD, and that the lower result would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded the serial numbers for the ASDs used as 101959 and 101968, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator in which Jason Bayer certified that the ASDs used in your case were found to be within the recommended limits when he checked their calibration. He also certified that to the best of his knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

In the Narrative, the officer indicated that while dealing with you at the roadblock you leaned away from the window and would not make eye contact. The officer reported that you told him you had been working but had trouble answering when asked when you had finished work. He stated that there was an odour of liquor on your breath, your eyes were glossy, and you twice denied that you had been drinking. In the Report, the officer indicated that you admitted to consuming alcohol earlier after you blew a "FAIL".

You stated that you got off work around 2:00 a.m. and picked up a friend to give her a ride home to Surrey. You said she was not feeling well so you decided to go to her friend's house, where you consumed two beers. You indicated that before leaving and encountering the officer you "mouth washed" because you did not want to smell like cigarettes and beer. You said you felt like you were okay to drive and shortly after you began driving you hit a roadblock. You stated that you panicked and told the officer you had not consumed alcohol, possibly because you did not want him to think you were impaired and driving irresponsibly.

I infer by your submission that you rinsed your mouth with mouthwash prior to driving and that you feel the mouthwash may have affected the ASD test results. Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. However, you did not provide me with the time you allegedly used the mouthwash; therefore, I do not know if it was within 15 minutes of when the ASD tests were administered. Further, you did not provide any evidence with respect to the type of mouthwash you claim to have used, such as whether or not it contained any alcohol.

I have also considered the officer's evidence with respect to your indicia and your behavior at the scene. I note that twice you were dishonest with the officer with respect to your alcohol consumption and I find that this causes me to question the credibility of your submissions for this review.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%, and I have already made a finding that the ASDs were reliable.

Based on the evidence before me, I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 15, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.



October 16, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 25, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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

Your representative, Cathryn Waker, confirmed in the oral review that you received all of the disclosure documents. In your application you checked two grounds which involve a “WARN” reading on an ASD; these grounds are not available for the reason which the officer served the Notice on you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?

- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 1907 hours on September 25, 2013. He provides in his occurrence report that he observed your vehicle speeding and driving aggressively. You were directly observed driving, and identified by your BC Driver's license.

In paragraph 14 of your affidavit, you confirm that you were driving; this corroborates the evidence of the officer on this point.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register a "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 1910 and 1921 hours.

Neither your affidavit nor the submissions of Ms. Waker place the ASD results into question.

With no contrary information to indicate other results on the ASDs, I am satisfied that the ASDs registered "FAIL" results.

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. In the occurrence report, he provided detail that this occurred at 1917 hours, and that this was "read from IRP booklet." He also provides that you understood the offer of a second analysis. He checked 'YES' to indicate that you requested a second ASD test.

Neither your affidavit nor Ms. Waker's submissions address this point of evidence. I am satisfied that the officer advised you of your right to a second analysis, and that you requested a second test which the officer provided to you. There is no evidence contradicting that of the officer on this point.

Was the second analysis performed on a different ASD?

The Report contains the detail that ASD serial number 101959 was used for the second test at 1921 hours; this is a separate serial number than that of 101970, for the ASD used in the first test.

You state no evidence to the contrary. I am therefore satisfied that the second analysis was performed on a different ASD from that used in the first analysis.

Was the Notice served on the basis of the lower analysis result?

Both the Report and the occurrence report contain the officer's evidence that both ASD test results were "FAIL". With no evidence otherwise, I am satisfied that the Notice was served on the basis of the lowest analysis result, here being "FAIL".

Was the ASD reliable?

The officer provided Certificates of a Qualified ASD Calibrator in which an ASD Calibrator certified that he is a qualified to perform this operation. These Certificates form part of the sworn Report.

The qualified ASD Calibrator J. Bayer certified that on September 19, 2013, he checked the calibration of ASD serial number 101970. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 17, 2013, and the service expiry date as November 22, 2013.

He also certified that on September 19, 2013, he checked the calibration of ASD serial number 101959. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 17, 2013, and the service expiry date as October 25, 2013.

I am therefore satisfied, based on the officer's evidence, that the ASDs were reliable at the time the samples were taken.

Was your BAC less than 80 mg% even though the ASDs registered "FAIL"?

In your affidavit you provide that you had four drinks on the day in question. You were drinking brandy over a timespan of three-and-one-half hours, from approximately 2pm to 530pm. You rely on a formula calculation of BAC to arrive at a BAC maximum of 87.2 mg%. Based on this, by the time of driving your BAC "would have been 64.7 mg% at the time of driving."

The source of your calculation is the 'Superintendent's Report on Calculating Blood Alcohol Concentration' (the "BAC Report"), from July 1999. In comparing that document to your affidavit, I note the following:

The BAC Report notes: "peak BAC usually occurs 20 to 40 minutes after completion of last drink"; this is not addressed in your submission, nor does it appear to be factored in to your calculations.

The BAC Report notes: "Absorption rates are affected by the type and amount of food in the stomach, the alcohol concentration of the beverage, the rate of alcohol consumption, and the presence of certain drugs, diseases or emotional states." Your account contains no information on what and how much you had eaten that day.

The value used as an elimination rate is used in combination with an accepted BAC reading from a mg% breath or blood sample; that elimination rate does not exist in isolation and is used more accurately in situations where a BAC reading from a device is obtained. In this IRP, two ASDs showed "FAIL" results; there is no BAC expressed in a mg% value. I note also that this document begins: "The following shows how the Office of the Superintendent of Motor Vehicles calculates blood alcohol concentration . . . at the time of driving in a review of a person's administrative driving prohibition." The administrative driving prohibition stems from different legislation, involving a mg%, so this BAC Report is limited in its application. Calculating an elimination rate starts with an accurately-measured BAC; your pattern of consumption as described is not as strictly accurate.

In addition, your affidavit does not contain detail on how you assured exact 1 oz. or 2 oz. measurements of brandy drinks over the evening; I also question the exact 45-minute consumption of each of your four drinks, and find it unlikely you were watching the timelines and measurements so accurately.

You make no submission on your initial denial of consumption to the officer, nor your omission of telling him accurately what you had consumed that evening. This is in stark contrast to your recollections in your affidavit concerning amount, quantity and timespan. I find this diminishes your credibility overall.

In your affidavit, you also do not acknowledge the "FAIL" results on two ASDs, if only to express shock, or to deny that those results occurred when you provided samples. Also, you swear to the accuracy of BAC calculations you provide, yet do not speculate or point to other results on the ASDs which would more accurately reflect your sworn-to drinking pattern. That is to say, you do not address why the ASDs should have more accurately provided "WARN", or other, results in your case.

There is no compelling evidence before me that leads me to question the ASD results. I accept as fact that the ASDs both registered "FAIL" results; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 25, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc. Cathryn Waker, Mickelson & Whysall Law Corporation
fax: 604-637-1617

October 28, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 6, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You checked the boxes next to all of the grounds on the application form. However, the grounds associated with a “WARN” result on an ASD and with a refusal or failure to comply with a demand are not applicable to your situation. Similarly, you did not receive a 7-day or 30-day prohibition. I will consider all grounds available to you in this review.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Philip Cote. To date, I have not received any submissions from Mr. Cote. However, I have a written submission from you. As such, I have proceeded with this review on the evidence before me.

In your written submission you submit that the serial number recorded in the Certificate for the second test has 6 digits and in the officer's report the serial number for the same device is recorded as a 5 digit number.

Here, it seems reasonable not to record the first numerical digit when the 1st digit is more likely than not a zero.

Further, you submitted that section 215.42 (1)(a) of the Act states that "(A) the person has the right to forthwith and be provided with a second analysis." You submit that there was a 21 minute delay between the two tests.

There is no demand read for the second test; therefore; there is no requirement for the second test to be made "forthwith."

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0415 hours on October 6, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that you provided a "FAIL" result at 0420 hours and 0441 hours respectively.

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

The officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer's evidence is that you provided a second result.

There is no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

The officer's evidence is that he used two separate ASDs to obtain samples of your breath.

There is no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both results as "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the "FAIL" result.

Were the ASDs reliable?

The evidence provided by police in the Certificates of Qualified ASD Calibrator regarding the ASDs used in your case indicates that the devices were in good working order and that the results are reliable. Based on the evidence before me, I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 6, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Philip Cote
Fax: 778-395-6226

October 31, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 13, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the beginning of the hearing your lawyer, David H. Silverman, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer's demand to provide a breath sample”, however this ground is not applicable to your situation because on the Notice the officer indicated you were being prohibited from driving because an ASD test

resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

Mr. Silverman submits that on the Notice the investigating officer indicated that you were being prohibited from driving because a sample of your breath on an ASD registered "FAIL" and your ability to drive was affected by alcohol; however, that the officer provides no evidence that alcohol had affected your ability to drive. Here, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Referencing the heading "ASD Demand" on page 2 of 4 in the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), Mr. Silverman submits that the officer indicates he made the demand from memory; however, that what is anticipated is a demand that references the *Canadian Charter of Rights and Freedoms* (the "Charter"). Specifically, that the officer provides evidence of the exact words spoken, yet his demand does not reference the Charter as is anticipated by the question, "Was demand read from Charter card or made from memory?" Here, section 215.5(4)(b) of the Act requires me to revoke a 90-day driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the ASD demand is not a stated ground in section 215.5(4)(b). Therefore, it is not an issue I am by statute permitted to consider in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 0524 hours on October 13, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 0528 hours and 0541 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that a second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 61106 and 040235, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "FAIL". Accordingly, the lower analysis result was a "FAIL". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Referencing the headings pertaining to the first and second ASD tests/results on pages 2 and 3 of the Occurrence Report, Mr. Silverman submits that the officer does not reference the respective devices used to conduct your tests. As such, he submits that this calls into question whether the ASDs were properly calibrated and operational.

The officer disclosed two Certificates of a Qualified ASD Calibrator (the "Certificates") that bear serial numbers 061106 and 040235, respectively. In section 6 of the RTS, "FIRST ASD TEST", the serial number recorded by the officer is 61106. Accordingly, the serial number indicated on the Certificate and the serial number recorded by the officer in the RTS are not identical, as the

leading zero indicated on the Certificate was not recorded by the officer in the RTS. However, I feel it is reasonable to infer that the officer recorded "61106" in the RTS because the leading number was a zero. Therefore, I am satisfied that the Certificate provided for ASD serial number 061106 corresponds to ASD serial number 61106 recorded by the officer in section 6 of the RTS. Moreover, the Certificates include the ASDs calibration expiry date of 2013-11-02. Your prohibition was served on October 13, 2013, therefore, I am satisfied that the calibration expiry date indicated on the Certificates is valid.

Further, as a qualified ASD Calibrator, Jason Bayer, signed the Certificates indicating that to the best of his knowledge both ASDs were found to be within their recommended limits and functioning correctly when he checked their calibration on October 5, 2013. This is indicated further in section 14 of the RTS where by signing the RTS and having a Commissioner solemnly affirm the contents of his report, the officer indicated that any ASD units referred to in the report were functioning correctly. Moreover, under section 215.47(e) of the Act an officer is required to submit information related to the calibration of the ASDs used in an IRP investigation. By providing the Certificates as part of his evidence, I am satisfied that the officer fulfilled the requirement to provide information on the calibration of the devices used in your investigation.

Based on the evidence before me, I am satisfied that the ASDs used for your tests were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 13, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the Act) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a "WARN" as a result of your blood alcohol concentration ("BAC") being not less than 50 milligrams of alcohol in 100 millilitres of blood ("50 mg%");
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device ("ASD");
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office indicate you received full disclosure.

You applied on one ground. For your benefit, I have considered all the grounds available to you.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "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

I find there is one issue that is determinative of my review.

Was the ASD reliable?

Having considered the Certificate of a Qualified ASD Calibrator, I find that the ASD used was unreliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

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 immediate release of your vehicle. Upon receipt of your proof of payment, the Superintendent of Motor Vehicles will pay towing and storage costs up to and including the day the vehicle was eligible for release. Original receipts and invoices with proof of payment must be attached. You must also enclose a copy of this letter to ensure the correct charges are refunded to you. You may send your receipts and invoices to the address on page one of this letter. You are responsible for any storage costs beyond that date. You should know that if the vehicle is not reclaimed, the impound lot may apply to the Superintendent of Motor Vehicles to dispose of the vehicle.

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 5, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your October 10, 2013, letter you pointed out that the reason the officer said he pulled you over is because your headlights were not on. You said it was bright in the gas station. I wish to point out that the reason the officer pulled you over is not a stated ground in section 215.5(4) of

the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

You said you asked the officer what your blood alcohol level was after your first ASD test and he said a fail is .5 to .8. You later said you could not get a valid blood alcohol read. The officer would have been unable to tell you a numerical reading of your BAC because the ASDs are calibrated to display either a “fail” or a “warn” readout.

You told me that you are a new small business owner of s.22 and you need your vehicle to carry supplies and staff. You have clients all over the lower mainland who depend on you. Further, you said that not having a vehicle for work will cause immense economic hardship for you. You asked for either a full exoneration of your driving prohibition or a reduction in the length of the prohibition. While I understand that it must be difficult to be without your car and driver’s licence; under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues as outlined below. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the Report) is that on October 5, 2013, at 21:03 hours, Officer Tetreault (the “officer”) established you as driving or having care or control of a vehicle. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 21:06 hours and at 21:18 hours, the officer used ASD serial numbers 40223 and 40242 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 40242 at 21:18 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the "Certificates") indicates the following:

- ASD serial number 040223 was checked for calibration on October 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 2, 2013, and a service expiry date of January 31, 2014.
- ASD serial number 040242 was checked for calibration on October 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 2, 2013, and a service expiry date of December 14, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You told me that you had only one glass of wine an hour prior to being stopped by police. You said that you find it hard to believe that the officer smelled alcohol because you had freshened up in the restroom in the gas station and used mouth wash. You said you were completely shocked when the officer advised you that you "failed". Regarding the indicia of impairment observed by the officer, you said your speech was not slurred and you explained your eyes were red and glossy because you had been crying.

The officer's evidence is that he was conducting targeted traffic enforcement duties on Hastings Street when he pulled your vehicle over. He observed that you had red glossy eyes, slurred speech, odour of alcohol, could not recite the full alphabet or follow simple directions for counting to ten and back. You then admitted to drinking wine a half hour before.

I realize you said you had freshened up in the restroom at the gas station and used mouthwash; however, there is no evidence before me that the mouthwash you used contained alcohol or that it would adversely affect the results of the ASD test.

I note that when asked by the officer, you first said you had not been drinking and then admitted to drinking wine half an hour ago. However, you told me you had wine over an hour prior to being stopped. Because of these varying answers, I do not find your stated drinking pattern to be very credible. As well, you said you had "no effects of impaired driving." I cannot comment on how impaired you feel you were at the time and rely on the fact that you blew two "fail" ASD tests on two separate ASDs – both of which I have already found to be functioning properly on the night in question. Finally I note that section 215.41(2) of the Act states that a "fail" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 5, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

December 6, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 7, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer – Cst. Potter – indicated that you were driving or in care or control of a vehicle at 0454 hours on September 7, 2013. Cst. Potter provides in his narrative report that he observed your vehicle stopping at a roadblock. He then identified you driving the vehicle; he verified your identify with your driver's license.

I accept as fact that Cst. Potter's observation of you driving your vehicle occurred on September 7, 2013; neither you nor your counsel submit evidence to contradict that of Cst. Potter. I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register "FAIL"?

In the Report, the officer indicated that you provided ASD "FAIL" results at 0457 and 0508 hours.

Ms. Helps does not present other evidence to contradict that of Cst. Potter. I am satisfied that the ASDs registered "FAIL" results.

Were the ASDs reliable?

The officer provided two 'Certificates of a Qualified ASD Calibrator' (the "Certificates") in which an ASD Calibrator certified that he is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, the qualified ASD Calibrator Jason Bayer certified that on August 10, 2013, he checked the calibration of ASD serial number 101966. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 7, 2013 and the service expiry date as November 20, 2013.

For the second ASD, the qualified ASD Calibrator David Chu certified that on August 21, 2013, he checked the calibration of ASD serial number 101982. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 18, 2013 and the service expiry date as September 19, 2013.

Ms. Helps draws attention to the Certificate for the second ASD, and submits "There is no way of determining whether the ASD was properly calibrated at the time of the test, as it expired on the same day it was administered to s.22 " The calibration expiry date for ASD 101966 is September 7, 2013; this is the same day that your second sample of breath registered a "FAIL" on that ASD. Common sense suggests that, based on the 24-hour clock, ASD Calibration expires at 2359 hours on the calibration expiry date. You provided a breath sample on the ASD for which Ms. Helps calls its calibration into question before 2359 hours. I am satisfied on a balance of probabilities that when you provided breath samples, that ASD was reliable.

I am therefore satisfied of the reliability of the ASDs at the time they were used by Cst. Potter to obtain samples of your breath for analysis.

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked 'YES' to indicate that you requested a second test. In regards to his informing you of the right, he included the detail in the occurrence report that this occurred at 0505 hours, and that he read this from "IRP booklet."

There are no submissions on this point by you, or on your behalf. I am satisfied that the officer advised you of your right to a second analysis, and that you understood that offer.

Was the second analysis provided by the officer, and was it performed on a different ASD?

The officer's evidence here is that you requested a second analysis, and it was carried out with an ASD result of 'FAIL' at 0508 hours. He carried out this analysis on ASD serial number 101982, a separate unique identifying serial number from that of the ASD used in the first analysis.

With no evidence to the contrary, I am satisfied that Cst. Potter provided the second analysis on your request, and performed that second analysis on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer recorded both test results as "FAIL". Ms. Helps submits that you were not afforded the benefit of the lower analysis result, with the first test result appearing on an expired ASD. Given that I have found the ASD within calibration I conclude that the Notice was served on the basis of a "FAIL" result.

You present no evidence to the contrary. With this being the lowest result obtained I am satisfied that the Notice was served on the basis of a "FAIL" result.

Decision

As a result of my findings, I confirm your driving prohibition, and monetary penalty, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days; however, as you have already served 19 days of your prohibition, you must serve the remaining 71 days which commences on November 8, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Lisa Helps
Helps Law Corporation
fax: 604-669-5558

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 1, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your submission you state that the IRP was in violation of your constitutional rights. You state that under the *Charter of Rights and Freedoms* you are, "presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." You state that this did not occur. You also state that you were not given the opportunity to contact a lawyer, which is against your right to legal counsel.

I acknowledge your submission that you feel the process of the issuance of your IRP was a violation of your constitutional rights, and that you feel because you were not given an opportunity to contact a lawyer that was a breach of your right to legal counsel. However, this review is an administrative process and not a criminal proceeding. The scope of this review is limited to the grounds defined in the Act. Moreover, the Act does not grant me jurisdiction, nor do I have the authority, to resolve constitutional issues or to apply remedies under the *Canadian Charter of Rights and Freedoms*.

In your submission you state that you are a responsible driver, as indicated by your driving history. Under the Act, I am not permitted to consider your driving record as a factor in my decision. The scope of this review is limited to the grounds as defined by the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2354 hours on September 1, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you arrived at the roadblock and were identified as the driver via your BC driver’s licence.

In your submission you state, “I approached a roadblock after leaving Red Robin downtown.”

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 2355 hours and 0009 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary.

I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0006 hours.

I have no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0009 hours.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 040229 and your second sample of breath into ASD serial number 040214. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 040229 and 040214.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 26, 2013, he checked the calibration of ASD serial number 040229. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 23, 2013 and the service expiry date as October 25, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 10, 2013, he checked the calibration of ASD serial number 040214. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 7, 2013, and the service expiry date as September 19, 2013.

I have no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though an ASD registered a "FAIL"?

In your submission you state that you were with four friends sharing appetizers and you had a drink. You state that you recently got out of a long-term relationship and you were emotional as you were going home, but you were not impaired. You state that the watery eyes noted by the officer were further established when you were put in the back seat of the police car. You state that the officer notes that you had slow, deliberate movements, which is not true. You state that the sandals you were wearing have a slight heel and you were driving barefoot because you know it is unsafe to drive in heels. You state that it does take longer to put these sandals on, as opposed to flip-flops.

I acknowledge that you have provided reasoning for the observations made by the officer; however, I do not find that I have any compelling evidence before me which causes me to question the results of the ASD analyses. You were provided with two opportunities to provide samples of your breath on two different ASDs, both registering "FAIL" readings. Section 215.41(2) of the Act indicates that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 1, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 9, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 19, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device ("ASD") registered a "FAIL" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sarah Leamon. I have proceeded with this review based on that confirmation.

In her written submission, Ms. Leamon raised the issue of a violation of your rights pursuant to sections 8 and 10(b) of the *Charter*. Ms. Leamon attached copies of *R v. Suberu*, *R. v. Collins*, *R. v. Conway*, *R v. Grant*, *R v. Collins*, and *Hunter v. Southham Inc.* for my consideration. It is my position, however, that the Superintendent when conducting an IRP review does not decide questions of law and is not a court of competent jurisdiction. Therefore, the *Conway* decision does not apply to this review and the Superintendent cannot grant any *Charter* remedies in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the *Motor Vehicle Act*?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on September 19, 2013, at 00:22 hours, Officer Bayer (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41 of the *Act*.

Did an ASD register a “FAIL”?

The police evidence in the Report is that at 00:28 hours and at 00:43 hours, the officer used ASD serial numbers 040220 and 101966 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 101966 at 00:43 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “FAIL” reading.

I have no evidence before me to the contrary, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 040220 was checked for calibration on September 7, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 5, 2013, and a service expiry date of May 8, 2014.
- ASD serial number 101966 was checked for calibration on September 7, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 5, 2013, and a service expiry date of November 20, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 19, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Sarah Leamon
by fax 604 370-2505

October 17, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your written submission (the “Submission”), you indicate that after you made a left hand turn onto Skeena Street that you heard someone say, “Bingo...we got one...”, and immediately saw an officer race out onto the street and wave you down. You submit that the remarks made you feel ashamed and insulted and like you were some, “sort of fish caught on bait.” I acknowledge

your submissions, however, any concerns you have with respect to officer conduct must be made in writing directly to the appropriate police authority as it is not an issue before me in this review.

You indicate that you have never committed this type of offence and are a responsible driver. I do not have authority to consider a person's driving record in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "WARN", and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 0106 hours on September 29, 2013. There is no evidence before me to the contrary.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did the ASD register a "WARN"?

In the RTS, the officer indicated that the ASDs registered a "WARN" at 0107 hours and 0111 hours, respectively.

In your Submission, you indicate that after each test the officer told you that you had blown a "WARN"; however, that you were never shown or told what the exact readings were.

Section 215.41(2) of the Act indicates that:

"warn" means an indication on an approved screening device that the concentration of alcohol in a person's blood is not less than 50 milligrams of alcohol in 100 millilitres of blood.

Accordingly, no numerical data is required as per the legislation. Further, there no requirement in the Act that an officer show a person the result of the ASD test. Aforementioned, the officer has provided evidence that both test results were a "WARN". There is no compelling evidence before me that the ASDs did not register a "WARN".

I am satisfied that the ASDs registered a "WARN".

Were you advised of your right to a second analysis?

In the RTS, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the RTS, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the officer recorded the serial numbers of the ASDs used for your tests as 040233 and 040227, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the officer indicated that both ASD test results were a "WARN". Accordingly, the lower analysis result was a "WARN". There is no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The officer submitted Certificates of a Qualified ASD Calibrator in which Jason Bayer certified that the ASDs were found to be within the recommended limits when he checked their calibration on September 24, 2013, and September 19, 2013, respectively. He also certified that to the best of his knowledge the ASDs were functioning correctly.

In your Submission, you question the integrity of the ASD devices and indicate that the result of the ASD is not reliable.

I have no evidence before me as to what specifically about the ASDs' integrity you are questioning. While I acknowledge your submission that you honestly do not believe that you were over 0.05, I have no compelling evidence before me that indicates the ASDs were not functioning correctly. On this point, section 14 in the sworn RTS indicates that any ASD tests referred to in the officer's report were conducted by a qualified ASD operator and that the ASD units used were functioning correctly.

Based on the evidence before me, I am satisfied that the ASDs used for your tests were reliable.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

In the Narrative Text Hardcopy, the officer indicates that a strong odour of liquor was detected emitting from your breath. Further, when asked the time of your last drink, the officer submits that you indicated that you had had two beers about two hours ago.

In your Submission, you write that on Saturday, September 28, 2013, you attended a wedding in Richmond. The reception began at 5:00 pm and ended at 11:30 pm. Over the course of the evening, you consumed two beers, with the last beer consumed at approximately 10:00 pm. You socialized, ate various desserts, and left the reception at 11:45 pm. After taking a shortcut, your vehicle was stopped by police. The officer asked you where you were coming from and if you had had anything to drink. You advised him that you had had a couple of beers about two hours ago.

While you may have believed that you were not impaired prior to driving, you did not provide any compelling evidence that would cause me to doubt the "WARN" readings on the ASDs that I have found to be reliable. Section 215.41 (2) of the Act states that "WARN" means an indication on an ASD that the concentration of alcohol in a person's blood is not less than 50 mg %. As such, I am satisfied that your BAC was not less than 50 mg%.

Based on the evidence before me, I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your 3-day driving prohibition and monetary penalty. Your prohibition took effect on September 29, 2013.

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Two of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

At the beginning of the hearing your lawyer, Kenneth J. Learn, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

I acknowledge receipt of Mr. Learn's submissions which include an opinion from Carolyn M. Kirkwood, as well as copies of the *Wilson v. British Columbia (Superintendent of Motor Vehicles)* decision and the *Longstaff v. British Columbia (Superintendent of Motor Vehicles)* decisions.

With regard to the *Wilson* decision, Mr. Learn submits that it is appropriate in your case to revoke your driving prohibition because the investigating officer has not provided evidence to establish that your ability to drive was affected by alcohol. I have read and considered the *Wilson* case and I acknowledge your lawyer's submissions with respect to the Court's ruling. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

With regard to the *Longstaff* decision, I note that the circumstances of that case are different from the ones in your case because Mr. Longstaff had been served with an Administrative Driving Prohibition. Having said that, however, I am mindful of my obligations in considering this review.

Mr. Learn submits that the timeline is short from when Officer Jewell (the "officer") established you as a driver to when he made the ASD demand. I acknowledge Mr. Learn's point on this matter; however, I do not find the timeline to be problematic.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that on October 27, 2013, at 04:49 hours, the officer established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 04:50 hours and 05:03 hours, the officer used ASD serial number 040235 and 40220 respectively to take a breath sample from you and the result of both of your ASD tests was a “fail”. There is no evidence before me to the contrary.

I am satisfied that the ASD registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 40220 at 05:03 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both results were “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) that I have before me indicates the following:

- ASD serial number 040235 was checked for calibration on October 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 2, 2013, and a service expiry date of February 27, 2014.
- ASD serial number 040220 was checked for calibration on October 5, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of November 2, 2013, and a service expiry date of May 8, 2014.

Mr. Learn pointed out that at section 8 of the Report, the officer has written down serial number 40220 for the ASD used for your second test. Mr. Learn asserts that I cannot be satisfied that this ASD was reliable at the relevant time because the Certificate that was provided with the officer’s evidence indicates that the Certificate is for ASD serial number 040220. He provided me with the opinion of Carolyn M. Kirkwood, Alcohol Analyst, dated November 8, 2013. Ms.

Kirkwood states on page 2 of her report that the Certificate for ASD serial number 040220 does not match the instrument used to test you as described by the officer in his Report.

I do not disagree that the serial number noted in section 8 of the Report does not match the Certificate; however, I note that on page 1 of the Narrative Text Hardcopy (the "Narrative"), the officer indicates that ASD serial number 040220 was used for your second test at 05:03 hours. In my view, the officer has provided the appropriate Certificate for ASD serial number 040220 that was used for your second ASD test, as indicated in the Narrative. I believe that the omission of the first "0" on the serial number on the Report is a clerical error.

Based on a consideration of the evidence before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

Your lawyer submits that the officer should have investigated further regarding the time of your last drink when your answer to that question was "drank earlier, a couple of beers". Your lawyer referred me to page 3 of Ms. Kirkwood's opinion wherein she states that "a recent drink of an alcoholic beverage or regurgitation could introduce "mouth alcohol" to the breath thus causing a falsely high reading." Ms. Kirkwood goes on to say that a burp, belch or regurgitation that brings alcohol from the stomach into the mouth may cause a falsely high breath test..."

I acknowledge Mr. Learn's submissions regarding the above-noted points. However, there is no evidence before me that you consumed alcohol within fifteen minutes of your ASD test. There is also no evidence before me that you did burp, belch or regurgitate such that the ASD test results were rendered unreliable. Ultimately, I am not persuaded that your ASD tests registered a "fail" for any other reason than your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Kenneth Learn
by fax 604-294-9522

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 10, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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 oral hearing your lawyer, Jeffrey Green 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

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent for the IRP (the “Report”), the officer indicated that you were driving or in care or control at 0125 hours on August 10, 2013. The officer submitted an Occurrence Report (the “Narrative”), which forms part of the Report and is also sworn. In it, he noted that he

observed you switch from the curb lane from the centre lane without signaling. The officer reported that he conducted a traffic stop and you were identified as the driver.

In paragraph 10 of your Statutory Declaration (the “declaration”) you described your driving behavior that evening.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report, the officer indicated that he formed his suspicion at 0126 hours and read the ASD demand at 0126 hours. He checked the box to indicate that you had an odour of liquor on your breath, and he indicated that your response to being asked the time of your last drink was “I haven’t been drinking.” The officer stated that you were the sole occupant in the vehicle.

In the Narrative, the officer stated that he formed the suspicion that you were impaired by alcohol given the following:

- The strong odour of liquor on your breath.

Here, the threshold for making an ASD demand is whether or not there was alcohol in the body. The officer stated that he read the ASD demand from memory and you understood.

Based on the evidence before me, I am satisfied that the officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Report. The officer checked the box to indicate that you refused. He recorded the time of the refusal as 0130 hours. In the Narrative, the officer stated that after he read the demand you provided a two second puff into the device to display “nogo” on the screen. The officer stated that he showed you the result. The officer stated that he could clearly hear when you stopped blowing into the device. You were then advised you would be given two more opportunities to provide a valid sample. The officer stated that he advised you of the consequences. On your second attempt the officer stated that again you provided a two second puff and suddenly stopped causing the device to display “nogo” on the screen. Again you were shown the result.

The officer stated that he removed the mouthpiece from the device and inserted a fresh mouth piece into the device. The officer stated that he showed and explained the proper technique to you; and he indicated that you understood. When he inserted a new mouth piece for you; once again you blew for two seconds and the device registered a “nogo.” Again, the officer stated that he clearly could see that you stopped blowing into the device. You were shown the result.

The officer stated you were arrested for failing to provide a breath sample contrary to a criminal code demand. You were provided your charter rights and right to counsel which you declined. The officer stated that he asked you if you had a medical condition that would prevent you from providing a sample; you replied, s.22 He stated that he asked you if you have a diminished lung capacity, you replied, s.22 The officer stated that he asked you if there is anything that you believe would cause you to not provide a proper sample and you replied “yeah, your machine is fucked up.”

In your declaration you stated that you consumed two rum and cokes between 4:30 and 5:30p.m. You went to bed at 10:30p.m. At 11:20p.m you received a telephone call and you were advised that there was problem with your dog and you would have to attend Stelly's Cross Road in Saanich. You were stopped by an officer and he asked if you had been drinking, you replied, no because you did not believe that the drinks you had in the afternoon fell into the ambit of "have you been drinking".

You stated that the officer's emergency lights were flashing intermittently and distracting you. You stated that you made three attempts to provide a sample and each time you blew hard to the point where you ran out of air. You questioned the officer's reference to two seconds as the time that elapsed between commencing to blow, removing the instrument, and telling you that you had not correctly provided a sample. You stated that the officer had "ride alongs" with him and the woman in particular seemed to be entertained by the proceedings. You stated that this too made you distracted and uncomfortable. You stated that at no time did you deliberately try to fail to provide a breath sample. There is no evidence before me of a valid breath sample. Consequently, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You stated that you when the officer asked you if you had a medical condition you did not reply s.22 rather, you said I don't think so. You stated that from time to time over the last few years you have experienced a shortness of breath. You assumed this was normal function for your age. You stated that you have never mentioned this to your doctor. Since reading the police Report you have made enquiries with your doctor regarding the medications you take and whether they could have attributed to your inability to provide a sufficiently long breath. According to your doctor s.22 s.22 can cause shortness of breath. You stated that if you had realized this at the time you would have advised the officer of this. Last, you stated that you were not happy with the uncomfortable environment arranged by the officer and your frustration led to you using intemperate language with the officer.

Mr. Green submitted that the burden of proof is on the Crown to satisfy the adjudicator, on a balance of probabilities, that the applicant deliberately failed to provide a suitable sample. Mr. Green provided case law in *Lang v. B.C.* [2000] B.C.J. No. 2452, and *Aitken v. B.C.* [2013] B.C.J. No. 403 to support his position.

Mr. Green submitted that the officer failed to mention the very odd environment in which you were required to provide a sample. Mr. Green provided a copy of the RCMP training manual on ASDs. Mr. Green submitted that it is obvious from the manual pertaining to the operation of the Alco-Sensor IV DWF states that it is important to provide a stable and comfortable environment. Mr. Green cited the manual again when he referred to the way the officer described your blow as a "puff". Mr. Green submitted that a "puff" is not consistent with a "nogo." Mr. Green submitted that the manual refers to a manual button which can be used if the subject has impaired breathing or an uncooperative subject to get a reading.

Mr. Green submitted that you tried your very best under the circumstances. You have provided a letter from s.22 dated August 25, 2013. s.22 stated that you are of good character and would never seek to avoid responsibility for your actions.

In considering the character reference I am satisfied that the sequence of events and character reference provided by s.22 are not directly related to the Notice served by the investigating officer. I have reviewed the letter and am satisfied it is not useful in deciding this case.

You have provided a letter from your physician, s.22 dated August 27, 2013 s.22 submitted that the medications that you are taking can cause shortness of breath.

I acknowledge that your medications can cause you to experience shortness of breath; however, there is no evidence before me that this was the case at the time. While you do not agree with the officer's time frame of you blowing for two seconds I still find that you stopped blowing before the device registered a result.

I also acknowledge that the manual suggests that the subject should be in a stable position preferably facing the AS IV operator; however, I am not convinced that this statement extends to the officer having ride alongs that are there strictly to observe the process. While I acknowledge that you were frustrated with the spectators I do not find this a reasonable excuse not to comply with the demand. With regard to the officer's description of a "puff" and a "nogo" result I find the majority of the evidence suggests that you did blow for a very short time. Moreover, your attempts are not consistent with some who is making earnest attempts or experiencing shortness of breath; rather, the evidence before me suggests that you were intentionally not complying with the demand.

With regard to Mr. Green's statement regarding the lack of indicia noted by the officer I am curious why the officer detected a "strong" odour of liquor on your breath eight hours after your stated drinking pattern.

Ultimately, I find there is no compelling evidence before me that would lead me to conclude that you were incapable of providing a sample of your breath into the ASD. Nor am I persuaded that anything was preventing you from providing a sample of your breath into the ASD.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse for failing or refusing to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on August 10, 2013. I note that as you have already served 18 days of the prohibition, you need only serve the remaining 72 days, which commences on October 26, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator s.15

cc: Jeffery Green
Green & Helme
By fax 250 361 9181

October 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 24, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your written submission you asked for an early release of your vehicle from the impound lot. You stated that the vehicle is the sole family vehicle. You suggested that if you could have an early release of the vehicle your wife could then take your children to school, and get groceries. I acknowledge and appreciate your situation. However, under the Act I do not have the authority to consider hardship, nor can I alter the terms of the driving prohibition. The scope of the review is limited to the grounds as defined in the Act.

In a written statement, your friend, s.22 provided his address, driver's licence number, and telephone number to assist you with this matter. However, as this is a written review I cannot contact him; therefore, this information is not helpful.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 2040 hours on September 24, 2013.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 2045 hours and 2100 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report and the Narrative Text Hardcopy (the "Narrative"), the officer indicated that you were advised of your right to a second analysis and that you request one. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that you were advised of your right to a second analysis and you requested one.

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

In the Report, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied on a balance of probabilities that it is more likely than not that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report and the Narrative, the officer indicated that both ASD tests registered a "FAIL" result. I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicate that the devices were found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 24, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 10, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kevin Walker. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?

- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0509 hours on September 10, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that at 0454 hours Merritt RCMP received a complaint of a vehicle collision near the 1500 block of Voght St. The complainant thought that the male near the vehicle looked impaired. The officer arrived and you were identified as the driver via your driver's licence. The officer states that you advised him that you had pulled off the road to use your cell phone.

In your submission you state that you were driving from work and picked up a pedestrian who was a worker from s.22 You state that he invited you for drinks at his campground, and you agreed to go with him and his friends. You state that you pulled over and parked along the side of the road at approximately 2:10am. You attempted to phone directory assistance to contact your friends to tell them where you were and to invite them along but your minutes ran out. You gave your key to another worker who was leaving, and were planning to get your key back another day. You state that you socialized and drank for approximately two hours and at approximately 4:00am you noticed that the vehicle had sunk slightly into the bank. Two campers indicated that they would walk to Merritt and get a tow truck. You waited near your vehicle for the tow truck. You state that your intention was to wait for the tow truck, and once it had moved the vehicle you intended to walk to a nearby motel. You state that at approximately 5:00am the police officers arrived. You acknowledged that you drove there and that you had alcohol between arriving and 5:00am, but that you had not been driving after having any alcohol and you did not have your keys. You state that the officers did not believe you. You state that at no time were you driving or in care and control of your vehicle after you had consumed alcohol.

Mr. Walker states that you were not in the vehicle when the officers attended the scene. Mr. Walker submits that there is an admission of consumption earlier in the night, and the officer's disclosure indicates an admission that you were the driver earlier in the evening prior to drinking. Mr. Walker states that the disclosure provides no information that you were driving or in care and control after drinking.

I have considered the evidence before me, and I find a number of elements cause me to question the reliability of your version of events. I note that you have not commented on the officer's evidence in the Narrative that, "at 0454 hrs Merritt RCMP received a complaint of a vehicle collision near the 1500 block of Voght St." Or in the Report to Superintendent Vehicle Impoundment, in response to "Details of incident" where the officer states, "Accident – complainant reported soc s.22 appeared intox." I do not find it likely that if your vehicle had merely sunk into the bank where you parked it, that it would be called in as a collision and described as an accident by the officer. Furthermore, it does not make sense to me that you would tell the officer that you had, "pulled off the road to use [your] cell phone," if you had actually pulled off the road with the intention of parking and walking into the campsite.

I acknowledge your submission that you attempted to inform the officer that you had not been driving after consuming alcohol and that you did not have the keys, but that the officer did not believe you. However, I find it odd that the officer did not make any mention of this conversation in his evidence. The officer states, "Members arrived and s.22 advised that he was the driver." I note that you do not refute advising the officer that you were the driver.

I also find it odd that if you had no intention of driving and did not possess your keys, why you would feel the need to call a tow truck in order to recover your vehicle. Your statement that your vehicle had "sunk slightly into the bank" does not imply that your vehicle was in any sort of peril that required it to be immediately rectified by a tow truck. If you had no intention to drive, I do not understand the immediacy of your requirement for a tow truck. I also do not understand how you intended to have your vehicle towed if you were not in possession of your keys. You state that you intended to walk to a nearby hotel, if this is true, I do not understand why you would not park there first, before walking into the campsite, especially as the initial invitation specifically mentioned "drinks at their campground." You were clearly aware that your plans involved consuming alcohol.

Due to the inconsistencies noted above, I do not find your evidence to be compelling. I find the officer's evidence more convincing in that the officer received a complaint that a vehicle had been involved in a collision, and when he arrived, you were standing beside the vehicle and identified yourself as the driver. Additionally, as I do not find your evidence persuasive, I also do not find your claim of drinking after driving to be credible. The officer's more convincing evidence is that he responded to a report of a collision at 0454 hours and when he arrived on scene at 0509 hours you indicated that your last drink was "1.5 hours ago."

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 0511 hours and 0517 hours, both resulting in "FAIL" readings.

I have no evidence before me to the contrary.

I am satisfied that an ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 0517 hours.

I have no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 0517 hours.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101261 and your second sample of breath into ASD serial number 061469. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101261 and 061469.

I have no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a "FAIL" reading. The lowest analysis result was "FAIL".

I have no evidence before me to the contrary.

I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 101261. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 18, 2013, and the service expiry date as October 2, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 061469. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 18, 2013, and the service expiry date as June 21, 2014.

I have no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 10, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc: Kevin Walker
fax: 250 374-4485

November 7, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 20, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on four grounds, two of which are not applicable to your situation because of the reason for which you were prohibited. However, I have considered all the grounds available to you in this review in case you omitted some when completing the application.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with the review based on that confirmation.

You stated that the officer asked you if you were drinking and you said that you had a couple of beers four hours ago. The officer noted in his Narrative that you admitted to “several beers throughout the day” and that your last drink was “15 minutes ago”. You stated that you feel like he trapped you. From your submission, I infer that you are questioning the officer’s reasonable suspicion to issue you the ASD demand, which relates to the validity of the demand.

Section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. The validity of the demand is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to consider in this review.

In your written submission you explained that you require your licence for pleasure, as well as for your job because you are s.22 You also stated that you have been a good driver since 1987, and you indicated that you have no previous alcohol related driving prohibitions on your record. I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, transportation needs, or employment in this review. Nor do I have the authority to consider your driving record. The scope of the review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Narrative, the officer stated “Driver neglected to signal 3 of the 4 turns observed in a two block drive from the liquor store to his residence.” The officer indicated that he stopped you at your residence and identified you as the driver through your BC driver’s licence. In the Report to Superintendent (the “Report”), the officer indicated that you were driving or in care or control of a motor vehicle at 20:31 hours on October 20, 2013.

In your submission you stated that you believe the officer was watching you or he would not have known you were at the beer store. You stated that he stopped you in your driveway when you were outside of your van and you do not think it was right of him to do that, or to impound your van when it was in your driveway.

The issue before me here is whether or not you were a driver as defined in section 215.41(1) of the Act. It is not the reason for the stop or whether the officer had been watching you. The officer's evidence, which it appears you agree with, is that he followed you while you were driving home from the liquor store. Further, with respect to your vehicle being impounded when it was in your driveway, the Act requires officers to impound the vehicle when issuing a 90-day driving prohibition.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 20:40 hours and 20:46 hours, respectively. There is no evidence before me to the contrary.

I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report, the officer indicated that he advised you of your right to a second analysis. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that he provided you with a second analysis. There is no evidence before me to the contrary.

I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded the serial numbers for the ASDs used as 072478 and 101224, respectively. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report, the officer recorded the result of both ASD tests as a "FAIL".

As both test results were the same, I am satisfied that the Notice was served on the basis of the "FAIL" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator in which the calibrators certified that the ASDs used in your case were found to be within the recommended limits when their calibration was checked. The calibrators also certified that to the best of their knowledge the ASDs were functioning correctly. There is no evidence before me to the contrary.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 20, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

November 4, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- an approved screening device (“ASD”) registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”)
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds you applied on do not apply to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a “warn”. For your benefit, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you. I acknowledge that I have received your one page handwritten letter dated October 28, 2013.

You said you mentioned to the officer that the first time you were charged, you were told that you could park your car across the road. You said you did not think the officer had the right to remove your car from your lot. However, if an officer serves a person with a notice of a 30-day

or 90-day driving prohibition under section 215.41(3.1) of the Act, the officer must cause the motor vehicle that the person was driving at the time to be taken to an impoundment lot.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “WARN”, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Narrative Text Hardcopy (the “Narrative”) is that on October 12, 2013, an anonymous complaint was received that the owner of a s.22 often consumes too much alcohol and then drives home from the Pipers on the Ridge Pub. The officer said you were pulled over outside your residence, basically in your driveway. However, the officer also indicated that he did observe your driving behavior for a short period. The evidence in the Report to Superintendent (the “Report”) is that at 17:58 hours, Officer Ryan (the “officer”) established you as driving or having care or control of a motor vehicle.

You said that you were at the back of your car when the officers approached you, and not in your vehicle. I acknowledge your submission; however, the issue before me is whether or not you were a driver. You have not disputed that you drove from the Pipers on the Ridge Pub to your residence.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did an ASD register a “WARN”?

The police evidence in the Report is that at 18:13 hours and at 18:15 hours, the officer used ASD serial number 054806 and ASD serial number 101339 respectively to take breath samples from you. The result of both of your ASD tests was a “warn”. There is no evidence to the contrary before me.

I am satisfied that the ASD did register a “warn”.

Were you advised of your right to a second analysis?

The officer’s evidence in the Narrative Text Hardcopy (the “Narrative”) is that he read from the IRP booklet your right to request a second ASD test at 18:13 hours. The officer said that you understood the offer of a second test. There is no evidence to the contrary before me.

I am satisfied that you were advised of your right to a second breath analysis.

Was the second analysis provided by the officer?

As noted above, the officer conducted a second ASD test at 18:15 hours on ASD serial number 101339.

I am satisfied that the officer did provide the second analysis.

Was the second analysis performed on a different ASD?

The officer's evidence indicates that your first ASD test was conducted on ASD serial number 054806 with a temperature of 16 degrees Celcius, and your second ASD was conducted on ASD serial number 101339 with a temperature of 16 degrees Celcius. As part of his evidence, the officer has submitted two Certificates of a Qualified ASD Calibrator (the "Certificates") that set out serial numbers that match the serial numbers of the two devices used for your ASD tests.

You said that you were not informed that the officer used two ASD units and if the officer did inform you of such, you did not hear him. You said you mentioned that you were hard of hearing and did not have your hearing aids in.

I acknowledge that you may not have heard the officer tell you that you had the right to provide a second breath sample into a different ASD; however, I find that the evidence in the Report and the Certificates provided by the officer supports the fact that two different ASDs were used to conduct your breath tests. In addition, there is no requirement for an officer to inform an individual that the test would be on a different device.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Both of your ASD tests resulted in a "warn" and as such I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates indicates the following:

- ASD serial number 054806 and ASD serial number 101339 were checked for calibration on September 19, 2013, and found to be functioning correctly and within the recommended limits. Both ASDs have a calibration expiry date of October 17, 2013, and a service expiry date of September 4, 2014.

There is no evidence to the contrary before me. I am satisfied that both ASDs were reliable

Was your BAC less than 50 mg% even though the ASD registered a “WARN”?

You said that you were at the Pipers on the Ridge Pub s.22 When you went up to see the owner s.22 he was busy and you had to wait there for about two hours. You said that you are at the Pub all the time s.22

The officer’s evidence is that when he engaged with you, he could smell liquor on your breath and you admitted to consuming beer. You said you had just finished drinking immediately before being pulled over.

I understand that you were at the Pub s.22 however, I have evidence before me that you blew a “warn” on two different ASDs, both of which I have already found to be functioning properly at the time.

I am satisfied that your BAC was not less than 50 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on October 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

November 15, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your written submission, you stated that you are a s.22 and you require your licence for work. You said that without it, you will lose your job. To show your responsibility and seriousness, you would be willing to accept any drinking and driving remedy such as ignition interlock or RDP, as long as you are able to drive for work. You also requested

that your driving prohibition be reduced or revoked but not extended because it greatly hinders your work and life.

I understand and appreciate that receiving a 90-day driving prohibition can have serious consequences in a person's life. However, under the Act I cannot consider personal circumstances, hardship, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

In addition, I am authorized to vary a prohibition under section 215.5(2) of the Act if I determine that you were prohibited from driving for a longer time period than the Act requires. Section 215.5(2) does not apply in your situation, so I am not authorized to offer leniency by varying the length of the prohibition, and I cannot impose alternative penalties or conditions.

You also indicated that you believe the officer made many false statements in his Report, but you did not indicate what those statements were, or how they were relevant to the issues I must consider.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "Report"), the investigating officer reported that you were driving or in care or control of a motor vehicle at 01:35 hours on October 27, 2013.

In your written statement, you confirmed you were stopped by police at a roadblock on October 27, 2013. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the Report, the officer indicated that the ASDs registered a "FAIL" at 01:38 hours and 01:50 hours, respectively.

There is no evidence before me to the contrary. I am satisfied that the ASDs registered a "FAIL".

Were you advised of your right to a second analysis?

In the Report and the Narrative Text Hardcopy (the "Narrative"), the officer indicated that you were advised of your right to a second analysis and that you requested one. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer and was the second analysis performed on a different ASD?

In the Report, the Narrative and in the Certificates of a Qualified ASD Calibrator (the "Certificates"), the officer provided evidence that two distinct ASDs were used for two analyses. There is no evidence before me to the contrary.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

In the Report and the Narrative, the officer indicated that both ASD tests registered a "FAIL" result. I am satisfied that the Notice was served on the lowest available result which was "FAIL".

Was the ASD reliable?

The evidence provided by police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

You indicated that this is your second 90 day prohibition. You said that after your first prohibition, you attended the Responsible Driver Program ("RDP") and Interlock Program. You have not mixed drinking with driving since your first prohibition and on the night of the Halloween celebration, you used the knowledge and information you learned from RDP. You said you had one beer as a welcoming beverage and waited two hours before you consumed a shot of what you were told was vodka. You waited three hours before driving home, and based on what you have learned, you said you should not have been impaired. You said you felt "100% & responsible".

You also indicated that you are aware that there is a zero tolerance for BAC for novice drivers and you felt you were being responsible. You do not understand why you registered a "FAIL" result.

I acknowledge your last statement with regard to a zero tolerance for BAC so I am a bit puzzled as to why you would consume any alcohol before driving. Regardless, any previous alcohol related infractions are not part of what I must consider in making my findings.

The officer's evidence that there was a strong odour of liquor coming from you is consistent with the ASD results, but not consistent with what you told the officer or me about your consumption that night. For two reasons, I am not persuaded that you provided an accurate account of your alcohol consumption. First, the officer's undisputed evidence that you told the officer your last drink was at 9:30 pm, and that your breath samples were taken at 01:38 and 01:50 hours respectively. In the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait 15 minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. With this in mind and given that the breath samples were taken more than four hours after your last drink, I am satisfied the results were not due to mouth alcohol from recent consumption. Second, I have already made a finding that the ASDs used in your case were reliable.

While you may have felt suitable to drive, you did not provide any persuasive evidence that would cause me to doubt the "FAIL" readings on ASDs that I found to be reliable.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 27, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

OCTOBER 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 27, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- 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

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to you. I proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “RTS”), Constable Valenta indicated that you were witnessed driving or in care or control of the vehicle on September 26, 2013, at 1906 hours.

In the Narrative Text Hardcopy (the “Narrative”), Constable Valenta said she took statements from Fire Captain, Colin Clarke, who said they responded to a call of an unresponsive male in a parked car on Okanagan Landing Road. Captain Clarke told Constable Valenta that an off-duty fireman had found the man, later identified as you, in the vehicle.

Constable Valenta said she obtained a statement from an off-duty fireman who told her he found a lone, unresponsive, male occupant of a vehicle sitting in the driver’s seat, slouched over. The male was later identified as you. The fireman told Constable Valenta that he noticed the vehicle was running and in “drive”, so he placed it in “park”, turned off the engine and took the keys out of the ignition. The fireman then called 911. He said you woke up and he noticed you were “obviously intoxicated”.

Constable Valenta responded to the fire department’s request to attend the scene and conducted the IRP investigation.

In your written statement, you argued that you were not in care or control of the vehicle. You said on the evening of September 26, 2013, you slipped and had some drinks in a pub. You said you met some tourists outside and they agreed to accompany you to your house for a hot tub and some drinks. You said they had not consumed any alcohol at this point, so one of them drove you in your vehicle and the other two followed.

You said when you were almost home, you said something that offended the man who was driving, so he pulled over and they left you there. You said you decided to sleep it off, but the fire department arrived to see if you were alright. You said you told them you were not fit to drive and they called the police.

You argued that the fireman’s evidence in the Narrative is that the vehicle was in “drive”, but since it is an automatic vehicle and you were on flat ground, this would mean the vehicle would have been moving. You said you had to climb into the driver’s seat from the passenger’s seat when the tourists left you there, so it is not possible that the vehicle could have been in “drive”. I find there is not enough evidence before me to draw any conclusions regarding the fireman’s evidence in this regard.

The officer’s evidence is that you told her some friends dropped you off, because they had somewhere to go and you were just sleeping in the vehicle. Your explanation about what

happened raises questions in my mind about the reliability of your evidence. I find it implausible that a group of sober tourists would agree to go to the house of a stranger who was under the influence of alcohol for a hot tub and drinks. The story that the officer said you told also lacks credibility.

On page three of the Narrative, Constable Valenta indicated that you said the police arrived after you had pulled over. The officer considered this an admission that you had been driving.

When I consider all of the evidence before me, I am not persuaded to find your version of events to be reliable. I am satisfied on a balance of probabilities that you were a driver within the meaning of section 215.41(1) of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand, and whether you failed or refused to comply with that demand.

The undisputed evidence before me is that the witnesses, including Constable Valenta, noticed an odour of liquor on your breath and that you admitted to having consumed alcohol. The officer stated in the RTS that she read you an ASD demand on September 26, 2013, at 1926 hours. Based on all the evidence before me, I am satisfied that the peace officer made a valid demand.

I now turn to whether you failed or refused to comply with the demand. Constable Valenta's detailed evidence in the Narrative indicates that you questioned the need to provide a breath sample, because you said you had not been driving. There is no evidence before me that you made any attempt to provide a breath sample into an ASD. I am satisfied that you failed or refused to comply with the demand, as set out in the officer's evidence.

Did you have a reasonable excuse?

You argued that you did not need to comply with the demand, because you were not driving. I have found that you were a driver, as defined by the Act, so this is not a reasonable excuse.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 27, 2013. You may resume driving once you have obtained a driver's licence from the Insurance

Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On August 31, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Some of the grounds on which you applied for this review are not applicable to your situation because the officer alleged that you were being prohibited from driving because an ASD test resulted in a "fail". Therefore, I will consider all of the grounds available to you in this review that are appropriate to those circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on August 31, 2013, at 01:14 hours Officer Connell (the “officer”) established you as a driver or having care or control of a motor vehicle.

As there is no evidence before me to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 01:17 hours the officer used ASD serial number 100854 to take a breath sample from you and the result of your ASD test was a “fail”.

As there is no evidence before me to the contrary, I am satisfied that the ASD registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence in the Report is that after your first ASD test, the officer explained to you your right to a second analysis and also explained that the lower of the two test results would prevail. This is corroborated in the Narrative Text Hardcopy (the “Narrative”) which states that at 01:18 hours the officer read you your right to request a second ASD test.

As there is no evidence before me to the contrary, I am satisfied that you were advised of your right to a second test.

Was the second analysis provided by the officer?

The police evidence in the Report is that at 01:19 hours, the officer conducted a second ASD test. The result of this ASD test was a “fail”.

As there is no evidence before me to the contrary, I am satisfied that the officer did conduct the second ASD test.

Was the second analysis performed on a different ASD?

The Report indicates that ASD serial number 100854 was used to conduct your first ASD test and ASD serial number 042899 was used for your second ASD test. Part of the police evidence includes Certificates of a Qualified ASD Calibrator (the "Certificates") for ASDs bearing the serial numbers 100854 and 042899.

You said that after the first ASD test, the officer took the mouthpiece off the first ASD and threw it onto the hood of his car. You said this made it unclear whether he had changed the first device with a second, or if just the mouthpiece was replaced. You said it is your understanding that a second officer is supposed to bring and administer the second test and this did not happen.

Although you saw the officer remove the mouthpiece from the first ASD, you did not say he did not use a second ASD. You said you were unclear as to whether he had changed to a different ASD. In other words, the officer could have picked up the second ASD without you observing him do so. The evidence before me would seem to indicate that two different ASDs were used to conduct your breath tests. In addition, I am not aware of any requirement for a second officer to bring and administer the second test.

I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Because both ASD test results were "fail", I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The police evidence provided in the Certificates indicates the following:

- ASD serial number 100854 was checked for calibration on August 7, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 4, 2013, and a service expiry date of June 6, 2014.
- ASD serial number 042899 was checked for calibration on August 7, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 4, 2013, and a service expiry date of June 5, 2014.

As there is no evidence before me to the contrary, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a "fail"?

You submit that you were stopped by police at approximately 01:15 a.m. on August 31, 2013. You told the officer that yes, you had consumed alcohol. In your written statement you indicate that you had three drinks throughout the course of the night starting from 4:00 p.m. and finishing up the last bit of the third drink only minutes before dropping a few friends off downtown. You were asked to step out of the car and took the first ASD test at 01:17 a.m. and the second ASD

test at 01:19 a.m. You say you do not understand how you could have failed both tests. You then researched ASD machines as well as the IRP process. You maintain that it was hard for the ASD to differentiate between the alcohol still preserved in your mouth at the time, as opposed to the alcohol level that was actually in your blood. Your research led you to understand that the second test should not have been given for at least another fifteen minutes after the first test. Since the two tests were taken within minutes of each other you feel confident that if the test was taken not sooner than fifteen minutes after the first test, the ASD would not have registered a fail.

I turn now to the evidence supplied by the officer. He indicates in both the Report and the Narrative that when he asked what time your last drink was, you told him it was at 4:00 p.m. In my opinion, the officer proceeded with the IRP investigation relying on the information you provided him about the time of your last drink.

In addition, I find the information you gave me vague. You said you finished the last bit of your third drink only minutes before dropping a few friends off downtown. You then said you finished the last bit of your drink at a residence in the bowl area just minutes before being pulled over and tested. You do not tell me what time you actually left the residence, how long it took you to drive downtown to drop off your friends, or how long after dropping off your friends you were stopped by police.

You said you did some research about alcohol in the mouth as opposed to alcohol in your blood. However, you have not provided me with any reliable evidence or expert documentation to substantiate your submission.

I am mindful that Section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%. As I have already made a finding that the ASDs were reliable, I do not find your stated drinking pattern to be credible.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 31, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 10, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 22, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review you indicate a number of grounds that are not applicable to your situation because on the Notice the officer alleged you were being prohibited from driving because that you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of your breath into an ASD. All grounds for review that apply to your case will be considered in this review.

I have before me a sworn letter of support from s.22 I infer that s.22 is
a male. As such, I have referred to s.22 for the purposes of this review.

In your sworn submission, you indicate that you were being targeted for the type of vehicle you were driving. You submit that the investigating officer showed no respect towards you, was rude, and belligerent. Further, s.22 submits that the officer removed his flashlight multiple times and laughed when you were attempting to read the paperwork you were served.

s.22 also writes that you called the RCMP in an attempt to have someone else assess the situation, however, that you were told no one could help you until Monday morning. Any concerns you have with respect to the officer's behaviour towards you must be made in writing directly to the appropriate police authority as they are not issues before me in this review.

I acknowledge the sworn letter of support from s.22. However, I find the only evidence he has provided is corroboration that you were stopped by a police officer, an impaired driving investigation commenced, and your vehicle was impounded as a result.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the investigating officer, Cst. Turner, indicated that you were driving or in care or control of a motor vehicle at 0054 hours on September 22, 2013.

You submit that Cst. Turner recorded the wrong driver's licence number in the Notice and the RTS, which indicates an inability to follow protocol and do his job properly. I acknowledge that the driver's licence number indicated in these documents is incorrect by one digit. However, I find that this is a clerical error. As such, it does not lead me to conclude that Cst. Turner did not follow proper protocol or that he did not do his job properly. Further, you acknowledged that you were driving at the time the vehicle was stopped by Cst. Turner.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

In the RTS and Narrative Text Hardcopy (the "Narrative"), Cst. Turner's evidence is that he noted an odour of liquor on your breath. Further, in the Narrative, when asked the time of your last drink, Cst. Turner writes that you stated you had a beer, "a couple hours ago."

In your submission, you write that upon approaching the driver's side door of the vehicle, Cst. Turner stated that the vehicle smelled like alcohol. In response, you advised him that you had just picked up your friends because they were, "hammered." You were asked to step out of the vehicle and you complied. When asked if you had had anything to drink you submit that your exact words were, "I had a sip out of a cup that my team had won at about 6:30-7:00ish." On this point, you submit that Cst. Turner provided a false statement regarding your response to the time of your last drink. Accordingly, you indicate that he assumed you had been drinking due to the odour in the vehicle and at no time advised you that he detected an odour of liquor on your breath. You also indicate that it took three minutes from the time you were pulled over to the time of the first breath test.

You write that you were picking up your friends because they were allegedly, "hammered". I note that when recalling your response to Cst. Turner regarding the time of your last drink, s.22 provides your response in quotations. By doing so, I infer that s.22 is imparting that those were your exact words, as he remembers. I question if s.22 was "hammered", as you claim, how he would have the ability to clearly recall words spoken by you. Moreover, I note that s.22 provides the identical response to yours which leads me to conclude that he was either told what to say by you or he was not "hammered". I also note that s.22 provides evidence of a conversation he had with Cst. Turner. Again, I question if s.22 were "hammered" how he would have the ability to have a coherent conversation with Cst. Turner about an incident that did not directly affect him. In my view, this evidence damages your credibility regarding your drinking pattern that evening. As such, I accept Cst. Turner's evidence regarding the time of your last drink. Your response is indicated in quotations in both the RTS and Narrative, which leads me to conclude that these were your exact words.

Additionally, a peace officer is not obligated to advise a person that they detect an odour of liquor on their breath when conducting an impaired driving investigation. While I acknowledge that it took three minutes from the time you were stopped to the time that you attempted to blow into the ASD, in this review I must make a finding as to whether Cst. Turner made a valid ASD demand. In the RTS, Cst. Turner indicated the time of reasonable suspicion as 0055 hours and the time he read the ASD demand as 0056 hours, therefore, I find there was no delay.

I am satisfied that the peace officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Narrative. Cst. Turner submits that you were instructed on how to blow into the ASD and that you pretended to blow, resulting in a "NOGO" reading. Cst. Turner advised that you needed to provide a breath sample and it was explained to you that failing to provide a sample carried the sample penalty as a "FAIL". You were provided with two additional opportunities and blew a "NOGO" on both attempts.

You submit that after blowing into the device, Cst. Turner told you that you were not doing it properly and that you would have to do it again. You attempted to provide a sample two more times, each time you were told to take a deep breath and blow. Despite doing everything that was asked of you, you submit Cst. Turner could not come up with a sufficient enough reading.

Accordingly, you assert that at no point did you refuse to cooperate with his demands; however, I note that there is no evidence before me that you provided a suitable breath sample.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

You submit that after three unreadable attempts, you repeatedly demanded that Cst. Turner do better by either offering a different sobriety test or letting you attempt to blow on a different ASD. Accordingly, you write that Cst. Turner not only failed to inform you of your right to blow into another device but also provide you with that right. Related to this, you submit that Cst. Turner neglected to complete the Narrative sections addressing the first and second ASD tests, as well as the right to request a second ASD test.

Section 215.41(3.1)(a) of the Act allows a peace officer to obtain a sample of breath for analysis by means of an ASD at roadside. There is no provision in the Act that requires a peace officer to conduct alternate or additional sobriety tests. Further, section 215.42 (1)(a) of the Act indicates that if an analysis of the breath of a person by means of an approved screening device registers a warn or a fail that:

(a) the person has a right to forthwith request and be provided with a second analysis.

The evidence before me indicates that a "WARN" or "FAIL" result did not register. Accordingly, I am satisfied that Cst. Turner did not have to inform you of your right to request a second test and did not fill out the appropriate sections in the RTS and the Narrative, as a result.

You also submit that you advised Cst. Turner that you are a smoker and that this was not noted. While I acknowledge your submission, you have not provided any evidence as to how being a smoker may have effected your ability to provide a suitable sample into an ASD.

Further, you submit that the ASD was clearly not reading accurately because you followed Cst. Turner's instructions and that your prohibition should be revoked. Cst. Turner submitted a Certificate of a Qualified ASD Calibrator in which Brian Wesley Davis certified that the ASD was found to be within the recommended limits when he checked its calibration on September 4, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly. I have no compelling evidence before me that the ASD used was not functioning correctly.

I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 22, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 22, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On October 2, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

In your IRP Application for Review you indicate a number of grounds that are not applicable to your situation because on the Notice the officer alleged you were being prohibited from driving because you failed or refused, without a reasonable excuse, to comply with a demand to provide a sample of your breath into an ASD. All grounds for review that apply to your case will be considered in this review.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2157 hours on October 2, 2013. Further, in the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer submits that he observed a s.22 list heavily to the shoulder of the southbound lane on Upland Street and that the vehicle nearly climbed the sidewalk.

In your written submission, you indicate that on October 2, 2013, you were pulled over by the RCMP for swerving your car to the side of the road. You submit that the reason for this was because a book had fallen off your lap and you went to grab for it causing your car to accidentally swerve to the right of the road. After being stopped, you submit that the officer inquired about your driving behaviour and that you explained what had happened but he did not believe you.

The reason why your vehicle was stopped is not an issue I must consider in this review. Further, you do not refute driving when your vehicle was pulled over by the officer.

I am satisfied that you were a driver within the meaning of section 215.41 of the Act.

Did you fail or refuse to comply with an ASD demand?

There are two matters for me to determine in this issue. I must determine whether the peace officer made a valid demand and whether you failed or refused to comply with that demand.

In the Occurrence Report, the officer submits that you would not look at him and spoke with very slow, deliberate speech. He submits that you attempted to conceal your breath from him, however, that he detected a very strong odour of liquor. Further, when you were asked to exit the vehicle he observed that your steps were very slow and minimal. When you were asked the time of your last drink, the officer indicates that you denied consuming liquor.

Conversely, you indicate that when the officer asked you if you had had anything to drink you said, "no", but he did not believe you. Moreover, you submit that you can assure me that you were not drinking and driving that night.

While I acknowledge the evidence that you denied consuming liquor, you do not refute the officer's evidence that he detected a very strong odour of liquor or that you were trying to conceal your breath. I also have no persuasive evidence before me that you had not consumed alcohol prior to driving. On this point, the *Criminal Code* gives authority to an officer to demand

a sample of breath if they have reasonable grounds to believe that a person has operated a motor vehicle with alcohol in their body.

Based on the evidence before me, I am satisfied that the peace officer made a valid ASD demand.

In determining whether you failed or refused to comply with the demand, I turn again to the Occurrence Report. The officer submits that you failed to put air through the ASD four times. He also indicates that he explained the process before attempting to gather the first sample, following the first "NOGO" sample, and following each subsequent "NOGO" sample. Additionally, he submits that you were informed that a refusal carried the same penalty as a "FAIL" result and that you understood.

You submit that the officer told you to, "blow into the analyser (sic)", so you did. You indicate that you did not blow hard enough and that you did this about four times; however, that you could not blow hard enough to get a reading.

There is no evidence before me that you provided a suitable sample of your breath.

I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In the Occurrence Report, the officer indicates that you claimed that you were in shock and part deaf.

You submit that at the time you failed to tell the officer that you suffer from s.22 Accordingly, you suggest that this may be why you failed the, "analyser (sic) test." You assert that you did nothing wrong and that you are sorry you could not provide a good sample of your breath because of your anxiety.

I am left wondering why you did not advise the officer that you suffer from s.22 when you were unable to provide a suitable sample on four occasions. Although you submit it was because you were very stressed, scared, and in shock, the officer's evidence is that you told him you were s.22 I find it noteworthy that you would advise him that you were s.22 and then provide a different excuse altogether in your written submission. On this point, I have no evidence before me that indicates symptoms of s.22 s.22

I have also considered the letter of support from s.22

s.22 While I acknowledge these submissions, s.22 does not articulate what behaviours occur when you experience s.22 or what type of emotional stress triggers these behaviours. I am also s.22 left wondering if s.22 can be defined in the same terms as s.22 Further, I note that s.22 is not an accredited physician, therefore, I cannot conclude

from her evidence that she is qualified to diagnose the symptoms and effects of emotional stress.

s.22 On this point, you indicate that when you suffer from s.22 that you cannot think straight. However, I have no persuasive evidence before me that you were experiencing any issues understanding the officer's instructions. Rather the officer provides evidence that the testing process was explained to you on five occasions, that were advised of the consequences of refusing, and you understood. Moreover, you provided evidence that you blew into the ASD on four occasions.

Further, you submit that when you s.22 that you cannot breathe properly; however, I have no evidence before me that you were experiencing any difficulties breathing during your attempts to provide a suitable sample. You also have not provided any evidence that you told the officer that you could not breathe properly or that you were s.22 which was affecting your ability to breathe.

You also submit that you were under a lot of stress because your

s.22 While I acknowledge your submissions, I note that these incidents occurred prior to and independent of the IRP incident, therefore, I have not considered them in this review.

You have not provided any persuasive evidence that you were experiencing s.22 during your interaction with the officer. On a balance of probabilities, I am satisfied that your ability to breathe was not compromised in a manner that affected your capacity to comply and provide a suitable sample of breath into the ASD.

Based on the evidence before me, I am satisfied that you did not have a reasonable excuse to fail or refuse to comply with the ASD demand.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 2, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 23, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On January 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the ASD registered a “WARN” as a result of your blood alcohol concentration (“BAC”) being not less than 50 milligrams of alcohol in 100 millilitres of blood (“50 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different approved screening device (“ASD”);
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jon Duncan. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “WARN”, and was it as a result of your BAC exceeding 50 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed with a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

As it is determinative of this review, I will only address the following ground:

Was the ASD reliable?

After considering the totality of the evidence before me, I am not satisfied that the ASD was reliable.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act. A refund of your penalty fee and reinstatement fee has been authorized and will be sent to you in approximately 6 – 8 weeks. If you have any outstanding fines or debts owing to the Province of British Columbia, your refund may be used to help offset those debts.

Please note that this decision does not change any other prohibitions from driving or licensing requirements.

Adjudicator

cc: Jon Duncan
Fax: 1 888 899 4906

October 1, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 12, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

At the time of your review, I confirmed that you received all of the disclosure documents. I have proceeded with this review based on this confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 22:56 hours on September 12, 2013.

In your submissions you described being pulled over by the officer on your way home from a local restaurant, about 3 or 4 houses away from your own house. You described handing your driver’s license and insurance papers to the officer, by which he positively identified you at that time.

I am therefore satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASDs register a “FAIL”?

In the Report, the officer indicated that you provided two ASD “FAIL” results at 22:59 and 23:03 hours.

In your statement you confirm two “FAIL” results; you presented no evidence to directly contradict that of the officer on this point. I am therefore satisfied that the ASDs registered “FAIL” results.

Were you advised of your right to a second analysis and was the second analysis provided by the officer?

In the Report, the officer indicated that he advised you of your right to a second test on a different ASD, and that the lower test result would prevail. He checked ‘YES’ to indicate that you requested a second ASD test. The narrative report provides: “Driver asked investigating officer to explain in layman s terms after read from prepared card, stated he understood.”

In your submissions, you stated that the officer never told you that you could request to go to the police station to request a test, and if you had known that, you would have done that.

You did not provide a source for your assertion that you had the right to request a test at the police station – the Act makes no provision for this option, and both tests are taken at roadside

as was done in this case. You recall telling the officer “I think this thing is broken” after the first test result was shown to you; however, you do not specifically contradict the officer’s evidence on this point, and I am satisfied that you were advised of a second test at roadside, and the officer then provided that second roadside test at your request.

Was the second analysis performed on a different ASD?

The Report notes the detail that ASD serial number 065848 was used for the second test at 23:03 hours; this is a separate serial number from that of 065885, for the ASD used in the first test.

You stated that you did not know if the officer tested you on two separate devices; however you also stated “I can’t tell you for sure, I couldn’t see it.” Further, you questioned whether these were the actual devices used when the officer did not show you the serial numbers at roadside.

Without a positive assertion from you that the officer did NOT use the devices he recorded in the required format documents, I cannot attach much weight to the doubt you express on this point. The officer provided recorded sworn evidence; your statements, by contrast, are suggestive, and not backed up by the details of your observations.

Therefore, in all likelihood, I find that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

Both the Report and the narrative report contain the officer’s evidence that both ASD test results were “FAIL.” You acknowledged this detail in your statements where you expressed disbelief that two ASDs could register “FAIL” results based on your consumption.

I am satisfied that the Notice was served on the basis of the lowest analysis result, here being “FAIL”.

Was the ASD reliable?

The officer provided a Certificate of a Qualified ASD Calibrator (the “Certificates”) for each ASD, in which Leisa Rae Shea certified that she is qualified to perform this operation. These Certificates form part of the sworn Report.

For the first ASD, L.R. Shea certified that on August 27, 2013, she checked the calibration of ASD serial number 65885. She found the ASD to be within the recommended limits. She recorded the ASD calibration expiry date as September 24, 2013 and the service expiry date as February 8, 2014.

For the second ASD, L.R. Shea certified that on August 27, 2013, she checked the calibration of ASD serial number 65848. She found the ASD to be within the recommended limits. She

recorded the ASD calibration expiry date as September 24, 2013 and the service expiry date as February 8, 2014.

In regards to the reliability of the ASD, you stated in the oral review: “tests show these devices have a 50% failure rate, especially if you take the test right after drinking.” Material you sent in after your oral review provided an explanation of how ASDs work, a history of ASDs, problems, and an opinion piece on the use of ASDs in BC. These are materials from the internet homepage/blog of ‘BC Lawyers – Acumen Law’.

The material you provided on this point does not make reference to the Act, which is the governing authority for the use of ASDs in British Columbia. It makes reference to RCMP ‘internal documents’ which are not linked and which you did not provide. Likewise, the studies mentioned in the materials you provide are not linked, leaving the content of the opinion pieces open to interpretation. I cannot rely on this evidence as authoritative, and give it little weight in determining the reliability of the ASDs.

You also mentioned that you had sought independently to find out how many times the ASDs used in this IRP had been used by police in the past; the RCMP told you that they do not give that information out.

I acknowledge the difficulty you have in obtaining authoritative materials on ASDs, especially when considering the time limits involved in having this review heard. However, the materials you provide do not add evidence to the assertions you are making with regards to reliability of the devices. I attach little weight to these submissions and find that they are serving as an attempt to cast doubt on the process used to obtain a sample of your breath. By contrast, the sworn material provided by the officer provides evidence on a process involving the regular checking and calibration of the ASDs, and a record-keeping process for the purposes of establishing this information as evidence should the reliability of the devices be called in to question. I attach greater weight to the material provided by the officer on these two ASDs; I find that these Certificates establish guidelines that the blog material you provided calls in to question.

The materials you provided also mention recent alcohol consumption having an effect on ASD results; alcohol in the mouth can be shown to have a “cumulative” effect on elevated results. In your case, in the Report, the officer had recorded the “time of last drink” as “30 – 40 minutes ago”, and added in the narrative that you had “1” big beer” at that time. In your review you stated this was not correct and that really it was fifteen to twenty minutes – or even twenty-five minutes maximum -- that you had finished that beer, just coming back from the restaurant at the time the officer conducted a vehicle stop. Throughout, you maintained that it was a single beer that you had consumed; this is the same as the evidence recorded by the officer in his evidence. You present this evidence based on your recollection of the timeline involved, and do not provide the exact time that you left the restaurant. Without an exact timeline provided by you, I cannot establish that the officer had any reason to delay his taking of a sample from you in expectation that alcohol in the mouth could affect the results.

I am therefore satisfied, based on the officer’s evidence that the ASDs were reliable at the time the samples were taken.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

On this point, you express your disbelief that a single beer could lead to a “FAIL” result on the initial ASD test. You stated that you also expressed this disbelief to the officer at the time, and told him your body weight. You stated that at the time you had a receipt from the restaurant where you had the beer earlier, the officer did not take this into account telling you that ‘it is not evidence’ and ‘the proof he needs is from the breathalyzer’. In regards to the indicia of impairment the officer recorded – eyes were red, slurred speech – you speculated that this is something standard that all of the officers write in their reports.

In the IRP legislation, section 215.41(2), specifies a “FAIL” result on an ASD to mean an indication that your BAC is not less than 80 mg%. In line with this legislation, ASDs track only “FAIL” results beyond a certain threshold; this officer served the Notice based on two test results showing “FAIL”, with no legislative need to assess a true numerical reading on the ASD.

Despite your statements, you do not provide any factual evidence as to the amount of liquor you consumed that evening, despite your assertion on one beer to be the same at roadside and as evidence in this review. You did not provide any evidence showing what your consumption at the restaurant that evening was. The officer, by contrast, provided sworn evidence that two reliable ASDs recorded “FAIL” results – from that, I conclude that your BAC was not less than 80 mg%.

I conclude that the ASDs registered “FAIL” results; as per the Act, this indicates a concentration of alcohol in blood to be not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on September 12, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 21, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 3, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

I acknowledge receipt of your letter faxed on October 16, 2013. You asked me to review your s.22 driving record with one speeding ticket and one claimed accident. While I can acknowledge that you may have a good driving history, I am unable to take that information into consideration for this review hearing.

You asked for leniency as transportation for medical reasons is very important to you and your husband at this time. Please know that I do appreciate that being without your vehicle and licence can be a hardship. However, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “fail”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the “Report”) is that on October 3, 2013, at 17:30 hours, Officer Leslie (the “officer”) established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a “fail”?

The police evidence in the Report is that at 17:36 hours and at 17:48 hours, the officer used ASD serial numbers 055629 and 100896 respectively to take a breath sample from you. The result of both of your ASD tests was a “fail”. There is no evidence to the contrary before me.

I am satisfied that both ASD tests registered a “fail”.

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 100896 at 17:48 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Both ASD test results were “fail”; therefore, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates the following:

- ASD serial number 055629 was checked for calibration on September 26, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 24, 2013, and a service expiry date of February 12, 2014.
- ASD serial number 100896 was checked for calibration on September 26, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 22, 2013, and a service expiry date of October 22, 2013.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “fail”?

You said that when you were speaking with the officer, you were nervous and advised him of your s.22 I understand this to mean that you made the officer understand that you would s.22 to understand what he was saying. You said you were distressed when he asked you to walk a straight line, heel to toe and you were unable to do this and realized you had been unable to do this for the past few years. You said you understood the officer to say “you have had 2 beer”. You said no, and then told him you had four beers. You said this is incorrect and your body cannot drink four beers in that time period. You go on to say that you do not drink and drive and that you had planned to stay at your cabin. However, you did not realize you were under the influence of alcohol and felt you could drive as normal.

The officer’s evidence is that when he was talking with you, you showed obvious signs of impairment, including a moderate smell of alcohol on your breath. Further, I note that you blew a “fail” on two different ASDs, both of which I have already found were functioning reliably at the time.

I cannot comment on how impaired you may have felt; however, section 215.41(2) of the Act states that a “fail” result on an ASD indicates that the concentration of alcohol in an individual’s blood is not less than 80 mg%.

I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 3, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

OCTOBER 30, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 25, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

When you applied for this review, you checked all grounds listed on the application form; however, not all grounds are applicable to your situation, because of the reason for which you were prohibited. For your benefit, I have considered all grounds that apply in your case.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Sacha Roudette. I proceeded with this review based on that confirmation.

In her written submission, Ms. Roudette cited the *Spencer*, *Gillies*, and *Costain* decisions and argued that adjudicators must follow the courts' directives in these cases when conducting hearings. I agree with your lawyer in this regard; in conducting this review, I am mindful of and have applied the principles of natural justice and administrative fairness, as required by these cases; I have carefully and conscientiously weighed and evaluated the evidence before me.

On page four of her written submissions your lawyer argued that the prohibition should be revoked based on the *Wilson* case. I have read and considered *Wilson* and I acknowledge your lawyer's submission with respect to the court's ruling in this case. However, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Corporal McVicar indicated that he witnessed you driving or in care or control of the vehicle at 2250 hours, on September 25, 2013. In her statement, your lawyer said you told her you disputed the officer's evidence of where the officer said he stopped you. Ms. Roudette said you told her you were never driving on Elk Road, as alleged by Corporal McVicar. Whether you were stopped in the golf course parking lot or on Elk Road is not relevant to this issue, as both places fall within the definition of "highway" under the Act.

As there is no evidence to the contrary, I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, Corporal McVicar said you provided breath samples into two ASDs and that the

devices both registered “FAIL”, as a result of the analyses.

On the last page of her submission, your lawyer said you told her that you were never shown the test results. Although the RTS has a spot in which an officer can indicate whether he showed the driver the test result, a peace officer is not required by the Act to do this. As a result, this is not a ground on which I can revoke the prohibition or on which I need to make a finding of fact.

Based on all the evidence before me, I am satisfied that the ASDs registered “FAIL” at 2256 and 2304 hours, respectively, as set out in the officer’s evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative, Corporal McVicar indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

Based on all the evidence before me, I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the RTS, the Narrative and in the Certificates of a Qualified ASD Calibrator (the “Certificates”), the officer provided evidence that two distinct ASDs were used for two analyses. I am satisfied that the second analysis was performed on a different ASD.

Was the ASD reliable?

The evidence provided by the police in the Certificates regarding the ASDs used in your case indicates that the devices were found to be functioning correctly and were found to be within the recommended limits. There is nothing before me to the contrary on this point. I am satisfied that the ASDs were reliable.

Was your BAC less than 80 mg% even though the ASD registered a “FAIL”?

In the Narrative, Corporal McVicar said you were polite and cooperative. He also said he noticed that you swayed back and forth slightly when you stood talking to him and that you had an odour of liquor on your breath. Constable McVicar said you denied drinking when he asked how many drinks you had consumed, but when he had you blow some breath in his direction,

you admitted to having consumed one beer prior to leaving work. The officer noted that your place of work is s.22 He said when he asked you for the time of your last drink, you told him you had consumed the beer before leaving work, and then stated about 20 minutes ago.

In her submission, your lawyer said you advised her that you never denied drinking and you did not tell Corporal McVicar that your last drink was “20 minutes ago.” Ms. Roudette suggested that it “is completely nonsensical that Cpl. McVicar would observe our client in the parking lot of his own work, record an admission that he had consumed one [1] beer ‘just prior to leaving work,’ and then allege that the time of last drink was ‘20 minutes ago.’” She argued that this allegation ought to be weighed accordingly with respect to the credibility of Cpl. McVicar. Ms. Roudette argued that the evidence indicates that mouth alcohol could have affected the ASD results, so I should revoke the prohibition.

Your lawyer misquoted the officer’s evidence. Corporal McVicar did not record an admission that you had consumed one beer “just prior to leaving work.” In the RTS, he said “before leaving work, about 20 minutes ago.” In the Narrative, he said you told him you “consumed the beer before leaving work, and then stated about 20 minutes ago.” While I must not give a peace officer a credibility advantage over an applicant, I must consider the officer’s evidence as carefully and conscientiously as I do yours. You may have told your lawyer that this is what you said to Corporal McVicar, but it is inaccurate to suggest that these words were part of his evidence and argue that they decrease his credibility.

Given the conflicting evidence before me, I must make a finding of credibility. On one hand, I have the officer’s sworn RTS that incorporates the Narrative into the sworn document. On the other hand, I have unsworn hearsay from your lawyer and a misrepresentative statement in her argument. Based on these factors, I find it appropriate to give more weight to Corporal McVicar’s evidence than to yours. I am satisfied on a balance of probabilities that the officer turned his mind to the time of your last drink and that you told him it was 20 minutes prior.

Ms. Roudette also argued that even if the time of the last drink was 20 minutes prior, the officer should have delayed the first ASD test because you were seen leaving a drinking establishment. She cited the *Seivewright* case to support this argument. Ms. Roudette noted that this case deals with ambiguous responses to enquiries about the time of the last drink. She quoted paragraph 31 of *Seivewright*, which involves “an indirect response to a question about recent consumption.” In your case, there is nothing vague, uncertain or ambiguous about “20 minutes ago,” so the case is distinguishable in this regard.

In addition, paragraph 26 of *Seivewright* states:

“[26] As is clear from the case law summarized in *Mastromartino, supra*, there is no general police duty to inquire into recent alcohol consumption before administering the ASD. In addition, the mere possibility that a driver has consumed alcohol within the relevant timeframe does not preclude the officer from relying on the accuracy of the ASD. Whether or not officers are required to wait before administering the screening test is a fact-based inquiry determined on a case-by-case basis (*Mastromartino, supra*).”

While case law such as *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, indicates that the possibility of mouth alcohol may require a peace officer to wait 15 minutes before administering an ASD test, this requirement is considered on a case by case basis. Based on all the evidence before me, I am satisfied on a balance of probabilities that in this set of circumstances, it was reasonable for Corporal McVicar to believe he could obtain a reliable result without a delay. I am satisfied that it is more likely than not, that mouth alcohol did not affect the ASD results.

Your lawyer did not provide any persuasive evidence on your behalf that would cause me to doubt the "FAIL" readings on ASDs I found to be reliable. Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 80 mg%. I am satisfied that your BAC was not less than 80 mg%.

Was the Notice served on the basis of the lower analysis result?

In the RTS, the corporal said that both ASDs that analyzed your breath samples registered "FAIL". Ms. Roudette argued that neither test was reliable, so your right to be served on the basis of the lower of the two analyses was violated. I disagree with this argument, based on my findings above. I am satisfied that the Notice was served on the basis of the lowest available result, which was "FAIL".

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act.

You are prohibited from driving for 90 days. You have already served 14 days of the prohibition, so you need only serve the remaining 76 days, which commences October 31, 2013. When your prohibition ends you may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

September 20, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On August 30, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

You applied on the ground that, “I did not refuse or fail to comply with the officer’s demand to provide a breath sample.” However, this ground is not applicable to your situation because on the Notice the investigating officer alleged you were being prohibited from driving because an

ASD test resulted in a "FAIL". All grounds for review that apply to your case will be considered in this review.

In your written submission (the "Submission"), you assert that without your licence it makes it very difficult to get to your shifts on time and that you fear you may not be able to fulfill your work obligations. Further, you indicate that s.22 has very serious health problems and is reliant on you to take her to and from medical appointments. I have also considered the letters of support from, s.22, describing your strong work ethic and good character. I can appreciate that a 90-day driving prohibition can have far reaching effects. However, under the Act, I am not able to consider hardship including employment, transportation or personal circumstances. The scope of this review is limited to the grounds as defined in the Act.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "FAIL", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

In the sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Paetz, indicates that you were driving or in care or control of a motor vehicle at 0127 hours on August 30, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Paetz submits that she was conducting a static sobriety road check on Kirschner Road in Kelowna. She observed you, "seated in the drivers seat, [with the] vehicle running and key in the ignition." Your identity was confirmed with a valid British Columbia driver's licence.

There is no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "FAIL"?

Evidence in the RTS indicates that at 0129 hours, Cst. Paetz made an ASD demand on you. At 0130 hours you provided a breath sample for analysis on ASD serial number 101221. The test result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Narrative, Cst. Paetz submits that at 0134 hours she read you your right to a second test on a different instrument. Evidence in the RTS indicates that you were informed of your right to a second test on a different ASD and that the lower ASD test result would prevail.

There is no evidence before me to the contrary. I am satisfied that you were advised of your right to a second analysis.

Was the second analysis provided by the officer?

In the Narrative, Cst. Paetz submits that after you were informed of your right to a second test that you stated you, "did not want a second test." Further, on line 7 in the RTS, in response to the question, "Did the driver request a second ASD test?", Cst. Paetz indicates "NO".

I am satisfied that the second analysis was not provided by the officer because you did not request a second analysis.

Was the Notice served on the basis of the lower analysis result?

Evidence in the RTS, Narrative, and your Submission indicates that the sole ASD test result was a "FAIL".

There is no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

Evidence indicated on the Certificate of a Qualified ASD Calibrator is as follows:

- ASD serial number 101221 was checked for calibration on August 28, 2013, with a service expiry date of July 19, 2014 and calibration expiry date of September 25, 2013 and;
- Qualified ASD Calibrator, Chris Neid, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Paetz. These signatures confirm that any ASD test referred to in the investigation was conducted by a qualified ASD operator and that the ASD unit used was functioning correctly.

There is no evidence before me to the contrary. I am satisfied that the ASD was reliable.

Was your BAC less than 80 mg% even though the ASD registered a "FAIL"?

Cst. Paetz indicates that at 0129 hours she formed reasonable suspicion that you were driving or in care or control of a motor vehicle, with alcohol in your body. Upon approaching your vehicle, she noted a strong odour of liquor in the vehicle and on your breath.

Cst. Paetz submits that you admitted to drinking one shot of liquor, at 2200 hours, and that this was your last sip of alcohol.

In your Submission, you state that your prohibition stems from your unfortunate decision to drive your friends home from the bar after consuming a maximum of two drinks. You submit that you did not realize that two alcoholic drinks would lead to an ASD "FAIL" result, especially because you had consumed these drinks with a meal. You assert that you take full responsibility for your actions and wrongfully assumed that you were within the legal limit.

Section 215.41(2) of the Act states that a "FAIL" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 80 mg%. I have an ASD "FAIL" result before me and your own admission of consumption. You indicate that you had a maximum of two alcoholic drinks at a going away gathering. Police evidence indicates that you advised Cst. Paetz that you had had one shot at 2200 hours. This evidence conflicts and causes me to question the credibility of your drinking pattern that evening. Further, I have already determined that the ASD registered a "FAIL" and that the ASD used was reliable.

There is no evidence before me to the contrary. I am satisfied that your BAC was not less than 80 mg%.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on August 30, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

October 3, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On September 14, 2013, a peace officer served you with a Notice of Driving Prohibition (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- an approved screening device (ASD) registered a "FAIL" as a result of your blood alcohol concentration (BAC) being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

You applied on the ground that "My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s)," however, that ground is not applicable to your situation because you did not receive a refusal IRP. I have considered all the grounds available to you.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did an ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2205 hours on September 14, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were pulled over for speeding and were identified as the driver via your BC driver’s licence.

I have no evidence before me to the contrary. I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act.

Did an ASD register a “FAIL”?

The officer indicates in the Report that you provided two samples of your breath, at 2210 hours and 2214 hours, both resulting in “FAIL” readings.

I have no evidence before me to the contrary. I am satisfied that an ASD registered a “FAIL”.

Were you advised of your right to a second analysis?

In the Report the officer indicates that you were advised of your right to request a second test, and that you were informed that the lower ASD result would prevail. In the Narrative the officer indicates that you were read your right to request a second test at 2211 hours.

I have no evidence before me to the contrary. I am satisfied that you were advised of your right to a second breath test analysis.

Was the second analysis provided by the officer?

The officer indicates in the Report that you provided a second sample of your breath at 2214 hours.

I have no evidence before me to the contrary. I am satisfied that the second analysis was provided by the officer.

Was the second analysis performed on a different ASD?

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 104844 and your second sample of breath into ASD serial number 066723. The officer

also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 104844 and 066723.

I have no evidence before me to the contrary. I am satisfied that the second analysis was performed on a different ASD.

Was the Notice served on the basis of the lower analysis result?

The officer indicates in the Report that both ASD analyses resulted in a “FAIL” reading. The lowest analysis result was “FAIL”.

I have no evidence before me to the contrary. I am satisfied that the Notice was served on the basis of the lower analysis result.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator certified that on August 19, 2013, he checked the calibration of ASD serial number 104844. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 16, 2013, and the service expiry date as May 17, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 19, 2013, he checked the calibration of ASD serial number 066723. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 16, 2013, and the service expiry date as April 22, 2014.

Ms. Lee provides *Spencer v Superintendent of Motor Vehicles* to assert that the officer must not be deemed to have a credibility advantage. I am aware of this decision; however I also note that you have not provided any submissions regarding your version of events. Ms. Lee also refers to *Spencer* to state that the “the onus is on the officer to justify the prohibition on a balance of probabilities,” and that it cannot be assumed that the police have no reason to be careless, inaccurate or untruthful.

With regard to the reliability of the ASDs, Ms. Lee states that in the Report, the temperature of the second ASD appears to be either 24 or 34 degrees Celsius. Ms. Lee states that while the Narrative states that the temperature of the second ASD was 34 degrees, there is no indication as to why the temperature recorded in the Report is unclear, and there is no evidence to explain the temperature discrepancy. Ms. Lee states that the burden is on the officer to provide evidence to establish that the ASDs were reliable. Ms. Lee also stated that the ASD operating temperatures are close to their limit, and as such, the officer ought to have provided an explanation for the discrepancy. Ms. Lee also provided a memorandum from the RCMP entitled, “Proper Operation of the Approved Screening Device” which states, “The operating temperature is between 10-40 (degrees Celsius).” Ms. Lee submits that *Johnson v Superintendent of Motor Vehicles* is not applicable to your case because you are not awarded the opportunity to obtain evidence in support of your suggestions, as the operating temperature of the ASD is not disclosed to you.

I have considered the submissions with respect to the differences in ASD temperature; however, I do not find them compelling. I have examined the Report and I find the temperature as it is recorded in the second test to read 34 and not 24 degrees. Regardless, I note that either temperature is within the operating range of the ASD, as defined by the RCMP memorandum.

Ms. Lee also indicates that, “the Narrative evidence of Constable Fuller establishes that he is not aware of how the device functions.” Ms. Lee notes that the officer records that the first attempt to provide a sample resulted in a “NoGo” reading. Ms. Lee states that the officer’s statement that a “NoGo” means “no good” is false. Ms. Lee also provided material to show the proper functionality of the ASD with regard to “No Go” and VOID” sequences.

I am not compelled by Ms. Lee’s submission that the “Nogo” results on the ASD indicate that it was not functioning properly at the time of your ASD test. In the Narrative, the officer states that after each attempt, the ASD was reset. There is no evidence that the ASD would ever have “timed out” or displayed a “VOID” reading if it was reset after each attempt. I also do not find the officer’s statement, “a “NO GO” reading means No good,” to indicate that he was unaware of proper ASD functionality, as the officer states after the “No go” reading he informed you that your breath sample was not adequate. Further, I find it significant that on your third attempt you were able to provide a suitable sample into the ASD without incident. The officer also swore in the Report that, “Any ASD tests referred to in this report were conducted by a qualified ASD operator and the ASD units were functioning correctly.” I also note that the officer has provided compelling evidence that both ASD units were properly calibrated.

Aside from Ms. Lee’s suggestions, I do not find that I have any compelling evidence before me that causes me to question the reliability of, or the officer’s ability to operate, the ASDs; therefore, I do not find the previous decisions provided to be relevant.

I am satisfied that the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by section 215.5(1) of the *Motor Vehicle Act*. You are prohibited from driving for 90 days. Your prohibition took effect on September 14, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

Adjudicator

cc: Kyla Lee
fax: 604 685-8308



October 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 28, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- the approved screening device (“ASD”) registered a “FAIL” as a result of your blood alcohol concentration (“BAC”) being not less than 80 milligrams of alcohol in 100 millilitres of blood (“80 mg%”);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to you. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a “FAIL”, and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Having reviewed the evidence before me, I find there is one issue that is determinative in this review.

Were you a driver within the meaning of section 215.41(1) of the Act?

I am not satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

This decision does not change any other prohibitions from driving or licensing requirements.

Please note that the corresponding vehicle impoundment is also revoked. The owner of the vehicle will be notified by separate letter that I am releasing the vehicle.



October 18, 2013

s.22

C/O PHILIP A. RIDDELL
62222 SHAUGHNESSY ST
PORT COQUITLAM, BC V3C 6K5

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. s.22

Introduction

On September 29, 2013, a peace officer served you with a Notice of Driving Prohibition (the “Notice”). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1);
- you failed or refused to comply with a demand made under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device (“ASD”); and
- you did not have a reasonable excuse for failing or refusing to comply with a demand.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me.

Preliminary Matters

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Philip A. Riddell. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did you fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

Facts, Evidence and Analysis

Having reviewed the evidence before me, I find there is one issue that is determinative in this review.

Did you have a reasonable excuse?

I am satisfied that you had a reasonable excuse to fail or refuse to comply with the ASD demand.

Having made this finding, I do not have to consider anything further.

Decision

As a result of my findings, I revoke your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(4) of the Act.

You may resume driving after you have obtained a driver's licence from the Insurance Corporation of British Columbia. If you hold an Enhanced Driver's Licence, you must make an appointment to reapply for that licence.

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 in a separate letter.

November 18, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (IRP) No. s.22

Introduction

On October 26, 2013, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with the corresponding monetary penalty and vehicle impoundment, if I am satisfied that:

- you were a driver within the meaning of section 215.41(1) of the Act;
- the approved screening device ("ASD") registered a "fail" as a result of your blood alcohol concentration ("BAC") being not less than 80 milligrams of alcohol in 100 millilitres of blood (80 mg%);
- you were advised of your right to request a second analysis;
- if requested, it was provided and performed with a different ASD;
- the Notice was served on the basis of the lower analysis result; and,
- the result of the analysis on the basis of which the Notice was served was reliable.

Section 215.5(4) of the Act requires me to revoke your prohibition, cancel the monetary penalty, and revoke any corresponding vehicle impoundment if I am not satisfied of any of the above.

In reaching my decision on this review, I must consider all relevant information provided to me. I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice that the peace officer served on you.

Records at this office confirm that full disclosure of the documents before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation

Preliminary Matters

Your lawyer, Kyla Lee, submits that your driving prohibition should be set aside because the officer's evidence does not establish that he formed the belief that your ability to drive was affected by alcohol or, if he did, that such belief was based on reasonable grounds. Ms. Lee provided me with a copy of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638 and *R. v. Andree* [1990] B.C.J. No. 1869 in support of her submission.

I acknowledge Ms. Lee's submission on this matter and I have read and considered the *Wilson* case; however, the *Andree* case is a criminal case, which is instructive but not determinative of administrative reviews. I acknowledge the Court's ruling in *Wilson*, however, section 215.5(4) of the Act requires me to revoke a driving prohibition if I am satisfied of any of the specific grounds set out in that section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground in section 215.5(4) of the Act, meaning that it is not a ground of review. Therefore, I have no statutory authority to revoke a prohibition on this ground.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "fail", and was it as a result of your BAC exceeding 80 mg%?
- Were you advised of your right to a second analysis?
- Was the second analysis provided by the officer and performed using a different ASD?
- Was the Notice served on the basis of the lower analysis result?
- Was the ASD reliable?

Facts, Evidence and Analysis

Were you a driver within the meaning of section 215.41(1) of the Act?

The police evidence in the Report to Superintendent (the "Report") is that on October 26, 2013, at 22:30 hours, Officer Spanos (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act.

Did the ASD register a "fail"?

The evidence in the Report is that at 22:40 hours and at 22:46 hours, the officer used ASD serial numbers 035616 and 052539 respectively to take a breath sample from you. The result of both of your ASD tests was a "fail".

I am satisfied that both ASD tests registered a "fail".

Were you advised of your right to a second analysis?

The police evidence at section 7 of the Report is that after your first breath test, the officer explained to you your right to a second analysis on a different ASD and also explained that the lower of the two test results would prevail. There is no evidence before me to the contrary.

I am satisfied that you were advised of your right to a second breath test.

Was the second analysis provided by the officer?

As indicated above, the second analysis was provided by the officer on ASD serial number 052539 at 22:46 hours.

I am satisfied that the second analysis was provided by the officer.

Was the Notice served on the basis of the lower analysis result?

Because both ASD test results were a “fail”, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

The evidence in the Certificates of a Qualified ASD Calibrator (the “Certificates”) indicates that ASD serial number 035616 and ASD serial number 052539 were checked for calibration on October 22, and found to be functioning correctly and within the recommended limits.

Your lawyer submits that your prohibition must be revoked because the officer’s evidence does not clearly indicate which ASD was used for the first test. She said the serial number recorded in the Report is unclear as to whether it is 035616 or 835616. I acknowledge Ms. Lee’s submission on this point; however, I do not agree that it is unclear on the Report. The ASD serial number listed on the Report for the First ASD test is 035616. This is supported by information found in the CN Police Service-Surrey Det. Document. On the first page of that document, third paragraph from the bottom, the officer indicates that at “22:40 hours the writer administered ASD #035616...” In addition, as indicated above, one of the Certificates submitted by the officer is for ASD serial number 035616. In my view, the evidence is clear that the first ASD used was 035616.

As there is no evidence to the contrary before me, I am satisfied that both of the ASDs were reliable.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment, as required by s. 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 26, 2013.

Please note that as a result of receiving this driving prohibition, you may be required to participate in the Responsible Driver Program and the Ignition Interlock Program. This driving prohibition may be considered by the Superintendent of Motor Vehicles in a review of your driving record. A further prohibition may be imposed.

s.15
Adjudicator

cc: Kyla Lee
by fax 604-685-8308