

Pages 1 through 556 redacted for the following reasons:

s.14

Wilkinson, Anita JAG:EX

From: Anderson, Kathy E JAG:EX
Sent: Thursday, April 17, 2014 12:35 PM
To: Simpson, Linda M JAG:EX
Cc: Handgraaf, Harjeet JAG:EX
Subject: FW: stand up discussion
Attachments: s.22 - s.15 docx

Can you join us please so you are aware for next week.

Kathy Anderson

From: Anderson, Kathy E JAG:EX
Sent: Thursday, April 17, 2014 12:34 PM
To: JAG OSMV 940 Blanshard Immed Roadside Prohibition 90 day; JAG OSMV 940 Blanshard Immed Roadside Prohibition 30 day
Cc: s.15 M JAG:EX; s.15 JAG:EX
Subject: stand up discussion

Kathy Anderson

April 16, 2014

s.22

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

Introduction

On February 2, 2014, a peace officer served you with a Notice of Driving Prohibition (the "Notice"). You applied to the Superintendent of Motor Vehicles for a 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);
- 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, Ms. Kyla Lee. I have proceeded with this review based on that confirmation.

You applied for this review on a single ground, that the ASD result is not reliable. For your benefit, I have reviewed and considered all grounds available to you that apply in your case.

Ms. Lee made submissions on this review, on your behalf, on February 18, 2014. She made submissions primarily on the basis of two BC Supreme Court decisions, *Wilson* and *Richardson*. She submits that in your case there is no presumption that your ability to drive was affected by

alcohol based solely on an ASD "FAIL" reading; there must be evidence to demonstrate the officer's reasonable grounds to believe your driving ability was affected.

She posits that I must address this issue, for the following reasons:

- The legislation confers authority on an adjudicator to examine grounds for the issuance of an IRP, "the mandatory prerequisite" found in the *Motor Vehicle Act*; and it is unreasonable for a delegate of the Superintendent to state there is no jurisdiction to consider if a driver's ability to drive was affected by alcohol;
- This office's position with respect to the superintendent's authority on review being limited to the review grounds in the *Motor Vehicle Act* is inconsistent with the position this office takes on an unsworn Report to Superintendent. *Murray* stands as authority that IRPs must be overturned where the prerequisites authorizing their issuance are not made out;
- *Wilson* and *Richardson* stand for the principle that statutory prerequisites for the IRP issuance must be enunciated clearly in the evidence of the officer. These cases cannot be distinguished on the basis of other case law authority which examines other *Motor Vehicle Act* requirements; *Kang* and *Williams* both pertain to *Charter* relief afforded by an administrative tribunal; in addition, *Rapton* pertains to a 24-hour driving prohibition;
- *R v Andree* stands as authority that reasonable grounds to believe a person's ability to drive is affected by alcohol requires subjective and objective elements;
- The subjective elements of an officer's opinion cannot be inferred by an adjudicator, a principle she derives from *Modhgill*.

Borrowing principles from the above authorities, Ms. Lee submits that, in your case, there are no specific symptoms of alcohol consumption, other than an odour on your breath, and your admission of consumption as recorded by the officer. She submits that *Wilson* and *Richardson*, if properly applied, support a revocation in your situation; the evidence for the demand recorded by the officer is not reflective of your ability to drive.

This issue was considered by the Deputy Superintendent in a decision dated April 3, 2014. In that decision she considered the decisions in *Richardson* and *Wilson* as well as other authorities, including *Rapton*, in some detail. I have reviewed this previous decision and those authorities and I agree and follow the analysis of the cases it contains. I have reproduced the analysis below.

In *Wilson*, the Court held that there was no presumption that the ability to drive was affected by alcohol solely on the basis of the ASD result. In *Richardson*, the Court did not confirm this finding in *Wilson*, but rather held that if an adjudicator does not follow *Wilson*, reasons must be given. As I have set out below, I find that both the BCSC decision in ***Sivia v. British Columbia (Superintendent of Motor Vehicles)***, 2011 BCSC 1639 and the British Columbia Court of Appeal in ***Sivia v. British Columbia (Superintendent of Motor Vehicles)*** 2014 BCCA 79 ("*Sivia*") have found that BAC readings within the 0.05 - 0.08 range (a "Warn" reading on an ASD) and possibly below confirm that driving skills are significantly impaired. In other words, a "Warn" or "Fail" ASD result is evidence that a person's ability to drive is affected. As such, it is unnecessary for me to consider further evidence on that point, and the grounds of review I may consider are limited to those

specified in the *Motor Vehicle Act*. Accordingly, I have set out below my reasons for declining to follow the line of reasoning set out in *Wilson*.

In *Wilson*, the driver was stopped at a road check. The only observation noted by the officer about Mr. Wilson's alcohol consumption was an odour of alcohol on his breath. Mr. Wilson admitted to drinking four beers earlier that evening and provided two breath samples, both of which registered a "Warn". The officer then served Mr. Wilson with a 3 day IRP notice. It was argued that the officer was wrong to issue the IRP because there was no evidence the officer had reasonable grounds to believe his ability to drive was affected by alcohol. That is, s. 215.41 (3.1) required this evidence in addition to a "Warn" reading. The adjudicator found that the fact the officer served the Notice was evidence that he believed Mr. Wilson's ability to drive was affected by alcohol and this belief was reasonable given the "Warn" readings.

On judicial review Mr. Justice Dley held that a "plain reading" of the legislation (s. 215.41 (3.1)) required an officer to have more than just the results of an ASD analysis in order to reasonably believe a driver's ability to drive was affected by alcohol. In the court's opinion, there was no evidence in the record to establish that, and as a result the adjudicator's decision was unreasonable.

In *Richardson*, the issue before Madam Justice Dardi was whether it was reasonable for the adjudicator to conclude that she did not have the jurisdiction to consider and revoke a driving prohibition on the ground that the officer did not have reasonable grounds to believe the driver's ability to drive was affected by alcohol. It was argued that the adjudicator's decision was unreasonable because in determining she had no jurisdiction to consider this ground of review the adjudicator declined to follow a binding court decision i.e., *Wilson*.

Although Madam Justice Dardi agreed that the adjudicator erred by not applying *Wilson*; what is imperative to note is that she did not confirm or validate the correctness of the findings in *Wilson*. Rather, what she held was this: since Mr. Justice Dley had decided how to interpret s. 215.41 (3.1), the adjudicator was obliged to apply that interpretation, unless sufficient and reasonable reasons were provided for not following that interpretation. The Court found that the adjudicator's decision in *Richardson* was unreasonable because she failed to explain the basis upon which she may have distinguished *Wilson*, and failed to provide "sufficiently transparent and intelligible reasons as to why she was not bound to follow *Wilson*". Further, Mr. Justice Dley's implied conclusion that the Superintendent had authority to revoke the prohibition was "predicated on the underpinning that the Superintendent had the requisite jurisdiction" (see paragraphs 31 and 35-37 of *Richardson*). Therefore, the adjudicator erred in not *explaining why *Wilson* was not being followed*. As a result, if I decline to follow *Wilson*, I must explain the basis upon which I am distinguishing that decision, which I will do now.

Mr. Justice Dley's finding in *Wilson* was premised on the understanding (at paragraph 20) that: "There is no presumption that a driver's ability to drive is affected by alcohol solely on the basis of a WARN reading." The findings in the *Sivia* decisions have held otherwise. In *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639, Mr. Justice Sigurdson heard expert evidence on the effect of alcohol on a driver's ability to drive at "Warn" and "Fail" levels and made the following findings (which were not overturned by the Court of Appeal). At paragraphs 267 to 270 of *Sivia*:

Under the ARP regime, drivers are removed promptly from the road when they are over the level of impairment prescribed by the *Criminal Code* (.08), and also when they are in the 0.05 – 0.08 range; a range which, although under the criminal limit, still, according to the evidence, significantly affects a driver's ability to drive safely.

The efficacy of this approach finds support in the opinion evidence of Robert E. Mann, an associate professor and specialist in addiction and mental health. He has written on the subject of impairment of driving by alcohol, drugs and other factors. Mr. Mann provided a number of opinions on drinking and driving-related issues that support the objective of this law. In particular he noted that: police officers have difficulty detecting impaired drivers; administrative suspensions are consistent with reducing recidivism, collisions and injury; and evidence supports that driving-related skills are significantly impaired at a 0.05 blood-alcohol level.

Although counsel for the petitioners argues that there is no evidence justifying the necessity of the ARP regime to go beyond the scope of the ADP regime, Mr. Mann's evidence clearly shows that by extending to drivers whose blood-alcohol concentration is in the "warn" range (0.05 – 0.08), this law helps to remove drivers from the highway who, although not necessarily at the criminal level of impairment, may nonetheless be a significant risk to themselves and others.

I refer to the comments in *R v. Ladouceur*, [1990] 1 S.C.R. 1257 where the Court said (at para. 48), "[t]he studies on this subject have been well publicized over recent years ... the evidence is overwhelming in its confirmation of the relationship between serious accidents and driving under the influence of alcohol or other drugs."

[emphasis added]

The Court of Appeal in *Sivia v. British Columbia (Superintendent of Motor Vehicles)* 2014 BCCA 79, (at paragraph 100) agreed that the expert evidence indicated "collision risks are significantly increased beginning in the .05-.08% range and possibly below" and "[a]t BAC levels of .05% and above, driving skills are significantly impaired and the likelihood of being involved in a collision is significantly elevated".

These findings stand in direct contrast to Mr. Justice Dley's finding that there was no presumption to suggest a "Warn" reading would affect a person's ability to drive. Mr. Justice Dley did not refer to Justice Sigurdson's decision in *Sivia* (and could not have mentioned the Court of Appeal's decision). As a result, I am satisfied that both decisions in *Sivia* have determined that a "Warn" or "Fail" reading on an ASD verifies that a person's ability to drive *is* affected and it is unnecessary for me to consider further evidence on that point.

If I am mistaken, I would still decline to follow *Wilson* on the basis of numerous authorities, including Court of Appeal authorities (which are binding on me), which have confirmed that the Superintendent's powers are circumscribed by the legislation. In *Ricard v. the Superintendent of Motor Vehicles*, 2014 BCSC 129, Madam Justice Dardi found that "... the Superintendent's powers are purely statutory. He has no 'inherent jurisdiction' but is limited to the powers specifically assigned to him by the statute."

In **Kang v. British Columbia (Superintendent of Motor Vehicles)**, 2014 BCSC 71, Mr. Justice Blok found: "*The adjudicator said that she was restricted to those grounds of review set out in the Motor Vehicle Act and the petitioner's argument did not fall within those grounds. On this level, at least, the adjudicator's decision was both reasonable and correct.*"

The BC Court of Appeal decisions of **Rapton v. British Columbia (Superintendent of Motor Vehicles)** [2011] B.C.J. No. 1867 and **Proctor v. British Columbia (Superintendent of Motor Vehicles)** [2011] B.C.J. No. 2198, both confirm that the Superintendent only has the statutory powers that are expressly set out in sections concerning what the Superintendent may and must do on a review. In **Rapton**, the Court of Appeal found that there was no power to revoke a 24-hour driving prohibition on the basis that the officer did not have reasonable and probable grounds to issue the driving prohibition at first instance, even though that too would be a "pre-condition" under the relevant legislation.

In **Sivia**, although the Court of Appeal dealt with the prior version of this legislation, the "pre-conditions" in s. 215.41 (referred to by Justice Dley in **Wilson**) were the same as they are now under the current s. 215.41. The Court of Appeal found that a driver would have no ability to challenge the results of the ASD. However, the reliability of the ASD would necessarily be a "pre-condition" since the officer must "have reasonable grounds to believe, as a result of the analysis". Similarly, at paragraph 176, the Court of Appeal quoted Justice Sigurdson's finding that under the former legislation there were "really only two issues to be decided under the statutory review: was the applicant a 'driver', and did the screening device register a 'warn' or 'fail' (or did the motorist refuse to blow) as the case may be?" In my view, the Court of Appeal in **Sivia** implicitly confirmed that only the specified grounds in s. 215.5 can be considered on a review and I am bound by that finding. The Court of Appeal had not yet released its decision in **Sivia** when Mr. Justice Dley and Madam Justice Dardi made their decisions.

Based on these authorities, I conclude that I am restricted to those grounds of review set out in the Act, and I have no authority to revoke a prohibition on any basis not expressly given to me in s. 215.5(4).

I agree with and incorporate the Deputy Superintendent's above noted analysis in this decision.

Based on the findings in the **Sivia** decisions (BCSC and CA) as explained above, I am satisfied that a "FAIL" result on an ASD verifies that a person's ability to drive is affected by alcohol. Further, if I am mistaken on that issue, I rely on the analysis of the cases above to establish that I do not have the authority to revoke a prohibition where it is submitted the officer lacked reasonable grounds to believe a person's ability to drive is affected by alcohol.

I also differ with the interpretation of the CA decision in **Murray** that your counsel has put forward in this review. I do not interpret **Murray** as requiring the Superintendent to quash or revoke a prohibition where the officer fails to send in a sworn Report to the Superintendent. The CA did not specifically decide that an unsworn Report was a ground of review allowing the Superintendent to revoke a prohibition. Rather, the court decided that the absence of a sworn Report was a jurisdictional bar to the Superintendent proceeding with a review hearing. The driving prohibition was not revoked by the Superintendent following the CA decision. Rather the CA decided there was no point in remitting the matter back to the Superintendent and subsequently declared the prohibition a nullity. However, the CA did not address whether the

Superintendent would have the authority to revoke a prohibition in similar circumstances, and if yes, where that authority was found.

As such, I proceed with this review on 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 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 investigating officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0219 hours on February 2, 2014. In the Occurrence Report, he provides that he observed a vehicle approach a roadblock, with a single occupant of the vehicle as the driver. He verified your identity with your BC driver's license.

There is no evidence before me to the contrary on this point. I am satisfied, therefore, that you were a driver within the meaning of s. 215.41(1) of the *Motor Vehicle Act*.

Did the ASDs register "FAIL" results?

The officer indicates in the Report that you provided two samples of your breath into ASDs, both resulting in "FAIL" readings, at 0222 and 0225 hours. These are the same as the times he records in the Occurrence Report for each result.

I have no evidence before me to the contrary; I am satisfied that the ASDs registered "FAIL".

Were you advised of your right to request a second analysis?

In the Report to Superintendent, 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 Occurrence Report the officer indicates that you were read your right to request a second test at 0223 hours.

There is no evidence to the contrary; I am satisfied that you were advised of your right to request 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 0225 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 055114 and your second sample of breath into ASD serial number 052909. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 055114 and 052909.

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 tests resulted in a "FAIL" reading.

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

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on January 10, 2014, he checked the calibration of ASD serial number 055114. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as February 7, 2014, and the service expiry date as August 30, 2014.

For the second ASD, the qualified ASD calibrator certified that on January 10, 2014, he checked the calibration of ASD serial number 052909. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as February 7, 2014, and the service expiry date as August 30, 2014.

I have no evidence before me to the contrary; I am satisfied that the ASDs were reliable at the time the officer used them to analyze samples of your breath on February 2, 2014.

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. I note that as you have already served 16 days of the prohibition, you need to serve the remaining 74 days. Your prohibition commences April 23, 2014. When you

prohibition ends, you may resume driving once you have obtained a driver's license from the ICBC.

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

Adjudicator

cc. Kyla Lee
Acumen Law Corporation
fax: 604-685-8308

Pages 566 through 603 redacted for the following reasons:

s.14

s.14

Pages 605 through 611 redacted for the following reasons:

s.14

Wilkinson, Anita JAG:EX

Subject: s.22 decision
Location: Kathy's office

Start: Tue 2014-03-11 2:00 PM
End: Tue 2014-03-11 2:30 PM
Show Time As: Tentative

Recurrence: (none)

Meeting Status: Not yet responded

Organizer: Anderson, Kathy E JAG:EX
Required Attendees: s.15 JAG:EX

Re: s.22

Hi s.15

The s.22 case is coming back as a rehearing and I see that you are the original adjudicator. I wanted to go over the advice and the case with you and have attached the advice for you to go over before we meet.



s.22 v.
Superintendent

Let me know if this time isn't good for you and I can reschedule.

Thanks,
Kathy

Not Responsive

From: Anderson, Kathy E JAG:EX
Sent: Monday, December 2, 2013 1:56 PM
To: s.15 JAG:EX; s.15 JAG:EX
Cc: Esposito, Tony JAG:EX; Burchnall, Shelly K JAG:EX
Subject: Adjudicator Manual

Here's the electronic version of the contents of the Adjudicator Manual. The only documents not in this version are the on boarding documents that s.15 put together. I'll need to get those from you tomorrow s.15

I'll ask for Megan from MOC come back and photo copy 3 more binders for you, s.15 and s.15 and s.15

This is a work in progress and I think we're off to a really good start!

Kathy Anderson

Pages 614 through 619 redacted for the following reasons:

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