

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* (the “Act”) requires me to confirm your prohibition, along with 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 the application form, you checked eleven grounds for review; however, the ground that you did not refuse or fail to comply is not applicable because you were prohibited on the basis of a “FAIL” result, not on the basis of a failure or refusal to comply. I have considered all grounds available to you.

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

Prior to the oral hearing, Mr. Filkow provided me with a copy of a recent court decision *Wilson v Superintendent of Motor Vehicles*. Mr. Filkow stated that *Wilson* may be in reference to a

“WARN” prohibition, but the principles apply to your situation. Mr. Filkow stated that the officer did not have sufficient grounds to establish that your ability to drive was impaired by alcohol.

Mr. Filkow also submitted that the officer did not have sufficient grounds to form a reasonable suspicion that you had alcohol in your body. Mr. Filkow stated that you admitted to consuming alcohol “five hours ago” which was similar to Wilson and in your case the officer reported very little indicia of impairment. Last, Mr. Filkow submitted that the officer lacked the objective and subjective grounds to form a reasonable suspicion.

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.

Further, 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.

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 indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 2305 hours on September 8, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that he responded to a complaint regarding a drunk driver coming off the Gibson’s Ferry on the Port Mellon highway.

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, both resulting 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 2320 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 2322 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 43881 and your second sample of breath into ASD serial number 101519. The officer also provided the Certificate of a Qualified ASD Calibrator for both 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 a "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?

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 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 section 215.5(1) of the *Motor Vehicle 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.

Adjudicator s.15

pc Kevin Filkow by fax: 604 270 3787

October 4, 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);
- 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. However, to date I have not received any submissions from you or Mr. Pechet to support your review. 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 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 19:36 hours on September 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 Report, the officer indicated that the ASDs registered a "FAIL" at 19:43 hours and 19:46 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 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 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 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.

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 C. J. Attlesey certified that the ASDs used in your case were found to be within the recommended limits when their calibration was checked on September 4, 2013. The qualified calibrator 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 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.

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.

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 1552 hours on September 1, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you failed to stop at a stop sign and were pulled over. You were identified as the driver via your BC driver's licence.

In your submission you confirm that you were pulled over by the officer for failing to stop at a stop sign.

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 indicates in the Report that you had the odour of liquor on your breath. In the Narrative, the officer states that he detected a strong odor of liquor coming from your vehicle and your person. The officer states that your eyes were glossy, and while speaking to you he detected a strong odour of liquor on your breath. The officer states that you denied consuming any alcohol that day. The officer states that at 1557 hours he read the ASD demand from a prepared card.

In your submission you state that you were pulled over for running a stop sign. You felt that there were no grounds to warrant the breathalyzer demand, and you deny that your person or your vehicle smelled of alcohol, as you had just returned from registering for your fall semester at s.22

The officer must form a reasonable suspicion that you have alcohol in your body before reading the ASD demand. I am mindful that you deny consuming alcohol, or that your breath and vehicle smelled of alcohol, however; I find the detail provided by the officer to be more compelling. The officer indicates that he detected the odour of liquor on your person and in your vehicle; he then separated you from your vehicle and continued to detect the odour of liquor on your person and your breath. Aside from your denial of the officer's evidence, you have not provided me with any further information to cause me to question the evidence provided by the officer. Based on the odour of alcohol on your breath and in the vehicle, your glossy eyes, combined with your observed driving behavior, as well as further reasons outlined below, I find the evidence of the officer to be more compelling, and I am satisfied that the officer had reasonable grounds to form a suspicion that you had alcohol in your body.

I am satisfied that a valid ASD demand was made.

In the Narrative, the officer states that he read the ASD demand to you, and you asked him if you had to blow into the ASD. The officer advised you that you had two choices: choice one was to comply with the demand and to blow into the ASD, choice two was to not blow into the ASD and face the consequences of refusing to provide a sample. The officer indicates that you stated the second choice. The officer asked if you were refusing to provide a sample and you

stated “yes.” The officer indicates that he informed you that the penalty for refusing was the same as providing a “FAIL” sample. The officer states that you indicated that you understood.

In your submission you state that when you refused you did not realize that it would result in an automatic “FAIL”. You state that you were not advised until the tow truck arrived and the officer gave you the IRP Notice. You state that after realizing the charge, you offered to take the breathalyzer test, but the officer refused.

If I accept your version of events to be true, I still find that you clearly and unequivocally refused to provide a sample of your breath until after you were served with the Notice. You are required to comply with the ASD demand forthwith, not at a time of your choosing.

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 your submission you state that you did not believe that the officer had grounds to make the ASD demand based on failing to stop and a stop sign. You state that you refused to provide a sample, but you were not explained the consequences and meaning of refusing, and as such you were not able to make an informed decision. In your evidence you state that you requested to provide a sample into a breathalyzer after the officer gave you the Notice and told you about the lot fees, administration fees, and other fees that the refusal may include. At first you made your decision on a lack of information and the belief that the officer was over stepping his right to administer an ASD to anyone running a stop sign. You feel that if the consequences of a refusal were explained, you would have complied and filed a complaint at a later date. You submit that the officer said that he could not inform you of what your decision meant as he would be advising you legally if he did. You state that the officer’s refusal to accept your attempt to correct your misunderstanding denied you the chance to prove your false charge.

The officer states that you were informed that refusing to provide a sample carried the same consequences as providing a “FAIL” sample, and you stated that you understood and still did not want to provide a sample. There is no evidence before me that you made further inquiries into the penalties associated with a “FAIL,” and if you were concerned about the penalties, I do not understand why you did not make further inquiries at this time. The officer indicates that he asked you at least three times if you were refusing to provide a sample, and each time you indicated that you did not wish to do so.

As stated above, I am satisfied that the officer made a valid demand for a sample of your breath, and you refused to comply with that demand. The officer is not required to provide you with legal advice, and I am satisfied that he informed you that you would receive the same consequences if you refused, as if you provided a “FAIL” sample. Your belief that failing to stop at a stop sign was not sufficient grounds does not negate the obligatory nature of the ASD demand that I have found to be valid, and that you understood.

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 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.

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);
- 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 seven 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.

We received a fax from Jennifer Currie on October 30, 2013, in which she said she will not be acting as your lawyer in this matter. Ms. Currie said you have a copy of the disclosure documents and will be making your own submission. We received a two page fax from you, which I will consider in this review.

In your written statement, you explained that you have a good driving record. You also said you are a single father of a s.22 boy and you are the sole provider for him. You said you need your licence to maintain employment and operate machinery. You said you feel that two weeks without a truck or a licence feels like punishment enough.

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 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"), Corporal Morgan indicated that he witnessed you driving or in care or control of the vehicle at 2239 hours, on October 18, 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, Corporal Morgan 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 2247 and 2249 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"), Corporal Morgan 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 officer 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 submission, you explained that you consumed four beers and one mixed drink over the course of four hours. You said that based on your height and weight, you do not think it was unsafe to drive the 2.5 kilometres home given this drinking pattern.

You said the distance from your friend's to the roadblock was 1.5 kilometres and less than two

minutes of driving. You indicated that you left your friend's place at 10:35 pm. You said you told the officer you had a couple of beers and that your last drink was 45 minutes prior. You said you forgot to tell the officer about the mixed drink you had at 10:30 pm. You argued that you were not given enough time from your last consumption of alcohol before being asked to provide a breath sample into an ASD. You said you feel that everything happened very quickly – within a ten minute period your truck was being towed away to the impound lot.

I infer you are arguing that mouth alcohol from your last drink affected the ASD results. 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.

In your statement, you indicated that you remembered consuming alcohol at the following times:

- 7:05 – opened first bottle of beer,
- 7:50 – had a second bottle of beer,
- 8:30 – had a third bottle of beer,
- 9:15 – opened last bottle of beer,
- 10:00 – finished the last bottle of beer,
- 10:30 – friend's wife brought you a one ounce spiced rum drink, which you drank.
- 10:35 – left friend's house and encountered roadblock less than two minutes later.

Corporal Morgan's evidence in the RTS is that you said you had your last drink 20 minutes prior. In the Narrative, the officer said you initially told him that you had not consumed any alcohol. He said he noticed a strong odour of liquor on your breath and asked you to pull over. When Corporal Morgan asked you the time of your last drink, he said you told him "45 minutes ago". When he asked you if you had consumed anything in the last fifteen minutes, he said you told him your last drink was "20 minutes ago."

Given the inconsistency between your evidence and that of the officer, I must make a finding of credibility. I infer there was no reason for you to keep track of when you consumed each drink, yet you remembered your consumption pattern precisely. In contrast, you failed to remember to tell the officer about the mixed drink you had consumed within a few minutes of encountering the roadblock. This internal inconsistency in your submission raises questions in my mind about the reliability of your evidence. In contrast, Corporal Morgan's undisputed evidence indicates that he turned his mind to the possibility of mouth alcohol and asked you very direct questions about your recent consumption to ensure this was not an issue.

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 Morgan 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.

You did not provide any persuasive evidence that causes me to doubt the "FAIL" readings on 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 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 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 “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.

In your written submission, you commented on the officer’s evidence regarding pulling you over and of your symptoms of being affected by alcohol. These matters 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 “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 Kan indicated that he witnessed you driving or in care or control of the vehicle on September 14, 2013, at 2200 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 Kan stated that you provided breath samples into ASDs and that the devices registered “WARN” as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered “WARN” at 2209 and 2214 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 Kan indicated that he informed you of your right to a second breath test analysis. There is nothing 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.

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 "WARN". I am satisfied that the Notice was served on the basis of the lowest available result, which was "WARN".

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 were found to be within the recommended limits. There is nothing before me to the contrary on this point. In fact, you specifically noted that the officer told you to apply for a review if you thought the ASD was not working. You said you did not think that was the problem. I am satisfied that the ASDs were reliable.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

Constable Kan's evidence in the RTS and the Narrative is that you told him the time of your last drink was an hour previously. In your written submission, you said, "after reflection, [you] realized that the glass of wine [you] were sipping on was finished well less than an hour ago that [you] told the officer." You did not indicate when you finished your last sip, though. I infer that your reflection did not occur at the scene.

You said you would have appreciated waiting 15 minutes to take the second test and you strongly feel that the reading above 0.05 could possibly be from residual alcohol in your mouth. You said you told the officer you strongly believed the first test result was from residual mouth alcohol. This statement contradicts your previous comment of having realized "after reflection" that you finished the glass of wine later than you had told the officer. The inconsistency in your evidence causes me to question the reliability of your statements.

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. Given that you confirm telling the officer your last drink was approximately one hour prior, the officer was not required to wait any period of time before administering the first breath analysis.

Further, the second test was administered 14 minutes after the time of driving, and there is no

indication that you had your last sip of wine while you were driving, prior to the officer pulling you over. Accordingly, it is more likely than not that you did not consume your last sip within 15 minutes of the second test, so I find that mouth alcohol was not a factor on the ASD results.

While you may have “in no way, felt intoxicated or impaired”, you did not provide any compelling evidence that would cause me to doubt the “WARN” readings on the ASDs that I 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%.

Decision

As a result of my findings, I confirm your 3-day driving prohibition, monetary penalty. Your prohibition took effect on September 14, 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 (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 indicate 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 2230 hours on October 12, 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 2234 hours and 2246 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. Further, in the Narrative Text Hardcopy – Occurrence Report – 1 (the “Occurrence Report”), he indicates that the right to request a second ASD test was read at 2240 hours, verbatim from wording on the back of the IRP booklet.

Mr. Nunrha submits that a proper demand for providing a second breath sample was never given by the officer. Specifically, because the officer had to wait for a second ASD to be brought to the scene, he submits that the demand for providing a second breath sample was negated. Further, Mr. Nunrha submits that once the second ASD had arrived on scene, that the officer provides no evidence that he read the demand to provide the second sample at this time. Accordingly, he submits that you were entitled to request a second test and be provided with that test forthwith. Therefore, any demand or right to request a second test must have been made when the officer had the second, different ASD in his possession.

While I acknowledge Mr. Nunrha's submissions as well as your sworn affidavit surrounding the same issue, a demand to conduct a second ASD test is not required per legislation. Rather, in an IRP investigation a peace officer must advise a person of their right to request a second ASD test. While a peace officer is required to advise a person of this right, it is the person's choice if they wish to request a second ASD test. On this point, you provide evidence that you requested a second test at approximately 10:40 pm, and that the second ASD did not arrive on scene until approximately 10:46 pm. However, while I have considered Mr. Nunrha's submission that you should have been provided with the second test forthwith, section 215.42(1)(a) of the Act states that:

(a) the person has a right to forthwith request and be provided with a second analysis.

I interpret this to indicate that a person must forthwith *request* a second test and if requested, must be provided with a second analysis. Further, with regard to the six minute delay in bringing the second ASD to the scene, the officer provides evidence in the Occurrence Report that a second ASD had to be brought to the scene by a second member. I find this indicates that the officer was following protocol set out in section 215.42(2) of the Act, by ensuring that your second test was conducted on a different ASD. Therefore, when considering the reason for the delay, I find the determinant factor is not the length of delay but the reason for it; a reason I have already found to be reasonable.

Based on the evidence before, 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 101705 and 101750, 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 3, 2013, and October 1, 2013, respectively. 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 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.

September 27, 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 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, Sarah Leamon. I have proceeded with this review based on that confirmation.

Ms. Leamon made submissions with respect to the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*. She stated that the officer failed to provide evidence to

establish that your ability to operate a motor vehicle was affected by alcohol or that the officer held such a belief.

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.

Ms. Leamon also referred to 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 the 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. I have 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 "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 you were driving or in care or control of a motor vehicle on September 8, 2013, at 00:50 hours. In the Narrative Text Hardcopy (the "Narrative"), the officer stated that he observed you roll through a stop sign while making a left turn. You were identified 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 "WARN"?

In the Report, the officer indicated that you provided a sample of breath into an ASD at 00:55 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 in the Report and the Narrative is that you were informed of your right to a second test. 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 officer indicated that the second analysis was performed on a different ASD from the first and you registered a "WARN" result. 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 police evidence indicates that the result of both ASD tests was a "WARN". In the absence of evidence to the contrary, I am satisfied that the Notice was served on the basis of the lowest available result which was "WARN".

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator (the "Certificates") in which D.W. Jones certified that he is a qualified ASD Calibrator (the "Calibrator").

For the first ASD with serial number 101744, the Calibrator certified that on September 5, 2013, he checked the calibration of the ASD and found it to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 3, 2013, and the service expiry date as January 24, 2014.

For the second ASD with serial number 101738, the Calibrator certified that on September 4, 2013, he checked the calibration of the ASD and found it to be within the recommended limits and functioning correctly. He also recorded the ASD calibration expiry date as October 2, 2013, and the service expiry date as February 20, 2014. Both Certificates indicate that the ASDs were calibrated in accordance with the training received by the Calibrator.

There is no evidence before me to the contrary. Based on the evidence before me, I am satisfied that the ASDs were 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 8, 2013.

Adjudicator

cc: Sarah Leamon, Acumen Law Corporation
Fax: 604-370-2505

October 31, 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.

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 the Notice, the officer indicated that the reason for the prohibition was because a sample of your breath on an ASD registered a “FAIL” and your ability to drive was affected by alcohol. However, the officer has not provided sufficient evidence to support this charge.

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 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

On September 26, 2013, I received a submission from Jennifer Currie indicating that she would no longer be acting as counsel for you in this review.

As part of your submission you provided the recent decision *Wilson v Superintendent of Motor Vehicles*. You state that your ability to drive was not affected by alcohol. You state that the vehicle behind you suddenly activated its emergency lights and you signaled for the vehicle to pass on the right and you pulled over to the curb and turned off the ignition.

I have read and considered the *Wilson* case and I acknowledge your submission. 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 0109 hours on September 12, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer states that she observed a vehicle drifting into other lanes and then jerking back. The officer states that the vehicle was driving 10-12km/h below the speed limit and would speed up and slow down again. The officer indicates that she initiated a traffic stop, and you were identified as the driver via your BC driver’s licence.

In your submission you state that you drove down King George Blvd slowly as it tends to have people who J-walk, often unsafely. You state that a vehicle following close behind you activated its emergency lights and you pulled over to the curb.

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 0123 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 0123 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 0123 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 045940 and your second sample of breath into ASD serial number 045929. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 045940 and 045929.

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 23, 2013, he checked the calibration of ASD serial number 045940. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 20, 2013, and the service expiry date as July 9, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 28, 2013, he checked the calibration of ASD serial number 045929. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 25, 2013, and the service expiry date as January 24, 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 the Narrative the officer indicates that you were shaky/nervous, you had glossy eyes, you avoided eye contact, and you had the odor of liquor on your breath. The officer indicates that when asked the time of your last drink you stated "Tuesday" and then changed your response to "noon."

In your evidence you state that you had 7oz at approximately noon on September 11, 2013, and then you laid down for about three hours at 4:00pm. You state that you had nothing to eat that day, and you are currently s.22 medication that does not allow you to drink alcohol. You state that your glassy eyes were due to the fact that you were tearing up due to your recent separation and the fact that the officer called you a liar three times in a loud tone. You state that you could not look at the officer as you were afraid that you would break down sobbing. You agree that you were shaky and you state that you are working with your physician to determine if you have symptoms relating to associated trembling that tends to worsen with stress. You state that at approximately 12:00am you went to 80th and King George Blvd to Robins Donuts for coffee. You state, "after I had coffee I used the washroom, my stomach was upset and I vomited more like spit up fluids."

You have provided reasoning for a number of the observations made by the officer with regard to glassy eyes, shaking, and avoiding eye contact. I acknowledge your submission that you consumed "7oz" thirteen hours prior to being stopped by the officer and that you spat up fluids in the bathroom at Robins Donuts. However, I am not clear on the relevance of these claims. If your intention was to insinuate that these actions could have caused your "FAIL" result, I note that I have not been provided with any evidence as to how consuming "7oz" the previous day and spitting up "fluids" prior to being stopped by the officer could affect the ASD results, if at all.

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 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 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 you and your lawyer Sacha Roudette received all of the disclosure documents. I have proceeded with the review based on this confirmation.

You applied on 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.

Ms. Roudette provided principles from three 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

- *Caitlin*: an adjudicator is required to weigh evidence, and provide “reasonable justification for his or her choice”

I am mindful of these principles and have applied them in conducting this review.

Ms. Roudette made submissions based on the officer’s initial contact with you, his discussion with you, and the formation of a ‘reasonable suspicion’ that you had alcohol in your body while operating a vehicle. The validity of the demand is not at issue in this review; the relevant provisions of the Act which govern this ASD “FAIL” review do not incorporate an examination of the validity of the demand.

Similarly, she makes a submission that the officer did not provide evidence that your ability to drive was affected by alcohol. As above, the Act makes no provision for an adjudicator overturning an IRP on this issue; it is not a stated ground in section 215.5(4) of the Act. I therefore 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 -- Cpl. Graham -- indicated that you were driving or in care or control of a vehicle at 2337 hours on September 21, 2013. Cpl. Graham provides in the occurrence report that: he observed your vehicle fail to stop at a stop sign; he stopped your vehicle; and he approached you as the driver of the vehicle.

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 ASDs register “FAIL”?

In the Report, the officer indicated that you provided ASD “FAIL” results at 2339 and 2341 hours.

In Ms. Roudette’s submissions, she conveys your version of events: there were three ASDs used, with the first ASD “not functioning”, with no explanation of why it was not functioning by Cpl. Graham. She submits that you advised that you had provided a sample into this first ASD, and that a “40” registered on this device, not a “FAIL”. She provides previous IRP superintendent delegate

decision numbers as examples to point to the position this office takes with unsatisfactory evidence that an ASD registered "FAIL".

To borrow from the principles stated by Ms. Roudette, I must weigh evidence, and review "credibility . . . on a standard of reasonableness." Cpl. Graham provided his evidence in the form of the Report, as required by the legislation, which is sworn. Ms. Roudette provided no evidence directly from you; this is hearsay, and I have therefore given less weight to her submission on this issue.

On this issue, I have evidence from Cpl. Graham that two ASDs registered "FAIL" results. I am satisfied that a first ASD was introduced that was malfunctioning; I am not prepared to accept as fact that you provided a sample into that ASD which registered "40" -- I infer with reason that such a reading would not be interpreted as a malfunction by the officer.

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

Were you advised of your right to a second analysis?

In the Report, Cpl. Graham 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 specific details:

- your right to have a second test on a different unit
- your reply "it will probably be the same"
- the lower reading would prevail
- you agreed and requested a second test from a different unit

Referring again to the introduction of a malfunctioning ASD, Ms. Roudette states this was not a second test, but really a third. Also:

our client advises that contrary to this allegation at no time did Cpl. Graham explain that it was [a] "right," nor did he explain that it would be conducted on a different unit, nor did he explain that "she had nothing to lose with another test and that the lower reading would prevail." He simply presented another instrument and said, "blow again."

The evidence she presents here is simply contrary to what Cpl. Graham provided in the occurrence report; again, I give it less weight to determine a more likely factual version of events. Also there is no element of questioning the reason for a second test in this submission -- this evidence, as presented on your behalf by Ms. Roudette, doesn't seem to question the need for a second test, which I would expect if the reason or right was not explained to you.

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?

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 notes the time of 2341 hours and the result "again showed a fail reading."

In her submissions, Ms. Roudette does not question the existence, or the result, of a second analysis, but rather asserts this second analysis occurring at 2341 is in fact the third ASD test and result. The Act makes no provision for a third test.

Above, I have determined that you did not provide a sample into the device initially introduced by Cpl. Graham. I therefore find this analysis occurring at 2341 to be the second analysis provided by the officer.

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

Cpl. Graham recorded the two test results as "FAIL".

Twice in her submissions, Ms. Roudette questions overall the reliability of the test results, though I cannot determine on what basis she is making that claim -- it appears to be in the alternative to main points she stresses. She uses this as a claim that your right to have the lower of the first and second test results be the basis for the IRP was violated -- in essence because of the confusion raised by the introduction of the malfunctioning device at the outset of the process.

As above, I have determined that you did not provide a sample into the device initially brought out by Cpl. Graham -- this is a decision I make based on credibility and a weighing of the evidence before me.

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 ASD serial numbers 101208 and 101215, the ASDs that he used to test the samples of your breath. These Certificates form part of the sworn Report.

For the ASD 101208, the qualified ASD Calibrator, M Banich, certified that on September 4, 2013, he checked the calibration of ASD serial number 101208. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 2, 2013 and the service expiry date as November 12, 2013.

For the ASD 101215, the qualified ASD Calibrator, M Banich, certified that on September 4, 2013, he checked the calibration of ASD serial number 101215. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 2, 2013 and the service expiry date as November 12, 2013.

As shown in the previous section, Ms. Roudette made statements on the reliability of the ASDs used by Cpl. Graham; these statements are not bolstered by evidence on the ASDs themselves.

Ms. Roudette also called into question the timing of the breath samples, asserting Cpl. Graham obtained results "without having observed a delay of at least fifteen [15] minutes for the possibility of mouth alcohol contamination." This is premised on your denial that Cpl. Graham asked the time of your last drink, and the responses he recorded: "I had a beer with dinner" and "... that was a long time ago." 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 line of questioning by the officer, your evidence is simply a denial of the officer's evidence, as told by Ms. Roudette.

The officer has provided Certificates to establish the fact that each ASD was properly calibrated, and I am therefore satisfied of the reliability of each.

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

cc. Sacha Roudette
Carr Buchan & Company
fax: 250-388-7327

October 25, 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

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, Jeremy Carr. I have proceeded with this review based on that confirmation.

In his written submission, Mr. Carr referred to the case of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311 and stated that *Spencer* reminds us that adjudicators must not assume from the existence of a demand that the demand was properly founded. He stated that according to the Narrative Text Hardcopy (the "Narrative"), the officer did not read the ASD demand; rather it was issued merely from memory. He submitted that a demand recited from memory cannot satisfy the requirements of a proper ASD demand.

While I acknowledge Mr. Carr's submissions, 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 s. 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.

Additionally, Mr. Carr made submissions with respect to making findings of credibility and referred to the cases of *Spencer* and *Gillies v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 899. I have read and considered both cases and I am mindful of what I must consider 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 reported that you were driving or in care or control of a motor vehicle at 03:14 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 03:18 and 03:21 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, 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 and you requested one.

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

The evidence before me is that the second analysis was provided by the officer on a different ASD. There is no evidence before me to the contrary.

Based on the evidence before me, I am satisfied that a second analysis was provided by the officer on a different ASD than was used for 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 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 of Qualified ASD Calibrator 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. 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 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.

Adjudicator

Cc: Jeremy Carr
Fax: 250-388-7327

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. 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

There is one issue that is determinative of this hearing.

Were the ASDs 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.

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

s.15

Adjudicator

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

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 (Notice). You applied to the Superintendent of Motor Vehicles for a 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 one ground. For your benefit, I have considered all the grounds available to you.

Records indicate that your lawyer, Geoffrey Simair, 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 AnalysisWere 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, at 16:30 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, at 16:30 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.

Mr. Simair pointed out that the ASDs were calibrated on the same day, by the same technician using the same standard and he suggested that this undermines the second test. He argued that the Accuracy Check logs are required to show that proper calibration was followed. He provided an expert report from J.T. Audrey Jakus. Ms. Jakus stated that in order for her to complete her written opinion she requires the calibration check sheets to confirm that the proper calibration and working order of the ASDs.

I disagree with Mr. Simair's suggestion that the second test was undermined. I acknowledge that both ASDs were calibrated on the same day, by the same technician using the same standard. However, there is no evidence before me that the ASDs were unreliable. While Ms. Jakus stated that she requires the calibration check sheets to confirm the proper calibration and working order of the ASDs, there is no obligation for an officer to forward maintenance records or any other documents relating to the 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 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.

Adjudicator

cc: Geofrey Simair
250-385-4506

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);
- 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, Erin Dance. I will proceed with the review based on this confirmation.

Ms. Dance submits that the Act clearly states that in order to issue the Notice the officer must have “reasonable grounds to believe as a result of the analysis that the driver’s ability to drive is affected by alcohol. Ms. Dance provided *R v. Wilson*, 2013 BCSC 1638 for my review and consideration.

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 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 0110 hours on October 12, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that witnesses observed you getting into your vehicle and starting it. The officer reported that you were the sole occupant. The officer stated that the witnesses directed the police to you. The officer reported that:

- you admitted that you were the driver
- you admitted that you started the vehicle
- the keys were in your possession
- you were belligerent and denied that you were driving

Ms. Dance submits that the officer did not witness you in care or control. There is evidence in the officer’s evidence that you denied driving. Ms. Dance submits that you had no intention of driving. It is also of note that under the heading “Evidence of Driving or Care or Control” it simply states “witnesses observed single occupant in vehicle.”

Ms. Dance submits that section 215 (1) of the Act defines a driver as including 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.” To support her position Ms. Dance provided me with McLaughlin.

I find a more pertinent case that also cites the same clause in *Toews*, is *Gray v. the Superintendent of Motor Vehicles*, 2007 BCSC 655. In *Gray*, the Honourable Mr. Justice Metzger analyses the decision of an adjudicator of the Officer of the Superintendent of Motor Vehicles. *Gray* addresses the issue of care or control in an administrative prohibition such as yours, unlike *McLachlan*, which deals with a criminal offence.

In your affidavit you stated that you were retrieving your s.22 and cell phone from your vehicle. You were in the driver’s seat and you turned on the cabin lights. You stated that at no time did you attempt to start the engine or put your keys in the ignition. You stated that you had no intention of driving. You stated that the sole purpose for being in the vehicle was to retrieve your belongings. You stated that the officer stopped you a block away from your vehicle. You submit that you repeatedly told the officer that your only intention was to walk home.

In considering this issue I find it noteworthy that that you told the officer that you were “not driving” rather than advising the officer you were retrieving your belongings. I find that I can accept that you were not actually driving; however, I am not convinced that you were not in care or control. I find it unlikely that the witnesses would contact police if they were simply observing someone retrieving objects from their vehicle. As well I find it unlikely that the witnesses led the police to you 1 block away from your vehicle.

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

Did the ASD register a “FAIL”?

In the Report, the officer indicated that you provided a “FAIL” result at 0115 hours and 0118 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 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 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.

Adjudicator s.15

cc: Erin Dance by fax 604 687 3022

November 6, 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) 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". 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, 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 Report to Superintendent (the “Report”) indicates that at 01:45 hours on October 19, 2013, Officer Wong (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 01:48 hours and at 01:52 hours, the officer used ASD serial numbers 103668 and 093980 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 01:52 hours on ASD serial number 093980.

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 both of the ASDs used to conduct your breath tests 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.

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

You told me that you are s.22 On October 19, 2013, you were at a company party and consumed two glasses of wine and then a strong rum and coke at the end of the evening. You said you live within a one mile radius of the establishment and had driven three minutes before being stopped at the roadblock. You said you had called for a cab and waited for an hour. You felt you were fine to drive. You also said that you advised the officer that you had just consumed alcohol and asked if you could rinse your mouth with water so the ASD test would not be contaminated. You said the officer refused to allow you to rinse your mouth. You felt the officer may have been prejudiced against you because he had already checked your plates. You said you had gone through the “whole thing” before last year.

The officer’s evidence is that you were stopped at a roadblock, that you appeared nervous, had watery eyes and a smell of liquor on your breath. When the officer asked you what time your last drink was, you initially denied drinking and then stated that you had four drinks earlier at the pub. The officer’s sworn evidence in the Report is that your last drink was at 01:30 hours.

You told me you had two glasses of wine and then a strong rum and coke. However, what you told the officer at roadside is different - after initially denying that you consumed anything, you told the officer that you consumed four drinks. You did not dispute the officer’s evidence on this point. In addition, I find it curious that you called for and then waited for an hour for a taxi if you say you felt fine to drive. In my view, your evidence is unreliable because you provided different information to me and to the officer regarding how much alcohol you consumed.

On the date and time in question, the officer was working a drinking and driving counter-attack. Part of their duties as trained police officers is to ascertain all information necessary and pertinent to their investigation, and to observe and record the timing of events as they occur. The evidence in the Report is that your response to “time of your last drink” is at 01:30 hours. The officer clearly turned his mind to the possibility of the existence of mouth alcohol and has your last drink as being at 01:30 hours. Therefore, there was no need for the officer to wait fifteen minutes. He acted reasonably in obtaining a breath sample without delay.

In reviewing the evidence in its totality, I am satisfied that there is sufficient evidence to find it more likely than not that the ASD registered a “fail” due to alcohol in your blood, and not as a result of alcohol in your mouth. 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 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

October 11, 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;
- 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 you did not refuse or fail to comply with the officer's demand to provide a breath sample. That ground does not apply in your situation however 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.

Mr. Butler has raised a number of issues as set out in his September 16 and October 4, 2013 letters.

Mr. Butler said that the Report to Superintendent (the "Report") is not properly before me as it is not properly sworn and has provided me with the case of *Murray v. SMV* to support this argument. Mr. Butler said that in Box 3 the name of the person who is swearing or affirming the contents of the Report has been left blank. I agree that Box 3 has been left blank, however, I note that the signature line on the Report indicates that the person signing is Badge No. 92. In reviewing the police evidence submitted in this matter I also note that the Narrative Text Hardcopy (the "Narrative") tells us that the author is "PO92 Ludeman, Eric"; both Certificates of a Qualified ASD Calibrator (the "Certificates") are signed by Constable Eric Ludeman, Badge No. 92; and the Notice of Driving Prohibition, Notice of Impound and the Report to Superintendent Vehicle Impound all indicate that they were prepared and/or signed by Constable Ludeman, Badge No. 92. In my view, it is clear that Badge No. 92 is connected to Constable Ludeman.

You applied for this review on September 9, 2013, and were provided with document disclosure at that time. The date set for the review hearing was September 17, 2013, with the decision due on September 30, 2013. Mr. Butler could have asked our office to supply him with the two pages missing from the Narrative when he realized they were missing. He instead chose to inform me by way of his written submissions dated September 16, 2013, the day before the review hearing. Upon learning that two pages of the Narrative had not been disclosed to you, I faxed them to Mr. Butler's office and, consistent with procedural fairness, allowed him more time to respond if necessary. I also extended the decision due date from September 30, 2013, to October 11, 2013. Mr. Butler then phoned our office to request additional time in which to provide a response to the missing two pages of the Narrative. Again, with my mind turned to procedural fairness, I agreed to extend the deadline to receive further submissions until 4:30 p.m. on Friday, October 4, 2013. I can confirm that Mr. Butler has provided me with further submissions under cover of his letter dated October 4, 2013. I have been mindful of the tenets of administrative fairness in ensuring that full document disclosure has taken place, as well as allowing you time to respond.

According to the fax information on the police disclosure, the two pages you were missing were submitted on September 8th along with the rest of the police disclosure. I do not know why they were not provided to you initially. If Mr. Butler had called our office as soon as he noticed them missing rather than formulate his submissions around them, I would not have had to adjourn the hearing.

Mr. Butler submits that there is lack of evidence regarding the type of demand given to you at roadside. 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. Butler has made further submissions to revoke your driving prohibition based on either (1) the result of the ASD being unreliable; or (2) the ASD did not register a "fail". Mr. Butler attached the recent BC Supreme Court decision in *Buhr v. SMV* in support of his submissions.

I acknowledge that I am aware of and have read the *Buhr* decision 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.

Mr. Butler 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. Mr. Butler provided me with a copy of the *Wilson* case in support of his submission.

I acknowledge Mr. Butler's submission on this matter, and I have read and considered the *Wilson* case. I acknowledge the Court's ruling, however, as indicated above, section 215.5(4) of the Act sets out the grounds under which I must revoke a driving prohibition. The type of demand made by an officer 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 is that on September 8, 2013, at 01:56 hours Officer Ludeman (the "officer") established you as a driver or having care or control of a vehicle.

As 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 02:01 hours and at 02:12 hours, the officer used ASD serial numbers 103668 and 093980 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 093980 at 02:12 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 103668 was checked for calibration on August 19, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 16, 2013, and a service expiry date of July 9, 2014.
- ASD serial number 093980 was checked for calibration on August 19, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 16, 2013, and a service expiry date of April 2, 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 consumed one shot of vodka on September 8, 2013, and had consumed nothing else alcoholic for weeks prior to that one shot. You explained that your glassy/bloodshot eyes were a result of fatigue and not from consuming alcohol. You were not slurring your speech. You regularly speak in a slow drawn out manner. You also do not believe that you were slurring at all. Regarding your unsteady gait and disheveled appearance, you explained that you had been pushed into a doorway at the bar. You were not a participant in this scuffle and neither were any of your friends, but you suffered a bruise on your hip and a rip to your pants pocket.

The officer's evidence in the Narrative Text Hardcopy Synopsis (the "Synopsis") indicates that you displayed gross signs of impairment and admitted to recent consumption of alcohol. The officer's evidence from the Narrative Occurrence Report indicates that the officer said he detected a strong odour of liquor emanating from the vehicle and asked you how much liquor you had to drink. The officer said you replied that you had been drinking in Vancouver which consisted of several "shots" with your last drink being "about an hour ago". The officer said he asked you to step out of your vehicle, which you did. The officer said he noted you had a strong odour of liquor emanating from your person, glassy/bloodshot eyes, an unsteady gait, and disheveled appearance.

You initially said you did not have any other symptoms relating to impairment by alcohol. Specifically, you said you "did not have any slurred speech nor any balance difficulties." However, I note that you subsequently provided explanations for these indicia of impairment by saying that what can be interpreted as slurred speech is actually your ordinary manner of speaking. You further explained that, if you did have balance difficulties or appeared disheveled, this was as a result of being pushed into a door at the bar. Your glassy/bloodshot eyes were like that due to fatigue.

I note that, although you have provided an explanation for your slurred speech, unsteady gait, disheveled appearance, and glassy/bloodshot eyes, you have not disputed the officer's comment about noting a strong odour of liquor emanating first from your vehicle and then, upon exiting the vehicle, from your person. I find it difficult to understand how the officer could detect a strong odour of liquor if you had just the one shot of vodka, an alcohol that is known to have very little odour.

In addition, you said you never told the officer that you "were drinking shots with your friends." You said you explained to the officer that you were out with a bunch of friends in Vancouver and that they were all doing shots. I find this explanation curious because, in my view, the officer's question is to ascertain the time of your last drink, not who you were out with and whether they were drinking. As well, I cannot find any mention in the officer's report where he said you had been "drinking shots with your friends."

In conclusion, in my view your attempts to explain the various indicia of impairment noted by the officer at roadside tend to vary depending on what allegations you are responding to. This leads me to question the reliability of your evidence in its entirety. I do not find your evidence to be credible. I cannot reconcile the two "fail" ASD test results with your claim that you drank only one shot of vodka .

Mr. Butler submits that there is no evidence that your BAC exceeded 80 mg%. I note, however, 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 measured twice using two separate ASDs that I have already found to be functioning reliably. Both of your ASD tests resulted in a "fail" reading, 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 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: Jamie Butler
by fax 604-739-9888

October 28, 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) 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, Jeremy G. Carr. I have proceeded with this review based on that confirmation.

Mr. Carr referred to the cases of *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1311 and *Gillies v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 899. 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 the above-noted cases; however, I am familiar with them and have proceeded with this review with *Spencer* and *Gillies* in mind.

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.

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 first 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: Jeremy G. Carr
By 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);
- 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 provided to you at the time of application. I will proceed with the review based on this confirmation.

You checked the boxes next to two grounds on the application form. However, the ground associated with a refusal or failure to comply with a demand is not applicable to your situation. I will consider all grounds available to you in this review.

In your written submission you stated that your *Charter* rights were breached by the officer by the manner in which he pulled you over, by not telling you what your blood alcohol concentration was, or by not recording the questions you had at roadside. You stated that you have a great driving record and will continue to abide by all the laws as required as a responsible driver. Finally, you stated that the fees associated with this review were not recorded in the Notice.

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. Further, I am not permitted to consider an individual's driving record in this review. The scope of the review is limited to the grounds as defined in the Act. Last, I know of no obligation for the officer to provide a numeric value to you with regard to your result on the ASD and the fees associated with the review are not an issue I can decide on.

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 1845 hours on October 18, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that he observed you pull out of the Fanny Bay Inn and travel south bound on highway 19a. He stated that he when he pulled you over; you were identified as the sole occupant and driver.

You question why you were pulled over; however, that is not the issue 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 you provided a "FAIL" result at 1848 hours and 1852 hours respectively.

You stated that after you provided a sample you asked the officer what your blood alcohol level was and he did not tell you. As noted above I know of no requirement for the officer to provide you with a numerical value of your blood alcohol concentration.

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?

You submitted that the officer recorded the temperatures of the ASDs as 22-23 degrees at 6:56 p.m. when in fact the outside temperature at the time was 10 degrees. Further, you questioned the reliability of the devices.

In a recent case *Buhr v. the Superintendent of Motor Vehicles* 2013 BCSC 1443 Justice Goepel referred to a an ASD Report where it states that the Alco Sensor IV is designed to provide maximum accuracy when the "internal" temperature is between 10 and 40 degrees.

The first analysis of your breath was performed on an ASD with the serial number 061131. The officer provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on October 6, 2013. This ASD had a Calibration Expiry Date of November 3, 2013, and a Service Expiry Date of August 28, 2014.

The second analysis of your breath was performed on an ASD with the serial number 101319. The officer provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on October 6, 2013. This ASD had a Calibration Expiry Date of November 3, 2013, and a Service Expiry Date of November 23, 2013.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report, the officer 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.

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

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 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, Kyla 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 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 Baylin and your lawyer's submissions, I find there is one determinative issue in this review.

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. However, based on the unique evidence provided by your lawyer on your behalf, I am not satisfied that the second analysis was performed on a different ASD. 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 12, 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 30, 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.

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.

Referencing section 215.41(3.1) of the Act, Ms. Currie submits that your prohibition should be set aside because the evidence provided by the investigating officer does not establish that he had reasonable grounds to believe that your ability to drive was affected by alcohol. Further, she provided the recent case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*,

2013, BCSC 1638, to indicate that Dley J. confirmed that the pre-conditions set out in section 215.41(3.1) of the Act must be satisfied before a Notice may be issued. I have read and considered the *Wilson* case and I acknowledge Ms. Currie's 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.

In paragraph 16 of your statement, you indicate that while the officer was holding the charter card in his hand, he advised you that you had to provide him with a breath test though you were surprised that he did not read verbatim from card. After reading his report, you submit that the demand made to you was similar to what the officer had written but that it was not as detailed or as long. 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.

You indicate that you would never risk your driver's licence because you have familial responsibilities which include driving your s.22 child to a private school in Maple Ridge, as well as driving your children to sporting events throughout the Mainland. 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.

You indicate that you have had only one driving infraction in the last 20 years of your driving record. While I acknowledge your submission, 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 sworn Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 0115 hours on October 12, 2013. Further, in the General Occurrence Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), he indicates that a

vehicle merged onto Highway 1 accelerating to a speed of 123 km/hr in an active 80 km/hr construction zone. He also observed the vehicle drift out of its lane twice and that the left side tires crossed the dashed white line before correcting back into the original travel lane. After conducting a traffic stop, the officer observed you as the lone occupant of the vehicle and confirmed your identity with a British Columbia driver's licence.

You submit that on October 12, 2013, at approximately 1:15 am, you were travelling eastbound on Highway 1. As you passed Gagliardi, there was a rolling, sharp turn to the right where lanes narrow due to construction. After noticing the police car behind you had activated its emergency lights, you pulled over to the right shoulder. The officer advised you that you were speeding and requested your driver's licence. In paragraph 8 of your statement, you indicate that you reminded the officer that he had initially pulled you over for speeding, not for drinking and driving, adding that it was not like you were weaving in and out of your lane. Surprised by your comment, the officer told you that there was one time you had touched the white line but then corrected yourself. Further, you advised him that you sped up to pass a vehicle, completing the pass safely, and slowing back down.

The reason why your vehicle was stopped is not an issue I must consider in this review. Further, you do not refute driving at the time the officer conducted the traffic stop.

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 0123 hours and 0126 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 077530 and 086039, 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 a Certificate of a Qualified ASD Calibrator for:

ASD serial number 077530, in which Billie Aadmi certified that the ASD was found to be within the recommended limits when he checked its calibration on September 18, 2013 and ASD serial number 086039, in which Barry Selver certified that the ASD was found to be within the recommended limits when he checked its calibration on October 1, 2013. Further, Mr. Aadmi and Mr. Selver certified that to the best of their knowledge the respective 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 Occurrence Report, the officer indicates that upon approaching the driver's side window of your vehicle that there was an immediate strong odour of liquor and observed that your eyes were glossy and your face was flushed. When you were asked the time of your last drink, he indicates that you advised him, "I've had nothing"; however, that when you were asked again prior to the ASD demand that you indicated that you did drink two hours prior consuming three drinks.

You wrote that after being stopped for speeding, the officer asked you if you were drunk to which you responded, "No." After stepping out of your vehicle the officer asked if you were drinking because he could smell alcohol on your breath. Accordingly, you advised him that you had had three drinks for the night and that was it. When he asked you if you would have any issues providing a sample on the ASD, you indicated none whatsoever because you had only consumed three cans of Budweiser beer over approximately three hours. Certain that you had a blood alcohol level under all legal limits for driving, you were not concerned about providing a sample of your breath for analysis. However, you submit that less than two minutes passed between the time you exited your vehicle and provided the first sample. During this time the officer did not observe you to determine whether you were coughing, sneezing, hiccupping or

burping seconds before the test was conducted. On this point, you indicate that you had a cold and were coughing the whole time and had sought medical attention for this on October 8, 2013.

While you have submitted evidence that approximately three hours had passed since your last drink and you s.22 I have no evidence before me as to how this duration of time or your body weight may have affected the ASD results. On this point, you indicate that the officer did not observe you from the time you exited your vehicle to the time before conducting the first test. As a result, he was not able to determine if you were coughing, sneezing, hiccupping or burping seconds before conducting the test. I note that in section 13 of the sworn RTS the officer indicated that you were observed continuously from the time of driving to the time of administering the first ASD test. Moreover, with regard to you having a cold, coughing, and requesting a flu shot, I have no evidence before me as to how these conditions may have affected your ASD test results.

I also acknowledge your submission that you advised the officer that your speech was not slurred, your walk was not assisted, and you were not staggering or swaying. Further, as an East Indian male, with a dark brown complexion and in limited lighting, you do not believe that it was possible for the officer to make observations that your face was flushed and your eyes were glossy. However, that if he did make these observations that it was due to you being slightly sick and coughing up phlegm, sneezing, and having a runny nose. Here, I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not how a lack of indicia associated with being under the influence of alcohol or how indicia observed by the officer can be explained by factors independent of being under the influence of alcohol.

While you may believe that you were under all legal limits for driving, you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs 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%.

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.

Adjudicator

cc: Jennifer L. Currie (by fax)
604-590-5626

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);
- 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 “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%”); 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.

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

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

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 married responsible man with a child on the way. You stated that you have a clean record. You stated that you are s.22 and you do service calls. You stated that not working for 3 consecutive days will cost you a total of \$700.00

in wages. Last, you stated that you recently applied for a s.22 and you will not be accepted with a driving prohibition on your driving record.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, or an individual's driving record in this review. 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 "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 investigating officer, Constable (Cst.) Wise indicated that you were driving or in care or control of a vehicle at 2302 hours on October 20, 2013. In his Narrative Text Hardcopy (the "Narrative") Cst. Wise reported that he was operating a roadblock at Skeena Street when he observed you heading East on Lougheed Highway and then turn left to go North on Skeena Street prior to the roadblock. He reported that when your vehicle was pulled over you were directly witnessed driving, and identified by your BC driver's license.

You admitted driving from a family engagement party.

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 an ASD register a "WARN"?

The officer indicates in the Report that you provided two samples of your breath, at 2308 hours and 2313 hours, both resulting in "WARN" readings.

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

Were you advised of your right to a second analysis?

The evidence in section 7 of the Report is that after the first ASD test, the officer read you your right to a second analysis and that you did request a second ASD test.

I have 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?

The evidence in the Report is that at 2313 hours, the officer conducted a second breath test. The result of this breath test was a "WARN".

I have 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?

The police evidence in the Report is that the second ASD test was conducted on ASD serial number 072955. There is no evidence to the contrary before me.

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?

In the Report, the officer recorded the result of both ASD tests as a "WARN".

As both test results were the same, 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 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.

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on October 20, 2013.

Adjudicator s.15

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

Ms. Leamon argued that to admit or rely on the ASD test results amounts to a violation of your constitutional rights under the *Canadian Charter of Rights and Freedoms* (the “Charter”),

specifically, your right to counsel under section 10(b). Ms. Leamon referred me to *Regina v. Brigitte Schultz* in support of her submission.

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 under section 144(1)(b) under the Act. The 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.

Under section 117 of the Act, I have been delegated authority by the Superintendent to conduct this review of your driving prohibition pursuant to section 215.41 of the Act. The scope of the review is limited to the grounds as specified in the Act. I have conducted my review accordingly.

Ms. Leamon also cited *Spencer v. British Columbia* and referred to the principles of fundamental justice and procedural fairness set out in this decision, of which I am mindful and have applied in conducting this review.

Further, Ms. Leamon referred to the *Wilson* case in her submissions. 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. Therefore, I have no statutory authority to revoke a prohibition on this ground.

In your affidavit, you addressed the officer’s comments about having red eyes, a red face and the odour of liquor on your breath. These matters 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. 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 AnalysisWere you a driver within the meaning of section 215.41(1) of the Act?

In the Report to Superintendent (the "RTS"), Constable Hakonson indicated that he witnessed you driving or in care or control of the vehicle at 2222 hours, on September 7, 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 Hakonson 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 2225 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 Hakonson indicated that he informed you of your right to a second breath test analysis. In the Narrative, the officer said he read you this right from an IRP booklet. He also said you stated that you did not wish to provide a second breath sample.

In paragraph 18 of your affidavit, you said the officer said "you have the right to blow again. Do you want to blow again?" You said you did not know what to do and you thought you would be blowing in to the same device. You did not trust the results of that test and you thought you were going to jail because you had blown a "fail". You said you did not want to blow into the same device again and make your penalties worse.

Your comments are inconsistent. You expressed concern that you were going to jail, because of the result of the first ASD test. You did not indicate why you thought taking a second test would make your "penalties worse" than going to jail. There is no evidence before me that you asked the officer what the point of a second breath sample was or if it would be on the same device. You said you voiced your concern to the officer about having to blow into the first ASD several times, which indicates that you were not averse to asking questions. I find it is more likely than not that a reasonable person who was "absolutely astonished" by the result of the first analysis (as you said you were in paragraph 15), would insist that something must be wrong with the device and demand another test on a different unit.

You said the officer did not tell you the second analysis would be on a different device and that the lower of the two results would prevail. The officer's evidence is that he provided you with this information. I note, however, that despite this, the Act requires only that the officer tell you of your right to request and be provided with a second test. It does not state that he must give you further information about the second analysis.

Ms. Leamon submitted four previous decisions of adjudicators in my office and argued that I

should make a similar finding, as did the other adjudicators. In the decision dated March 31, 2011, the prohibition was imposed under a different version of the Act than is the case with your IRP. A peace officer's requirements are different in the two versions of the Act. Further, the circumstances set out by the adjudicator in this case are distinguishable from those in your case. Accordingly, I am not persuaded to find this decision as a relevant precedent.

I reviewed the decisions dated February 14, 2013, February 22, 2013 and December 28, 2012. None of these decisions provides sufficient detail of the respective circumstances to compare to your situation. As a result, I am unable to conclude that any of these is a useful precedent.

Based on the evidence before me, I am satisfied on a balance of probabilities 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?

In the Narrative, Constable Hakonson said you told him that you did not wish to provide a second breath sample. 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?

Constable Hakonson submitted a Certificate of Qualified ASD Calibrator (the "Certificate") stating that Cst. Peter McLeod 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 September, 2013, he checked the calibration of ASD with serial number 049868 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG217101, Expiry: 2014-06-19. This ASD was found to be within the recommended limits. It had a calibration expiry date of October 3, 2013 and a service expiry date of June 21, 2014. I note that the ASD serial number on the Certificate matches the serial number of the ASD referenced on the RTS.

Further, in paragraph 14 of the RTS, Constable Hakonson stated that any "tests referred to in

this report were conducted by a qualified ASD operator and the ASD units were functioning correctly. The attached narrative and report and other attachments consist of 10 pages and forms part of this sworn document.”

In paragraph 20 of your affidavit, you said each time you blew into the device on September 7, 2013, you used the same mouthpiece. You said at no time did Constable Hakonson, or anyone else, change or eject the mouthpiece on the device. You said you blew into the device six times and did not lose continuity of the ASD at any point between your breath tests.

Considering your evidence overall, I infer you have not had a similar experience at a roadblock before. You said you did not learn about your right to a second breath test until you spoke to a lawyer. Given your inexperience with this situation, I find it odd that you would keep track of how many times you blew into the device. Further, I am not persuaded to believe that you would notice and keep track of every movement the officer made with the ASD – whether he ejected and reinserted the mouthpiece or not. You did not indicate and it is unlikely that you would know the relevance of this action. Further, in paragraph 10 of your affidavit, you said you were not thinking clearly that night. In paragraph 12 you said you were nervous and afraid. Your stated mind set was not conducive to keeping track of details that were not relevant to you, according to your evidence. Overall, I do not find your evidence to be reliable in this regard. I prefer that of the officer. I am satisfied on a balance of probabilities that the ASD was reliable.

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

In your affidavit, you said you consumed two glasses of red wine between 6:30 and 8:30 pm with dinner. You said you went out to a pub later to listen to music, but you did not have anything to eat or drink there. You drove yourself to the pub, because you did not feel affected by the alcohol. You said you left the pub at approximately 10:15 pm and drove up to the roadblock about three minutes later. You said you were not concerned, because you knew you were not “impaired by alcohol.”

In paragraph ten of your affidavit, you said Constable Hakonson approached your vehicle and asked if you had consumed any drinks in the last half hour. You said you were not thinking clearly and you replied “yes” to the officer – that you had consumed alcohol in the last half hour, in contrast to your affidavit evidence.

You indicated that in response, the officer “took a few steps backwards, put his hands on his firearm and directed [you] to step out of [your] vehicle.” You said he told you that you were under arrest for drunk driving. You said you were absolutely shocked.

In paragraph 11 you said you remained seated in the driver’s seat, despite the officer’s direction to exit the vehicle; you said Constable Hakonson called for back-up. You said you felt as if you could not move, and within a few seconds, more police officers arrived on the scene. Despite this, you said you remained seated in the vehicle, where Constable Hakonson presented you with an ASD.

I find a reasonable person would question the reliability of your statements in this regard. First, you acknowledged that you were not thinking clearly, which led you to give the officer false information about the time of your last drink. Further, you were at a roadblock where it is reasonable to believe that officers would expect to come across people who had been drinking. Yet you described Constable Hakonson's actions as suggesting that he feared for his safety, because you told him you had consumed alcohol in the last half hour. When you did not exit the vehicle upon his direction, he called for backup, rather than more forcefully reminding you to exit the vehicle. Finally, despite other officers arriving to assist him, you still remained in the vehicle when he presented you with the ASD. Your version of events does not ring true to me.

I also note that your evidence of having had an emotionally difficult day and not thinking clearly is inconsistent with your final statement in your affidavit, that your "memory of the event in question is very clear."

You said your ability to operate a motor vehicle was not affected by alcohol on the day in question. However, based on the inconsistencies in your statements, your evidence does not cause me to doubt the "FAIL" reading on the ASD. 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 on a balance of probabilities 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 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.

cc. Sarah Leamon
604-370-2505 (fax)

SEPTEMBER 19, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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. You provided written material on September 11, 2013. Your lawyer also provided written material in addition to making submissions at the oral hearing on September 16, 2013. In reaching my decision in this review I have considered all of the relevant evidence.

In your submission you said that the loss of your licence and corresponding vehicle impoundment causes hardship to you and your children as you are a single parent. I can appreciate that the loss of your driver’s licence can have a great impact on both yourself and others. I am, however, not authorized to consider hardship in this review. I have no authority to deal with the vehicle impoundment in this review.

You also note that you have a perfect driving record. I cannot, except in limited circumstances which do not apply in your situation, consider your driving history.

Your lawyer made a preliminary submission based on the decision *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. She submitted that there is insufficient evidence before me to establish that the officer had reasonable grounds to believe your ability to drive was affected by alcohol. There being insufficient or no evidence before me on this issue your driving prohibition should be overturned.

I have read and considered the *Wilson* decision. I acknowledge your lawyer's submission respecting the Court's ruling. Sub-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 sub-section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground of review. I have no statutory authority to revoke a prohibition on this basis.

Your lawyer made submissions referencing the *Canadian Charter of Rights and Freedoms* (the "Charter"), arguing that to admit or rely on the ASD test results amounts to a violation of your Charter rights. 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 is a contravention 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. I have conducted this review accordingly.

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

One of the grounds on which you applied for a review is that your 7 or 30- day prohibition should be reduced because you did not have the required number of previous IRPs. The Act allows me to alter the terms and conditions of a prohibition only where a higher prohibition has been applied and a lesser prohibition is required by the Act. There is no evidence that this is the case here.

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 September 7, 2013 at 2357 hours a vehicle was stopped at a roadblock. You were seated in the driver's seat and were its sole occupant. You identified yourself with your driver's licence.

There is no evidence to the contrary.

I am satisfied that on September 7, 2013 at 2357 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 0000 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0011 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a "FAIL."

There is no evidence to the contrary.

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.

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?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with serial number 049868 and a temperature of 20 degrees Celsius. The second sample of your breath

was analyzed by an ASD with serial number 101826 and a temperature of 22 degrees Celsius.

Your evidence is that you were given two tests on the same ASD.

The officer has provided serial numbers and Certificates of a Qualified ASD Calibrator for two different ASDs and has noted that you provided each of your samples into different ASDs. I would expect, if only one ASD was used, that the ASD temperatures would be the same and that there would not be an eleven minute delay between your first and second ASD analysis. ASDs often look the same, events happen quickly, often in the dark and after you have consumed alcohol. I am satisfied that you are honestly mistaken when you state that the same ASD was used for both of your analyses. The weight of the evidence is that two different ASDs were used.

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 049868. Constable Hakonson provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on September 5, 2013. This ASD had a Calibration Expiry Date of October 3, 2013 and a Service Expiry Date of June 21, 2014.

The second analysis of your breath was performed on an ASD with the serial number 101826. Constable Hakonson provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on September 5, 2013. This ASD had a Calibration Expiry Date of October 3, 2013 and a Service Expiry Date of August 26, 2014.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable Hakonson 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"?

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 accept the "FAIL"

results from two ASDs I have found reliable and which were certified to be correctly functioning. There is no persuasive 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 September 8, 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: Sarah Leamon (by fax)
(604) 370-2505

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

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

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 his Narrative Text Hardcopy (the "Narrative"), Constable Pearson (the "officer") stated that he was conducting a Roadblock in the 1400 block of Main. The officer indicated that you were the registered owner and driver of the vehicle that drove up to him at the Roadblock. The officer recorded in the Report to Superintendent (the "RTS") that the time and date of driving or care or control of the vehicle was at 01:08 hours, on October 19, 2013.

There is no evidence before 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 01:10 hours and 01:14 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 01:14 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 101821, and the serial number for the second ASD as 101820.

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 3, 2013, he checked the calibration of ASD serial number 101821. 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 September 25, 2014.

For the second ASD, the qualified ASD calibrator certified that on October 9, 2013, he checked the calibration of ASD serial number 101820. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 6, 2013, and the service expiry date as July 26, 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.

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

In the RTS, the officer indicated that when asked the time of your last drink you indicated that it was "three hours previous". In his Narrative, the officer stated that you told him you had your last drink three hours previous before having Chinese food and that you had a total of two beers that were "like pint size".

In your affidavit, you described your drinking pattern as you recalled it to have been and indicated that while eating Chinese food on October 18, 2013, between 7:00 and 9:00 p.m. you consumed two Heineken beer (the "Beer"). You noted that the Beer had an alcohol content of 5% and that each bottle contained 11.15 ounces. You further stated that while at your friend's apartment you consumed one drink containing Coke and one ounce of Sailor Jerry's rum (the "Rum") and noted that the Rum has an alcohol content of 46%. You stated that you finished that drink around 10:15 or 10:30 pm. You indicated that you did not consume any other alcohol on October 18, 2013, prior to 7:00 pm or after 10:30 pm. You noted that at approximately 11:00

pm you arrived at your home and went straight to bed. You stated that at 12:27 am you were woken by a call from your cousin, s.22 requesting a ride home because she had been drinking. You stated that you had no reservation about giving her a ride home, as you did not feel the effects of alcohol and knew you had only consumed a modest amount. You stated that since you had been asleep you assumed your breath was bad so you gargled with some alcohol-based mouthwash on your way out the door at 12:45 am. You indicated that at approximately 1:00 am you drove to Deep Cove and picked up your cousin and her friend, then afterwards arrived at the Roadblock at 1:08 am. You noted that you told the officer you only had two beers at dinner because you were nervous and forgot to tell him about the Rum and Coke you had. You also expressed your shock and surprise at the "FAIL" results.

You stated that on October 19, 2013, you weighed approximately s.22 and that you have reviewed the Superintendent's Report on Calculating BAC (the "BAC Report") which you attached to your affidavit as Exhibit "D". You noted that according to the formula for calculating the alcohol consumption and BAC for males that your BAC would have been 84.37 mg% at the time of your last drink. You also noted that after factoring in elimination rates of 10 mg % and 20 mg% your BAC at the time of driving would have been 59.37 mg% and 31.37 mg%, respectively.

You provided an affidavit from s.22 in which she confirmed that she called you to pick her up at 12:27 am on October 19, 2013. She noted that you are a very responsible individual and that you would never drive while your ability to do so was affected by alcohol.

In her written submission, Ms. Waker relied on the BAC Report and argued that a s.22 male who consumed two 11.15 bottles of Heineken beer at 5% alcohol volume each and a glass of Coke containing one ounce of Rum at 46% alcohol volume would have achieved a maximum BAC of 81.37 mg%. Ms. Waker further indicated that at the time of driving, some 2.5 hours after your last drink, your BAC would be been between 59.37 mg% and 31.37 mg%. She stated that based on your drinking pattern your BAC would not have exceeded 80 mg%. Ms. Waker also stated that it is possible that the mouthwash you gargled with at 12:45 am could have contributed to a falsely high reading on the ASD. She submitted that considering your sworn evidence it would seem more plausible that the device should have registered a "WARN" or a "PASS".

Based on the case of *Giesbrecht v. Superintendent of Motor Vehicles*, 2011 BCSC 506, the court found that police should wait fifteen minutes from the time of the last known drink before obtaining breath samples in order to allow for the elimination of mouth alcohol. While I acknowledge your submission and that of Ms. Waker regarding your asserted use of alcohol-based mouthwash, I note that there is no evidence before me you consumed alcohol within 15 minutes of either ASD test. Specifically your evidence is that you gargled with the mouthwash at approximately 12:45 hours; 25 minutes prior to your first ASD test at 01:10 hours. As such, I find that the ASD tests were not inaccurate as a result of mouth alcohol contamination.

With respect to your asserted drinking pattern and subsequent BAC calculations presented by you and Ms. Waker, I do not find your evidence to be very convincing, I note the following:

- On page two of Ms. Waker's submission she stated "BACmax from Brandy..."; however, there is no indication in her calculations or in your affidavit that you consumed Brandy.

- Ms. Waker calculated your total BAC max as "81.37 mg%", whereas in your affidavit you stated your BACmax to be 84.37 mg%. Upon reviewing the calculation for your BACmax in Ms. Waker's submission, I note that she may have added "59.73 + 24.64" incorrectly, as when summed it equals 84.37 mg%.
- You indicated that you did not advise the officer that you had a Rum and Coke because you were nervous and forgot; however, the officer's question was specific to what time your last drink was. It does not make sense to me that you would forget about the last drink you had which was only approximately two and half hours prior, but rather only recall the Beer you finished four hours earlier.

The issue before me here is whether your BAC was 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%. Ultimately, I find that there is no persuasive evidence before me that your BAC was less than 80 mg% or that the "FAIL" results were caused by anything other than alcohol in your body which you had consumed previously. I also note that I have already found both ASDs to have been functioning correctly at the time of your ASD tests.

In summary, 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 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

Adjudicator

cc: Cathryn Waker, Mickelson & Whysall Law Corporation
Fax: 604-637-1617

November 1, 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);
- 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

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. Hatcher submitted that the officer misrepresented the situation with regard to the taxi-driver and your ability to pay the fare, which should negatively impact the officer’s credibility. The officer states, “Cst DOSANJH was informed by the operations control centre that the taxi-driver who had departed with s.22 contacted 911 advising that s.22 would not pay for his fare.” Your evidence, which is supported by the taxi-driver, is that you came to an arrangement in which you would pay for the cab fare the next day. The taxi-driver states that contacting the police non-emergency line is standard procedure for an unpaid fare, and that he had no concerns about you paying your fare.

I have considered the evidence before me, and I respectfully disagree with Ms. Hatcher that the officer has misrepresented the situation. The officer states that the operations control centre informed him of the situation, and he then recorded it in his evidence. I do not find the officer's version of events to be inconsistent with yours, or to impact the credibility of his evidence.

I note in the taxi-driver's evidence, he states that the two of you talked for the entirety of the 20 minute drive back to your residence; he also indicates that you contacted him the next day to arrange to pay the \$20 fare. I do not find it to be keeping with ordinary human experience that a taxi ride lasting 20 minutes would cost only \$20. This causes me to question the reliability of the taxi-driver's 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 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 0058 hours on October 11, 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 confirm that you were driving home from hockey when you encountered a roadblock on the Second Narrows Bridge.

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 indicates that you had the following indicia of impairment:

- your motor skills were hindered and you struggled to grasp your driver's license from your wallet.
- your gross motor movements were sluggish
- you stumbled slightly
- you spoke with a slur
- your eyes were reddened and watery
- you appeared drowsy and were almost falling asleep while standing
- a powerful odour of liquor directly from your breath
- when asked when your last alcohol beverage was, you stated "two hours ago" and that you had consumed "one beer."

In your evidence you address a number of the officer's observations regarding your indicia of impairment:

- your wallet is small and streamlined, and it is always difficult to remove your cards from it. You also provided a picture of your wallet indicating its size
- you did not stumble, but your knees were sore from playing hockey, and you sometimes struggle to step down from your SUV
- your speech could have been interpreted as a slur because the roadway was very loud and busy, and you were speaking slowly and loudly so that the officer could hear you above the noise of the traffic
- due to an eye injury, your eyes are often red and watery, especially after exercise.
- you often appear to be drowsy due to a droopy eye lid from a previous eye injury and you provided a photograph to illustrate this
- you informed the officer you had consumed one beer

You have also provided three witness reports to support your claim that you were not impaired by alcohol, and were not displaying any the indicia of impairment noted by the officer. You have also provided a report from W.K. Jeffery, an alcohol expert, who states that based on your claimed drinking pattern your BAC would be 15-49 mg%.

In the hearing, Ms. Hatcher submitted that the officer grossly over-exaggerated your indicia of impairment and that this should impact the credibility of his evidence.

I acknowledge that you have provided reasoning behind the indicia indicated by the officer at the time of the traffic stop; however, I do not have any evidence before me to indicate that the officer was informed of these reasons at the time. I acknowledge Ms. Hatcher's submission that the officer's evidence should impact his overall credibility; however, I respectfully disagree. While the indicia noted by the officer may be explained by reasons other than alcohol impairment, I find it reasonable for the officer - based on the information available to him at the time - to interpret them as such. I note that you state, "I regret that I did not think to tell Cst. Dosanjh about the injury; it did not occur to me at the time that it might explain what he obviously interpreted as a sign of impairment." I do not find that the officer's evidence is internally or externally inconsistent, or to impact the credibility of the evidence.

While you provide an explanation for almost all of the indicia of impairment noted by the officer, you do not deny the odour of liquor on your breath, and you confirm that you informed the officer that you had consumed a beer prior to the traffic stop. I am satisfied that the officer had reasonable grounds to suspect that you had alcohol in your body.

The officer indicates in the Report that you were read the ASD demand at 0100 hours. In the Narrative, the officer states that you were read the ASD demand from memory, and the officer has provided the exact wording used. The officer indicates that you were also read the ASD demand a second time, and were further explained the meaning of the demand in simple language.

In your evidence you state that the officer informed you that you would have to take a "sobriety test." You agreed to take the sobriety test as you thought it would be similar to what you have seen on TV, you did not know that the officer was referring to a breath sample. You state that only once you were pulled over and standing at the side of the road, did the officer ask whether you wanted to provide a breath sample.

The evidence before me indicates that you were aware that you were to provide a sample of your breath. I am satisfied that the peace officer made a valid ASD demand.

In the Narrative, the officer summarizes your interaction as follows:

- You were read the ASD demand at 0100 hours and when asked if you understood the demand, you stated, "yeah."
- When asked if you were willing to provide a sample of your breath you answered, "Sure," and then asked, "what are my options?" to which the officer explained that a failure or refusal to comply with a demand would result in a 90 day prohibition and a 30 day impound.
- The officer then again read the ASD demand to you and you indicated that you understood. He asked if you would provide a sample of your breath and you replied, "I don't. No."
- The officer then again explained the consequences to you and informed you that refusing to comply with the ASD demand carried the same penalty as providing a "FAIL" reading.
- The officer asked if you understood the punishment and you responded "yeah."
- The officer asked again if you were willing to provide a sample and you said, "I don't." followed by a "No."
- You were then read the following verbatim from the IRP card:
 - o "I have reasonable grounds to believe; You have failed or refused without a reasonable excuse to comply with a demand made under the Criminal Code to provide a sample of breath for analysis in an approved screening device. I therefore direct you to surrender your licence. You are now prohibited from driving."
- At 0106 hours the officer advised you of your last opportunity to provide a sample but you remained motionless
- At 0113 hours the officer asked "Are you willing to provide me a sample of your breath?" to which you responded, "No."
- At 0122 hours while the officer was preparing your documents you were asked, "Do you want to give me a sample?" to which you unequivocally answered, "No," followed by, "I'm not a threat... I was just coming from hockey."
- You were served the prohibition at 0140 hours.

In your affidavit you state:

- The officer asked if you wanted to provide a breath sample. This was not what you thought he was referring to earlier as a "sobriety test."
- You were not sure about your rights at this point, you knew that you were not impaired but you wondered if you were actually legally obligated to provide a sample. Not knowing your rights you told the officer that you wanted to speak to a lawyer first.
- You repeated your request to speak to a lawyer multiple times to the officer but he ignored you and repeated his request to provide a sample. The officer did not explain to you that you were not permitted to speak to a lawyer at this stage.
- You never refused to provide a sample. You said, "I don't know," in response to the officer's request. There was no gap in between "I don't" and "know" such that the officer could have reasonably interpreted your response as "I don't. No."
- Adding to your confusion, the officer told you that it did not matter whether you provided a sample or not, as you would either fail or refuse and both carried the same penalty.
- You did not know what to do, and you could not figure out what you should do versus what you were obligated to do. The officer did not explain to you that you could also provide a "WARN" reading, and if he had done so you would have provided a sample.

- You deny that the officer ever asked you at 0106 hours or 0113 hours if you were going to provide a sample. The officer never asked you again after he told you at 0104 hours that you had, in his mind, refused to provide a sample.

In the hearing, Ms. Hatcher stated:

- There was no clear refusal, as you never uttered the word, “No.”
- You have provided significant evidence that you were not impaired, which is important for three reasons
 - o You ability to recall events from the evening in question
 - o Your lack of motive to refuse
 - o That I must reject the officer’s evidence on the basis that it is not believable and is, at first reading, grossly exaggerated in both the symptoms noted, and the conversation
- There is a suspension of your Charter rights during a roadblock. As such, it is important for the officer to be clear on what they are asking and to ensure that the driver understands. In your situation, you had never been through a road block before, you did not know your rights, and you were unfamiliar with the situation. The officer did not take the necessary steps to explain things to you.
- The officer’s interpretation of your response as, “I don’t. No” speaks to his bias and the incredibility of the officer’s evidence. It borders on the absurd to interpret your response in this way.
 - o To interpret your response this way is a huge stretch and is a very opportunistic way to present your language.
- Three witnesses and an expert confirm that you were not impaired
- The officer’s evidence is completely void of any reference to your request to speak to counsel, this again shows the officer’s bias
- *Regina v. Hak*
 - o “I don’t want to blow” is analogous to “I don’t know.”
 - o The judge in this case found that there was not a definitive refusal to provide a sample
 - o The facts in this case are not identical to yours, however, the facts of law remain the same, and the basic principles and the criteria to determine a proper refusal are applicable to your situation.

As stated above, I do not find that your submissions regarding the officer’s observations of your indicia of impairment impact the officer’s credibility.

If you responded to the officer’s line of questioning with, “I don’t know,” as you claim, I do not understand the source of your confusion. You refute a number of aspects of the officer’s evidence, but you do not address the officer’s evidence that you were asked twice if you understood the ASD demand, and both times you indicated that you did. I note that the officer has provided the exact wording of the ASD demand which states, “In accordance with the provisions of the Criminal Code, I hereby demand that you provide a sample of your breath, forthwith, suitable for analysis using an approved screening device.” The officer’s evidence also indicates that he explained the demand to you in simple language.

I do not find your statement, “I did not know what I *should* do versus what I was *obligated* to you” to be consistent as you clearly understood that the officer had demanded a sample of your breath. I find your statement that you did not know what you “should” do, to imply that you did not know which course of action would benefit you the most. This is supported by your

statement, "It felt more like Cst. Dosanjh was asking me to make a tactical or strategic decision rather than complying with a law."

When the officer made the ASD demand on you, he was not asking what you thought it best to do; he was demanding that you provide a sample of your breath. I find your statement, "I did not know that a "warn" carried a lesser penalty than a refusal or a fail result. If I realized there was another choice – to blow and receive a warn – I would have provided a sample," to emphasize that you understood that you were to provide a sample of your breath, but that your decision was based on the consequences of your decision, and not a misunderstanding of what was expected of you.

Furthermore, I do not find it reasonable that you would assume that, because the officer informed you that refusing to provide a sample carried the same penalty as a FAIL sample, that that those were your only two options. In your affidavit you state, "I knew I was not impaired, but I honestly did not know what to do." If you knew that you were not impaired as you state, I do not understand why you assume that you would provide a "FAIL" sample of breath.

The evidence before me indicates that the officer made the ASD demand on you, and explained the consequences of failing or refusing to comply. The officer is not required to advise you of your right to speak to a lawyer or to provide you with the opportunity to do so.

There is no evidence before me to indicate that you ever expressed a desire to the officer to provide a sample of your breath. I note that you deny that the officer asked if you wanted to provide a sample of your breath at 0106 and 0113 hours; however, I also note that you were not served with the prohibition until 0140 hours.

You have provided significant evidence to contradict the officer's version of events; however, due to the inconsistencies in your version of events, I do not find your claim to be credible. Nowhere in your evidence do you imply that you intended to provide a sample of your breath for analysis. You do not contest that the officer told you to provide a sample into an ASD, explained the consequences of failing to provide a sample, and informed you that you were being deemed with a refusal. I do not have any evidence before me to indicate that at any of these times you indicated that you wished to provide a sample of your breath.

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

Did you have a reasonable excuse?

I do not have any evidence before me to indicate that you had 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 section 215.5(1) of the Act. You are prohibited from driving for 90 days. Your prohibition took effect on October 11, 2013.

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

cc: Claire E. Hatcher
fax: 604 687-3022

October 2, 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

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 provided a copy of the recent case *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. Ms. Leamon states 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.

Ms. Leamon also referred me to the case of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311. 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. Ms. Leamon did not provide me with a copy of *Spencer*; however, I am familiar with it and have proceeded with *Spencer* in mind.

Ms. Leamon referred to the case *R. v. Schultz* to support her submission that the ASD demand was not valid. Relying on *Shultz*, she noted that the courts have held that the results of roadside screening devices are not to be utilized as evidence to incriminate drivers. She also argued that an ASD was only intended to be a screening device to determine if a person ought to be subjected to further breath tests at the police station. I infer your lawyer is referring to prohibitions under section 94.1 of the Act, for which officers may use an ASD as a screening device. However, you were prohibited under the IRP regime which came into force in September 2010. The IRP legislation permits a peace officer to rely on ASD results to issue a driving prohibition under section 215.41 of 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?

The police evidence in the Report to Superintendent (the "Report") is that Officer Cichon (the "officer") established you as a driver or having care or control of a vehicle at 01:32 hours on September 13, 2013. The police evidence in the Narrative Text Hardcopy (the "Narrative") is that your vehicle approached and was stopped at a road block on Second Narrows bridge northbound. 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 059571 and 101822 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 101822 at 01:40 hours. I am satisfied that the officer did provide a second analysis on a different ASD.

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 059571 was checked for calibration on September 5, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of October 3, 2013, and a service expiry date of July 26, 2014.
- ASD serial number 101822 was checked for calibration on August 23, 2013, and found to be within the recommended limits and functioning correctly. This ASD has a calibration expiry date of September 20, 2013, and a service expiry date of October 19, 2013.

As there is no evidence before me to the contrary, 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: Sarah Leamon
by fax 604-370-2505

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 you. I proceeded with this review based on that confirmation.

You faxed a letter to this office on September 20, 2013, indicating that s.22 is your agent for this review. We received a written statement from s.22 on September 26, 2013.

s.22 submission is entitled “Notice of Conditional Acceptance”. His document implies that the Notice is a contractual offer, to which he has submitted a conditional acceptance. s.22 s.22 misinterpreted your situation. You were prohibited from driving for 90 days and your vehicle was impounded for 30 days, because a sample of your breath on an ASD registered “FAIL”. As a result, a peace officer had reasonable grounds to believe that your ability to drive was affected by alcohol. The prohibition was not a contract offer, but a sanction authorized under the Act.

You applied for a review of this IRP and the grounds for review are set out on the application form. The contents of s.22 submission are not relevant to the issues that I can consider in this administrative review. I am authorized by the Act to consider only those grounds that are directly related to the issues outlined below.

Having reviewed the evidence of the investigating officer, I find that the Report to Superintendent (the “RTS”), was not properly sworn, so this is not 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

Having reviewed the evidence of Constable Chicon that is before me, I find there is one determinative issue in this review.

Was the ASD reliable?

Based on all the evidence in this particular case, I am not satisfied that the 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.

s.22

IRP Review Decision

Page 3

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.

Neither you nor s.22 provided a telephone or fax contact number, so I was unable to contact you immediately to advise you of the revocation.

s.15

Adjudicator

cc.

s.22

November 13, 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.

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, one of which is 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 indicate that disclosure was provided to your lawyer, Mark Cacchioni. I have proceeded with this review based on that confirmation.

Issues

The following are the issues in this review:

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

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.

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

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

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

Adjudicator

cc: Mark Cacchioni
604-872-0617

October 1, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with 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, David G. Baker. 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 you were a driver or in care on control of a motor vehicle.

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

Having made this finding, I do not need to consider 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 22, 2013

s.22

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

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;
- 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.

I acknowledge receipt of your letter received in our office on October 15, 2013. You wrote in part that your job as s.22 depends on you being able to drive and asked for a reduction in the length of your driving prohibition and the vehicle impoundment. 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. 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 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 4, 2013, at 01:33 a.m., Officer Dosanjh (the "officer") established you as a driver or having care or control of a motor vehicle.

The police evidence in the Narrative Text Hardcopy (the "Narrative") is that the officer stopped your vehicle at an impaired driving roadblock on the Second Narrows Bridge on October 4, 2013 at 01:33 hours.

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 evidence in the Narrative is that when the officer engaged in dialogue with you, a powerful odour of liquor was observed directly from your breath. Your eyes were observed as reddened and watery and your facial skin color was pale. As well, the officer said your balance and walk were unsteady and you admitted that you consumed two beers. The officer said he reasonably suspected that you had alcohol within your system and at 01:35 hours read verbatim the ASD demand from memory.

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

The evidence in the Narrative is that, after reading the ASD demand to you from memory, the officer asked if you understood and you said "yes I do." The officer said he asked you at 01:35 hours if you were willing to provide a sample of your breath and you answered "no." The officer said that at 01:35 hours, he recited the ASD demand to you again. He said he explained in simplistic language that you must comply with the lawful demand made under the Criminal Code to provide a sample of your breath into the device as shown to you. The officer said he asked you if you understood the Demand and you said "yes", but when asked if you would provide a sample of your breath you answered "no".

The officer said that at 01:37 hours, he advised you that the repercussions of a failure or refusal, without a reasonable excuse, to comply with an ASD demand made under the Criminal Code are a 90 day immediate roadside prohibition and a 30 day impound. The officer said he further

advised you that the above-noted penalty for a refusal was identical to that of a driver who registers a "fail" sample of his breath into an ASD.

At this point, the officer said he asked if you understood the punishment and you answered "yes". When he asked if you would provide a sample of your breath, you responded "no".

At 01:40 hours, the officer said he again read verbatim from memory an ASD demand. When he asked if you understood, you said "yes" and at 01:41 hours when he asked if you would provide a sample of your breath you answered "no".

On the first page of your letter you said that you asked the officer what the options mean for your criminal record. You said he responded by saying that if you refuse, you will lose your driver's licence for 3 months and your vehicle will be impounded for 1 month, plus a fine of \$500. You said you asked the officer if it will show a criminal offence on your criminal record history and he said "no". You said you asked that question again and he responded the same - that if you refuse there will not be a criminal record.

On page two of your letter, you said that you were not told that if you failed the ASD test, the result would be the same as a refusal or may be worse. You said you chose that option (I assume you mean the option to refuse to provide a breath sample) due to fear of losing everything you had, not that you were near or over the legal limits.

In reviewing all the evidence, I note that you have not disputed any of the officer's evidence except for when he said he advised you that the penalty for a refusal is identical to that of a driver registering a fail sample on an ASD. However, there is no requirement that I am aware of for the officer to explain to a driver that the penalty for refusing to provide a breath sample is the same as the penalty for blowing a "fail". The officer made an ASD demand on you four times. He explained the penalty for refusing to provide a breath sample and each time you said you understood and each time you refused to provide a sample of your breath.

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?

The evidence in the Narrative is that when the officer asked if you had any medical conditions or injuries preventing you from providing a breath sample, you stated "no".

You said in your submission that your refusal had nothing to do with the amount of alcohol you consumed but rather you were trying to save your jobs and your livelihood. However, there is no evidence that you provided the officer with any reasons for failing or refusing to comply with the 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 Act.

You are prohibited from driving for 90 days. Your prohibition took effect on October 4, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15
Adjudicator

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);
- 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, Bryan Fitzpatrick, 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 indicate five grounds for review. All grounds for review that apply to your case will be considered in this review.

Mr. Fitzpatrick submits that there are certain requirements outlined in the, *Information and Instruction Guide for Commissioners for Taking Affidavits for British Columbia* (the "Guide"), that must be followed in order to make an affirmation valid. With regard to the case before me, he submits that on line 15 in the Report to Superintendent (the "RTS"), the jurat is not properly signed. Therefore, the RTS is not properly affirmed and subsequently invalid. Referencing page two of the Guide, Mr. Fitzpatrick asserts that when completing the jurat the Commissioner's name, the designation, and expiry date of appointment must appear, legibly, below the Commissioner's signature. He indicated that the Commissioner's name and expiry date of appointment do not appear in the RTS. Accordingly, this makes it impossible to determine who the Commissioner is and confirm if they are a valid signatory. He also submits that it is unclear from the signature, due to its illegibility and size, if the investigating officer, Cst. Biller, was the Commissioner. Put more simply, if she was both the Commissioner and Peace Officer signatory. Referencing page six of the Guide, he asserts that a Commissioner cannot take their own affidavits. He also submits that there is no law that indicates that a Commissioner's signature is sufficient to accept that the RTS is valid. Effectively, there is no jurisdiction to proceed in your case because section 215.47(d) of the Act has not been satisfied and your prohibition should be revoked. On this point, Mr. Fitzpatrick also disclosed a past decision from this office to support his submission that when the evidentiary requirements of section 215.47 are not met, a prohibition must be revoked.

Mr. Fitzpatrick's submissions suggest that he believes the RTS is subject to the rules applicable to affidavits; however, there is no authority before me stating this is so. In *Granger v. British Columbia (Superintendent of Motor Vehicles)*, Justice Wong stated, "the name of the deponent in the jurat is not a matter of substance. It does not detract from the presumption of regularity that there was, in fact, an oath or affirmation taken." Further, in *Chamberland v. British Columbia (Superintendent of Motor Vehicles)*, 2004 BCSC 1078, Justice Blair stated, "There is no suggestion either under the Act or the Rules that the Rules relating to affidavits are applicable to the prohibition review procedure found in the Motor Vehicle Act." Related, in *Johnston v. British Columbia (Superintendent of Motor Vehicles)*, 2007 BCSC 1044, Justice Romilly indicated that the legibility requirements attached to affidavits does not apply to the reports to the Superintendent because under s. 94.3 of the Act, the reports are not affidavits. On this point, Mr. Fitzpatrick submits that due to the illegibility of the Commissioner's signature it is unclear if Cst. Biller was both the Commissioner and Peace Officer signatory. I acknowledge this submission, however, I have no evidence before me to substantiate this suggestion. Further, I am mindful that *Chamberland* and *Johnston* were decided under the Administrative Driving Prohibition legislation, though I feel a reasonable inference can be made that the same would apply to the IRP legislation. I am satisfied that the RTS is in its appropriate form and properly affirmed by a Commissioner for taking affidavits.

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, Cst. Biller, indicates that you were driving or in care or control of a motor vehicle at 2243 hours on September 5, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Biller submits she responded to a report of a vehicle colliding with a parked vehicle and that you identified yourself as one who was driving when the collision occurred. Your identity was confirmed with a British Columbia Identification Card (BCID).

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 2303 hours, Cst. Biller made an ASD demand on you. At 2306 hours you provided a breath sample for analysis on ASD serial number 101005. The test result was a "FAIL". Further, at 2309 hours you provided a second breath sample for analysis on ASD serial number 053333. The test result was a "FAIL".

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. Biller submits that at 2307 hours she advised you of your right to request a second ASD test. You indicated you understood by responding, "Oh fuck yeah, I will blow again." 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?

Police evidence indicates that you requested a second ASD test and that at 2309 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result by Cst. Biller.

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. Biller indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 101005, with a temperature of 23 degrees Celsius and ASD serial number 053333, with a temperature of 21 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.

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".

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 Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 101005 was checked for calibration on August 9, 2013, with a service expiry date of October 31, 2013 and calibration expiry date of September 6, 2013;
- Qualified ASD Calibrator, Bradley Paul Deveau, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 053333 was checked for calibration on August 9, 2013, with a service expiry date of October 31, 2013 and calibration expiry date of September 6, 2013 and;
- Qualified ASD Calibrator, Bradley Paul Deveau, 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. Biller. 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.

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 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

cc: Bryan Fitzpatrick (by fax)
250-785-4346

November 13, 2013

s.22

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

Introduction

On November 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

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

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 used for your 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.

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) 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

One of the grounds you applied on does 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 your lawyer, Bryan E. Fitzpatrick. I have proceeded with this review based on that confirmation.

Mr. Fitzpatrick submits that the police evidence is not properly before me in this matter because there is a deficiency in the Report to Superintendent (the "Report"). Although the Report has been signed by the officer, the jurat has not been properly completed in that below the commissioner's signature it has not been printed legibly or stamped with the commissioner's name, designation and expiry date of the appointment. I acknowledge Mr. Fitzpatrick's submission on this point; however, I do not agree that the Report is not properly before me. In *Granger v. British Columbia (Superintendent of Motor Vehicles)*, Justice Wong said "the name of the deponent in the jurat is not a matter of substance. It does not detract from the presumption of regularity that there was, in fact, an oath or affirmation taken." Further, in *Chamberland v. British Columbia (Superintendent of Motor Vehicles)*, 2004 BCSC 1078, Justice Blair stated, "There is no suggestion either under the Act or the Rules that the Rules relating to affidavits are applicable to the prohibition review procedure found in the Motor Vehicle Act." Also, in *Johnston v. British Columbia (Superintendent of Motor Vehicles)*, 2007 BCSC 1044, Justice Romilly indicated that the legibility requirements attached to affidavits does not apply to the Reports to the Superintendent because under s. 94.3 of the Act, the Reports are not affidavits.

Further, while I am mindful that *Chamberland* and *Johnston* were decided under the Administrative Driving Prohibition legislation, a reasonable inference can be made that the same would apply to the IRP legislation. Therefore, I find I am satisfied that the RTS is in its appropriate form and properly before me.

Mr. Fitzpatrick referred me to the recent case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638 in support of his assertion that your driving prohibition should be revoked. Mr. Fitzpatrick submits that the officer in this case did not have reasonable grounds to believe that based solely on the result of the screening analysis, your ability to drive was affected by alcohol.

I have read and considered the *Wilson* case 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 "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 Report is that on September 27, 2013, at 22:35 hours, Officer Chen (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 an ASD register a “warn”?

The police evidence in the Report is that at 22:38 hours, the officer used ASD serial number 053334 to take a breath sample from you and the result of your breath test 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 police evidence in section 7 of the Report is that after your first breath 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. There is no evidence before me to the contrary.

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

Was the second analysis provided by the officer?

The police evidence in the Report is that at 22:50 hours, the officer conducted a second breath test. The result of this breath test was a “fail”. There is no evidence to the contrary before me.

I am satisfied that the officer did provide the second analysis.

Was the second analysis performed on a different ASD?

The police evidence in the Report is that at 22:50 hours the second analysis was performed on ASD serial number 100982. There is no evidence to the contrary 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?

The officer noted the result of your first ASD test as a “warn” and the result of your second ASD test as a “fail”. You were served with a three day driving prohibition based on the “warn” result.

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 of a Qualified ASD Calibrator (the Certificates) indicates the following:

- ASD number 053334 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 May 3, 2014.
- ASD number 100982 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 November 20, 2014.

I am satisfied that both ASDs were reliable

Decision

As a result of my findings, I confirm your driving prohibition, monetary penalty, and vehicle impoundment. Your prohibition took effect on September 27, 2013.

s.15
Adjudicator

Cc: Bryan E. Fitzpatrick
By fax 1-250-785-4346

October 11, 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 “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 IRP Application for Review indicates that your written review was scheduled for October 8, 2013, at 9:30 am. At the time of the review, I had not received any submissions from you or on your behalf. I have proceeded with this review with the evidence I have before me.

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 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 officer indicated that you were driving or in care or control of a motor vehicle at 0018 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(1) of the Act.

Did the ASD register a "FAIL"?

In the RTS, the officer indicated that the ASD registered a "FAIL" at 0026 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. 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 you did not request a second ASD test.

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 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 a Certificate of a Qualified ASD Calibrator in which Bradley Deveau certified that the ASD was found to be within the recommended limits when he checked its calibration on September 6, 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 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.

OCTOBER 29, 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 “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, 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 statement, you said you are eligible to get your full driver's licence, and the thought of re-starting the "N" licence would really set you back. You said losing your licence would ultimately mean losing your job. You indicated that a lot of people in your household depend on you and your car. You promised to never do something like this again.

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.

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 DeWolf indicated that he witnessed you driving or in care or control of the vehicle on October 11, 2013, at 0240 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 DeWolf stated that you provided a breath sample into an ASD and that the device registered "WARN" as a result of the analysis. There is nothing before me to the contrary. I am satisfied that the ASD registered "WARN" at 0242 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 DeWolf indicated that he informed you of your right to a second breath test analysis, but you declined to take advantage of this opportunity. There is nothing before me to the contrary. I am satisfied you were advised of your right to a second 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 one ASD was used to analyze your breath sample, and that the device registered "WARN", as a result. I am satisfied that the Notice was served on the basis of the lowest available result, which was "WARN".

Was the ASD reliable?

The evidence provided by police in the Certificate of a Qualified ASD Calibrator (the "Certificate"), 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.

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

In your written statement, you said you consumed one glass of wine earlier in the evening in question. At approximately 12:30 a.m., you received news that caused you concern about your sister. You said you thought enough time had passed after consuming the alcohol that it would be fine to drive. You said you would not have driven if you thought you were at all drunk.

You acknowledged that the officer pulled you over, because you did not have the vehicle lights on. You said it is a new car and you forgot it has manual lights, unlike your previous vehicle. I find it odd that you would not notice that the lights were not on while driving in the middle of the night. I also note that the officer's undisputed evidence is that he noticed an odour of liquor on your breath, which is inconsistent with your reported drinking pattern.

You have not provided any persuasive evidence that would cause me to doubt the "WARN" reading on the ASD that I 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%.

s.22

IRP Review Decision
Page 4

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 11, 2013.

s.15

Adjudicator

Amendment

October 7, 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

At the beginning of the hearing your lawyer confirmed that he had received all of the disclosure documents before me prior to the scheduled hearing. I have proceeded with this review based on that confirmation. Your lawyer provided written material for my determination.

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 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

My decision on one issue in this review is determinative of it.

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

Based on all of the evidence before me, I am satisfied that your BAC was less than 80 mg%.

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.

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 23, 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.

Adjudicator s.15

cc: Jamie Butler by fax: 604 739-9888

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

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 indicate one ground for review. All grounds for review that apply to your case will be considered in this review.

Ms. Lee indicated that the date provided in the jurat, depicted on line 15 in the Report to Superintendent (the “RTS”), is unclear. Specifically, that it cannot be determined if the date reads “06” or “66”. Accordingly, she submits that the RTS is not properly sworn and your prohibition should be revoked. I have considered Ms. Lee’s submission, however, I feel a reasonable inference can be made that a day “66” does not exist and that the date reads, “06.” This is the conclusion I draw from the evidence before me.

Ms. Lee referenced *Modhgill v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1971, to assert 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. Three past decisions from this office were provided addressing a lack of clarity as to what type of demand was made, that a lawful demand was not made under section 254(2) of the *Criminal Code*, and that an ASD demand did not exist. I have read these decisions and 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 RTS, the investigating officer, Cst. Armitage, indicates that you were driving or in care or control of a motor vehicle at 2336 hours on September 5, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Armitage submits that while on patrol on Marine Avenue in Powell River he observed a vehicle travelling in excess of the 50 km/h speed limit. The vehicle was travelling 67 km/h and observed drifting in its lane. Cst. Armitage initiated a traffic stop, approached the driver's side of the vehicle, and noted two male passengers. Your identity was confirmed with a British Columbia driver's licence.

In your Affidavit, you indicate that you were driving northbound on Marine Avenue when you noticed a police vehicle behind you. You, "pulled [your] vehicle over to a stop as directed...Constable Armitage, approached [your] vehicle."

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 2336 hours, Cst. Armitage formed reasonable suspicion that you were driving or in care or control of a motor vehicle with alcohol in your body. Specifically, upon approaching your vehicle he detected an odour of liquor from the open vehicle window. You were asked to exit the vehicle so he could isolate the odour. Police evidence submits that you admitted to consuming a couple of beers at 1800 hours and that when you spoke, Cst. Armitage noted the odour of liquor was coming from your breath. You were informed that you were under investigation for impaired driving and asked to sit in the back of a police vehicle.

Ms. Lee disclosed an, "ORDER APPROVING CERTAIN SCREENING DEVICES FOR THE PURPOSES OF SECTION 254 OF THE *CRIMINAL CODE*", that lists the Alco-Sensor IV DWF as an approved screening device. She also provided an, "ORDER APPROVING CERTAIN BREATH ANALYSIS INSTRUMENTS AS SUITABLE FOR THE PURPOSES OF SECTION 258 OF THE *CRIMINAL CODE*", that lists the BAC Datamaster C and Datamaster DMT-C as approved instruments. She asserts that police evidence indicates that a demand was made on you to provide a sample of your breath into an approved instrument, not an approved screening device. Accordingly, she submits that a demand under s. 254 2(b) of the *Criminal Code* was not made on you and that you had no legal obligation to comply with an ASD demand as a result. She indicates that an ASD demand was made on you, however, when you asked to be taken to the police station, Cst. Armitage informed you that you had been requested to provide a sample of your breath, "into an approved instrument." After requesting numerous times to be taken to the police station Cst. Armitage presented you with an ASD and advised you that you had been asked to provide a sample of your breath forthwith into an, "approved screening device."

Further, after you requested to be taken to the police station again Cst. Armitage informed you that the, "instrument was accurate", and you were refusing to provide a breath sample. Referencing Paragraph 19 of *Ema v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 47, Ms. Lee submits that two demands cannot be issued at the same time. She asserts that it is clear from police evidence that Cst. Armitage does not know the difference between an ASD demand and an approved instrument demand. Referencing *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 676, Ms. Lee submits that there is no presumed baseline of police competence and reliability. Accordingly, she submits that the evidence provided by Cst. Armitage is internally inconsistent and therefore, one cannot reliably ascertain what demand was made on you.

Ms. Lee asserts that it can be proven that an approved instrument demand was made on you because you requested numerous times to be taken to the police station to provide a sample. Referencing Paragraph 8 of your Affidavit, she indicates that you were asked to sit in the back seat of a police vehicle. Referencing *Scott*, she submits that common sense and ordinary human experience led you to believe that because you were asked to sit in the police vehicle, you believed you were going to be transferred to the police station to provide a sample of your breath into an approved instrument. You assert that you never once told Cst. Armitage that you would not blow, that you would comply, and asked to be taken to the police station to do so. On this point, Ms. Lee submits that the use of the word *animate* in the Narrative verifies that you believed you were being asked to provide a sample of your breath at the police station.

In the Narrative, Cst. Armitage submits that at 2337 hours he read you the Approved Screening Device (ASD) demand verbatim from his supplied card. You did not provide evidence that indicates you questioned the information that was read from this card. Further, following the ASD demand, Cst. Armitage submits that you stated you wanted to go to the police station as you, "did not want to used (sic) the small little machine, [you] continued to deny the ASD was accurate and wanted to be taken to the detachment." You do not deny this statement was made. I feel a reasonable inference can be made that you understood an ASD demand had been made on you and as a result were required to provide a sample of breath into an approved screening device. In Paragraph 10 of your Affidavit, you state that you had been, "asked to provide a sample of [your] breath into an approved instrument." I understand that you would like

me to infer this evidence as you believing you were asked to blow into an approved instrument at the police station. However, in Paragraph 11 of your Affidavit, you indicate that you were presented with a small grey machine and it appeared Cst. Armitage wanted you to blow into the machine. You asked him about the calibration of the machine. This evidence persuades me to believe that you understood an ASD demand had been made on you and accordingly that you were required to provide a sample of your breath into an ASD at roadside.

I am mindful of Ms. Lee's submission that Cst. Armitage's Narrative refers to an, "approved instrument", and that he, "assured [you] the instrument was accurate." Though, I note in your Affidavit you do not explicitly refer to a Datamaster C or a Datamaster DMT-C. Throughout your Affidavit and the Narrative it is confirmed that an ASD was present at roadside. Accepting this, I feel a reasonable inference can be made that when referring to an instrument in the Narrative, Cst. Armitage was referencing the ASD. I acknowledge Ms. Lee's submission that an approved instrument demand was made on you; however on a balance of probabilities, I find it more likely that Cst. Armitage made an ASD demand on you. Following this demand, he presented you with an ASD and requested you to provide a sample of your breath into the device.

Further, in Paragraph 8 of your Affidavit, you state that after being placed in the back of the police vehicle you, "thought [you] were being arrested. Cst. Armitage told [you] that [you were] under investigation for impaired driving." You provide no evidence that you advised Cst. Armitage, at any point in the investigation, that you believed the reason you were seated in the police vehicle was to be taken to the police station to provide a sample. In Paragraph 9 of your Affidavit, you submit that Cst. Armitage read you information from a card, the language he used was technical, however that you understood he was asking you to take a breathalyzer test. You advised him that you would take the test and, "told him to take [you] to the police station and [you] would blow there." The evidence you provide indicates that you *told* Cst. Armitage to take you to the police station. There is no evidence before me that after making an approved instrument demand, as Ms. Lee claims, that Cst. Armitage advised you that you would have to be taken to the police station to provide a sample. I have already determined that Cst. Armitage made a valid ASD demand on you. On this point, the IRP legislation does not mandate a peace officer to transfer a driver to a police station to provide a sample of breath into an approved instrument.

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

In the Narrative, Cst. Armitage submits that he retrieved the ASD and advised you that you had been asked to provide a sample of your breath, "forthwith into a approved screening device." He explained that what you were doing (i.e. requesting to be taken to the police station) was considered refusing and that a refusal carried the same consequences as providing a sample of breath over the legal limit. At 2344 hours, he submits that you stated you would, "not provide a sample of [your] breath into the portable ASD." You continued to ask to go to the police station and were advised again of the consequences of refusing. At 2355 hours, he advised you that this was your last opportunity to provide a sample of breath and that you, "refused, saying [you] knew the consequences of [your] actions." Consequently, a refusal was deemed at 2355 hours.

In Paragraph 15 your Affidavit, you state that at, “no point did [you] refuse to do what Cst. Armitage asked.” You assert that he asked you to blow into an approved instrument which you understood to be the machine at the police station. Accordingly, you requested numerous times to be taken to the police station; requests that were denied. On this point, you assert that you were not refusing and, “wanted to go to the detachment and comply with [Cst. Armitage’s] request.”

I note that you do not refute police evidence that you were warned about your last opportunity to provide a sample into the ASD or that you refused stating that you knew the consequences of your actions. I have already determined that a valid ASD demand was made on you. Therefore, any belief that you held that you were going to be transferred to the police station to provide a sample of your breath is unfounded. Based on the evidence before me, I am satisfied that after an ASD demand was made on you, you refused. This was despite being told of the consequences of not complying and that being transferred to the police station was not an option in the investigation.

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 persuasive evidence before me that you provided Cst. Armitage with a reasonable excuse for failing or refusing to comply with the ASD demand. You were advised twice that refusing to provide a sample of your breath carried the same penalty as a “FAIL” result. You refused to provide a sample, instead requesting numerous times to be taken to the police station to provide a sample.

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 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

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

Mr. Filkow provided me with the recent case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. Although *Wilson* is in reference to a "warn" prohibition, Mr. Filkow maintains that the circumstances in *Wilson* are similar to the circumstances in your case.

He said he has represented other applicants on their review applications where he has raised the *Wilson* argument. Therefore, he is aware that the adjudicators responsible for those decisions ultimately confirmed the driving prohibition even though he raised the *Wilson* argument. Mr. Filkow said that in your case, you were not exhibiting any indicia of impairment and therefore the officer did not have sufficient grounds to establish that your ability to drive was impaired by alcohol.

I have read and considered the *Wilson* case and I acknowledge your lawyer's submission with respect to the Court's ruling. However, I am bound by section 215.5(4) of the Act which 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 September 21, 2013, at 02:40 hours, Officer Molenaar (the "officer") established you as a driver or having care or control of a vehicle. There is no evidence to the contrary before me.

The evidence in the Narrative Text Hardcopy (the "Narrative") is that the officer observed you fail to yield to a red light at the 112th Street / 80th Avenue intersection, and to travel over the speed limit.

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 02:51 hours and at 02:59 hours, the officer used ASD serial numbers 097938 and 101509 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 101509 at 02:59 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 097938 was checked for calibration on September 18, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 16, 2013, and a service expiry date of April 23, 2014.
- ASD serial number 101509 was checked for calibration on September 18, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 16, 2013, and a service expiry date of August 13, 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 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

cc: Kevin Filkow
by fax 604-270-3787

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 your lawyer, Albert E. King. 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 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 Statutory Declaration (the “Declaration”), you submit that the officer was yelling at you, making unnecessary comments, and abruptly pulled the ASD from your mouth. You indicate that his behaviour towards you made you very upset. Further, in Annexure “C”, you indicate that when the officer was explaining things to you that he never looked at you or ensured that you understood what he was saying. You also submit that the officer dismissed your attempts to provide further information about your activities that evening. I acknowledge your submissions, however, 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.

In Annexure “C”, you submit that you were told to breathe into the officer’s face and then told to pull over. On this point, you indicate that you were able to observe other police officers at the road block and that not one of them had anyone breathe into his/her face. I acknowledge your submission, however, the manner in which the officer determined you had an odour of liquor on your breath is not an issue I must decide 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 officer indicated that you were driving or in care or control of a motor vehicle at 2234 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 2234 hours and 2241 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 061495 and 101318, respectively. Moreover, he provided two unique Certificates of a Qualified ASD Calibrator (the "Certificates"), which bear the same serial numbers of the respective ASDs.

In the Declaration, you submit that you could not tell if the officer used the same ASD for your second test as he brought the second device from his car.

Although I acknowledge that you could not tell if the same ASD was used, the officer has provided evidence that two different ASDs were used for your tests. I have no compelling 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 Text Hardcopy indicates that 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 officer submitted Certificates in which Jonathan Craig Schnablegger certified that the ASDs were found to be within the recommended limits when he checked their calibration on September 20, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly.

Mr. King writes that given the variation in the temperature between the two ASDs there is an issue as to the devices proper operation because you displayed no symptoms of impairment. Further, Mr. King submits that there is insufficient evidence that the ASDs were operating

properly. Referencing Paragraphs 40-51 of *R. v. Johnston*, 2007 ONCJ 45, Mr. King indicates that Feldman J. ruled where there is no evidence of recent calibration the result of a screening device cannot be relied upon.

On page four of Annexure 'B', Ms. Kirkwood indicates that an Alco-Sensor IV DWF produces a valid reading at a temperature range of 10-40 degrees Celsius. In the RTS, the officer indicated the ASD identification for both devices as Alco-Sensor IV DWF. Further, the officer indicated that at the time your first ASD test was administered the operating temperature for ASD serial number 061495 was 23 degrees Celsius. Additionally, at the time your second ASD test was administered the operating temperature for ASD serial number 101318 was 27 degrees Celsius. I note that both of these temperatures fall within the accepted temperature range of 10-40 degrees Celsius. Moreover, Mr. King does not provide evidence as to the significance a variation in the temperature between the two ASDs would have on the independent readings produced by both devices.

Further, I have read and considered *Johnston* which is a criminal case, however, I am mindful that this is an administrative review and not a criminal proceeding. Having said that, section 215.47(e) of the Act indicates that a peace officer who serves a notice of driving prohibition must promptly forward to the superintendent:

(e) in the case of a driving prohibition resulting from the analysis of a sample of breath, information relating to the calibration of the approved screening device on the basis of which the notice of driving prohibition was served.

Aforementioned, I have two Certificates before me that include information related to the calibration of the ASDs used for your tests. Referencing the Certificates, I also note that both ASDs were checked for calibration on September 20, 2013, the day your probation was served. As such, I am satisfied I have evidence of recent calibration with respect to the ASDs used for your tests.

Based on the evidence before me, 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, the officer submits that he detected an odour of liquor on your breath. When asked the time of your last drink, he submits that you stated you had not had anything to drink as you had been the designated driver earlier.

In the Declaration, you submit that you went to the Westwind Pub (the "Pub") at 7:00 pm on September 20, 2013. While there you consumed one glass of Riesling white wine, which you submit was approximately eight ounces. Following this, you had food and only drank water. You left the Pub at approximately 9:15 pm and went for a walk at the Harbour Marina and Quay (the "Marina"). You left the Marina at approximately 10:25 pm and while driving on Kingsway Avenue you came to a roadblock. When you were asked if you had been drinking, you submit that you replied that you had not, however, approximately ten minutes later you

corrected yourself and advised the officer that you had had one drink. You also indicate that you had taken cough medicine earlier in the evening and that you told the officer it was between 5:00 pm and 6:00 pm. Further, you indicate that you take s.22 problem, as well as s.22

I acknowledge that the letter of support signed by s.22 supports your claimed drinking pattern. I also acknowledge your submissions that you consumed food and water after 7:30 pm, take two medications, had taken cough medicine, and were upset the evening you were stopped by the officer. By providing this evidence, I infer that you would like me to consider that these factors may have affected the ASD results. However, you did not provide me with any compelling evidence to support this claim. I also acknowledge that in the Declaration, you submit that you verily believe that you did not exhibit any symptoms of impairment from alcohol or drugs. However, in this review I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not what your symptoms of impairment should have been.

In Annexure "B", Ms. Kirkwood indicates that on September 20, 2013, between 7:00 pm and 9:15 pm, you consumed one 8 ounce glass of Pinot Grigio white wine. She submits that it takes approximately thirty minutes for a drink of alcohol to be completely absorbed and the peak BAC to be reached. Further, she indicates that alcohol is eliminated from the body at a relatively constant rate of 15 mg% per hour, yet provides evidence that this may vary. Accordingly, based on your weight of s.22 and the full absorption of one glass of white wine (12%/volume alcohol), Ms. Kirkwood indicates that your maximum BAC at 10:34 pm would have been 14mg of alcohol in 100 mL of blood.

I acknowledge Ms. Kirkwood's opinion that based on your stated drinking pattern your BAC should have been 14mg%. However, 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 in your investigation were reliable. As such, I am not persuaded that the drinking pattern provided to Ms. Kirkwood 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 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.

Adjudicator

cc: Albert E. King (by fax)
250-753-6123

October 30, 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);
- 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, L. J. Shelling, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Mr. Shelling disclosed the “Superintendent’s Report on Approved Screening Devices (ASDs)”, to submit that information included under the heading “ASD Calibration” can longer be considered when making my decision due to the court’s ruling in *Buhr v. British Columbia*

(*Superintendent of Motor Vehicles*), 2013, BCSC 1443. I acknowledge that this report is not admissible in this review hearing and accordingly, I have not relied upon it 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 sworn Report to Superintendent (the “RTS”), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2020 hours on October 10, 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 2036 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. 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 Blake Norman Manchur certified that the ASD was found to be within the recommended limits when he checked its calibration on September 21, 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"?

In the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer indicates that you displayed slurred speech and swayed back and forth when standing outside of your vehicle. A strong odour of liquor was detected from your breath with you admitting to the consumption of 5-6 beers that night. When asked the time of your last drink, you indicated that it was 10 minutes ago, causing the officer to conduct a 15 minute face to face observation period beginning at 2020 hours.

Referencing section 215.5(1)(b)(iii) of the Act, Mr. Shelling submits that in order for me to confirm your prohibition, I must be satisfied that a "FAIL" registered on the ASD and that the "FAIL" was the result of your blood alcohol level being over 80 mg%. Although the Notice indicates that a "FAIL" result registered, Mr. Shelling indicates that it does not address the level of your BAC (i.e. 80 mg%). On this point, he indicated that a recent decision by Justice Goepel in *Buhr*, instructs that my findings must only be based on the input of the officer and the applicant. Accordingly, he indicates that nowhere in the material disclosed is there reference to your blood alcohol level being at or above 80 mg%.

While I acknowledge Mr. Shelling's submissions, an IRP is administrative sanction and as such, this review is guided by the Act. Accordingly, section 215.41(2) of the Act indicates 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.

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 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: L. J. Shelling (by fax)
250-245-4896

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);
- 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, Donald J. White. I have proceeded with this review based on that confirmation.

Mr. White submits that the investigating officer did not have reasonable grounds to believe that your ability to drive was affected by alcohol because your manner of driving, behaviour, and demeanor did not support this belief. Specifically, that aside from the “FAIL” results, a smell of alcohol in your vehicle, and an affirmative response to a question regarding drinking, the officer

does not state anywhere in his narrative that he had reasonable grounds for believing that your ability to drive was affected by alcohol. Accordingly, referencing *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013, BCSC 1638, Mr. White submits that 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.

Moreover, Mr. White indicates that in section 10 of the RTS, with regard to applicable grounds for reasonable suspicion, the officer did not select, "Other (explained in narrative)." Therefore, because he did not provide any additional (i.e. other) grounds for reasonable suspicion, Mr. White submits that the officer failed to provide sufficient evidence that your ability to drive was affected by alcohol. I have read and considered the *Wilson* case and I acknowledge Mr. White's 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.

Mr. White submits that you feel the officer was "retrospectively searching" for further justification for the ASD demand. Specifically, Mr. White indicates that the officer observed a noticeable but minor slur in your speech but that you said very little to him prior to the demand being made on you. Further, you submit that the officer was at least two feet away from your face, at all times, while he spoke to you when you were seated in your vehicle. On this point, in paragraph 27 of your affidavit, you submit that you do not recall the officer mentioning that he specifically smelled alcohol on your breath. Moreover, Mr. White indicates that the officer does not mention glassy or watery eyes, which he submits are "signature indicators" of alcohol impairment. Further still, although the officer observed that you were a little unsteady on your feet, Mr. White indicates that the officer notes this unsteadiness may have resulted from sitting for a long period of time, then standing, and walking. While I acknowledge both your and Mr. White's submissions, 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.

In paragraph 27 of your affidavit, you submit that you were not asked or commanded to take part in any sobriety tests. While I acknowledge your submission, under the Act a peace officer is not required to provide a driver with a sobriety 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?

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 0236 hours on October 12, 2013. Further, in the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer indicates that he conducted a traffic stop on a s.22 after observing that two of the vehicle's brakes lights were not working. Upon approaching the driver's side window, he observed a male driver and informed him that his brake lights were out.

In your affidavit, you submit that you left your friend's residence at approximately 2:30 am on October 12, 2013, driving a s.22. While driving on Hall Mines Road near Nelson, you noticed a police car following you for approximately half a kilometre and indicate that you were not swerving or driving in an unsafe way. As you were driving down a hill, using your brakes to slow down on a moderate to steep incline, the officer activated his lights and pulled you over. After approaching the driver's side window, you submit that the officer informed you that the reason for the stop was due to an improperly functioning tail light.

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 at the time the officer conducted the traffic stop.

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 0241 hours and 0247 hours, respectively. Further, in the Occurrence Report the officer indicates that he held the ASD so that both you and him could see the result. However, he submits that you turned away and would not look at the result when prompted and you indicated that you knew what the result was.

In paragraph 20 of your affidavit, you indicate that the officer did not show you the result of the second test or place the ASD in your field of view. Accordingly, when the officer asked you if you had seen the result, you indicate that you said, "No, I did not see the result", and that he told you that it was a "FAIL". As such, Mr. White submits that you are uncertain about whether the officer properly performed the test.

While I acknowledge your evidence and that of the officer's contradict, under the Act a peace officer is not mandated to show a person a "FAIL" result.

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 051017 and 079132, 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".

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 for:

ASD serial number 051017, in which Cpl. John Hugh Ferguson certified that the ASD was found to be within the recommended limits when he checked its calibration on October 8, 2013, and ASD serial number 079132, in which Derrick George Donovan certified that the ASD was found to be within the recommended limits when he checked its calibration on October 8, 2013. Further, Cpl. Ferguson and Mr. Donovan certified that to the best of their knowledge the respective 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 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

cc: Donald J. White (by fax)
888-777-0951

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

Referencing *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2013, BCSC 1638, Ms. Hatcher submits that the investigating officer did not have reasonable grounds to issue the

Notice because there was no indication that your ability to drive was affected by alcohol. Specifically, she indicates that in the Occurrence Hardcopy - Occurrence Report - 1 (the "Occurrence Report") the only physical observations made by the officer were that you appeared tired and your eyes were slightly watery. Ms. Hatcher also indicates that the officer noted that your speech and coordination were normal. Observations she submits further indicate that your ability to drive was not affected by alcohol. Referencing Paragraph 24 of *Wilson*, Ms. Hatcher also submits that there is no persuasive evidence, either independent of or in conjunction with the "FAIL" reading, that would suggest your ability to drive was affected by alcohol. I have read and considered the *Wilson* case and I acknowledge Ms. Hatcher's 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.

Ms. Hatcher referenced Paragraphs 286 and 287 of *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011, BCSC 1639, to indicate that Mr. W. K. Jeffery's is a toxicologist who provided opinion evidence on the current system of breath testing to the Court in this case. Accordingly, she submits that I consider the reliability of his opinion regarding your BAC on the morning you were stopped by the officer. I am aware of this case and have considered Mr. Jeffery's opinion regarding your BAC in this review.

Referencing Paragraph 63 of *Spencer v. British Columbia (Superintendent of Motor Vehicles)*, 2011, BCSC 1311, Ms. Hatcher brought to my attention assessments of credibility, impartiality, and the proper allocation of the burden of proof. I am aware of this case and the principles of administrative justice and have conducted this review with these issues 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?

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 0127 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 RTS, the officer indicated that the ASD registered a "FAIL" at 0134 hours.

Ms. Hatcher submits that there is no evidence before me as to what a "FAIL" means and that it is incumbent upon the officer to provide such evidence. Specifically, she submits that the officer has not provided an expert report to define what a "FAIL" result meant to him. On this point, Ms. Hatcher submits that it is not open to me to infer or bring special knowledge to this review to determine what a "FAIL" means.

While I acknowledge Ms. Hatcher's submissions, an IRP is administrative sanction and as such, this review is guided by the Act. Accordingly, section 215.41(2) of the Act indicates 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.

Further, under the Act, an officer is not required to provide an expert report in order to define a "FAIL" result.

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 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 analysis.

In Paragraph 10 of your sworn Affidavit, you submit that you declined to take a second test because you did not understand the system or procedure at the time. Specifically, that you did not understand that it would do you no harm to take a second test.

While I acknowledge your submission, there is no evidence before me that you requested any clarification from the officer. In any event, you declined a second test.

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 Cst. Michael Haider certified that the ASD was found to be within the recommended limits when he checked its calibration on September 17, 2013. Cst. Haider 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"?

In the Occurrence Report, the officer indicates that you appeared tired, your eyes were slightly watery, your speech and coordination were normal, and that he detected a slight smell of alcohol from the vehicle. Further, under the heading, "How did driver respond to "time of your last drink?", he indicates that you admitted to having a few glasses of wine earlier with dinner.

In your sworn Affidavit, you submit that on the evening of October 5, 2013, you attended a gathering at a friend's house. You arrived at 6:30 pm and left at around 1:20 am on October 6, 2013. Throughout the evening you consumed three glasses of white wine, pouring each five ounce glass yourself. At the end of the evening, you submit that you were washing glasses and your glass was the last one left. You had half left to drink so you quickly finished it and washed the glass before leaving.

Approximately 5-7 minutes after leaving, you encountered a roadblock. You indicate that the officer first asked where you were coming from and that you advised him you had been at a gathering a few minutes away. The officer then asked you if you had consumed any liquor that evening and you advised him that you had had a few glasses of wine throughout the evening. You submit that the officer never asked you when you had consumed the liquor or the time of your last drink. As such, you strongly dispute his evidence that you stated your consumption was earlier in the evening or earlier with dinner. You indicate that you were compliant and cooperative throughout your brief interaction with the officer because you were confident that you would pass the [ASD] test and felt no effects from alcohol. Accordingly, you submit that you were extremely surprised by the "FAIL" result and that you had no idea that your recent drink could taint the result of the test.

Ms. Hatcher submits that the officer's evidence conflicts with your sworn account of your drinking pattern that evening. Specifically, that the officer focuses on the amount of alcohol consumed, not the time of your last drink. Accordingly, she submits that the officer's evidence on this point is hazy as it was necessary for him to "drill down" and determine the actual time of

your last drink. By indicating that you had consumed wine, “earlier in the evening”, Ms. Hatcher submits that the officer provided a notional response that does not specify the time your last drink was consumed. As such, she submits that the officer should have waited 15 minutes before administering the ASD test. Referencing the Alco-Sensor IV DWF Screener Manual (the “Manual”), she indicated that on page 4 under the heading “*Principle of Operation Alcohol in the Breath*” it specifies that a recent alcoholic beverage or regurgitation could introduce “mouth alcohol” to the breath causing an exaggerated reading. As such, a 15 minute waiting period prior to testing is required to ensure the elimination of mouth alcohol.

Moreover, Mr. Jeffery’s offered an opinion that based on an assumption that your claimed drinking pattern is accurate, you s.22 and that all of the alcohol you consumed was absorbed into your system at the time of driving, that your BAC would have been between 0-59 mg%.

In the RTS, the officer indicated the time of the ASD test as 0134 hours (i.e. 1:34 am). In your sworn Affidavit, you indicate that you finished your last half glass of wine immediately before leaving your friend's house at 1:20 am. While your evidence is unclear if you left around or at 1:20 am, for the purposes of this review I have accepted that you left your friend’s house at 1:20 am. Accordingly, I feel a reasonable inference can be made that prior to leaving you would have had to drink the wine, wash your glass, said your goodbyes, put on your coat and shoes, gathered your purse, retrieved your keys, and then left. However, for you to have left at 1:20 am all of these things would have had to have taken place prior to you leaving. I find it highly unlikely that you would have been able to accomplish all of these tasks in the same minute that you left the house. Therefore, I find it more likely than not that you consumed your last drink of wine several minutes prior to leaving.

I also find it noteworthy that you indicate that you made sure you poured each of the three, five ounce glasses of wine yourself because you are mindful you must moderate your alcohol consumption. However, you provide sworn evidence that you, “quickly finished”, your last half glass (i.e. 2.5 ounces) of wine immediately before leaving. I question why you would quickly consume a half a glass of wine right before driving, if you had been so careful with your consumption over the course of the evening. Further, I find myself asking why your friend whose house you were at for more than seven hours did not provide any evidence for this review if that person could have supported your alleged drinking pattern. You have not convinced me that your last alcoholic drink was finished less than 15 minutes before you provided a sample of your breath into the ASD. Therefore, on a balance of probabilities, I am satisfied that your ASD test result was not affected by mouth alcohol.

I have considered Mr. Jeffery’s opinion regarding your BAC, however, I note that it is based on the assumption that your stated drinking pattern is accurate and that mouth alcohol may have caused the ASD to register a “FAIL”. However, I have already made a finding that the ASD test result was not affected by mouth alcohol. Therefore, I have not considered his findings with regard to your BAC.

Further, I acknowledge your submissions that your eyes were slightly watery because you had been wearing contact lenses for 17 hours, the bright glare from the flashing police lights was

irritating your eyes, and that at s.22 you never look refreshed or awake at 1:30 in the morning. However, I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not how indicia observed by the officer can be explained by factors independent of being under the influence of alcohol. 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 ASD used for your test was 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 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.

cc: Claire Hatcher (by fax)
604-687-3022

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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with 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 the hearing I did not speak to you, but rather, to an interpreter speaking on your behalf. For the purposes of this review I have accepted the submissions to be your own, and I will therefore refer to them as if you had made them yourself.

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.

In the hearing you stated that you have a clean driving record. You also stated that you drive for a living and your family is dependent on you. 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 0030 hours on September 12, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that he received a report of a male hunched over the wheel of their car. The officer states that the male had to be woken up by tapping on the window. The officer states that after notifying police, the witness reached into the vehicle and turned off the engine. You were identified as the driver via your driver’s licence.

In the hearing you stated that you got a call from your friend and went to pick him up from downtown Vancouver. You stated that you were surprised and conscious when the officer arrived.

There is a discrepancy between your version of events and that of the officer with regard to whether or not you were asleep when the officer arrived. The witness stated that you were asleep behind the wheel with the engine running and the officer’s evidence is also that you were asleep. In the review, you stated that you were driving to Vancouver to pick up your friend; however, I note that in the officer’s evidence you were the sole occupant of the vehicle. I find it reasonable that you had not yet picked up your friend, and that your intention was still to drive downtown when you were approached by the officer.

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 0041 hours and 0050 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 0042 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 0050 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 052915 and your second sample of breath into ASD serial number 061114. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 052915 and 061114.

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 052915. 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 27, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 19, 2013, he checked the calibration of ASD serial number 061114. 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 27, 2014.

In the review you stated that you read an article that states that more than 50% of the ASD results are inaccurate. You stated that the calibration was due on September 16, 2013, which is

only four days from the date of your analysis. You also submitted that the article states that calibration used to be done after 14 days, but now is only done every month. You stated that we cannot rely solely on the machine.

I acknowledge that you may have read an article which claims that the ASDs are not reliable; however, the evidence before me indicates that the ASDs were calibrated at the time. 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." I do not find that I have any compelling evidence before me to cause me to question the reliability of the ASDs.

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 stated that you only drank a very little bit with your family who were in town from Italy. You stated that you were very surprised by the results of the ASDs.

As stated above, I am satisfied that the ASDs were reliable. You submit that you had only consumed a small amount of alcohol; however, you do not address the fact that you were observed slumped over the wheel of the car with the engine running. You also do not address the officer's observations that your speech was slurred and confused, your eyes were glassy, and you stumbled when exiting the vehicle. The officer also states that he was overwhelmed by the smell of liquor when you opened the door of the vehicle. 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%.

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 *Motor Vehicle 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.

November 14, 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 IRP Application for Review, you indicated five 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 an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

IRP Review Decision
Page 2

Your IRP Application for Review indicates that your written review was scheduled for November 13, 2013, at 9:30 am. At the time of the review, I had not received any submissions from you. Therefore, 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 investigating officer indicated that you were driving or in care or control of a motor vehicle at 2355 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 the ASDs registered a "FAIL" at 2357 hours and 0003 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 055112 and 055118, 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. David Cowley certified that the ASDs were found to be within the recommended limits when he checked their calibration on October 16, 2013. Cst. Cowley 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 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.

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

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 Jamie Butler, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

I confirm receipt of Mr. Butler's submissions, together with sworn Affidavits from you and s.22 a statement from s.22 the report and resume of Nizar Shajani, the ultrasound image showing s.22 Google map and caselaw of *Buhr v. SMV*; *Wilson v. SMV* and *Ema v. SMV*.

Mr. Butler submits that there is a lack of evidence regarding the type of demand given to you. The evidence submitted by police fails to disclose the precise demand (or the card from which it was read) and thus there is no evidence to support what was exactly read to you. In addition, Mr. Butler 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. Mr. Butler has provided me with the cases *Ema v. SMV* and *Wilson v. SMV* in support of the above-noted submissions.

I acknowledge Mr. Butler's submission on these points, and I have read and considered the *Ema* and *Wilson* cases. Based on the circumstances of your case, the type of demand or whether the officer had reasonable grounds to issue the Notice are not stated grounds as set out in section 215.5(4) of the Act, meaning that they are not grounds of review. Therefore, I have no statutory authority to revoke a prohibition based on these grounds.

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 00:36 hours, Officer Redhead (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 00:39 hours and at 00:47 hours, the officer used ASD serial numbers 052915 and 061114 respectively to take breath samples 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 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 061114 at 00:47 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 lowest available result.

Was the ASD reliable?

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

- ASD serial number 052915 and ASD serial number 061114 were checked for calibration on September 17, 2013, and found to be functioning correctly and within the recommended limits. Both of these ASDs have a calibration expiry date of October 15, 2013, and a service expiry date of March 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"?

Your lawyer submits that your evidence provides that the BAC reading achieved by any ASD used may be "unreliable", and that your BAC readings were actually under 80mg% despite any ASD test registering otherwise. In support of this argument, Mr. Butler provided Affidavits from you and s.22 a statement from s.22 Nizar Shajani's report, the ultrasound images and a copy of a Google map.

In reviewing your Affidavit, you said that you came home at about 5:30 p.m. and went to a restaurant with your wife s.22 and two other friends, being s.22. You did not consume anything alcoholic at dinner. You said you agreed not to drink at the restaurant so that you could drive from the restaurant to the next social gathering. You left the restaurant at approximately 7:30 p.m. and arrived at the party at about 8:00 p.m., and stayed until 11:30 p.m. While at this party you drank two mixed drinks between approximately 9:00

p.m. and 11:00 p.m. You mixed both drinks yourself and so you knew they each contained at most 1.5 ounces of Stolchnaya vodka. You left the party with s.22 at approximately 11:30 p.m. and you were driving. On the way home, you said you all stopped at s.22 parents' house where you were invited in. You were all offered a drink and you decided to have a beer. You said you arrived at s.22 parents' house close to midnight. You consumed your beer from midnight at the latest until the time you left. You said you note the police officer's report indicates that you were observed driving at 12:36 hours. You said you did not look at the clock when you left and take the time as being accurate. You said that from s.22 parents' house to where you were stopped is only a 2.5 minute drive. Your last sip of beer would have been at 12:33 a.m. as you recall when you left s.22 s.22 parents' house that you were just finishing the last of the beer. You said you recall you put on your shoes, finished the beer and your group departed.

In reviewing s.22 Affidavit, she said you came home from work in a sober state. You had plans with your roommates, s.22 to go for dinner and then to a party in Abbotsford. She said you went for dinner at Rusty's where neither she nor you consumed anything alcoholic. You left Rusty's at about 8:00 p.m. and you drove s.22 car to the party. At the party, s.22 said she saw you pour yourself two drinks and believes they were vodka/sodas. She said your group left at about 11:30 with you driving because you had indicated earlier that you would be driving s.22 car home. s.22 goes on to say that you made the stop at s.22 parents' house, got invited in and stayed for about twenty to thirty minutes in total. She said while there, everyone was offered a drink. She was not drinking but she recalls that you accepted and drank a beer. After about twenty or thirty minutes, she indicated that she was tired and wanted to leave. Your group left within one minute. s.22 said that if she thought you were at all impaired she would have driven. She said she has had a driver's licence for more than ten years and regularly drives even though she s.22

In reviewing s.22 statement, she said that at 12:35 a.m. you were pulled over while driving her vehicle. She said the evening began with a discussion of who was going to be the driver for the evening. You volunteered since you weren't planning on drinking. s.22 said that around 5:30 your group went to Rusty's in Cloverdale. She confirms that you did not have anything alcoholic to drink at Rusty's. After dinner your group went to the party in Abbotsford, arriving there around 8:00 p.m. s.22 believes you had two drinks at the party and that your group left the party around 11:30 p.m. On the way home from the party, s.22 says your group stopped at her parents' house and were invited in and offered drinks. She, s.22 and you agreed to stay for one beer. She says you had your beer and left around 12:30. She says that growing up, her mom was always strict about being a smart driver and told her not to drink and drive and not to get in the car with anyone that has been. She says this is something she has always been cautious about and had you not been totally capable of driving, either she or her mom would have stopped you.

In reviewing the two Affidavits and s.22 statement, I notice several inconsistencies in the information you provided, which raises some questions:

- You said you decided not to drink at the restaurant because you were going to drive s.22 s.22 car from the restaurant to the party in Abbotsford. However, if you had decided not to drink because you would be driving, I question why you subsequently decided to drink two mixed drinks and a beer throughout the evening and then drive.
- You said you got home from work at 5:30 p.m., but s.22 say you were at Rusty's at 5:30 p.m.

- You said your group left Rusty's at 7:30 p.m., s.22 says your group left Rusty's at 8 pm., and s.22 says your group got to the party in Abbotsford around 8pm.
- You say the time you left s.22 parents' house "would have been at about 12:33 a.m." This is based on when the officer says he observed you driving. You also said that "[you] did not look at the clock when you left."
- s.22 does not say at what time you left s.22 parents' house, only that you stayed there for twenty or thirty minutes and that you left within a minute of finishing your beer.
- s.22 says you had your beer and left her parents' house around 12:30 a.m.
- Considering the inconsistencies in the times provided in your evidence, I question how s.22 can be certain that the time you were pulled over was precisely 12:35 a.m.

I'm left to wonder if anyone was consulting a clock, a watch or a cell phone throughout the course of the evening because the times that have been provided in the two Affidavits and the statement are conflicting, which leads me to question the reliability of the information. Consequently, I do not find your evidence to be credible.

In paragraph 13 of your Affidavit, you outlined the conversation you had with the officer about the time of your last drink. In summary, you say that:

- The officer asked you what you had to drink that night
- You first told him that you had "just" consumed a beer
- The officer asked if that was all you had to drink
- You then told him you had two vodka sodas earlier in the night
- The officer asked you about the timing of your last beer
- You said you just had a beer at your friend s.22 parents' house around the corner. You explained that you had stopped there about 20 minutes ago.

You then say that he did not ask you anything else about what you had done that night, where you had been or anything else regarding the alcohol you had consumed. In my view, the officer turned his mind to the issue of recent consumption when he asked you how much alcohol you had to drink that evening, and when you had last consumed alcohol.

Your lawyer said that in the Narrative, the officer did not provide context for what he has in quotation marks for the time of your last drink. The officer notes that "...about 20 minutes ago..." was your response. I acknowledge Mr. Butler's assertion on this point, however I do not agree. Immediately after the note "...about 20 minutes ago...", the officer has summarized the conversation by saying that you originally claimed one beer for the night, then added two separate hi-balls throughout the night. In my view, the officer has recorded the portion of your response which was relevant to his question about the time of your last drink. He has noted "twenty minutes ago" in the Report and in the Narrative. I find it is reasonable to conclude that based on his conversation with you and the fact that he has your answer in quotation marks, the officer believed that the time of your last drink was twenty minutes ago. I find that it was reasonable for the officer to proceed to conduct the ASD tests based on his belief that your last drink was twenty minutes ago, and to rely on the ASD test results.

I turn now to the report of Mr. Shajani dated October 5, 2013, which I have read and considered. Mr. Shajani has based his opinion on the information provided to him by your lawyer about your stated drinking pattern on the night in question. It is Mr. Shajani's opinion that your maximum blood alcohol level at 12:39 a.m. would be between 6 and 12 mg% and at 12:47 a.m. would be

between 3 and 11 mg%, based on full absorption of all the alcohol. However, as I have already found your evidence to lack credibility, I am not persuaded your drinking pattern is as you stated. As a result, I have given little weight to Mr. Shajani's opinion.

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 have already found that the two ASDs were tested and found to be in reliable working order. Based on a consideration of the evidence in its totality, 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: Jamie Butler
by fax 604-739-9888

October 3, 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) 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

The ground 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". 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 you work s.22 and require your driver's licence so that you can take people to various appointments. You told me that you are a single mom with an active s.22 son. You asked for a reduction in the length of your driving prohibition, or to limit the time you can drive to only the hours you work during the day.

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. As well, I am not authorized under the Act to shorten or otherwise alter the terms of a 90 day driving prohibition.

You expressed concern that the officer said he pulled you over because he observed you exiting a liquor licenced establishment and not because of your driving behavior. The reason the officer pulled you over is not one of the issues that I am permitted to consider in this review. The issues that I am able to consider are set out in Section 215.5(4) of the Act, and listed 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?

The police evidence in the Report to Superintendent (the "Report") is that on September 15, 2013, at 02:05 hours, Officer MacDonald (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 02:10 and at 02:23 hours, the officer used ASD serial numbers 101754 and 101676 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 101676 at 02:23 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 101754 was checked for calibration on August 23, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 20, 2013, and a service expiry date of November 28, 2013.
- ASD serial number 101676 was checked for calibration on September 4, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 2, 2013, and a service expiry date of November 27, 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 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

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);
- 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 indicate one ground 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 you have been driving for s.22 have never had an accident, and are considered a safe driver. I have no authority to consider a person's driving record in this review.

I also have before me a submission from your daughter, s.22 details the effects of a known hereditary disease, s.22 with regard to her ability to metabolize alcohol. While I acknowledge her submissions, I have no evidence before me that you have been diagnosed with s.22. Therefore, I have not considered this submission when making a decision in this review.

I am familiar with the September 30, 2013 article you submitted titled, "B.C. gov't to appeal ruling overturning impaired conviction." I acknowledge that you submitted this article to indicate that a breathalyzer reading is not enough to justify a roadside penalty for impaired driving. Further, I infer that this article is referring to the British Columbia Supreme Court ruling of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*. On this point, 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 assert that the Superintendent of Motor Vehicles or his representative should not be judging or imposing penalties under the *Criminal Code*. You also indicate that the legislation should be rewritten and that a law should be created that is just and constitutional under the *Criminal Code*. However, any concerns you have in this regard must be made in writing directly to the Superintendent as they are not issues before me in this review.

You submit that you have lots more evidence and witnesses that you would like to present, however, that the time limit of five work days has limited your ability to do so. The Act mandates that an applicant be given seven days to apply for a review of their prohibition. Your IRP Application (the "Application") indicates that you applied for this review on September 20, 2013 and that your written review was scheduled for September 30, 2013 at 9:30 am. I note that you signed the Application and by doing so indicated that you understood all written information you wished to be considered should be provided to the Superintendent in advance of 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 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. Macdonald, indicated that you were driving or in care or control of a motor vehicle at 2020 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 RTS, Cst. Macdonald indicated that the ASDs registered a "FAIL" at 2025 hours and 2037 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?

Evidence in the Narrative Text Hardcopy (the "Narrative") indicates that at 2027 hours Cst. Macdonald read you your right to request a second ASD test and that you understood. Moreover, on line 7 in the RTS, Cst. Macdonald 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?

Police evidence indicates that you requested a second ASD test and that at 2037 hours you provided a sample for 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, Cst. Macdonald recorded the serial numbers of the ASDs used for your tests as 101754 and 101676, 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". 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 Certificates of a Qualified ASD Calibrator (the "Certificate") is as follows:

- ASD serial number 101754 was checked for calibration on August 23, 2013, with a service expiry date of November 28, 2013, and calibration expiry date of September 20, 2013;
- ASD serial number 101676 was checked for calibration on September 4, 2013, with a service expiry date of November 27, 2013, and calibration expiry date of October 2, 2013, and;
- Qualified ASD Calibrator, Cpl. D.W. Jones, 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.

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

In the Narrative, Cst. Macdonald submits that your speech was slurred and that he observed your eyes were watery and glassy. A strong odour of liquor was noted on your breath and when asked the time of your last drink, Cst. Macdonald submits that you responded, "finished a beer 30 minutes ago."

In your Submission, you assert that you only drink beer and that when driving your rule of thumb is one beer per hour, with a maximum of three or you do not drive. You submit that you are

s.22

On September 15, 2013, you attended the Famingo Lounge (the "Lounge") shortly before 5pm. While there you drank two sleeves of beer and left after 8pm. You assert that you did not drink enough to warrant a fail. You also submit that those who were at your table that night, regular attendees, and bartenders often comment that they wish all who attended the Lounge could conduct themselves like you.

You submit that your habit after you finish your beer is to go to the washroom and head home. You admit to telling the officer that you had your last drink within one half hour of being stopped. You also submit that a few days ago you had a friend pick you up from the Lounge. You finished your beer and went to the washroom. On the way home, your friend stopped for two red lights and it only took 7 minutes before you arrived at the location where you were stopped by the officer; therefore, it was not 30 minutes before your last drink but less than 10 minutes. Accordingly, you submit that the ASD reading was not accurate. You also indicate that the officer gave no indication that you were impaired or incapable of driving, only that you had failed the breathalyzer reading.

I have no evidence before me as to how alcohol is metabolized when your current age, weight, and height are considered. Further, you detailed a route that you travelled by car a few nights ago that you assert was the same route taken the night you were served your prohibition.

While I acknowledge this route may have taken less than ten minutes the night your friend drove it, I note that you do not refute telling Cst. Macdonald that your last drink was thirty minutes prior to being stopped. Also I cannot be certain that your behaviour and the route you travelled on the night you were stopped was exactly replicated when your friend drove the same route. While you may feel that you consumed alcohol less than ten minutes before you were stopped, I find there is no compelling evidence to support this.

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 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 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 21, 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);
- 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 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 "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 0120 hours on October 10, 2013. You were directly witnessed driving, and identified by your BC Driver's licence.

In your statement sent October 17, 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 "FAIL"?

In the Report, the officer indicated that you provided two ASD "FAIL" results at 0130 hours and 0142 hours.

Your 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.

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 0135 hours, and that this was read from a "IRP booklet." He also provides that you understood the right to a second test.

Your statement does not provide evidence to contradict or question that of the officer on this point.

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 101743 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 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 24, 2013, he checked the calibration of ASD serial number 101677. 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.

For the second ASD, L.E. Ewanyshyn certified that on October 1, 2013, he checked the calibration of ASD serial number 101743. 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 February 20, 2014.

You provided evidence that you had a chest cold at the time, as well as asthma; however, you do not provide evidence on how this may affect the results obtained on an ASD. With no evidence to the contrary, 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 were prohibited from driving for 3 days. Your prohibition took effect on October 10, 2013.

s.15

Adjudicator

September 23, 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 and I am delegated the authority to conduct this review.

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

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. Nickel – indicated that you were driving or in care or control of a vehicle at 0235 hours on August 24, 2013. Cst. Nickel provide in his narrative report that: your action came to his attention as you were leaving the bar; there were six occupants in the vehicle; you were observed as the driver of the vehicle.

Your statement confirms these details provided by the constable: you left the bar at “about 2:30 am and proceeded to leave in my dad’s minivan.” Also: “Just as I exited the parking lot I was pulled over by the police.”

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 0235 hours.

There is no evidence to the contrary on this point. In your statement you do provide that “the officer said I failed,” yet state that the officer did not show you the results of the test.

There is no requirement under the Act for the officer to show you the result of the test. 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 ‘NO’ to indicate that you did not request a second ASD test; the narrative report provides: “Second test offered and refused.”

On this point, you state: “I just did not believe the machine, so I asked to have a retest and see the results – the officer refused that request. . .”

The evidence you provide does not address the officer advising you of your right to request a second analysis, nor does it address the detail that this officer provides evidence that he informed you that the second test would be on a second device, and that the result of the lower test result would prevail. Upon your review of the evidence provided by the officer, you omit acknowledging and do not address this important detail in the officer's evidence, if only to deny it. As such, I accept the officer's evidence as fact. I cannot conclude that the officer would record sworn evidence that he advised you of your right to a second test, yet refuse your request in the manner you describe in your version of events.

I am satisfied overall that you were advised of your right to a second breath test analysis, and that you declined the offer of a second analysis.

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?

The officer provided a single Certificate of a Qualified ASD Calibrator in which D.W. Jones certified that he is qualified to perform this operation. This Certificate forms part of the sworn Report.

For the ASD, D.W. Jones certified that on August 7, 2013, he checked the calibration of ASD serial number 101750. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as September 4, 2013 and the service expiry date as February 12, 2014.

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

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

You stated that you did not see the result of the single sample, that you "just did not believe the machine". You maintain that you had a single shot when you were picking your friends up at the bar. You state: "I was sober and most definitely able to drive safely."

I place emphasis on a discrepancy in the evidence that you provide: the times you give of your last drink do not lend credibility to your statement regarding consumption. In your submission on this review you detail your answer to the officer as being "about 45 minutes ago", then later state (in regards to the smell of liquor noted by the officer) that "I had a shot about half hour prior." Both of these times are in contrast to what was recorded by the officer in the Report: "10

to 20 minutes maybe”, and in the narrative report: “stated it was “a while ago” then said “maybe 10 to 20 minutes ago.” Your submission on this review does not address this time recorded by the officer, and does not lend further clarity by adding two more alternate times of consumption. I find your evidence on this point not clear, and thus your statement in regard to consumption to be not credible.

I accept as fact that the ASD 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 August 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.

Adjudicator

September 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) 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 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

As there is one issue that is determinative in this review, I have only addressed that issue.

Were you advised of your right to a second analysis?

After considering the evidence before me, I am not satisfied you were advised of your right to a second analysis.

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

September 24, 2013

s.22

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

Introduction

On July 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.

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?

Preliminary Matters

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

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 satisfied that you were not 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.

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.

Adjudicator s.15

cc: Paul Evans by fax: 778 395 6226

SEPTEMBER 24, 2013

s.22

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

Introduction

On September 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 “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, 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, Paul Doroshenko. I proceeded with this review based on that confirmation.

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.

In your affidavit you acknowledged doing a u-turn that caught the officer's attention, but you said it was a legal u-turn. The officer's reason for pulling you over is not relevant to the issues I can consider in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did the ASD register a "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 Ivanov indicated that he witnessed you driving or in care or control of the vehicle on September 4, 2013, at 2014 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 Ivanov stated that you provided breath samples into two ASDs and that both devices registered "WARN" as a result of the analyses. There is nothing before me to the contrary. I am satisfied that the ASDs registered "WARN" at 2017 and 2021 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 Ivanov indicated that

he informed you of your right to a second breath test analysis. There is nothing before me to the contrary.

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 "WARN". I am satisfied that the Notice was served on the basis of the lowest available result, which was "WARN".

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 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 50 mg% even though the ASD registered a "WARN"?

In your affidavit, you said you consumed $2\frac{2}{3}$ beers at the job site before you left. You said you did not feel impaired by alcohol on September 4, 2013 and your balance was perfect and your speech was clear. There are many factors that can affect a person's blood alcohol content to greater or lesser extents. Each person's body and experience with alcohol is different and context specific. While you may have felt "straight", your evidence has not persuaded me to doubt the "WARN" readings on two ASDs that I 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%.

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 4, 2013.

s.15
Adjudicator

cc. Paul Doroshenko
604-685-8308 (fax)

October 8, 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

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Matthew Low. 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.

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: Matthew Low
Swift Datto Law Corporation
250-334-2335

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) 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, Jennifer L. Currie. 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

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.

s.15
Adjudicator

cc: Jennifer L. Currie
By fax 604-590-5626

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 (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.

In the hearing you questioned the officer’s evidence of a “strong odour of liquor” and stated that this was possibly due to your passenger rather than yourself. In regard to “slight slurring of words” you stated that you have a slight speech impediment.

If you are questioning whether the officer had the grounds to make an ASD demand, I must advise that the validity of the demand is not an issue in this review. Section 215.5(4)(a) of the Act requires me to revoke a driving prohibition served on the basis of an ASD “FAIL”, 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, meaning that it is not a ground of review. Therefore, it is not an issue that I am by statute permitted to 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 2240 hours on September 7, 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 2247 hours, and 2252 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.

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 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 the hearing you stated that you consumed 1½ -2 glasses of champagne that evening. You stated that you are more familiar with ASD's that provide a numeric value rather than just "FAIL". You stated that research has led you to believe that the timing of the results is critical.

In considering your statement I find that the Act defines a "FAIL" on an ASD as 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. With regard to the timing of the results you have not provided any alternate times for my consideration. Therefore, I find the officer's times reliable.

The officer provided two Certificates of a Qualified ASD Calibrator:

For the first ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 101762. 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 January 15, 2014.

For the second ASD, the qualified ASD calibrator certified that on August 21, 2013, he checked the calibration of ASD serial number 101738. 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 January 15, 2014.

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 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.

October 22, 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 disclosure documents were faxed to your lawyer, Kris Pechet. I will proceed with the review based on this confirmation.

Mr. Pechet made submissions with respect to the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)*. 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. 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

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 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.

Adjudicator s.15

cc: Kris Pechet
Merrigan and Company
by fax 604 519 6071

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. You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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 this review based on that confirmation.

Preliminary Matters

You stated in the review, and in your written submission of October 29, 2013, that you require your license for work, and you have a clean long-term driving record. Under the Act, I am not authorized to consider hardship, personal circumstances, or employment or transportation needs, or your driving record, in this review. 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?

The officer establishes in his evidence that you were driving the motor vehicle in question at 0150 hours on October 24, 2013, when he observed your vehicle fail to come to a complete stop at a stop sign. After stopping your vehicle, he identified you as the driver.

In your oral review on November 1, 2013, you acknowledged driving by your statements describing a “passed right turn”, then on to Bridge Street, ending up in a “high-crime area.”

Your evidence does not place that of the officer into question. I therefore find you in care and control of a motor vehicle at 0150 hours, as presented in the officer’s evidence.

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 officer made a valid demand, and whether you failed or refused to comply with that demand.

In the Report to Superintendent (the “Report”), the officer indicated that he formed his suspicion at 0150 hours, and read the ASD demand at 0151 hours. He checked the box next to “Odor of liquor on breath.” He indicated that you denied consuming liquor. In his synopsis, he included details that you were combative, and “refused to listen to police direction.”

You submit you were “incredulous when the office [sic] explained to me that he had reason to suspect I was intoxicated. [sic]” You were driving in that area because you had taken a wrong turn.

I understand from the officer’s evidence in the synopsis that he formed the suspicion to make the ASD demand based on your driving behaviour, and the odour of liquor on your breath, in addition to your curt replies and combative behaviour. Although you provided an explanation for the driving in that area that time of the morning, you did not dispute the officer’s other observations in that regard.

I am looking at whether or not it was reasonable for the officer to suspect that you had alcohol in your body. Although you deny consuming liquor, and did the same at roadside to the officer, you do not address the other observations of the officer, and provide no evidence in that regard. Having carefully considered all of the evidence before me, I accept that the officer’s suspicion was reasonable.

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 failed or refused to provide a sample, and he recorded the time of refusal at 0153 hours. In the synopsis, his evidence is that you stated “I don’t have to blow into it,” and when he explained the consequences of not providing a sample to you, you replied “FUCK OFF.” He again explained the consequences, and you replied “don’t bother.”

In your statement, you provide that “I remember being asked multiple times to submit to a breathalyzer. I declined each time I was asked, because as stated before, I was not intoxicated.”

I accept your statement as proof affirmative that you refused to provide a sample. I am therefore satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In regards to what occurred at roadside, you stated that you do not remember being told that the result of refusing was a 90-day prohibition, the same consequence as providing a “FAIL” result on an ASD. Your words in your statement are: “If I had been aware of this repercussion . . . I would have submitted to a breathalyzer.

The officer records your combative actions and curt replies to his questions. I accept this as evidence that you were deliberately not listening to what was being told. At one point, the officer records your response of “don’t bother” when he attempted to explain the consequences to you. The officer also records telling you of the consequences three times during the interaction, at one point taking two minutes to do so. I am satisfied that this in fact occurred.

In themselves, your actions do not constitute a reasonable excuse. In your oral review you admit there was “no reason to be in a physical confrontation.” This contradicts your statement at the beginning of the oral review where you stated there was “no resistance on my part.”

In your written and oral statements, you present that you missed taking medications for your condition in the past, and that you did so on this occasion as well. This affects your judgment. I infer that you are offering this as a reason for you not understanding what the officer was telling you.

Your submissions on this point are vague. You state: “This may or may not have affected my judgment, and subsequent reaction when I was pulled over.” You note s.22 ; the note you provide s.22 notes a past visit to a s.22 ” but nowhere does it present specifically what your condition is, or what happens if you miss medications.

In evaluating your evidence, I cannot accept your not understanding – possibly as a result of not taking medication – as a reasonable excuse. You have not convinced me that this is what was happening; I cannot establish it as fact.

I am satisfied 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 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.

s.15

Adjudicator

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

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

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

Preliminary Matters

Records at this office indicate that you identified George Leven as your lawyer in this matter. On September 18, 2013, this office faxed to the number which you provided, Mr. Leven 19 pages of disclosure documents which included a fax cover sheet. The fax cover sheet stated that the written review was scheduled for September 23, 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 “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 Narrative Text Hardcopy (the “Narrative”), Cst. Jiwan noted that a report was received about a possible impaired driver swerving all over the road and that the vehicle almost rear ended a vehicle. Cst Jiwan indicated that you were identified as the driver of the vehicle when it was pulled over roadside. In the Report to Superintendent (“RTS”), the constable indicated that you were driving or in care or control of the vehicle at 15:36 hours on September 8, 2013.

There is no evidence before me contrary to that of Cst. Jiwan. 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 “WARN”?

In the RTS, Cst. Jiwan indicated that the first ASD test was administered at 15:44 hours and it resulted in a “WARN” reading. The RTS indicates that the second ASD test was administered at 15:52 hours, and that it also resulted in a “WARN” reading.

There is no evidence before me that indicates the ASDs did not register a “WARN” result. I am satisfied that the ASDs registered a “WARN”.

Were you advised of your right to a second analysis?

In the RTS, Cst. Jiwan indicated by checking boxes that she informed you of your right to a second test on a different ASD and that the lower ASD test result would prevail. She 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 breath test analysis.

Was the second analysis provided by the officer?

In the RTS, Cst. Jiwan indicated that a second ASD test was completed at 15:52 hours.

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

Was the second analysis performed on a different ASD?

In the RTS, Cst. Jiwan recorded the serial number for the first ASD as 043874, and the serial number for the second ASD as 101375.

There is no evidence contrary to that of Cst. Jiwan's on this issue. 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?

Cst. Jiwan recorded in the RTS that both results registered as "WARN" results.

There is no evidence before me that refutes Cst. Jiwan's evidence on this point. I am satisfied that the Notice was served on the basis of the "WARN" result, since each result was the same.

Was the ASD reliable?

In the RTS, Cst. Jiwan swore that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. Cst. Jiwan also provided two Certificates of an ASD Calibrator.

For the first ASD, the qualified ASD calibrator certified that on September 7, 2013, he checked the calibration of ASD serial number 043874. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 5, 2013, and the service expiry date as June 21, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 8, 2013, he checked the calibration of ASD serial number 101375. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 6, 2013, and the service expiry date as August 2, 2014.

There is no evidence before me that the ASDs used were not functioning correctly at the time of your ASD tests on September 8, 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 section 215.5(1) of the Act. You were prohibited from driving for 3 days. Your prohibition took effect on September 8, 2013.

Adjudicator

Cc: George Leven
Fax: (250) 564-0563

November 7, 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);
- 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 review, 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.

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. Wilson -- indicated that you were driving or in care or control of a vehicle at 2009 hours on October 21, 2013. Cst. Wilson provides in the IRP Narrative that he responded to a call about your vehicle being driven in a questionable fashion. Upon stopping your vehicle, he identified you as the driver of the vehicle in the driver's seat, and verified your identity using 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 2013 and 2015 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. Wilson.

Were you advised of your right to a second analysis?

In the Report, Cst. Wilson 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 2014 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 103013, 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. Wilson 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. Wilson provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASD serial numbers 103016 and 103013, which he used to test the samples of your breath. These Certificates, completed by John Wilcox, form part of the sworn Report.

For the ASDs he 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 July 25, 2014.

There is no evidence before me to suggest that the ASDs were not functioning properly on October 21, 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 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

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 (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. For your benefit, I have considered all the grounds available to you.

You stated that you have proudly held a valid driver's licence for s.22 with minimal driving infractions. You explained that you were in a car accident two years ago and you are in the process of re-training. You stated that you need to be able to get to your training when your wife is at work. You also stated that your family needs the use of your driver's licence.

The scope of this 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 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 October 4, 2013, at 22:45 hours. In the Narrative the officer stated that he observed your vehicle aggressively leaving the parking lot of the liquor store and that you pulled over to the side of the road prior to police emergency equipment being activated. The officer stated that you showed immediate signs of impairment. He indicated that your speech was slurred, your eyes were glazed and your breath smelled of intoxicating liquor.

In your written submission you stated that upon exiting the liquor store parking lot a police vehicle immediately pulled up close behind you at a stop light. You stated that you made a right turn toward home and noticed the police vehicle following close behind. You indicated that you thought the officer had an issue with your vehicle so you pulled over, exited your vehicle and asked the officer what the problem was. You took issue with the officer's statement that you aggressively pulled out of the liquor store and that your speech was slurred. You stated that in your opinion this was an embellishment after the fact to justify pulling you over in the first place. You stated that you had a friendly discussion and that the officer did not mention your driving behavior or your slurred speech.

I do not have jurisdiction under the Act to consider the officer's grounds for stopping you. While you disputed the officer's evidence about your driving behavior and your slurred speech, it is clear based on the evidence before me that you were driving.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act on October 4, 2013, at 22:45 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.

You stated that the ASDs may have been unreliable. You noted that there is no evidence or statements of where and how the ASDs were stored. You stated that given the sensitivity of the equipment you wondered if they could have been influenced by heat, cold or even rough travel while being hauled around in a police vehicle for a week and a half.

While you wondered if the ASDs could have been influenced by heat, cold or rough travel you did not provide any evidence to support your statements. Specifically you did not state how heat, cold or rough travel would adversely affect the ASD.

I am satisfied that the ASDs were reliable.

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

The officer stated in the Narrative that you showed immediate signs of impairment. He indicated that your speech was slurred, your eyes were glazed and your breath smelled of intoxicating liquor. The officer also noted that you admitted to consuming two beers four hours previously.

You denied that you told the officer that your last drink was four hours ago. You stated that this was incorrect. You said that the officer asked you how long it had been since your last drink and you told him about two hours or maybe less since you really had not been watching the clock. You said that you told the officer that you had consumed several beers through the evening. You stated that the officer asked if you would like to take a breathalyzer test and you said sure because you were not concerned about being over the limit. You stated that before blowing you asked the officer if you appeared intoxicated and he said "No". You stated that both you and the officer were surprised when your first result registered a "fail". You indicated that you asked the officer what happens now and you asked him about the reliability of the ASD. You stated that the officer told you that you have the right to take another test. You also stated that the officer explained that there have been some problems with the ASDs according to lawyers and the Courts. You stated that you consumed six beers between 5:00 pm and 10:45 pm and that you finished at 9:00 pm. You provided a BAC calculation that indicates your BAC would have been 60 mg%. You stated that you did not consider yourself impaired and you had no difficulty driving. You stated that you would not knowingly operate your vehicle while impaired beyond the legal limit. However, you realize that you consumed more alcohol than you normally would have allotted for the time period in question and you admit that you may have been over the .05 regulation. You quoted from a recently published article that drivers could have alcohol in their mouth from burping and register a reading above .08 mg% even though their blood alcohol is below the legal limit and that the machines are not reliable at differentiating between the two.

While you stated that you told the officer that your last drink was two hours prior and that you had not been watching clock, I find it interesting to note that you stated in your written submission that you finished your last drink at 9:00 pm. If you had not been watching the clock, I am curious as to how you were able to determine that your last drink was 9:00 pm. I note that you denied the officer's observations of your driving behavior and your slurred speech. However, you did not dispute the officer's evidence that your eyes were glassy and that your breath smelled of intoxicating liquor. With respect to your drinking pattern, I note that the officer's evidence is that you consumed two beers, but that you said you told the officer that you consumed several beers and then you claimed to have consumed six beers. I find it odd that you would tell the officer that you consumed several beers when you had in fact consumed six beers. I am left to wonder how much beer you actually consumed. I also find it odd that the

officer would indicate that you said you had two beers if you had told him that you had several beers. This does not make sense to me. In considering the calculation that you provided of your BAC, I note that this is based solely on your stated drinking pattern, which I find questionable. Having considered the fact that you admit that you may have been over the .05 regulation, I find it difficult to accept that you would not operate your vehicle while impaired beyond the legal limit. Ultimately, I do not find your evidence credible. I accept the officer's evidence.

With respect to the quote you provided regarding mouth alcohol, I take it that you want me to consider whether mouth alcohol was an issue. 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 considering the evidence before me, I find that mouth alcohol was not an issue in either test.

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 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.

October 3, 2013

s.22

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

Introduction

On March 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

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

In the hearing, I informed Mr. Klassen that I was unable to decipher the printouts he had provided and I requested him to provide me with digital copies of the images. I also requested a copy of the submission you gave in the oral hearing. I received digital copies of the Google maps, cell phone screen shot, and a written version of your oral submission.

Mr. Klassen referenced *Murray v Superintendent of Motor Vehicles* to state that the BC Court of Appeal determined that, in the absence of a sworn or affirmed report, in the form prescribed by the Superintendent, the adjudicator cannot continue with the review. Mr. Klassen stated that the

Report to Superintendent (the "Report") is not properly sworn and therefore not properly before me as evidence. Further, Mr. Klassen stated that paragraph 14 of the Report states that, "the attached narrative report and other attachments consist of 10 pages and forms part of this sworn document;" however, unless it is appended to the Report, the 10 pages do not form a part of the sworn document. Mr. Klassen noted that the Report indicates that it was solemnly affirmed on March 30, 2013. Mr. Klassen then brought my attention to the Narrative Text Hardcopy (the "Narrative") which states that it was printed on March 31, 2013. Mr. Klassen stated that it is not possible for the narrative to form part of the sworn document, as it was printed after the Report was solemnly affirmed. Mr. Klassen stated that one of two things may have happened. First, the Narrative was not printed at the time it was sworn, therefore the officer could not have sworn them because they did not exist yet. Second, some other documents were appended on March 30, 2013, which we do not currently have before us.

The information in the Narrative indicates that it was written on March 30, 2013 at 2326 hours. I acknowledge that the Narrative indicates that it was printed on March 31, 2013; however, I do not see this as an issue and I accept the Report as sworn.

Mr. Klassen made reference to the fact that the identity of the commissioner for taking affidavits is unknown. I have considered Mr. Klassen's submission on this point; however, I do not find it compelling. As established by the courts, I do not find that I need to know the identity of the commissioner to accept the JURAT as properly sworn.

Mr. Klassen also stated that the officer must confiscate the driver's licence and forward it to the Superintendent. Mr. Klassen stated that this is mandated by the Act and ought to serve as grounds to satisfy the IRP. Mr. Klassen stated that the goal of this requirement is to confirm the identity of the driver and it is possible that the officer pulled over multiple people and may be gotten mixed up, and we potentially have been deprived of the opportunity to argue that the Narrative might be confused with someone else. Mr. Klassen states that the Narrative makes it clear that it the licence was confiscated, but there is no evidence that it was sent to the Superintendent.

I have considered the submission of Mr. Klassen, and I have understood it to refer to section 215.47(a) which states:

A peace officer who serves a notice of driving prohibition on a person under section 215.41 must promptly forward to the superintendent
(a) the person's licence or permit or any document issued in another jurisdiction that allows the person to operate a motor vehicle, if the peace officer took the licence, permit or document into possession,

Aside from the absence of a photocopy of the driver's licence in the evidence before me, I do not find that I have any evidence to indicate that the officer has failed to uphold the requirements of the Act in this regard. The fact that the officer did not photocopy the driver's licence is not sufficient evidence to indicate that she did not fulfil her obligation. The officer indicates on the Notice that the driver's licence was seized. You have not provided any evidence to support your claim, and I do not find your suggestion of what may have occurred to be sufficient.

Furthermore, whether or not the officer forwarded your driver's licence to the Superintendent is not an issue I am permitted to consider 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.

This 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 submission you also expressed concern with the officer's reasons for conducting the traffic stop. The officer's reasons for pulling you over are beyond the scope of this review. 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 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 that you were the driver of a motor vehicle at 2230 hours on March 30, 2013. In the Narrative the officer indicates that you were pulled over and were identified as the driver via your BC driver's licence.

I acknowledge that you have provided details regarding your driving pattern to show that the version of events described by the officer is not reliable and therefore should affect her credibility. I have considered your version of events regarding your driving pattern compared to that of the officer. I accept that your and s.22 submissions indicate that you were taking the most efficient route home and were not attempting to avoid police. I also note that the officer felt that you were attempting to avoid police contact. I am mindful of Mr. Klassen's submissions that Map #3 and Map #4 establish that it is not possible for the officer to have seen what she claims to have seen in her rear view mirror; however, I do not find that I am able to speculate as to what the officer may or may not have seen. I also note that there is a discrepancy with regard to whether or not you were parked on the East or the West side of the building. As your issues with the reliability of the officer's version of events are dependent upon suggestions of what you may not have seen (i.e. the officer stopped in the road) and what the officer may not have been able to see (i.e. you turning off of Blueridge Rd.) I do not find that I have any concrete evidence before me to cause me to question either version of events. The undisputed fact remains that the officer witnessed you exiting the parking lot, and pulled you over on Wagner Dr. Regardless of whether or not she saw you in the rear view mirror, I am satisfied that she followed you, and subsequently pulled you over. I do not find the suggestions put forward by you and Mr. Klassen are sufficient to cause me to question the credibility of the officer's evidence. As both your and the officer's versions of events are internally consistent, and not necessarily mutually exclusive, I do not find these facts alone to impact the credibility of either your or the officer's evidence.

While you contest a number of points in the officer's version of events regarding your driving pattern, you do not contest the fact that you were a 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 Report, the officer indicates that you had the odor of liquor on your breath. In the Narrative, the officer indicates that you were asked to exit the vehicle and were attempting to not breathe towards the officer. The officer states that despite your attempts she could still smell the odor of liquor coming from you. The officer also states that when asked the time of your last drink you stated, "a few minutes ago." The officer states that when you were asked how many drinks you consumed you stated that you did not have to answer. The officer states that she read the ASD demand to you from memory, and I note that she has provided the exact wording in her Narrative. In the Report to Superintendent Vehicle Impoundment, the officer states, "Odour of liquor – Formed suspicion. ASD demand made."

In your evidence you state that you did not attempt to breathe away from the officer, but were trying to find your insurance paperwork in the glove compartment. You state that the officer never spoke to you about your driving behavior and that you volunteered the information that you had been at the restaurant. You state that you clarified with her what the definition of "a few minutes ago" was. You state that the officer then proposed "10 minutes ago" to which you sheepishly agreed. You state that no demand was ever made under the criminal code, nor was any warning given regarding the consequences of failure on the test or failure to blow. You state that during the five minutes during which the officer delayed the analysis, there was no further conversation between you and the officer. You state that once the five minutes were over the officer stated, "you have to blow." You state that once again there was no criminal code warning.

You have provided a justification for the officer's observation that you were attempting to breathe away from her while in the vehicle, as you were searching for your insurance documents. The officer states that you continued to be evasive with your breath when you had exited the vehicle as well, and you do not address this in your evidence.

I note that your and the officer's versions of events are in contradiction to each other, therefore, the issue of whether or not the officer made a valid ASD demand on you is an issue of credibility. In the hearing, Mr. Klassen stated that the evidence suggests that that officer was rushed and inattentive and that I should consider the following five things when weighing the credibility of the officer:

- 1) The defect in the swearing of the attachments in the Report and the inadequately sworn JURAT and Narrative.
- 2) The failure of the officer to forward the driver's licence to the Superintendent.
- 3) Failure to write the impound number on the IRP Notice.
- 4) The impossibility of the officer's version of events with regard to your vehicle's path of travel.
- 5) The Supplemental to the Report to Superintendent (the "supplemental") contains a modified JURAT, but still contains the same error in date as the original. Further, the supplemental does not indicate the number of pages attached.

Mr. Klassen stated that these defects in care indicate that the evidence of the officer should be given less weight than your evidence. Mr. Klassen stated that due to the errors on the Report

regarding the number of pages I ought not to refer to the Narrative at all, and if I do, I must find it to be unreliable.

I have already dealt with issues 1), 2), and 4) in previous sections of this decision. With regard to 3), I acknowledge that the officer has not written the VI number on the Notice. With regard to 5), I also note that the supplemental does not indicate that any pages are attached. I am mindful of your submission that this implies inattentive police work. However, I do not find that a single omission on the Notice implies that the officer's entire Narrative is unreliable. Further, I note that the officer's intention in submitting the supplemental was to rectify the location of the signature in the JURAT. It is not apparent that the supplemental refers to any other documents. I have considered your submission; however, I do not the minor clerical errors in the officer's evidence indicate that her version of events is not credible.

Mr. Klassen further submitted that the demand must be made under the criminal code, and reasonable and objective evidence of alcohol consumption was only gained after you were detained. Mr. Klassen stated that there were two occupants of the vehicle and the odour of alcohol could have come from either. Mr. Klassen stated that once you were asked to exit the vehicle you were detained, and since you were not given a charter demand, the officer cannot gain any further evidence without your opportunity to seek counsel.

As stated above, I note that the officer indicates that you were asked to exit the vehicle and the officer continued to detect an odour of liquor on your person despite your attempts to be evasive with your breath. The officer states that once you were removed from the vehicle and the officer had determined your drinking pattern you were read the ASD demand. Your evidence is that no demand was made under the criminal code and the officer stated, "we are going to wait five minutes and then you will blow," and after the officer delayed five minutes she then said, "you have to blow."

I note that the officer indicates in the Report, the Narrative, and the Report to Superintendent Vehicle Impoundment that you were read the ASD demand. In the Report, the officer states that you were read the demand at precisely 2232 hours. In the Narrative, the officer provides the exact wording of the demand, and in the Report to Superintendent Vehicle Impoundment, the officer states, "read ASD demand." The officer also indicates in the Narrative that after the demand, she prepared ASD #101524 and presented it to you. You do not address this in your evidence. I also note that the evidence indicates that you were attempting to be elusive with regard to your breath once removed from the vehicle. I find that your attempt to be deceitful to the officer impacts the credibility of your version of events. Further, the officer has provided significant evidence regarding the time, context, and language of the demand. I do not find it likely that the officer would provide the aforementioned level of detail regarding the demand if she had only stated, "you have to blow." I find the officer's version of events to be more compelling.

I am satisfied that a valid ASD demand was made.

In the Report, the officer indicates that you refused to provide a sample of your breath at 2238 hours. In the Narrative, the officer states, "When presented with the ASD, DRI s.22 stated, 'I refuse to blow.'" The officer further states that you were asked a second time, and you again stated, "I refuse to blow." The officer states that you asked what your options were at this time and the officer states that she advised you that, "by refusing to blow, (you) would have the most severe consequence of being prohibited from driving for 90 days and (your) vehicle would be impounded for 30 days." The officer also notes that she informed you that if you provide a

sample there is a possibility that you would have a lesser consequence depending on the result. The officer states that after you were informed of this you were again asked if you were refusing to provide a breath sample and you stated that you refused to blow. The officer states that you then called someone whom you claimed was your lawyer. The officer states that she completed the Notice and served it to you. The officer states that you then asked if the officer wanted to speak with your lawyer. The officer states that she told you to tell your lawyer that you had been served with the Notice. At this time, the officer states that you changed your mind and stated that you wanted to blow. The officer states that she informed you that the window of opportunity had closed for you to provide a sample.

In your submission you state that there was no criminal code warning regarding any of the consequences of failing to blow. You state that you told the officer that until she told you her reason for pulling you over you would not blow. You state that when the officer returned to her vehicle to commence the paperwork you went back to the car and borrowed s.22 phone to call s.22 who is a lawyer. You state that you explained the situation and when the officer returned you notified her and asked her immediately if she would talk to your lawyer. When she refused, s.22 told you to offer to blow. s.22 then told you to state, word for word, "if I have refused to blow I withdraw the refusal and I am willing to blow," which you did. The officer told you that it was too late and that you had been served. You state that this entire dialogue occurred prior to you receiving any documentation from the officer.

In the hearing, your lawyer s.22 stated that he can confirm that you contacted him during your interaction with the officer. Mr. Klassen stated that he made a note of the phone call, and that his note indicates that at 10:45pm he received a call from you saying that you had been pulled over. Mr. Klassen stated that you told him that you think you had refused, but you were not 100% sure. Mr. Klassen stated that he then told you to tell the officer that you would blow, and that he overheard the officer say something to the effect of, "No I won't let you blow, you have refused." Mr. Klassen stated that at this time he told you to withdraw your refusal, to which he heard the officer respond, "No it is too late."

As part of his evidence s.22 provided a screen shot of his cell phone, showing that a call was placed to Mr. Klassen at 10:43pm.

There is a conflict between your evidence and that of the officer with regard to whether your request to provide a sample of your breath occurred before or after you were served with the Notice. In the Narrative, the officer indicates that you were served with the Notice at 2242 hours (10:42pm). In Mr. Klassen's submission, he stated that he made a note of receiving a phone call from you at 10:45pm, and the evidence from s.22 indicates that a call was made from his phone at 10:43pm. I am mindful of your submission that you had not been served any documents prior to your withdrawal of your refusal and the service of the Notice; however, the timeline evidence before me suggests that you were served prior to your phone call with s.22

Further, you do not deny the officer's evidence that you were asked three times if you were refusing to blow and each time you stated that you were not going to blow. In your evidence you state that you told the officer that you would not blow until she told you why you were pulled over. You state that when the officer told you that you were refusing to blow you found her demeanor to be condescending and aggressive, so you did not reply.

The officer indicates, and you do not contest, that she prepared the ASD device and presented it to you, but you indicated that you would not provide a sample of your breath. I find that I have

significant evidence before me to indicate that you were given ample opportunity to provide a sample of your breath before you were served with the Notice and you indicated that you would not do so. Further, the evidence before me indicates that the Notice was served to you before you requested to provide a sample of your breath.

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

Did you have a reasonable excuse?

I do not have any evidence before me to indicate that you had a reasonable excuse to fail 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

I therefore confirm your driving prohibition, as required by section 215.5(1)(b)(i) of the Act. You are prohibited from driving for 90 days. However, as you have already served 65 days of your prohibition, you must serve the remaining 25 days which commences October 5, 2013. Due to this prohibition, the Insurance Corporation of British Columbia has cancelled your drivers licence, under section 61 of the Act. It is necessary that you surrender any driver's licence in your possession to the Insurance Corporation of British Columbia, PO box 3750, Victoria BC, V8W 3Y5.

When your prohibition ends, you may resume driving once you have obtained a drivers 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.

cc: James Klassen
fax: 604 850-6559

OCTOBER 7, 2013

s.22

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

Introduction

On March 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* requires me to confirm your prohibition, along with 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

In considering the evidence in your case, I am not satisfied that the officer’s report, or the accompanying narrative, was properly solemnly affirmed.

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

s.22

IRP Review Decision
Page 2

Decision

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

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

s.15

Team Lead, Adjudication

cc: James Klassen
(604) 850-6559

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

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

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

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

Preliminary Matters

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

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 considered the evidence of Constable Mitchell and your submissions, I find there is one determinative issue in this review.

Were you advised of your right to a second analysis?

In the RTS and the Narrative Text Hardcopy, Constable Mitchell indicated that he informed you of your right to a second breath test analysis. However, based on the unique circumstances you described to me in the oral hearing, I did not find the officer’s evidence to be reliable.

I am satisfied that you were not advised of your right to a second ASD analysis. 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 31, 2013

s.22

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

Introduction

On July 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

At the beginning of the oral hearing I confirmed with your lawyer, Kyla Lee, that full disclosure of the documents before me was provided to her. I have proceeded with the review based on that confirmation.

In accordance with the BC Supreme Court’s decision in *Buhr v. Superintendent of Motor Vehicles*, 2013 BCSC 1443, the “Superintendent’s Report on Approved Screening Devices”, which was disclosed to your lawyer, is not admissible in this review hearing and, accordingly, I have not relied upon that report in making my decision.

Ms. Lee submitted the case of *Wilson v. Superintendent of Motor Vehicles* 2013 BCSC 1638, to support her argument that your prohibition should be revoked because the police evidence does not establish that the officer had reasonable grounds to believe that your ability to drive was affected by alcohol.

I have read and considered the *Wilson* case 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.

Ms. Lee also submitted the case of *Scott v. Superintendent of Motor Vehicles* with respect to my credibility assessment in this review, and the consistency of the evidence provided by you and your witnesses. I am familiar with *Scott* and have proceeded with the review with this case 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?

Facts, Evidence and Analysis

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

In the Narrative, the officer indicated that he observed a vehicle speed away very quickly (70 km/h in a 50 km/h) after leaving a bar. The officer indicated that the vehicle then failed to stop at a 4-way stop sign at a slower speed, and then quickly accelerate again. The officer stated that he activated his emergency lights and the vehicle pulled over to the side of the road. You were subsequently identified as the driver of the vehicle. In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 01:36 hours on July 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 Report, the officer indicated that the ASD registered a "FAIL" at 01:38 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 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 provided by the officer?

In the Narrative, the officer indicated that prior to blowing into the ASD for the second test, you began asking questions about the second test. The officer stated that you asked "what if I refuse?" The officer stated that he advised you that it was optional and not a demand, that you could choose not to provide another test, and that he tried to explain to you that the lower test would prevail. The officer reported that at 01:44 hours you stated "I don't want to take the second test I don't think it's fair."

You stated that you told the officer you wanted to wait but he told you that you had to do the test right away. You said that you tried to explain to the officer that you realized your recent drink caused a false reading, but he did not care.

I will address your stated reasons for declining the second analysis further in my decision. However, for the purposes of this issue, I am satisfied that you declined a second analysis; therefore, the officer was not required to provide you with one.

Was the second analysis performed on a different ASD?

As you declined a second analysis, this issue is not applicable to your case.

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

As previously noted, the ASD test resulted in a "FAIL" reading.

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, in which John Allen Wilcox certified that the ASD used in your case was found to be within the recommended limits when he checked the calibration on July 11, 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 Narrative, the officer reported that after stopping your vehicle, you would not look at him when he asked for your licence and he had to ask you for it twice before you produced it. The officer reported that you had very glassy eyes, you were unsteady on your feet when you exited the vehicle, and there was a strong odour of liquor coming from you when you were 15 feet away from the vehicle. The officer also noted that you kept putting your hands in your pockets after being asked three times not to. In the Report, the officer indicated that there was an odour of liquor on your breath and that your response to the question of the time of your last drink was that it was three hours ago. As previously noted, you declined your right to a second analysis by stating, "I don't want to take the second test I don't think it's fair."

In your affidavit you stated that on July 20, 2013, you went to the Phoenix Lounge (the "Lounge") with your friends s.22 You stated that you planned to be the designated driver and abstained from alcohol during the night, but just as the bar was closing your friends were pressuring you to order one drink. You said you ordered a bottle of Molsen Canadian shortly after 1:00 a.m. which was last call. After this, the Lounge began to close and you stayed long enough to finish your drink, with the last of it being consumed immediately before leaving and getting into your vehicle. You indicated that you were pulled over within fifteen to twenty meters of leaving the parking lot.

You stated that when the officer asked you if you had anything to drink that night, you told him that you had one beer three minutes earlier. You indicated that after the first "FAIL" result you told the officer the machine was not right, because you only had one beer. You said that you never have more than two drinks before driving because you do not want to drink and drive. You indicated that when the officer held up the machine for the second test and asked you to blow you told him you wanted to wait. The officer told you that you had to do it right away and you told him that it was not fair. You said that what you meant by this was that he needed to wait. You indicated that it was only after seeing that you failed the first test that you realized your recent drink had caused a false reading. You said that you tried to explain this to the officer before the first test but he did not care. You indicated that you asked the officer to wait before taking the test because you wanted to make sure the test was fair to you and you wanted to prove your innocence. You said that you did not have this opportunity because the officer would not wait and you feel as though your rights have been violated.

You also indicated that after you exited the vehicle you were standing near a ditch and there were jagged rocks at the edge of the road which was not paved. You said that it was difficult to keep your balance on the uneven ground. Further, you stated that the officer asked you to remove your hands from your pockets, which you found odd because your hands were not in your pockets.

s.22 each provided a statement in which they concurred that you consumed one bottle of beer that evening, and that you all left the Lounge at 1:30 a.m. which was immediately after you finished your beer. s.22 stated that he heard you telling the officer "that the result of the reading is not fair, as [you] felt the reading was inaccurate as [you] had just finished [your] beverage minutes prior." s.22 stated that you informed the officer that

you had just finished your beverage three minutes ago, that you requested a second test, and then refused as a sample was requested right away.

You stated that you have since considered the events of the evening and you have learned about the effects of residual mouth alcohol. You stated that your last drink was just after 1:30 a.m. and no more than eight minutes passed between your last drink of alcohol and the time you blew into the first machine. You stated that you did not realize your recent drink would have such a significant impact at the time.

Ms. Lee stated that it is common sense and ordinary human experience that people who go to pubs sit there and drink, and then leave when they are finished their drink. Ms. Lee submits that the officer should have delayed the ASD test because he observed you leaving the parking area of a pub, and that he misheard you say that your last drink was three hours ago when you actually told him that it was three minutes ago. She stated that you did not realize that your last drink would have such a significant impact on the ASD result. She also stated that your second test was withdrawn because the officer would not wait 15 minutes. She submitted the cases of *R. v. Seivewright*, *R v. Kirton* and *R. v. Bensmiller* to support that the officer should have waited 15 minutes before proceeding with the ASD test in order to eliminate the possibility of mouth alcohol.

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 mouth alcohol affected the ASD test results, 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 should delay the taking of an ASD sample is fact specific and dependent of specific findings made by the Adjudicator conducting each specific review.

While I acknowledge the criminal court cases Ms. Lee provided, I am mindful that this is an administrative process and not a criminal proceeding. Further though, I do not find your evidence to be credible for the following reasons.

In my view, you have provided conflicting evidence. It appears that you and Ms. Lee want me to believe that you did not realize that your alleged recent drink would have a significant impact on the result of the ASD test, and it was after the incident that you learned about the effects of residual mouth alcohol. Yet, in summary, the evidence that you and your witnesses and Ms. Lee have provided is also that after the first test you realized that your recent drink had caused the fail reading, and you declined the second analysis because the officer would not wait before administering it.

I have also considered your evidence that you were the designated driver that evening, along with your statement that you do not want to drink and drive and never have more than two drinks before driving. From this, I infer you want me to believe that you are very responsible when it comes to drinking and driving. Yet, you also want me to believe that on this evening, you consumed no alcohol until the Lounge was closing when you consumed an entire beer

within a very short period of time, and then immediately proceeded to your vehicle and began driving. I find this very odd.

I have also considered your explanation in response to the officer's evidence that you were unsteady on your feet. However, it seems likely to me that during the investigation the officer was likely standing very close to you. As such, if there were jagged rocks and you were standing on uneven ground, I would expect that the officer would not only have noticed this, but would also have had some difficulty with his own balance. Further, I note that you did not deny that the officer asked you three times to remove your hands from your pockets; however, you did state that you found his request odd because your hands were not in your pockets. However, in my view it seems reasonable to infer that whatever it was that you were doing with your hands, led the officer to believe that you were putting them in your pockets. I have also considered your evidence and that of s.22 that you consumed only one beer that evening. However, I note that you did not address or deny the officer's evidence that you would not look at him when he asked for your licence, that he had to ask you for it twice before you produced it, and that your eyes were very glassy. As such, I find that this evidence from the officer supports that you were affected by alcohol.

Last, I have considered your evidence and that of your witnesses that you advised the officer that your last drink was 3 minutes prior to the stop. I have also considered Ms. Lee's submission that the officer misheard you. However, I note that the stop occurred at 1:37 a.m. and there is no evidence before me that it occurred on a busy road or in a noisy area. Based on this lack of evidence, along with your other evidence that I do not find credible, I find it unlikely that the officer misheard you and I am not convinced that you stated that your last drink was 3 minutes prior to the stop.

I am satisfied 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 November 1, 2013. The prohibition ends at 23:59 hours 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.

SEPTEMBER 25, 2013

s.22

REVIEW DECISION Immediate Roadside Prohibition (“IRP”) No. 21 - 586590

Introduction

On August 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* requires me to confirm your prohibition, along with 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 *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

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

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 “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?

As per section 215.47(d) of the *Motor Vehicle Act*, the investigating officer must promptly forward to the Superintendent “a report in the form established by the Superintendent”. After reviewing the evidence before me, I am not satisfied that the officer complied with this section of the *Motor Vehicle Act* as I note that he has not signed the Report to Superintendent.

Having made this finding I do not have to consider any of the issues in this review.

Decision

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

Adjudicator

cc: Sarah Leamon
(604) 370-2505

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);
- 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, Lisa Helps. I proceeded with this review based on that confirmation.

We received a one-page fax from Ms. Helps on November 4, 2013, indicating that she is your counsel in this matter. Ms. Helps said she would not be making any submissions. We did not receive anything from you, either, so I will base my decision on the evidence that is before me at this time.

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”), Constable Cortes indicated that he witnessed you driving or in care or control of the vehicle on October 24, 2013, at 0035 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 Occurrence Report-1 (the “OR”), Constable Cortes said he stopped you for speeding. He indicated that when standing at the driver’s side window, he could smell a strong odour of liquor coming from inside the vehicle. The officer said you told him you had not consumed any liquor and that the smell was coming from your passenger.

Constable Cortes asked you to step out of the vehicle and he observed that you were walking slowly and deliberately, as if trying to keep your balance. He asked you about your consumption again and when you answered, he said he could smell a strong odour of liquor coming from your breath. At that point he said you told him your last drink was ten minutes prior to being stopped.

Constable Cortes indicated based on his reasonable suspicion, he made an ASD demand. There is nothing before me to the contrary. Based on the evidence before me, I am satisfied that the peace officer made a valid demand on October 24, 2013, at 0039 hours.

I now turn to whether you failed or refused to comply with the demand. In the OR, Constable Cortes said you refused to provide a breath sample into the ASD. He indicated that you told him you do not trust the machine and do not feel comfortable giving a breath sample. The officer said he explained the consequences of refusing to comply with the demand, but you still refused to provide a breath sample. There is nothing before me to the contrary. I am satisfied that you failed or refused to comply with the demand.

Did you have a reasonable excuse?

As noted above, the officer said your reason for refusing to comply with the demand was that you do not trust ASDs. This is not a reasonable excuse for refusing to provide a breath 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 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.

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, Jennifer Currie. I will proceed with the review based on this confirmation.

You checked the boxes next to five of the grounds on the application form. However, you did not receive a 7-day or 30-day prohibition. I will consider all grounds available to you in this review.

Ms. Currie provided a copy of a recent decision in the case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638.

I have read and considered the *Wilson* case and I acknowledge your 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 for the IRP (the “Report”), the investigating officer indicated that you were driving or in care or control of a vehicle at 2148 hours on October 18, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer stated that he conducted a traffic stop in the 2100 block of 56th street on a s.22 bearing plate # s.22. The officer reported that a query revealed that you were the registered owner and you produced a valid British Columbia driver’s licence.

In paragraph 19 of your affidavit you stated that admitted 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”?

In the Report, the officer indicated that you provided a “FAIL” result at 2153 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?

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 on the Report is that the request was withdrawn. In the Narrative, after describing his reading of your right to a second analysis, and the preparation of a second ASD to accept your breath sample, the officer notes that after you were advised of the consequences, provide a second sample.

In paragraph 30 of your affidavit you stated that the officer did not explain in a way that allowed you to understand. Further, you stated that were concerned about getting charged with impaired under the criminal code.

The officer's evidence is that you were asking what would happen to your vehicle if you blew into the ASD. He stated that he advised you that until you blew into the ASD he could not answer that question. However, he stated that he explained to you what a subsequent "FAIL" would mean and if you provided a lower result the lower would prevail. The officer stated that at that time you stated that you no longer wanted to provide a sample. He confirmed this by stating, "you are stating that you no longer like you provide a second sample"? And you shook your head up and down and stated, "yes." I am satisfied that the second analysis was not provided because you withdrew your request.

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 single test result obtained, 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 "Certificate") for the ASD serial number 097929, which he used to test a sample of your breath. This Certificate forms part of the sworn Report.

For this ASD, the qualified ASD Calibrator, Khalid Din, certified that on October 16, 2013, he checked the calibration of ASD serial number 097929. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as November 13, 2013, and the service expiry date as October 17, 2014.

The officer has provided a Certificate to establish the fact that the ASD was properly calibrated, and I am therefore satisfied of its reliability.

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

In the Narrative, the officer reported that he detected a moderate odour of liquor coming from within the vehicle. He reported that he smelled an odour of liquor on your breath. He reported that he asked, "When was your last drink?" You responded by saying "Umm, 20 minutes ago."

In paragraph 16 of your affidavit, you indicated that you took your last sip of Strongbow between 9:40 and 9:41 p.m. In paragraph 24 of your affidavit you admitted that you told the officer your last drink was "20 minutes ago", not realizing that you had just finished your drink as you walked out of the pub. You stated that were not aware of the consequences of consuming less than 15 minutes before providing a breath sample.

In his statement, your co-worker, s.22 confirms your stated drinking pattern. He confirms that you both left the pub shortly after 9:30 p.m. and he observed you finish your Strongbow just before leaving.

In her statement, s.22 stated that on October 27, 2013, she accompanied you to the pub (location A) where you were drinking with s.22 and then drove to where you were stopped

(location B) to determine the timeframe it would have taken to drive from location A to B. s.22
s.22 stated that the time was clocked at 6 minutes and 6 seconds.

Ms. Currie indicated in her submission that the evidence of both you and s.22 is that you consumed beer just prior to leaving the pub. Ms. Currie noted that the presence of mouth alcohol will falsely elevate ASD result. Ms. Currie indicated that the officer obtained the breath sample without having observed a delay of 15 minutes after the time of your last drink, and as such your ASD test results are invalid as a result of mouth alcohol. In support of her submission on this issue Ms, Currie provided an excerpt from the Alco-Sensor IV DWF Manual.

While you have asserted that you consumed alcohol within 15 minutes of the ASD test, I do not find your evidence to support this to be very convincing. I find it unlikely that you recall the exact time you finished your beer as you claim. It is also noteworthy that the officer recorded your response as “um, 20 minutes ago” which I do not find to have an air of certainty to it. Further, if you had just consumed the Strongbow, I would expect the officer would more likely have detected a strong odour of liquor alcohol rather than a moderate odour.

It is also noteworthy to point out that you admitted that you advised the officer your last drink was consumed 20 minutes ago with an explanation that you were not aware of the 15 minute waiting period; however, I am not convinced that lack of knowledge of the 15 minutes would have a bearing on your reply. I acknowledge s.22 statement; however, I have applied no weight as I do not find your evidence regarding your last drink compelling.

Based on what you reportedly told the officer, I can see no reason why the officer would have disbelieved your statement with respect to the time of your last drink. There is no evidence before me that the officer saw you leaving a drinking establishment, or that he observed you consuming alcohol, or that he found any open liquor in your vehicle. On this basis, I am satisfied that the officer had no reason to believe that you had consumed alcohol in the fifteen minutes preceding the time at which he stopped you. I am also satisfied that the officer turned his mind to the issue of mouth alcohol because the evidence confirms that he asked you the time of your last drink.

Based on all the evidence before me, I am not persuaded on a balance of probabilities to agree with Ms. Currie’s argument that mouth alcohol was a factor in the ASD result. 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 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: Jennifer Currie
Stern Albert Shapray & Associates
604 590 5626

October 30, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with 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, Phillip 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 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 2335 hours on August 16, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you failed to stop for a roadblock and were identified as the driver via your BC driver’s licence.

In your submission you state that, “I drove directly from the Sandpiper Pub to the location where I was stopped.”

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 2338 hours and 2345 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 2339 hours.

In your submission you state that, “I do not disagree with Constable Barkase that I was advised as to the opportunity to provide a second sampling into a different approved screening device, and I did request that.”

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 2345 hours. In the Narrative, the officer states that there was a delay in administering the second ASD test as you produced a piece of gum in your mouth. The officer states that he delayed the second test by five minutes due to the chewing gum.

In your submission you state that you habitually chew Wrigley’s Juicy Fruit gum (the “Gum”). You state that you were chewing the Gum when you were stopped by the officer. You state that the officer did not ask if there was anything in your mouth before making the demand. You state that you provided the first sample of breath with the Gum in your mouth. You state that after the

first sample you were asked if there was anything in your mouth, and you told the officer that you were chewing gum. You claim that the officer told you that you would need to “re-do” the test. You state that the officer then asked you to remove the Gum, and after a period of time you provided a second sample.

You have provided a list of the ingredients of the Gum. You have also provided a report from W.K. Jeffrey, a toxicology consultant, who states that the Gum contains Sugar Alcohols (Mannitol and Sorbitol), which are treated as mouth alcohol during an ASD test and may interfere with the test, giving a false reading. Mr. Jeffrey states that the operator need only wait five minutes before the test, and not the typical 15 minutes for mouth alcohol. Mr. Jeffrey states that it is his opinion that the first ASD test was done incorrectly and that this invalidates the test. Mr. Jeffrey submits that the second ASD test was done correctly.

Mr. Riddell submits that the opinion of Mr. Jeffery is clear in that the first ASD analysis is unreliable due to the fact that the Gum was present in your mouth and falsely elevated the ASD results. Mr. Riddell notes that the impact of the Gum was noted by the officer as he delayed the second ASD analysis because of it. Mr. Riddell states that the difficulty which arises is that it is clear that the officer was aware that the first test was not reliable, otherwise he would not have asked for the removal of the Gum. Mr. Riddell submits that the goal of the legislation is to provide a system in which the applicant is provided the security of providing two valid samples. Mr. Riddell states that because the first test was not valid, the officer did not provide you with two opportunities to provide valid samples of your breath. Mr. Riddell states that this would have been easily rectified if the officer had conducted a third test, re-using the first ASD. Mr. Riddell compares your situation to one in which two ASDs are used and two FAIL results are obtained but the first of the two ASDs is found to be outside of the calibration period. Mr. Riddell submits that in this situation it cannot be said that the applicant had access to provide separate samples into two separate instruments, as quite clearly no reliance can be placed on the first sample. Mr. Riddell states that your situation is similar in that it cannot be said that you were provided with an opportunity to provide two samples into different properly functioning instruments.

I have considered the evidence before me, and I respectfully disagree with Mr. Riddell. Mr. Jeffery submits that, “the officer shall determine that the driver has removed all food, drink, tobacco products, chewing gum and other substances and objects from his mouth.” I do not have any authoritative document or reference before me to indicate that the officer is required to examine your mouth prior to the ASD analysis. The evidence before me indicates that at the time of the first ASD analysis, there was no evidence before the officer that the ASD analysis would not be reliable. The officer’s actions with regard to the second test indicate that he was aware of the procedure when dealing with gum in the mouth. I find it reasonable to conclude that if the officer was aware of the presence of the Gum, he would have delayed the first test accordingly. Although the test was taken with the Gum in your mouth, based on the information that was available to the officer at the time, the officer was reasonable in relying on the results of the first test to conclude as he did and to advise you of your right to a second test. The evidence before me indicates that you provided two samples of your breath in two different, functioning ASDs.

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 101757 and your second sample of breath into ASD serial number 101762. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101757 and 101762.

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

Was the ASD reliable?

For the first ASD, the qualified ASD calibrator certified that on July 24, 2013, he checked the calibration of ASD serial number 101757. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 21, 2013, and the service expiry date as September 7, 2013.

For the second ASD, the qualified ASD calibrator certified that on July 24, 2013, he checked the calibration of ASD serial number 101762. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 21, 2013, and the service expiry date as January 15, 2014.

I have no evidence before me to the contrary.

I am satisfied that the ASD was reliable.

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

As noted above, you have provided evidence to indicate that the result first test may not have been reliable due to the presence of the Gum. You have not, however, provided any evidence to cause me to question the result of the second ASD analysis. Mr. Jeffery confirms that the second test was conducted properly, and as such, I accept the results as valid.

I also note that the officer indicates that you had "a heavy odor of liquor on (your) breath," and that you struggled to produce your insurance documents.

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 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: Phillip Riddell
fax: 604 520-6035

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. 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. 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.

Ms. Lee also submitted *R. v. Andree* to set forth the proposition that a “subjective belief must be objectively reasonable”; my reading of this case material however, is that it concerns an officer’s grounds for making a demand, and the validity of the demand is not at issue 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. Nijjar — indicated that you were driving or in care or control of a motor vehicle at 0206 hours on October 29, 2013. In the Occurrence Report he describes observing your vehicle speeding, making a u-turn to pursue, and then stopping your vehicle. Upon stopping your vehicle, you were identified by license as the driver of the vehicle.

There are no submissions on your behalf on this issue. 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 0210 and 0216 hours, respectively.

There is no evidence contradicting 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?

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 indicates he advised you at 0213, and that he read the prompt from a “department issued card.”

With no evidence to the contrary, I am therefore satisfied that Cst. Nijjar 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?

Cst. Nijjar records his carrying out a second ASD analysis at 0216 hours with a result of “FAIL”. He records the same serial number as 059580, a separate ASD from that used in the first test.

With no submissions on your behalf on this point, I am 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. Nijjar 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 the lowest result available, which was "FAIL".

Were the ASDs reliable?

Cst. Nijjar provided a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") for ASDs serial numbers 097938 and 059580 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

The qualified ASD Calibrator, Cst. Din, certified that on October 16, 2013, he checked the calibration of both ASDs. He found the ASDs to be within the recommended limits. He recorded the ASD calibration expiry date for both as November 11, 2013 and the service expiry date as April 23, 2014, and September 11, 2014, respectively.

You have not placed the reliability of the ASDs into question. With no evidence contradicting that placed in to evidence by the officer, I am satisfied as to the reliability of the ASDs.

I therefore find the ASDs, and the test results obtained, to be reliable at the time samples of your breath were analyzed by Cst. Nijjar at roadside.

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.

s.15

Adjudicator

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

OCTOBER 30, 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);
- 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 proceeded with this review based on that confirmation.

In your written submission, you said you have s.22 in the last few years and you take medication for this. You also said your parents depend on you for things like taking them to medical appointments.

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 am not authorized to consider personal circumstances or transportation needs in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

In your submission you commented on the officer's reason for pulling you over. You said you drove on the meridian, because you were picking up your cell phone, not because you were affected by alcohol. In addition the officer commented on what you told him in the liquor store, but you denied having said these things. These matters 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 "RTS"), Constable Shaw indicated that he witnessed you driving or in care or control of the vehicle at 2210 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 RTS, Constable Shaw 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 2228 and 2232 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 Occurrence Report-1 (the "OR"), Constable Shaw indicated that he

informed you of your right to a second breath test analysis.

In your written submission, you said the officer did not tell you anything about your right to a second test, although you did not dispute that you provided a breath sample into a second device. The officer's evidence in the RTS is that he told you that you have a right to a second test on a different ASD and that the lower result will prevail. I infer you are implying that the officer did not explain this to you, contrary to his evidence. Under the Act, a peace officer is not required to provide this information, although some officers do, anyway. As a result, I cannot revoke a prohibition if an officer does not advise someone of this additional information.

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

Was the second analysis provided by the officer?

You said the officer did not show you the result of the second ASD test, despite what he said in the RTS and the OR. While some officers show drivers the results of ASD tests, a peace officer is not required by the Act to do so. As a result, I am not authorized by the Act to revoke a prohibition if an officer does not show a person the test result. You did not dispute that the second analysis took place.

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 OR, 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 statement, you said you drank one beer at approximately 7 pm and had three glasses of water and food after that. You said the beer was only 5% alcohol. You said you were not "drunk" and you disagree with the results of the ASD tests. There is no evidence before me that the ASDs malfunctioned in any way.

While you may not have felt affected by alcohol, you did not provide any persuasive evidence that causes 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 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.

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) 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, Jennifer Currie. I have proceeded with this review based on that confirmation.

Ms. Currie 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. Currie 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. Currie'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 September 12, 2013, at 22:45 hours Officer Hillier (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 22:50 and at 22:54 hours, the officer used ASD serial numbers 101541 and 101548 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 101548 at 22:54 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 101541 was checked for calibration on August 27, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 24, 2013, and a service expiry date of November 21, 2013.
- ASD serial number 101548 was checked for calibration on August 22, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 19, 2013, and a service expiry date of November 21, 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 provided me with comprehensive details about the few days leading up to the moment you were pulled over by police on September 12, 2013. I acknowledge that you had done a lot of long distance driving and that you had only had two four hour sleeps. You also told me that when you got home, your friend s.22 came over for a visit. You said you drank three cans of beer between 6:40 p.m. and 9:30 p.m., at which point you left your home to get some food. You were on your way to the McDonald’s drive-thru when you were pulled over. You disagree with the officer and say you were not driving 30 km/h in a 50 km/h zone, and you were not drifting or swerving at any point. Your eyes appeared droopy, watery, and bloodshot because you were extremely tired at the time. You also say you were “shocked” when your first ASD test registered a “fail” and were “equally surprised” when the second test resulted in a “fail”. You said you were certain you had a blood alcohol level under .05.

I have read and considered the statement from your friend s.22 gives an account of the events of September 12, 2013 from 6:30 p.m. onwards that is similar to your own. I note that s.22 said that you were not drinking before he got to your house because you had just arrived home. He also said that there was no other alcohol in your condo and he is sure you did not drink anything else while he was there because he was with you the whole

time. With respect, in my view s.22 cannot know with certainty whether you had any other alcohol in your condo or whether you had anything to drink prior to his arrival. For this reason I have not given a great deal of weight to his statements in this review.

The officer's evidence is that, in addition to the appearance of your eyes, he detected a strong smell of stale liquor on your breath and body. I cannot comment on how impaired you say you felt at the time but note that you blew a "fail" ASD test result on two different ASDs which I have already found to be functioning correctly. As well, 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%. Consequently, I do not find your stated drinking pattern to be very 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 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

cc: Jennifer Currie
by fax 1-604-590-5626

October 17, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a 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 that you received full disclosure. I have proceeded with this review based on that confirmation.

You applied on three grounds. For your benefit I have considered all the grounds available to you.

You provided two newspaper articles that make reference to the case of *Wilson v. Superintendent of Motor Vehicles*. You requested that I apply this decision to your case.

I have read and considered *Wilson*. I acknowledge the Court's ruling in this decision. 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 (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 28, 2013, at 22:12 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 28, 2013, at 22:12 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.

You stated that you were not given a second test.

I have considered your statement. However, I have also considered the officer's sworn evidence which includes recordings in the RTS and Narrative, and copies of the Certificates of a Qualified ASD Calibrator which provide convincing details that you were given two tests. I prefer the officer's more detailed sworn evidence over your statement.

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 had one glass of wine with your common law wife. You also stated that you gargled with scope which contains 15% alcohol and you also used sterocel for a toothache which contains 17% alcohol. You explained that you went to tempo gas station. When you got back to your vehicle you were stopped by the RCMP.

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. While you asserted that you gargled with scope and used sterocel, you have not provided any evidence to indicate the times at which you used these products. Specially, there is no evidence before me to indicate that you used either of these products within 15 minutes. I find that based on your initial statement at the scene, the officer had no reason prior to administering

the tests to suspect that you had consumed mouthwash or sterocel within the previous 15 minutes. As such, I find that the tests were accurate and reliable at the time they were taken.

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 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.

Adjudicator

October 3, 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) 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 on which you applied for this review does not apply to your situation because your prohibition is for three days. For your benefit, in this review I have considered all of the grounds that apply to your situation.

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

Ms. Andrews referred me to the recent case of *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638 in support of her assertion that your driving prohibition should be revoked. Ms. Andrews submits that the officer in this case did not have reasonable grounds

to believe that based solely on the result of the screening analysis, your ability to drive was affected by alcohol.

I have read and considered the *Wilson* case 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 "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 evidence in the Report to Superintendent (the "Report") is that at 22:26 hours on September 12, 2013, Officer Chassie (the "officer") established you as driving or having care or control of your 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 "WARN"?

The evidence in the Report is that at 22:32 hours the officer used ASD serial number 101545 to take a breath sample from you and the result of your breath test was a "warn". There is no evidence to the contrary before me.

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

Were you advised of your right to a second analysis?

The 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?

The evidence in the Narrative Text Hardcopy is that at 22:33 the officer read you your right from the prepared card. He indicates that you initially accepted the offer of a second ASD test, but then declined the device when presented and stated "Forget it all I want is my car parked here. That's it."

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

Was the second analysis performed on a different ASD?

As indicated above, the second analysis was not performed.

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

As there was only one analysis conducted, I am satisfied that the Notice was served on the basis of the lower analysis result.

Was the ASD reliable?

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

- ASD number 101545 was checked for calibration on August 22, 2013 and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of September 19, 2013, and a service expiry date of November 21, 2013.

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. Your prohibition took effect on September 12, 2013.

s.15
Adjudicator

CC: Sylvia Andrews
By fax 1-604-244-0617

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 (Notice). You applied to the Superintendent of Motor Vehicles for a 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. For your benefit, I have considered all the grounds available to you.

At the outset of your oral hearing your lawyer, Jack Harris, confirmed that he received full disclosure.

Mr. Harris argued that there is no evidence before me that your ability to drive was affected by alcohol. He submitted that your driving prohibition should be revoked on that basis. In support of his submission he directed me to the case of *Wilson v. Superintendent of Motor Vehicles*.

I have read and considered *Wilson* and I acknowledge Mr. Harris'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 RTS the officer noted that you were a driver or had care or control of a motor vehicle on September 21, 2013, at 00:40 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 September 21, 2013, at 00:40 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 Narrative the officer indicated that he read you your right to a second test from a prepared card. He noted that you did not understand the offer of the right to a second test until after it was explained to you in simpler language.

Mr. Harris directed me to section number 7 “After the first ASD test was completed, did you inform the driver” on the Report to Superintendent (RTS). He noted that this section is blank and that there is no reason why this was not completed. Mr. Harris also directed me to the Narrative under the heading “Did driver understand the offer of the right to a second test?” He noted that the officer stated “NOT FROM CARD BUT UNDERSTOOD AFTER EXPLAINED IN SIMPLER LANGUAGE”. Mr. Harris stated that the officer did not explain what it is he said and that this is unsatisfactory.

The issue before me is whether you were advised of your right to a second analysis. I acknowledge that the officer did not completed section number 7 on the RTS. However, I do not find this to be fatal. While Mr. Harris takes issue with the manner in which the officer reported to have advised you of the second test, I find there is no evidence before me that would indicate the officer did not advise you of your right to a second test. 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 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

cc: Jack Harris
604-859-1375

OCTOBER 30, 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);
- 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.

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 and your written submission, you explained that this was your first incident of this type and that you are sincerely sorry that it occurred. You said you will not drink anything anymore at anytime.

You told me your

s.22
s.22 which includes driving her to medical appointments and to the hospital. You must balance this with your employment obligations.

You indicated that it has been a very difficult time for your family; you said you wanted to explain that you were not at a bar on the night in question. You told me you were at the home of a friend, who is also

s.22 s.22 You said you do not drink very often, but that night you did have a few drinks. You said you are truly sorry that this occurred and you know what can happen when people drink and drive.

You said you understand that you should be punished, but you asked to be penalized in some way that will not affect your wife. You said your wife can still drive, but the vehicle that was impounded is the only one that you have. You said you made this application to appeal for some leniency.

I understand and appreciate that receiving an IRP can have serious consequences in a person's life, especially in a situation such as yours. As I indicated in the oral hearing, however, I am not authorized by the Act to consider personal circumstances or transportation needs in this review. I can consider only those grounds that are directly related to the issues outlined below. In addition, I can only 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.

I also explained that I do not have the authority to consider a request for early release of the vehicle on compassionate grounds; however, I encouraged you to investigate applying for a separate hearing on that basis, given 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 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 Desrosiers indicated that he witnessed you driving or in care or control of the vehicle at 2145 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 RTS, Constable Desrosiers 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 2150 and 2157 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 Desrosiers 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 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.

OCTOBER 10, 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);
- 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 proceeded with the review based on that confirmation.

Ms. Leamon argued that to admit or rely on the ASD test results amounts to a violation of your constitutional rights under the *Canadian Charter of Rights and Freedoms* (the “Charter”),

specifically, your right to counsel under section 10(b). Ms. Leamon referred me to *Regina v. Brigitte Schultz* in support of her submission.

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 under section 144(1)(b) under the Act. The 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.

Under section 117 of the Act, I have been delegated authority by the Superintendent to conduct this review of your driving prohibition pursuant to section 215.41 of the Act. The scope of the review is limited to the grounds as specified in the Act. I have conducted my review accordingly.

Ms. Leamon also cited *Spencer v. British Columbia* and referred to the principles of fundamental justice and procedural fairness set out in this decision, of which I am mindful and have applied 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 “RTS”), Constable Gnyp indicated that he witnessed you driving or in care or control of the vehicle at 0210 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 RTS, Constable Gnyp 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 0217 and 0219 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 Gnyp 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 the RTS and the Narrative, Constable Gnyp said you told him you had consumed two beers and the time of your last drink was at midnight. In your affidavit, you said you were at Sporty’s Bar from about 7:30 pm until about 2:05 am. You said you ate dinner and consumed two pints of beer. You said you finished your second pint at around 10 pm and drank only water for the rest of the evening. You said your co-worker and the client continued drinking beer. You said

just before you left, you were thirsty and out of water, so you decided to drink the remainder of a beer that was on the table.

Ms. Leamon submitted an unsworn, unsigned statement of s.22 who said he was with you at the bar on the night in question. He corroborated your evidence of having consumed alcohol for the first few hours of the evening, but then switching to water. s.22 also indicated that he saw you finish some beer that was in the bottom of a glass on the table just before you left the bar.

Ms Leamon argued that, given the timing of your last sip of beer before being pulled over, the results of the ASD tests were affected by mouth alcohol.

I have concerns with your evidence. First, I find it more likely than not that a reasonable person would find it rather unpleasant to drink that last bit of beer out of someone else's glass, especially in front of clients.

Second, you said the people you were with, including s.22 continued to drink alcohol after you stopped at 10 pm; I infer, therefore, that they were drinking for over six hours. This is consistent with the officer's evidence of having noticed a strong odour of liquor emanating from the interior of the vehicle. It also raises questions in my mind about the likelihood of s.22 remembering exactly what and when you had a last sip of beer. I do not find his evidence to be reliable.

Further, I am not persuaded on a balance of probabilities to believe your statement of having consumed someone else's last sip of beer just before leaving the restaurant.

Ms. Leamon submitted five previous decisions of other adjudicators in this office who revoked the respective driving prohibitions. She argued that I should consider them as precedents to follow in deciding this hearing. I have reviewed these decision letters and find them all to be distinguishable from your situation. The adjudicators in those cases found the applicants' evidence of the time of last drink to be compelling, which is not the case here.

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 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

s.22

IRP Review Decision
Page 5

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
604-370-2505 (fax)

September 27, 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);
- 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 you. I have proceeded with this review based on that confirmation.

At the time of this review I have not received 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 AnalysisWere 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 0257 hours on September 16, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you attempted to leave a parking area when the officer entered. 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, both resulting 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 0304 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 0305 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 034115 and your second sample of breath into ASD serial number 034114. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 034115 and 034114.

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?

For the first ASD, the qualified ASD calibrator certified that on September 3, 2013, he checked the calibration of ASD serial number 034115. 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 August 28, 2014.

For the first/second ASD, the qualified ASD calibrator certified that on August 29, 2013, he checked the calibration of ASD serial number 034114. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 26, 2013, and the service expiry date as July 18, 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 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.

OCTOBER 8, 2013

s.22

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

Introduction

On August 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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, Mikhael Magaril, Articled Student, confirmed that he had received all of the disclosure documents before me prior to the scheduled hearing. I have proceeded with this review based on that confirmation. Your representative provided written material on August 14, 2013 and made submissions at the oral hearing on August 20, 2013. The date for providing a decision was initially extended to September 18, 2013 and was again extended to October 16, 2013. I have carefully considered all relevant evidence in reaching my decision in this review.

In accordance with the BC Supreme Court’s decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443 (“*Buhr*”), 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.

You applied for a review on the ground that your 7-day or 30-day prohibition should be reduced because you did not have the required number of previous IRPs. The Act allows me to alter the term of a prohibition only where a higher prohibition has been applied in error and a lesser prohibition is required. There is no evidence that this is your situation.

One of the grounds on which you applied for a review is that you did not fail or refuse to comply with an officer's demand to provide a breath sample. That ground is not applicable because of the reason 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 Analysis

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

The officer's evidence is that on August 4, 2013 at 0300 hours a vehicle observed being driven the wrong way on a one-way street was stopped. You were seat-belted in the driver's seat and identified yourself with your driver's licence.

There is no evidence to the contrary.

I am satisfied that on August 4, 2013 at 0300 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 0300 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0304 hours you provided a second sample of your breath into an ASD. You were shown that the second ASD also registered a "FAIL."

There is no evidence to the contrary.

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.

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?

The officer's evidence is that the first sample of your breath was analyzed by an ASD with a temperature of 26 degrees Celsius and the serial number 033299. The second sample of your breath was analyzed by an ASD with a temperature of 28 degrees Celsius and the serial number 101253.

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 033299. Constable Craven provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 23, 2013. This ASD had a Calibration Expiry Date of August 20, 2013 and a Service Expiry Date of June 26, 2014.

The second analysis of your breath was performed on an ASD with the serial number 101253. Constable Craven provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 12, 2013. This ASD had a Calibration Expiry Date of August 9, 2013 and a Service Expiry Date of August 22, 2013.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable Craven 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.

Your representative submitted that there is no evidence that the ASDs were reliable at the temperatures recorded for them. On this basis your driving prohibition should be revoked because the ASD results are not reliable.

Unless distinguishable I must follow previous decisions binding on me as an adjudicator to ensure consistency in decisions. In *Buhr* the evidence was that the ASD operator's manual stated that a test could be initiated if the ASD temperature was between 10 and 40 degrees Celsius. The recorded temperature for the ASD used for your first breath test was 26 degrees Celsius and the ASD used for your second breath test was 28 degrees Celsius. I am satisfied that, at the temperatures recorded for each of the ASDs, each ASD provided reliable results.

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 when speaking with you there was an odour of liquor on your breath, you were speaking very slowly, and your speech was a bit slurred. You drove your vehicle the wrong way on a one-way street. You admitted that you had consumed alcohol and, when asked the time of your last drink, replied "About an hour ago."

There is no evidence to the contrary.

Your representative submitted that there is no evidence that the ASDs were calibrated to produce "FAIL" results at a BAC of 80 mg% or over. ASDs can be adjusted to register a "FAIL" result at any desired BAC. Although both of your ASD results were "FAIL" there is no evidence how these ASDs were calibrated and at what BAC they were calibrated to display a "FAIL." Accordingly, there is no evidence that each of your "FAIL" results on the ASD were proper "FAIL" results.

My decision in this review must be made on the evidence before me and not on suggestions or submissions unsupported by evidence. There is no evidence in this review that ASDs can be calibrated to register a "FAIL" result at any desired BAC.

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 providing 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 17 days of the prohibition, you need only serve the remaining 73 days of the prohibition which commences October 17, 2013. The prohibition ends December 28, 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.

s.15

Adjudicator

cc: Mikhael Magaril, Articled Student (by fax)
(604) 637-1617

Aug

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 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.

You submit that the address indicated on your driver's licence is not the same as the address on the ticket. I acknowledge your submission, however, this issue is beyond the scope of this review. The only issues before me in this review are those 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 "RTS"), the investigating officer, Cst. Neid, indicates that you were driving or in care or control of a motor vehicle at 1129 hours on September 14, 2013. Further, in the Narrative Text Hardcopy (the "Narrative"), Cst. Neid submits that the Kelowna RCMP received a complaint that a male, who appeared to be impaired, was leaving a business in his vehicle. Cst. Neid submits that he was on patrol and located a vehicle with the corresponding licence plate number parked, unoccupied, in a parking lot on Main Street. He observed a male return to the vehicle and drive onto Bottom Wood Lake Road. At 1129 hours, Cst. Neid stopped the vehicle near Lodge Road to check the driver's sobriety. You were observed as the lone occupant and driver. You were confirmed as the registered owner of the vehicle and your identity was verified with a valid British Columbia driver's licence.

In your written submission, (the "Submission"), you assert that you were pulled over for no apparent reason and that you asked the officer why you had been pulled over to which he responded, "I can pull over however (sic) I want."

The reason why your vehicle was stopped is not an issue before me in this review. I must make a finding as to whether or not you were a driver within the meaning of the Act.

You acknowledged that you were driving the vehicle when you were pulled over.

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. Neid indicated that the ASD registered a "FAIL" at 1132 hours and that the result was shown to you. In Narrative, Cst. Neid indicates that after you blew a "FAIL" that he showed you the reading and explained that the "FAIL" reading meant that your blood alcohol reading was in excess of 100 milligrams, with the legal limit being 80 milligrams.

In your Submission, you indicate that the officer gave you a breath test, which according to him said "FAIL". However, you submit that you never saw this reading.

I acknowledge the conflicting evidence; however, there is no requirement in the Act for an officer to show a person the result of the ASD test. Further, there is no compelling evidence before me that the ASD did not register a "FAIL".

Based on the evidence before me, I am satisfied the ASD registered a "FAIL".

Were you advised of your right to a second analysis?

In the Narrative, Cst. Neid submits that at 1135 hours he read you the right to a second test directly from the IRP Information Card.

In your Submission you state that the officer, "then said [you] would have a 2nd reading and [you] said fine."

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 detailed the evidence provided in Cst. Neid's Narrative with regard to you being advised of your right to a second analysis in point form below:

- Cst. Neid asked if you wanted a second test;
- You replied, "I don't trust those things";
- Cst. Neid advised you that was the reason you had the opportunity to request a second test on a different instrument and that a second unit was on scene and the test could be done right away;
- You replied, "I really don't trust those things";
- Cst. Neid advised you that if a second unit showed a "WARN" the sanctions would be less;
- Cst. Neid advised you that you had from that moment to the time it would take him to fill out the documents (approximately five minutes) to decide if you wanted the second test;
- You replied, "I just don't believe it", then, "Do I look drunk";
- Cst. Neid advised you that he was going to fill out the documents and that if you wanted the second test to let him or Cpl. Wytrwal know at any time;
- You wanted to smoke, which resulted in Cst. Neid having you empty your pockets;

- You leaned on the police vehicle and Cst. Neid said, "you mull over whether or not you want that second test and let us know";
- You stood with Cpl. Wytrwal and talked with her the entire time Cst. Neid filled out the documents;
- Cst. Neid completed the documents at 1153 hours;
- Cpl. Wytrwal asked you if you had decided if you wanted the second test;
- You replied, "I don't really think I have the choice";
- Cst. Neid advised you that you did have the choice, however, that once you were served with the documents that the window of opportunity to ask for the second test would close;
- Cst. Neid explained the 90-day driving prohibition and 30-day impoundment prior to handing you the documents;
- You accepted the documents in your hand and said, "that's based on my first test, right?";
- Cst. Neid said, "You're done. You had lots of opportunity to ask for a second test";
- You became upset, said, "I made my decision", and were reminded about the window of opportunity;
- You replied, "Oh, I didn't know";
- Cst. Neid advised you that you were told multiple times;
- You replied, "Well, I'll fight it";
- After being advised to gather your effects, Cst. Neid submits that you stated you were confused and you thought Cst. Neid was going to go to the police car, come out, and give you a second chance and;
- Cst. Neid told you that you were wrong about that.

You assert that you certainly did not refuse the second test and question why you would. You submit that the officer left you standing on the street for over thirty minutes and that you did not know what he was doing or why you were not allowed your second test. You indicate that the officer then came back and charged you. At this point, you advised him that you wanted your second breath test. You submit that the officer did not respond.

In your Submission, you indicate that you asked the officer for a moment to digest things. I note that in the Narrative, Cst. Neid submits that you were initially read the right to a second test at 1135 hours and served the IRP documents at 1155 hours. You submit that you were left waiting for over thirty minutes. However, police evidence indicates that at no point during this period, despite being advised multiple times of your right to a second test, did you request a second test. You provide no evidence to refute this.

I have also considered your submission that you certainly did not refuse the second test. Police are not required to provide a driver with a second ASD test unless the driver requests a second analysis upon being advised of their right to do so. On this point, police evidence indicates that Cst. Neid advised you that the reason you had the right to request a second test was to address your belief that you cannot trust ASDs. Therefore, your submission that you did not refuse the second test is unfounded.

Further, police evidence indicates that while Cst. Neid filled out the documents you were, “either standing with Cpl WYTRWAL or Cpl WYTRWAL and Cst NEID.” You do not refute this evidence. I question if you were in the company of Cpl. Wytrwal and were not sure what Cst. Neid was doing or why you were not allowed your second test, as you claim, why you did not ask Cpl. Wytrwal what was taking place or going to happen.

You assert that not being given a second test is a violation of your rights. However, based on the evidence before me I am satisfied that you were well informed of your rights throughout the investigation. This finding can be supported by the fact that you do not explicitly deny police evidence with regard to your conduct after being advised of your right to request a second ASD. On this point, under section 215.42(a) of the Act a person has the right to forthwith request and be provided with a second analysis. Further, under section 215.42(b) of the Act a peace officer must inform the person of that right before he or she serves the Notice. Police evidence indicates that you were informed of your right to request a second test at 1135 hours. Cst. Neid’s evidence also suggests that you were informed multiple times of this right before the Notice was served on you at 1155 hours. There is no evidence before me that you requested a second analysis prior to being served with the Notice.

Based on the evidence before me, 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. Neid’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 the “FAIL” result.

Was the ASD reliable?

Evidence indicated on the Certificate of a Qualified ASD Calibrator (the "Certificate") is as follows:

- ASD serial number 34750 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.

There is 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 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 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

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

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

Preliminary Matters

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

Issues

The following are the issues in this review:

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

Facts, Evidence and Analysis

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

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

Having considered 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.

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 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.

Adjudicator

cc: Jeremy Carr
Fax [250] 388-7327

October 24, 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

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Kyla Lee. Your hearing was scheduled for October 22, 2013, and to date I have not received any submissions from Ms. Lee on your behalf. I acknowledge receipt of your letter dated October 17, 2013.

You said that you require your driver's licence for work as you are employed at a s.22 s.22 You are required to ensure that residents are able to get to and from medical appointments. You also told me that this is your first offence and one that you did not commit intentionally or maliciously.

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.

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 02:10 hours, Officer Paetz (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 02:11 hours and at 02:13 hours, the officer used ASD serial numbers 106544 and 034750 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 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 in the Report indicates that the second analysis was provided by the officer on ASD serial number 034750 at 02:13 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?

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 106544 was checked for calibration on September 25, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 23, 2013, and a service expiry date of April 3, 2014.
- ASD serial number 034750 was checked for calibration on September 25, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 23, 2013, and a service expiry date of July 19, 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 told me that you are requesting a reconsideration of your IRP on grounds that you were not intoxicated and there is no evidence to suggest that your ability to drive was impacted. The afternoon previous to receiving your IRP, you drove to your friend’s house where you had two beverages around 17:30. You then decided to go out to have a late dinner to a place within walking distance. You ordered one double Caesar at 19:45, and then alternated between an alcoholic beverage and water while eating. You said you left the restaurant by 22:00 and retired to bed by 22:30. At 01:30 you woke up because your roommate needed a ride home. You said you drove straight back to your shared condominium from picking her up and were stopped two blocks from home at a routine stop. You said when the officer informed you that you blew a “fail” you were shocked.

You said that during the night in question, you were suffering from a sinus infection and have come to understand that it is possible that, due to being ill, your internal organs were not functioning efficiently and could not process alcohol as you normally do. You said when you asked the officer how it was possible for you to blow a “fail”, she replied that she had seen it happen before stating s.22 You said your speech was not slurred and your motor function was not compromised.

The officer’s evidence in the Narrative Text Hardcopy (the “Narrative”) is that you were stopped at a static sobriety check. The officer said you initially denied consumption and then stated that you had one double Caesar at 8:30 p.m. and several glasses of wine earlier. The officer said she detected a moderate odour of liquor on your breath.

I acknowledge your submission that you were suffering from a sinus infection and you believe your internal organs were not functioning efficiently and could not process alcohol as you normally do. I understand you want me to believe that is the reason you blew a “fail” on the ASDs.

I realize you said your speech was not slurred, your motor function was not compromised and that you did not feel your ability to drive was diminished. You told me that you had two beverages and then one double Caesar, and then you “alternated between an alcoholic beverage and water while eating”. The officer’s evidence is that you initially denied consumption and then admitted to one double Caesar and several glasses of wine earlier. I note that there is no evidence of exactly how much you consumed on the night in question. Further, you blew two “fail” test results on devices that I have already found to be functioning properly at the time. 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 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.

^{s.15}
Adjudicator

CC Kyla Lee
By fax to 604 685-8308

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 (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. However, I was notified that you contacted our office on October 15, 2013, to advise that you would be representing yourself in this review. I have proceeded with this review based on that confirmation.

I have before me a British Columbia Driving Record Search. Moreover, in your written submission, you indicate that you have an absolutely clean driving record and ask that I consider this. 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 sworn Report to Superintendent (the "RTS"), the officer indicated that you were driving or in care or control of a motor vehicle at 0248 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 RTS, the officer indicated that the ASDs registered a "FAIL" at 0250 hours and 0255 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 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 she 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 106544 and 034750, 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 Lise Marion certified that the ASDs were found to be within the recommended limits when she checked their calibration on September 25, 2013. 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 80 mg% even though the ASD registered a "FAIL"?

In the Narrative Text Hardcopy - Occurrence Report - 1, the officer indicates that you had very glassy eyes, difficulty focusing, and slurred speech. She also noted a strong odour of liquor on your breath and indicates that you admitted to having one drink much earlier. Prior to administering your first ASD test, the officer checked your mouth and observed that your tongue was green; you could not provide an explanation for this. When you were asked when your last sip of alcohol was, you indicated that it two hours ago. After being shown the first "FAIL" result, the officer submits that you admitted to drinking a mix of wine and beer.

You wrote that on Saturday, October 5, 2013, you and a friend walked to the Creekside Pub to have drinks and food. When you arrived back at your house at 6:15 pm, you had stopped drinking. Accordingly, you refute the officer's evidence that you told her your last drink was two hours before being stopped. Rather, you informed her that it had been five hours since your last drink and in retrospect indicate that it had actually been eight hours. When you felt you were okay to drive, you brushed your teeth and used green Listerine mouthwash prior to leaving your house at around 2:20 am. As such, you submit that you are certain the officer's observation that your tongue was green was due to the green mouthwash you had used.

While I acknowledge your submission that the ASDs could have read the alcohol caused by mouthwash in your mouth, the officer's evidence is that she detected a strong odour of liquor on your breath, not mouthwash. Moreover, you have not provided any evidence that green Listerine mouthwash contains alcohol or that this particular brand of mouthwash has been

proven to colour a person's tongue green. I also find it noteworthy that you submit that you were scared and caught off guard by the officer's question regarding the colour of your tongue. I question why you would be scared if you had simply used mouthwash and had not consumed any alcohol for eight hours. Further, you submit that you could not believe that you were over the legal limit and immediately requested a second test when it was offered. I question if you could not believe the "FAIL" result, coupled with the officer's inquiry about your green tongue, why you did not mention your use of mouthwash shortly before driving as a possible reason for the "FAIL" result. I find it hard to believe that this would only occur to you recently. I am also left wondering why your friend, who you submit had been with you since 2:00 pm, did not provide any evidence for this review if he could have supported your alleged drinking pattern. Based on the evidence before me, I am satisfied that your ASD test results were not affected by mouth alcohol caused by mouthwash.

Further, while you may believe that you were not over the legal limit, you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs that I have 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%. 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 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.

November 4, 2013

s.22

C/O NIXON WENGER, LLP. ATTN: DARREN KAUTZ
301 – 2706 30TH AVE
VERNON BC V1T 2B6

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);
- 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 October 17, 2013, this office faxed your lawyer, Darren Kautz, ten pages of disclosure documents which included a fax cover sheet. The fax cover sheet stated that the written review was scheduled for October 24, 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. Kautz. 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 AnalysisWere 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 22:44 hours, on October 14, 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 stated that the ASD registered a “FAIL” result at 22:46 hours. Further, she indicated that he showed you the result of the test.

There is no evidence before me that contradicts 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 RTS, the officer indicated that he advised you of your right to a second test. She also noted that she 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 Narrative that you did not request the second test.

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

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.

In the Certificate the qualified ASD calibrator certified that on September 25, 2013, she checked the calibration of ASD serial number 106544. She found the ASD to be within the recommended limits and functioning correctly. She recorded the ASD calibration expiry date as October 23, 2013, and the service expiry date as April 3, 2014.

There is no evidence before me to suggest that the ASD used in your case was not functioning properly on October 14, 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 October 14, 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: Darren Kautz
Fax: [250] 542-7273

October 11, 2013

s.22

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

Introduction

On August 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* (the "Act") requires me to confirm your prohibition, along with 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 provided a statement to assert that your father, s.22 will act on your behalf and make submissions in relation to your prohibition.

In his submission, s.22 particularly when involved in stressful situations, and when dealing with s.22

authority figures. s.22 states that your behavior can be perceived as odd and even impaired. s.22 provides reasoning for your driving behavior as you were checking your mirrors and may have moved over as a result. s.22 states that this event has left you in a s.22 states that you will have to sell your vehicle in order to pay for the fines. s.22 states that you have told him that you are never drinking again.

I am mindful that a driving prohibition can have far-reaching and significant ramifications. I acknowledge the disabilities your father has described; however, I am not authorized to consider them as factors in your prohibition. My decisions in this review are limited to the grounds indicated below. I have conducted this review in consideration of 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 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 0102 hours on August 25, 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.

s.22 confirms in his submission that you were driving when 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 0106 hours and 0114 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 0112 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 0114 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 101144 and your second sample of breath into ASD serial number 032562. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101144 and 032562.

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?

s.22 submits that the calibration expiry date for both ASD units is August 25, 2013.
s.22 states that, "perhaps the machines gave an inaccurate reading."

For the first ASD, the qualified ASD calibrator certified that on July 28, 2013, he checked the calibration of ASD serial number 101144. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 25, 2013, and the service expiry date as September 21, 2013.

For the second ASD, the qualified ASD calibrator certified that on July 28, 2013, he checked the calibration of ASD serial number 032562. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 25, 2013, and the service expiry date as October 31, 2013.

I have considered s.22 submission and the evidence from the officer. Common sense suggests that, just as your driver's licence or vehicle insurance expires at 2359 hours on the date specified for it to expire, an ASD remains within its recommended limits until 2359 hours on its Calibration Expiry Date. You provided your breath samples on August 25, 2013, prior to the expiration time of 2359 hours. I am satisfied that when you provided this breath sample the ASDs were reliable. Further, I do not have any evidence before me to support s.22 submission that the ASDs were inaccurate.

I am satisfied that the ASDs were reliable.

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

In his submission, s.22 stated that you informed him that you only had a few beers over a period of 8 hours and you drank water for the last two hours. s.22 states that you told him that you took a six pack of Bud Light and gave two away because you did not want to drink too much. s.22 states that you are s.22 and this should not be enough alcohol to make you impaired over an eight hour period. s.22 states that the breathalyzer units in the police station are more accurate, and that it is his understanding that a person stopped for impaired driving has the right to ask the officer to take him for a blood test or police station breathalyzer test.

I acknowledge s.22 statements regarding your drinking patter; however, I do not find his theorizing about your BAC to be compelling evidence. I note that you provided two samples of breath on two different ASDs. 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 do not have any evidence before me to cause me to question the results of the ASD analyses. As noted above, I find that the ASDs were calibrated on the day of your prohibition. Further, the Act states that you have the right to request a second test on a different ASD, but does not state that you have the right to provide a sample of your blood, or to use the breathalyzer at the police station.

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 August 25, 2013. Your prohibition was extended on September 11, 2013. There are 74 days remaining of your 90 day prohibition.

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

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

Introduction

On August 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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 3, 2013. The time for providing a decision in this review was extended to October 8, 2013. In reaching my decision I have considered all of the relevant information available to me.

In your evidence you state that you would like some leniency in the repercussions of your actions as you were courteous and co-operative with the officer. I recognize that a driving prohibition can have serious consequences for you but I am not authorized under the Act to vary the length of a driving prohibition, or change the consequences of one, in a review.

One of the grounds on which you applied for a review is that you did not refuse or fail to comply with the officer’s demand to provide a breath sample. That ground is 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 Analysis

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

The officer's evidence is that on August 25, 2013 hours a vehicle was stopped because its rear licence plate was covered. You were its driver and identified yourself with your driver's licence. The Report notes the time of driving as 0210 hours; the Occurrence Report notes the time of driving as 0211 hours.

In your information you do not directly state that you were driving but you generally confirm your interaction with the police that morning.

I am not as concerned about when you were driving as whether you were, in fact, driving. I am satisfied that on August 25, 2013 you were a driver within the meaning of section 215.41 of the Act. I am also satisfied that you are not prejudiced by the discrepancy in times provided by the officer and that you are well aware of the events causing the IRP to be issued.

Did the ASD register a "FAIL"?

The officer's evidence is that at 0213 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0218 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 were surprised to see the "FAIL" reading.

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 received a roadside prohibition from driving due to the results of two different screening devices.

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 032554. The second sample of your breath was analyzed by an ASD with serial number 032562.

Your evidence is that two different screening devices were used.

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 032554. Constable Christy provided a Certificate of a Qualified ASD Calibrator (the "Certificate") 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.

The second analysis of your breath was performed on an ASD with the serial number 032562. Constable Christy provided a Certificate 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 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 Christy 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 must consider whether I can rely on the results of the ASD used for your second test. You provided a breath sample into this ASD at 0218 hours on August 25, 2013. The Certificate for this ASD states that the Calibration Expiry Date for this ASD was August 25, 2013. Common sense suggests that, just as your driver's licence or vehicle insurance expires at 2359 hours on the date specified for it to expire, an ASD remains within its recommended limits until 2359 hours on its Calibration Expiry Date. You provided your breath sample on August 25, 2013 at 0218 hours, prior to the expiration time of 2359 hours. I am satisfied that when you provided this breath sample the ASD was reliable.

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 when you were outside of your vehicle he could smell the odour of liquor on your breath and that you advised him that you had one drink, one hour prior to being stopped.

Your evidence is that you had two drinks with your dinner. You were extremely surprised to see the "FAIL" reading. You do not claim that you were okay to drive.

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 accept the "FAIL" results from two ASDs I have found reliable and which were certified to be correctly functioning. There is no persuasive 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. I note that as you have already served 10 days of the prohibition, you need only serve the remaining **80** days of the prohibition which commences October 9, 2013. The prohibition ends **December 27, 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.

I apologize for any inconvenience my error caused you.

September 19, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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

In the hearing, Mr. Markovitz made reference to a recent court decision *Wilson v Superintendent of Motor Vehicles*. Mr. Markovitz stated that *Wilson* may be in reference to a “WARN” prohibition, but the principles apply to your situation. Mr. Markovitz stated that the officer did not have sufficient grounds to establish that your ability to drive was impaired by alcohol. Mr. Markovitz also submitted that the officer did not have sufficient grounds to form a reasonable suspicion that you had alcohol in your body. Mr. Markovitz stated that you only admitted to consuming alcohol after the officer had already read the demand, and the officer had no further indicia of impairment. Mr. Markovitz submitted that the officer lacked the objective and subjective grounds to form a reasonable suspicion, and the only reason that you were pulled over was that you were in the area of a house party.

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.

Further, 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.

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 0345 hours on September 2, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that 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, both resulting 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 0352 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 0401 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 032554 and your second sample of breath into ASD serial number 101152. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 032554 and 101152.

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 a "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 20, 2013, he checked the calibration of ASD serial number 032554. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 17, 2013, and the service expiry date as October 31, 2013.

For the second ASD, the qualified ASD calibrator certified that on August 20, 2013, he checked the calibration of ASD serial number 101152. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 17, 2013, and the service expiry date as September 21, 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 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: Danny Markovitz
fax: 778 297-3131

OCTOBER 10, 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);
- 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 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.

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 Hydamacka indicated that he witnessed you driving or in care or control of the vehicle on September 21, 2013, at 1832 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 and Narrative Text Hardcopy (the “Narrative”), Constable Hydamacka stated that he noticed the odour of liquor on your breath and that you admitted to having consumed alcohol. In your written submission, you acknowledged having consumed beer prior to driving.

Prior to the police stop, the officer reported that your driving behaviour caught his attention. He said you turned on your left signal light further back from the intersection than seemed appropriate to the officer. He also noted that you were driving fairly slowly. Constable Hydamacka said you turned onto Boivin Road very early and cut the corner so much that your left tires were nearly touching the opposite, oncoming lane of the intersection. The officer said s.22 was so much into the other lane that he was completely over the opposing wide ‘stop’ line and in the wrong lane for his direction of travel.” Constable Hydamacka said he noticed an oncoming white GMC pickup driving toward your vehicle on Boivin that had to stop approximately 30 metres short of the intersection to avoid hitting you head on. He said when discussing this with you, your response was that this maneuver was “common ‘small town driving’.”

In your written statement, you said your slow driving and early use of the signal light indicates you were driving safely, not recklessly. You said you may have cut the corner to some extent, but the officer’s description seems very exaggerated. You said you were driving slowly, because you were almost home. You also explained that the reason for the driving behaviour was because you had dropped a cigarette and were temporarily distracted trying to see where it went. You said there were no horns or brakes applied in any manner that would have drawn the

attention of anyone. You said you accept that you should not have tried to locate the cigarette, but you said it was an instinctive reaction.

You said the officer did not discuss the driving behaviour with you in as much detail as he set out in the Narrative. Although it is not in his Narrative, you said he told you someone from the Lamplighter Pub had complained that the driver of a vehicle such as yours may be drinking and driving. You commented on a similar incident you experienced 3 to 4 weeks earlier, noting that you were allowed to go without incident that time. The earlier incident and its outcome are not relevant to the issues before me in this review.

In the Narrative, Constable Hydamacka said he questioned you about how much you had consumed and that you initially denied drinking. He said your wife indicated that the two of you had just come from a pub where you had consumed two beers. The officer noted that you agreed you had recently consumed beer. Constable Hydamacka said your wife continued to give details of your activities that day and that it seemed like you both had been drinking throughout the day at several locations, having 2 – 3 beers at each stop. You said your wife did not make any comment concerning your day, as the officer described.

You said you went to the Motor Inn for two draft beers and then drove toward home for supper when you were pulled over. However, as I noted above, you also said the officer told you about a complaint from the Lamplighter Pub, and you did not dispute having been there. This indicates that you may have attended two drinking establishments in the afternoon, which corresponds to the officer's evidence of what your wife told him. It also raises questions in my mind about the reliability of your evidence.

In the RTS, Constable Hydamacka said he made the ASD demand on September 21, 2013, at 1844 hours. You said you were not given the opportunity to do a sobriety test or provide a blood or urine sample, which you implied breached your legal rights. Under section 215.41 of the Act, a peace officer is not required to arrange for a test other than the ASD analysis at the roadside.

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

I now turn to whether you failed or refused to comply with the demand. Constable Hydamacka gave detailed evidence of how he provided coaching and instruction on how to provide a suitable sample of breath. He said on your first attempt, you appeared to take a partial breath, put your lips on the mouth piece and suck air in, which resulted in the ASD reading "NOGO". He said he is familiar with the sound of air bypassing the mouth piece, as well as air being drawn out of the ASD.

The officer said he told you about the readings that appeared on the ASD, if air was going into the device and he said he was familiar with methods people try to use to bypass the ASD. He indicated that you told him you were not trying to defeat the ASD and that you needed a break, but would try again. The officer indicated having given you a break until you told him you were ready to try again.

On your second attempt, the officer said you did not make a good seal, you provided a very short breath that was clearly bypassing the mouthpiece, and he could see spit coming from you and going past the ASD. He said the ASD read "NOGO" again.

The officer gave a very detailed explanation of providing you with additional instructions and opportunities to provide a breath sample. He also said he advised you of the consequences of not providing a suitable sample of air. Ultimately, he concluded that you would not comply with the demand, so he served you with a prohibition for refusing.

You said you did your best to provide a sample, which I will address in the next section, but you did not dispute the officer's evidence that you did not provide a suitable breath sample for the ASD to analyze.

I am satisfied that you failed or refused to comply with the demand at 1907 hours, as set out in the officer's evidence.

Did you have a reasonable excuse?

Constable Hydamacka provided evidence that you told him you suffer from s.22
s.22 which affects your ability to blow. He said he is familiar with this
ailment, s.22

He said in his
experience, someone of your ability should be able to provide a sample into an ASD.

You said the thrust of the officer's observations and opinion are medical and that he is unqualified to make them. You said you are on a daily prescription of s.22
You said you also have a s.22 that can be used when
extraordinary breathing problems occur. You attached two s.22 reports that the
doctor gave you from your medical file concerning s.22 The first report was done on
December 4, 2008, and the second on December 12, 2011. I agree that the officer's personal
experience does not qualify him to offer a medical opinion on your health.

Point 14 of the sworn RTS indicates that the officer is a qualified ASD operator. I find it is reasonable to conclude that he has expertise and experience in administering the tests. This gives credibility to his comments about interpreting the readings that appear on an ASD, if air is going into the device or not. The officer provided evidence about the manner in which you attempted to provide a breath sample, further to his instructions.

I am not trained to interpret the pulmonary function reports you provided. There is no evidence before me regarding the effect of the medications you said you take since having these pulmonary tests. There is no evidence before me that your condition means you are physically unable to provide a suitable breath sample. I have before me the officer's description of the manner in which you attempted to provide a sample. I also have his undisputed evidence in the Narrative, of your wife asking you "Why didn't you just provide a sample?"

I have expressed concern about the reliability of your submissions. After considering all of the evidence before me, I find on a balance of probabilities that the officer's evidence is more persuasive than yours. I find it is more likely than not that you did not make a genuine attempt to comply with the 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 Act.

You are prohibited from driving for 90 days. Your prohibition took effect on September 21, 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 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);
- 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. 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 submission you indicated that you require your driver's licence for work and for some ^{s.22} you are taking. I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, employment or transportation needs in this review. 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 his Narrative, the officer indicated that while roadside with another vehicle, the vehicle you were operating approached the rear of his police vehicle, stalled for 2 minutes, and then turned around and went the long way around Douglas Fir Road to access Highway 3. The officer reported that he found these actions suspicious, followed your vehicle, and initiated a traffic stop. In the Report to Superintendent (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 23:15 hours on October 14, 2013.

You denied that you parked behind the police vehicle and then turned around. You indicated that you only slowed down to see who the police had pulled over, but you did not know them so you just kept going.

The issue before me here is whether or not you were a driver, it is not the reason the officer pulled you over.

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 23:30 hours and 23:33 hours, respectively.

You pointed out that in the Narrative, the officer recorded the time of your tests as 23:30 hours and 02:27 hours, and that he completed the IRP at 00:03 hours. You said that these times are false.

As you did not provide me with any other times to consider, I infer from your statement that the time of the second test which is recorded as 02:27 hours, is false. I agree that this could not be the correct time because it would have been more than two hours after you were served with

the IRP; however, I am satisfied that the officer made a clerical error when he recorded 02:27 hours as the time of the second test. I make this finding because in the Report, the officer recorded the time of the second test as 23:33 hours, which was 3 minutes after the first test. I also note that you did not address or deny the time of the second test as recorded in the Report. As such, I find that nothing turns on the error in the Narrative, and I am satisfied that the second analysis occurred at 23:33 hours.

You indicated that after the officer told you that you failed you asked him to bring you to the police station to do the test there, but he did not answer you. However, officers are not mandated under the Act to provide drivers with a breath test at the police station.

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 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 you were provided 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 Narrative, the officer provided detailed evidence with respect to two different ASDs being used for your tests including the corresponding serial numbers (which match the serial numbers in the Report), service expiry dates and calibration expiry dates. As previously noted, in the Report the officer indicated that he advised you that the second test would be on a different ASD. Further, the officer provided two Certificates of Qualified ASD Calibrator (the "Certificates"), which bear the same serial numbers as those noted in the Report and the Narrative.

You stated that at no time did the officer use another tester or a different one, and that he only changed the tips.

In my view the officer has provided me with a substantial amount of sworn evidence that he used two different ASDs for your tests. Further, I note that you did not address or deny that the officer explained to you that the second test would be done on a different ASD. As such, if the officer did in fact use the same ASD for the second test, I am left wondering why you did not provide me with any evidence that you raised this issue with him at the scene.

Based on all of the evidence before me, I do not find your evidence to be very persuasive and I prefer the officer's.

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 Certificates, the qualified calibrators certified that the ASDs were found to be within the recommended limits when their calibration was checked. They also certified that to the best of their knowledge the ASDs 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"?

In the Narrative, the officer stated that he noted a strong odour of liquor emanating from your breath as you spoke, and that your words were slow and dragged out, your eyes were glazed and your pupils were very constricted. The officer further provided specific details of the conversation he had with you with respect to your alcohol consumption. The officer provided these details in quotation marks. Specifically, the officer indicated that when he asked you if you had anything to drink that day you responded, "Yea I had a few", and that when he asked how long ago you had consumed alcohol you responded, "About an hour ago".

You stated that the officer asked you if you had anything to drink "tonight" and you said "no", but that earlier that day you had a few beers after getting off of the night shift. You said that from the time you had a few beers until the officer pulled you over was 5 hours, and at no time did you tell the officer that your last drink was an hour ago. You also stated that at no time were you impaired.

I am mindful that I need not make a finding on whether you told the officer your last drink was one hour prior or five hours prior. However, I find it noteworthy that you did not address or deny the officer's evidence with respect to your indicia and most specifically, that there was a strong odour of liquor on your breath. It does not make sense to me that you would have a strong odour of liquor on your breath after consuming a few beers some five hours prior. Further, I find the indicia reported by the officer to be indicative of someone who was under the influence of alcohol at the time of his interaction with you. Last, here again the officer has provided me with detailed evidence with respect to a conversation he had with you regarding alcohol consumption, and he has provided your responses to his questions within quotation marks. I take that evidence to mean that he has provided me with your exact words.

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.

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 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 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

At the beginning of the hearing your lawyer, Vincent Michaels, confirmed that he had received all of the disclosure documents before me. I have proceeded with the 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 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. Klein, indicated that you were driving or in care or control of a motor vehicle at 2247 hours on September 14, 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. Klein indicated that the ASDs registered a “FAIL” at 2248 hours and 2303 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. Klein submits that at 2300 hours she advised you of your right to request a second ASD test. Cst. Klein indicates that you originally declined a second test and that she asked you if you were sure. She explained again that the lower result would be used and submits that you then asked to provide a second sample. Moreover, on line 7 in the RTS, Cst. Klein 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. Klein indicated that you requested a second ASD test and that at 2303 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. Klein recorded the serial numbers of the ASDs used for your tests as 101356 and 037627, respectively.

Mr. Michaels submits that ASD serial number 101356, indicated in the RTS by Cst. Klein, does not correspond with the ASD serial number indicated on the related Certificate of a Qualified ASD Calibrator (the "Certificate"). I have addressed Mr. Michaels' submissions with regard to this issue under, "Was the ASD reliable?"

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 is as follows:

- ASD serial number 101356 was checked for calibration on August 28, 2013, with a service expiry date of November 27, 2013, and calibration expiry date of September 25, 2013;
- ASD serial number 037627 was checked for calibration on August 28, 2013, with a service expiry date of November 1, 2013, and calibration expiry date of September 25, 2013, and;
- Qualified ASD Calibrator, Stacey Ann Finlay, signed the Certificates indicating the ASDs were found to be within the recommended limits and functioning correctly.

Mr. Michaels submits that the ASD serial number indicated on line 6, "FIRST ASD TEST", in the RTS, is different from the ASD serial number indicated in the corresponding Certificate. Specifically, that ASD serial number 101356 handwritten by Cst. Klein in the RTS does not correspond with ASD serial number 10135[6] typed written on the corresponding Certificate. Mr. Michaels submits that the last number in the six digit serial number featured in the Certificate is a "5". He asserts that when one looks at the "6" in the Certificate for ASD serial number 037627, that the top of the "6" is completely rounded, whereas the "5" in serial number 10135[6] is completely straight and flat.

Further, Mr. Michaels submits that ASD serial number 101356 (as indicated in the RTS) is not referenced in Cst. Klein's Narrative. As a result, he submits that I do not have before me, "independent indicators of reliability", that would allow me to draw the conclusion that the serial number featured in the Certificate is in fact 101356. Accordingly, if I were to draw the conclusion that the serial number in the Certificate was indeed 101356 and that the "6" was perhaps distorted by repeated photocopying and/or faxing, Mr. Michaels submits that I would be reaching this conclusion based on speculation and principled inference. In support of this submission, he indicated that it is equally possible that ASD serial number 101355 was used in your investigation, as ASD serial number 101356.

Mr. Michaels also submits that I cannot rely on the statement featured on line 14 in the RTS because an ASD Operator qualification is separate from an ASD Calibrator qualification. On this point, he asserts that the Certificate is the means by which the reliability of the ASD's calibration is confirmed. Therefore, without corresponding serial numbers in the RTS and Certificate, I cannot be satisfied that the ASD used in your first ASD test was properly calibrated.

Referencing *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, Mr. Michaels submits that the Act was amended to ensure that under section 215.47(e) a peace officer promptly forwards to the Superintendent information relating to the calibration of the approved screening device on the basis of which the Notice was served. Moreover, under section 215.5(b)(iv) of the Act, that the result of the analysis on the basis of which the Notice was served was reliable. Accordingly, Mr. Michaels submits that I cannot reasonably conclude that the "FAIL" reading provided on ASD serial number 101356 is reliable because I do not have the correct calibration record (i.e. the Certificate) before me.

Mr. Michaels claims that his copy of the Certificate corresponding to the first ASD test reads 101355. However, my copy of the Certificate clearly reads 101356. I acknowledge Mr. Michaels' submission that the top of the "6" is completely straight and flat thus indicating that it is a "5", however, I feel there is a distinct difference between the 6's and the 5's indicated in the Certificates. Specifically, comparing the "6" in the Certificate for ASD Serial Number 101356 to the "6" in the Certificate for ASD Serial Number 037627, the lower portion of the "6" is clearly rounded and completely connected. There is a clear space evident in the "5" in serial number 101356 that is not present in the sixth digit.

Aforementioned, Stacey Ann Finlay, certified that on August 28, 2013, she checked the calibration of ASD serial number 101356 and found it to be within the recommended limits and functioning correctly. She also recorded the ASD calibration expiry date as September 25, 2013, and the service expiry date as November 27, 2013. This Certificate indicates that the ASD was calibrated in accordance with the training received by a qualified ASD Calibrator.

Further, Cst. Klein swore to the contents of her disclosure and provided the Certificates for each of the two ASDs as part of the disclosure for your investigation. By doing so, I am satisfied that she provided the correct Certificate for the ASD used in performing the first analysis (i.e. serial number 101356).

Based on the evidence before me, I am satisfied that the ASDs used 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.

SEPTEMBER 19, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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 Jeremy Knight, Articled Student. I have proceeded with this review based on that confirmation. Written information and submissions on your behalf were received September 1, 2013. In reaching my decision in this written review I have considered all of the relevant information available to me.

Your representative made a preliminary jurisdictional argument that the officer, as agent for the Superintendent of Motor Vehicles (the “Superintendent”), had no authority to issue your driving prohibition because there was no evidence that the officer had reasonable grounds to believe that your ability to drive was affected by alcohol. There being no or insufficient evidence on this requirement, your driving prohibition should be revoked. This argument was discussed in the decision *Wilson v. British Columbia (Superintendent of Motor Vehicles)* 2013 BCSC 1638. In

the alternative he submits that there is an implied statutory ground for review which is that the officer issuing the driving prohibition believe on reasonable grounds that your ability to drive was affected by alcohol.

I have read and considered the *Wilson* decision. Sub-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 sub-section. Whether an officer had reasonable grounds to issue the Notice is not a stated ground of review. I have no statutory authority, therefore, to revoke a prohibition on this basis and I have no ability to imply a ground of review not specifically stated in the Act.

I also find no evidence to support, either in the evidence or from legislation, the suggestion that an officer issuing a driving prohibition is an agent of the Superintendent.

Although it is unclear from the submission, your representative appears to be suggesting that the officer either did not have grounds to demand that you provide a breath sample or that your breath samples were provided were not in response to a breath demand but were in response to the officer telling you that you would be charged with refusing to provide a breath sample or that you would be prohibited from driving for 90 days for refusing.

The validity of the demand is not an issue in this review. Sub-section 215.5(4) of the *Motor Vehicle 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 that section, is not a ground of review. It is not an issue that I am by statute permitted to consider in this review. The validity of the demand is only an issue when a driver fails or refuses to comply with an ASD demand.

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 Analysis

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

The officer's evidence is that on August 11, 2013 at 0100 hours a vehicle was stopped at a roadcheck. You were its driver and identified yourself with your driver's licence. Your evidence is that you were operating a motor vehicle which at around 1:00 a.m. it was stopped at a roadblock.

I am satisfied that at 0100 hours on August 11, 2013 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 0129 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL." At 0137 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 were told your first breath sample was a "fail" and that your second breath sample was a fail too.

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 you were told that "if I [you] wanted to provide another sample into the device and if it came up a pass then that would be the result."

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 sample of your breath for analysis.

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 06674. The second sample of your breath was analyzed by an ASD with serial number 066743.

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."

Your evidence is that you provided two samples of breath both producing “FAIL” results. Five to eight minutes passed between the analysis of your first and second breath samples. Last summer when you were pulled over at a roadblock, you blew a “PASS” into an ASD but the officer told you the ASD showed you had some alcohol in your body. He told you that you were okay to drive but suggested you blow again so that you understand how the test worked. You agreed. This officer told you he had to wait 15 minutes to make sure the second test was reliable.

Your representative submits that during your first breath sample you provided a steady flow of air of sufficient volume and duration to measure alcohol content in your lung breath and that, when you did so, you brought alcohol into your mouth from your lungs. Only eight minutes elapsed between the two breath samples you provided. Proper procedure suggests 15 minutes should have been allowed to ensure the mouth alcohol introduced during your first breath sample had dissipated. This did not occur. It cannot be said that the second analysis was a reliable indicator of your BAC and should be disregarded because it was not a properly administered test. I cannot say that the Notice was served on the basis of the lower analysis result. Your driving prohibition should be revoked.

I must consider your submissions in light of the evidence. There is no evidence that the act of expelling air from your lungs when providing a breath sample into an ASD causes alcohol to enter your mouth. I cannot accept this novel proposition in the absence of any evidence supporting it. I then consider whether I can accept for its truth the hearsay evidence from an unknown officer who on a previous occasion advised you of something and that you have accurately recalled this evidence. I conclude that I cannot. I am mindful that this is an administrative, not a criminal proceeding, and that the rules of evidence are relaxed. I can accept hearsay evidence for its truth if I am satisfied that it is reliable. In this case I do not have sufficient supporting evidence to allow me to assess the accuracy of your recollection of what you say the officer said or the context in which this discussion occurred. The possibility that you misinterpreted or misunderstood what the officer said, when the officer said it during his conversation with you, and what the officer was referring to is too great for me to accept as the truth, or to base a decision on, what an officer may have told you.

I also note that when dealing with the officer you initially denied consuming alcohol but now admit to doing so. Being untruthful to the officer leads me to conclude that you are unconcerned about the truth. I cannot confidently base any decision in this review on your evidence.

I am satisfied that you were provided with two opportunities to provide breath samples for analyses both of which provided “FAIL” results which are reliable.

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 066744. Constable McKee provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on July 30, 2013. This ASD had a Calibration Expiry Date of August 27, 2013 and a Service Expiry Date of July 19, 2014.

The second analysis of your breath was performed on an ASD with the serial number 066743. Constable McKee provided a Certificate of a Qualified ASD Calibrator for this ASD confirming

that the calibration of this ASD had been checked on July 30, 2013. This ASD had a Calibration Expiry Date of August 27, 2013 and a Service Expiry Date of June 21, 2014.

These Certificates confirm that these ASDs were within the recommended limits and were functioning correctly. In the Report to the Superintendent, Constable McKee 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 eyes were red and bloodshot. You denied you had consumed any alcohol. Your female passenger admitted that you and she had been drinking earlier at a cabin at a lake.

Your evidence is that you consumed 4-5 light beer with 4% alcohol between 1500 and 1800 hours. You are s.22 You were not impaired or affected by alcohol when you provided your samples to the officer. You admit that you told the officer you had not been drinking. You also provided a copy of a letter from Shajani Forensic Consulting Inc. ("Shajani") prepared for an unrelated IRP.

Your representative submits that where mouth alcohol is present a "false fail" will likely or often result because the ASD is measuring mouth alcohol and not lung alcohol. Police are trained to observe waiting periods of 15 minutes to ensure no alcohol is brought to the mouth from further consumption, burping, vomiting or other means. The officer did not keep you under observation for 15 minutes before your first breath sample because he was engaged in other activities associated with establishing the identity of your passenger and conducting checks on the police computer. You provided your first breath sample at 0129 hours and your second at 0137 hours. The first sample brought up deep lung air which contaminated your mouth with alcohol. A 15 minute elimination period should have been observed to allow this mouth alcohol to dissipate. The Shajani report says that proper procedure to obtain reliable breath results requires the officer to have face to face observation with the subject to ensure there is no burping, belching, regurgitation of anything taken by mouth which could falsely elevate the test result. As this proper procedure was not followed, there is uncertainty whether the ASDs measured BAC or whether the results were tainted by mouth alcohol. The driving prohibition should be revoked.

I have already concluded that there is no evidence that the act of providing a suitable breath sample at 0129 hours brought alcohol into your mouth which could cause the second analysis at 0137 hours to be considered unreliable.

I accept that burping, belching, regurgitation or anything taken by mouth could falsely elevate an ASD result. There is no evidence that you burped, belched, regurgitated or consumed anything by mouth which could falsely elevate the ASD result. You have provided no evidence of burping, belching or regurgitating, things which would be uniquely within your knowledge if they occurred. There is no evidence from the officer that any of these things occurred. My decision must be based on evidence, not on suggestions unsupported by any evidence. I find as a fact that you did nothing in the 15 minutes prior to providing your first sample of breath, or in the 8

minute period between your first and second samples, that would cause the ASD result to be falsely elevated or to display a false "FAIL."

I have previously noted that I cannot accept as credible or reliable your evidence and re-iterate this in rejecting your evidence about your alcohol consumption and drinking pattern. Further, I may not consider how impaired or affected by alcohol you felt you were before driving, but solely whether or not your breath sample registered a "FAIL" reading on an ASD.

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. You are prohibited from driving for 90 days. Your prohibition took effect on August 11, 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 Knight, Articled Student (by fax)
(250) 374-7777

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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with 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;" 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. 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, Scott Mulder. 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?

The officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0021 hours on September 7, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that he spotted a vehicle stopped in a roadside pull out after midnight, and as this was an unusual spot for a vehicle to be stopped at that time of night, he decided to check the vehicle. The officer states that the driver was in the driver's seat with the keys for the vehicle in the ignition. The officer states that you were identified via your driver's licence.

In your affidavit you state that you were asleep in your vehicle when a police officer woke you up and questioned you. You state that you had been at the rest top for approximately two hours prior to the officer's arrival. You state that you had been driving with s.22 who had agreed to drive with you to Kitimat where you were scheduled to work the next morning. You state that you had had a few beers so s.22 drove your truck. You state that shortly into the drive you and s.22 go into an argument and at that point s.22 decided that she did not wish to drive with you anymore. You state that s.22 pulled into a rest stop about 3 minutes outside of Gitaus. You state that after parking your vehicle s.22 called a friend who picked her up and took her back to Gitaus. You state that you were upset by the fight that you had and you spent the next hour or so sitting at the river drinking one or two beers. You state that at 11:00pm you returned to your vehicle to go to sleep. You state that your truck is regular cab, and your work gear was in the box, so you moved it into the cab, on the passenger seat, so that it would not get rained on or stolen. You state that when you entered your truck you believe that the keys were on the floor. You state that you have read the officer's report that he believes the keys to be in the ignition but that this is not your recollection. If the keys were in the ignition, they were left there by s.22. You state that you told the officer that you had no intention to drive and that you were not expecting to leave for Kitimat for another six hours.

In her affidavit, s.22 states that she agreed to drive with you to Kitimat. s.22 states that she agreed to drive your truck because you had had a few beers. s.22 states that shortly after she began driving you started to fight and she decided at this point that she did not wish to drive to Kitimat and she pulled into a rest stop. s.22 states that after unsuccessfully calling for a taxi, she was eventually picked up by a friend. s.22 states that the two of you left Gitaus between 9:30 and 10:30pm and that she returned to Gitaus just before 10:30 pm.

Mr. Mulder states that where your evidence and the officer's evidence differ, I should accept your evidence. Mr. Mulder states that the nature of the driving prohibition review does not allow for the testing of evidence through cross examination. Mr. Mulder states that the burden is on the officer to establish the facts on a balance of probabilities.

Mr. Mulder states that the Supreme Court of Canada case *R v Boudreault* establishes the essential element of care and control as follows:

- 1) An intentional course of conduct associated with a motor vehicle.
- 2) By a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit.
- 3) In circumstances that create a *realistic* risk of danger to persons or property.

Mr. Mulder states that there is only one conflict in the facts as alleged by you and the officer, and that is whether or not the keys for the truck were in the ignition, or on the floor of the truck. Mr. Mulder states that I should prefer your evidence.

Mr. Mulder further states that the remainder of the evidence set out in your affidavit is uncontradicted, and is supported by the evidence of s.22. Mr. Mulder submits that the officer's evidence is lacking in essential information, such as whether or not the vehicle was running, or your actions when you were first approached by the officer. With regard to whether or not there was a realistic risk of danger, Mr. Mulder raises the following points:

- 1) The vehicle was parked at a rest stop, a place designed for the safety of stopped travelers. This is relevant to your intention, as a vehicle stopped in a rest stop shows an intention for a lengthier stop, away from other vehicles.
- 2) The vehicle was not running, and therefore it was highly unlikely that the vehicle could accidentally be put into motion. And provides a further impediment should you have changed your mind.
- 3) The vehicle had been parked for approximately two hours. You live in Terrace, and had you chosen to drive home you were not far away. The fact that you chose to stay at the rest stop for two hours shows that a change of heart was highly unlikely.
- 4) It is accepted that your BAC was greater than 80mg%, but there is no suggestion of intoxication beyond a moderate odour of liquor. An inebriated person is a greater risk to change their mind versus a non-inebriated person.

Mr. Mulder states that the overwhelming evidence indicates that you made a series of rational decisions to avoid endangering yourself and others by driving. Mr. Mulder states that you arranged for a sober driver to take you to Kitimat, and that when that plan fell through, you modified your plan and chose to sleep until the effects of alcohol wore off. In summation, Mr. Mulder states that there was no realistic risk that you would set the vehicle in motion accidentally, nor was there a realistic risk that you would change your mind and drive while impaired.

There are a number of aspects of your version of events which I find to be inconsistent. I do not understand if you were three minutes outside of town, and so close to your residence as suggested by Mr. Mulder, why s.22 would not simply turn around and drive the short distance back to town once she determined that she no longer wished to accompany you to Kitimat. Especially after she indicated that she had difficulty getting a taxi to take her home.

I find whether or not the keys were in the ignition to be an important factor in the evidence, and I find that your evidence on the matter is questionable and inconsistent. In your affidavit you state that you thought that the keys to the vehicle were on the floor of the truck, and not in the

ignition; but if they were in the ignition, then they were left there by s.22 From this statement, I understand that you do not recollect having any interaction with the keys to the vehicle after s.22 pulled over and parked the vehicle. You state that you moved your gear into the cab of the truck to avoid it getting rained on, or stolen. I find this odd, as you also state that after s.22 left, you walked down to the river and had one or two beers. In order to walk down to the river, I am confident that you would have left your vehicle unattended. Since you did not have the keys on you, your vehicle must have remained unlocked. I find it very peculiar that you would express concern about your gear being stolen while you slept, but would not have any concern about leaving your vehicle with your gear in the box, and with the keys in the ignition. I draw two conclusions from this. Either you had the keys on you when you went to the river, and then placed them in the ignition when you returned, or the reason you provided for being seated in the driver's seat instead of the passenger seat (ie: the safety of your tools) is not consistent with the remainder of your evidence.

Furthermore, you state that you had no intention to drive, and were concerned about driving while impaired, but I find that your actions do not support this claim. When s.22 left, you knew that you would have to drive in the near future, yet you then chose to consume more alcohol. I do not find these to be the actions of someone who is mindful of the dangers of drinking and driving.

As I find your version of events in relation to the keys to the vehicle, and your reasons for occupying the drivers seat to be questionable, I find the officer's evidence to be more credible. Based on the evidence before me, I am satisfied that you were seated in the driver's seat of the vehicle with the keys in the ignition, and that you had the intention to drive.

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 0027 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 0029 hours.

In your affidavit you state, "at no time did Constable Crack advise me that I had a right to a second test. Given the location, on the outside of town, I expect that the availability of a second test was limited."

Mr. Mulder submits that your evidence should be preferred to that of the officer for the reason that, on paragraph 14 of the Report, the officer indicates that the sworn document consists of nine pages, but the officer has only provided a total of nine pages of disclosure. Mr. Mulder states that based on the page numbers on the top right corner of the documents, only seven pages follow the Report. Mr. Mulder states that even if the Notice is included, this leaves one

page unaccounted for. Mr. Mulder states that the officer either neglected to include an additional page, or was inattentive with regard to the information he was swearing to. Mr. Mulder states that in either event, the officer's Report is inaccurate.

I have considered the argument of Mr. Mulder; however I find that there is a third possibility. The officer submitted nine pages of disclosure, and indicated that his sworn evidence consisted of nine pages. The Report forms part of this sworn evidence, and I find it likely that the officer counted it as part of his sworn evidence. Regardless, I do not find the number of pages recorded on line 14 of the Report to negatively impact the credibility of the evidence provided by the officer.

Mr. Mulder states that your evidence is that the location of the stop was outside of town and not readily accessible to a second device. Mr Mulder also states that the investigation occurred after midnight on a Saturday morning and the availability of a second officer or second device is less likely. Mr. Mulder states that this gives the officer good reason to omit reading the right to a second test. Mr. Mulder further states that the only evidence from the officer that he read the right to a second test is the cryptic note about a "purple card" and the officer has not provided any notes taken contemporaneously to corroborate the Narrative.

I note that you have provided a possible reason for why the officer did not offer a second test; however, I do not have any evidence to indicate that the officer did not have access to a second ASD. The officer is able to provide the exact time (0029 hours) that he read the right to a second test, and states that he read it from a prepared card.

I do not find the mere suggestion that the officer may not have had access to a second ASD based solely the location, date, or time of day to be compelling. I find that this is a suggestion based on a hypothesis that is not supported by any evidence.

Your evidence and the evidence of the officer is that you were angry and upset with the officer at the time. You also state that you had been consuming alcohol throughout the course of the evening and that you were recently woken up by the officer. Given the aforementioned, I am not persuaded of your ability to remember the precise details of your interaction with the officer. You state that you were not advised of your right to a second test; however the officer is able to provide the precise time, and the source from which the right was read. The officer also indicates in his sworn Report that you were read your right to a second test, you were informed that the test would be done on a different ASD, and that the lower test result would prevail. Based on the evidence before me, I find the officer's version of events to be more credible.

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 stated above, I am satisfied that you did not request a second breath analysis.

Was the second analysis performed on a different ASD?

Because you did not request a second breath analysis, the officer was not required to provide an analysis on a second ASD.

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

The evidence before me indicates that you provided one sample of your breath which 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 certified that on August 19, 2013, he checked the calibration of ASD serial number 061505. 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 June 11, 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 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.

cc: Scott Mulder
fax: 250 635-4998

September 25, 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.

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. 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.

In your written submission you explained that you require your licence for your job and for family responsibilities. You stated that you have not had a speeding ticket since 2003 or 2004 and you indicated that if I did not revoke the driving prohibition, anything other than a 90-day suspension would do. I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. Nor do I have the authority to consider your driving record, or to alter the terms of the prohibition. The scope of the review is limited to the grounds as defined in the Act.

You also stated that the officer did not treat you with respect or dignity; however, this is also not an issue before me. If you have any concerns or complaints about the treatment you received by police, they must be made directly 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 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 01:30 hours on September 7, 2013. In the Narrative, the officer indicated that the vehicle you were driving almost took off the mirror of the police vehicle that had all of its emergency lights on.

You provided an explanation for why you were driving so close to the police vehicle. You indicated that this was explained to the officer at the scene by your girlfriend. You said that the officer thought about it for 5 seconds and then stated, "we aren't having this conversation right now."

The issue before me here is whether or not you were a driver as defined in the Act; it is not the circumstances which led to the traffic stop. In your statement you acknowledged that you were driving the vehicle.

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 01:34 hours and 01:45 hours, respectively. There is no evidence before me to the contrary.

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

IRP Review Decision
Page 3

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 indicated that after the first test the officer asked you if you wanted to do another one. You stated that you asked what that would do and he told you that it would not hurt, but that was all he said.

Although I note that your evidence here is somewhat contradictory to the officer's, the issue before me is whether you were advised of your right to a second analysis and you acknowledged that you were. Under the Act, officers are only required to advise drivers of their right to a second analysis, they are not required to advise that the second test will be done on a different ASD or that the lower reading will prevail.

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 061505 and 100894, 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 Philip Troy Crack certified that the ASDs used in your case were found to be within the recommended limits when he checked their calibration on August 19, 2013. He also certified that to the best of his knowledge the ASDs were functioning correctly. In the sworn Report, the officer indicated that the ASD tests were conducted by a qualified ASD operator and the ASDs were functioning properly. He also indicated that he showed you the results of both tests.

You indicated that the officer was inconsistent with the administration of the tests and that you were not provided with the test results properly.

I have considered your submission; however, you have provided me with no compelling evidence to support that the officer was inconsistent in administering the tests. Further, I do not understand your meaning with respect to not being provided with the test results properly. Even though officers are not required under the Act to show you the results of the ASD tests, the officer stated that he did and you did not deny this.

On this issue, I prefer the officer's evidence.

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 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.

October 29, 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 before me was provided to you and/or your representative. I have proceeded with this review based on that confirmation.

Preliminary Matters

Your lawyer, John Bethell, has made submissions with the overarching theme that the *Charter of Rights and Freedoms* apply. He supplies citations for insurance law cases which presumably prescribe *Charter* relief. He quotes from *Helgesen* and *Culley* to illustrate *Charter* remedies in the context of “determination of an administrative suspension.” Respectfully, I distinguish these cases as distinct from yours on the basis that they were refusals: *Helgesen* proffers a breach of constitutional rights as a reasonable excuse, and prescribes that it does require consideration

by a tribunal; *Culley* states that an adjudicator must consider the grounds for a demand.

The validity of the demand is not at issue in this review, nor do I consider arguments on the issues of reasonable and probable grounds, or other *Charter* issues, or otherwise apply the *Charter*. 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. The evidence in regard to s.22 and the smell which you allege the officer mistook for alcohol, goes to the formation of the officer's demand in this regard.

Likewise, Mr. Bethell relies on a more recent case, *Wilson*, where 'reasonable and probable grounds' require a consideration of a person's driving behaviour. 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 "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 reports that you were driving or in care or control of a motor vehicle at 2130 hours on October 9, 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 2133 and 2137 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 test on a different ASD, and that the lower test result would prevail. In the occurrence report, he provided detail that this occurred at 2135 hours, and that this was read from "the purple OSMV card." He also provides that you understood the right to a second test.

I am satisfied the officer conveyed 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.

In the Report, the officer lists ASD serial number 106332 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?

Cst. Sorg provides a 'Certificate of a Qualified ASD Calibrator' (the "Certificates") completed by T.S. James for ASD serial numbers 106335 and 106332, the ASDs used to test the samples of your breath. These Certificates form part of the sworn report.

For the ASD 106335, T.S. James certified that on September 19, 2013, he checked the calibration. 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 February 26, 2014.

For the ASD 106332, he certified that on September 19, 2013, he checked the calibration. He found the ASD to be within recommended limits. He recorded the ASD calibration expiry date as October 17, 2013, and the service expiry date as February 26, 2014.

Mr. Bethell calls the content and validity of these Certificates into question by stating:

- there is nothing to show that the calibration was done in the manner in which the calibrator T.S. James was taught;
- the functionality of the ASDs at the time the officer took samples of your breath cannot be known by T.S. James;
- there is no indication that T.S. James "had the requisite certificate at the time he conducted the calibrations noted."

To be accurate, the Certificates provide evidence that the calibration was *checked* by T.S. James, and found to be within recommended limits. Given that the Certificates exist as signed by an ASD Calibrator, they serve to provide evidence on the reliability of the ASD on the date that the officer used them to analyze samples of your breath. This is required by the legislation, section 215.47(e) calls for "information relating to the calibration of the approved screening device." The legislation

does not require an officer to forward the items listed above; I am satisfied these Certificates as provided by the officer fulfill that duty as required by the legislation.

Cst. Sorg 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.

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

You provided that you were "out of balance" due to s.22 at the time of your interaction with the officer. You "had not had any alcohol to produce any result, let alone a failure on the ASD units." The officer's evidence confirms this, with your statement to him: "I didn't have anything to drink."

You have provided a note from your doctor which you state confirms you having s.22 the note from your doctor notes s.22 I infer this is synonymous for s.22 The note, while recently dated and attached to your sworn affidavit, does not provide detail on the impact this would have on an ASD, nor speculate how this could account for "FAIL" results. There is no evidence either from the officer or from yourself in your affidavit that you stated your condition s.22 at the time of the incident.

The 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 condition s.22 however. I attach more weight to the officer's evidence in the IRP. I accept as fact 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 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. John E. Bethell
fax: 250-437-0342

October 23, 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 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 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 *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

In your application for review, you only checked the boxes next to “The result of the ASD is not reliable” and “The ASD registered a WARN, but my blood alcohol content was less than 0.05 (50 milligrams of alcohol in 100 millilitres of blood)”. For your benefit, I have considered all of the grounds available to you in this review that relate to the reason for which you were prohibited.

Records at this office confirm that you received full disclosure of the documents before me prior to your scheduled hearing. I have proceeded with this 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" 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 "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 *Motor Vehicle 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 02:13 hours on August 2, 2013. This is corroborated in your submission.

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 "Warn"?

In the Report, the officer indicated that you provided two ASD "WARN" results; one at 02:15 hours and one at 02:16 hours.

As there is no evidence to the contrary, I am satisfied that the ASD registered a "WARN".

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 02:16 hours. The officer also indicated that when asked if you understood, you answered "yes" and nodded your head.

As 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?

In the Report, the officer indicated that a second analysis was conducted at 02:16 hours.

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 02:15 hours on ASD serial number 045233 and the second analysis was conducted at 02:16 hours on ASD serial number 076918.

As I have 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 "WARN" readings.

As there is no evidence to the contrary and the lowest analysis was a "WARN", 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 July 25, 2013, he checked the calibration of ASD serial number 045233 and found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 22, 2013, and the service expiry date as February 12, 2014.

For the second ASD, the qualified ASD calibrator certified that on July 25, 2013, he checked the calibration of ASD serial number 076918 and found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 22, 2013, and the service expiry date as February 12, 2014.

I also have before me the solemnly affirmed Report of Cst. Schafer which states that any ASD tests referred to in the Report were conducted by 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 50 mg% even though the ASD registered a “Warn”?

In the Narrative, the officer stated that you had a slight slurring of words, that a strong odor of liquor could be smelled from the vehicle, and that you admitted consuming a “couple” of drinks 2 hours prior. In the Report, the officer specifically noted an odor of liquor on your breath. In the Report and the Narrative, the officer recorded your response to the question, time of your last drink, as “2 hours ago”.

In your submission, you state that the strong odor of liquor coming from the car was being emitted from your friend and admit to consuming only one beer between 12:05 am and 2:05 am. You submit that you had “only one drink over the course of the night” and that you advised the officer that you had “a drink over the span of two hours”. You believe that “there must be an error with the machine” as there is no way that your BAC was over 0.05.

With regards to your stated drinking pattern, I find it curious that your friend would request that you drive his or her vehicle for the express purpose of being a designated driver but purchase alcohol for you to consume 2 hours after arriving at the bar. I also do not find it credible that you told the officer you had “a drink over the span of two hours”. In both the Report and the Narrative the officer stated that you admitted to consuming a “couple” of drinks “2 hours ago” and I note that you did not dispute saying this to the officer in your submission. Likewise I do not find it credible that the officer would not have ascertained further information regarding the time of your last drink if you had answered the question in the manner you claim.

With regards to the order of events, I do not find it credible that an officer who is a qualified ASD operator conducting a roadblock to check driver sobriety, would not inquire as to the time of your last drink or amount of alcohol consumed until after the first ASD test was conducted. The Report indicates that at 02:14 hours, as the result of an odor of liquor on your breath and an admission of consumption, the officer formed a reasonable suspicion that you had been operating or in care or control of a motor vehicle with alcohol in your body. The Report shows that this reasonable suspicion was formed prior to your first analysis at 02:15 hours. The officer’s Narrative substantiates this order of events.

Having carefully considered the evidence before me, I am inclined to believe the officer’s version of events. I am persuaded by the consistency of the officer’s evidence and his use of quotations to capture your exact words with regards to your drinking pattern. While I acknowledge your submission; I am also mindful that you provided two samples of breath into two different ASDs which both resulted in “WARN” readings. Section 215.41(2) of the Act indicates that a “WARN” result on an ASD indicates that the concentration of alcohol in a person’s blood is not less than 50mg%.

Having found the officers account of the events more credible than your own and the ASDs reliable, I am satisfied that when the ASDs registered “WARN” readings, 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 August 02, 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 23, 2013

s.22

AMMENDED

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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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 the hearing, Ms. Lee stated that the credibility of Cst. Shaeffer's evidence is an issue because he amended the Report to Superintendent (the "Report"), without re-swearing it. Ms.

Lee submitted that there are two copies of the Report in the officer's evidence. In the first, the officer does not put his name on Line 3, and indicates that there are a total of 7 pages within his sworn Report. In the second, the officer writes his name in Line 3, and changes the number of pages from 7 to twelve. Ms. Lee submitted that these further five pages did not form part of the officer's sworn Report when it was signed by the Commissioner for taking affidavits, and the officer did not re-swear the document to indicate that the additional five pages were sworn. Ms. Lee stated that as such, the additional documents submitted along with the revised Report are not properly sworn. Ms. Lee stated that the officer is qualified as a Commissioner for taking affidavits, and as such, he should be aware of the proper processes involved in providing sworn evidence. Ms. Lee further submitted that the officer did not originally submit the Narrative, and it was only after a request was sent from this office, that he provided the Narrative along with the revised Report. Ms. Lee stated that this renders the officer's evidence to be highly suspect, and at the very least, decreases the officer's credibility. Ms. Lee also referenced *Murray v. Superintendent of Motor Vehicles* to confirm the importance of the Report being properly sworn.

I have reviewed the evidence before me, and I concur that the officer has provided two copies of the Report, with the alterations noted above. I note that both copies bear the officer's signature, and the signature of a commissioner for taking affidavits, therefore, I do not find that *Murray* is applicable to your situation, and I am satisfied that the Report is properly before me. With regard to the second copy of the Report, I concur with Ms. Lee, and I will apply less weight to the Narrative as a result.

Ms. Lee also submitted a copy of *Wilson v Superintendent of Motor Vehicles* and stated that there is no evidence that your ability to drive was affected by alcohol. Ms. Lee further submitted that the indicia of impairment observed by the officer can be easily explained by other factors, such as the time of day, fighting a chest cold, etc.

Ms. Lee also provided *R v Andree* to state that the officer must have subjective belief that your ability to drive is affected by alcohol. Ms. Lee states that in *Andree* the court found that red, watery eyes and an odour of liquor were insufficient grounds when viewed objectively.

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 *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 officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 0343 hours on August 11, 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 evidence you state that you were driving for about ten minutes when you crossed the Lions Gate Bridge and encountered a roadblock.

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 officer indicates in the Report that you provided two samples of your breath, at 0344 hours and 0357 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 0357 hours.

In your evidence you state, "Constable Shafer explained that I had the option of taking 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 0357 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 101500 and your second sample of breath into ASD serial number 073141. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101500 and 073141.

In your evidence you state, "Constable Shafer returned to my vehicle. He had a different machine with him. I exited my vehicle in order to take 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?

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?

For the first ASD, the qualified ASD calibrator certified that on July 25, 2013, he checked the calibration of ASD serial number 101500. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 22, 2013, and the service expiry date as December 12, 2013.

For the second ASD, the qualified ASD calibrator certified that on July 25, 2013, he checked the calibration of ASD serial number 073141. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as August 22, 2013, and the service expiry date as December 12, 2013.

I have no evidence before me to the contrary.

I am satisfied that the ASD was reliable.

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

As stated earlier, where there is a contradiction between your version of events, and that of the officer, I have given less weight to the evidence contained in the officer's Narrative.

In your affidavit you state that you consumed two and a half glasses of white wine, and finished your last drink around 12:30am. This is consistent with the officer's Narrative, in which he notes that you admitted to consuming two glasses of wine three hours prior.

In your affidavit you state that before you began to drive, at approximately 3:30am, you took two puffs from your s.22 You also state that after the first test, the officer informed you that he would need to get another machine, and informed you to wait in your vehicle. You state that as you waited, your anxiety about your situation grew. You state that you took two more puffs from your inhaler and used a Listerine breath strip to eliminate the taste of the inhaler. You state that within ten minutes of using the inhaler you provided your second sample of breath.

I note that in the Narrative the officer states, "Driver repeatedly stated how scared she was to blow a "FAIL". You do not refute this statement in your evidence. In your affidavit you state, "If I had known that the time I used my inhaler was important to obtaining a reliable reading, I would have told Constable Shafer that I had just used it." It is clear from the evidence that your concern about providing a "FAIL" sample was based upon the alcohol you consumed earlier as

you were unaware of the effect of the inhaler. I find it odd that the officer would note this when you also state in your affidavit, "I did not feel impaired by alcohol and I knew I was not over the limit."

There are a number of aspects of your version of events which I find to be odd. First, I note that the officer states that he was conducting a road block specifically to check the sobriety of drivers. I do not find it likely that the officer would not have access to a second ASD if this was the case. Further, I do not find it likely that the officer would leave you unattended during the course of the investigation. Finally, you submit that you were using the inhaler to assist with a chest cold. I do not understand how the anxiety about your situation would aggravate your chest cold and require a second use of your inhaler.

You have provided a photocopy of your inhaler, as well as a printout which states, "A metered dose from s.22 Inhalation Aerosol delivers 0.0054 milliliters of ethanol per puff which is subject to evaporation as the aerosol expands and is diluted in body fluids as it expands."

You have also provided a report from N.K. Shajani, an alcohol expert, who states, "A false "FAIL" can result on an ASD, if there was mouth alcohol due to recent consumption or use of product containing alcohol, burping, belching, or regurgitation, and a fifteen minute waiting period was not observed prior to the test."

I find that Mr. Shajani's Report lacks sufficient detail to be compelling evidence. Mr. Shajani lists the times you used the inhaler and the corresponding ASD analyses, but does not mention the wine you consumed earlier in the evening. Despite the detailed information available regarding the ethanol content of your inhaler, Mr. Shajani's statement regarding, "products containing alcohol" provides no specific information regarding your situation. Mr. Shajani states, "It should be pointed out that since the ASD collects and analysis 1 ml of breath sample, minute quantity of mouth alcohol can produce a false FAIL on the ASD," but Mr. Shajani makes no claims regarding whether or not 0.0054 milliliters would constitute a minute quantity. I also note that the product information you provided states that the ethanol in your inhaler is subject to evaporation, and is diluted in body fluids as it expands. I do not find that this indicates that it would have been present, even in minute quantities, at the time of the analyses.

Having reviewed the evidence before me, I do not find your evidence that the use of your inhaler caused a false "FAIL" on the ASD to be compelling.

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 11, 2013. Your review was extended on August 28, 2013, and was re-extended on September 25, 2013. You have already served 16 days of your IRP and you have 74 days remaining. Your Prohibition ends on **January 6, 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.

Adjudicator

cc: Kyla Lee
fax: 604 685-8308

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);
- 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 you and your lawyer, Mitch Foster. I proceeded with this review based on that confirmation.

A representative of this office faxed disclosure documents to Mitch Foster on October 17, 2013. The fax cover sheet indicated that any written submissions must be received in this office by the time scheduled for the hearing, which was October 25, 2013 at 9:30 am. We did not receive any submissions from you or your lawyer, so I will base the review on the evidence before me at this time.

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 Harrington indicated that he witnessed you driving or in care or control of the 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, Constable Harrington 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 0250 and 0257 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 Harrington 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 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 24, 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.

At the beginning of the hearing, your lawyer Vince Michaels, 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

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.

^{s.15}
Adjudicator

cc: Vince Michaels
By fax to 604-270-3787

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* (the “Act”) requires me to confirm your prohibition, along with 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, 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 made an argument 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.

In your affidavit, you commented on the officer's reason for pulling you over and his reference to you not exhaling in his direction. These matters 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 "RTS"), Constable Gibbons indicated that he witnessed you driving or in care or control of the vehicle at 0058 hours, on October 10, 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 Gibbons 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 0100 and 0108 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 Gibbons 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?

Ms. Lee argued that the officer's evidence of the serial number of the first ASD he used is internally inconsistent, so we cannot be satisfied that the device used was reliable. I disagree with your lawyer. In the RTS, Constable Gibbons stated that the ASDs he used in the investigation had serial numbers: 101479 and 024941. After hearing her submissions, I infer that she must have interpreted the officer's handwriting to indicate that the first ASD is "101477". I note that the "9" in the first serial number is similar to the "9" in the second serial number, and both are slightly different from the officer's "7" in the first serial number and elsewhere on the RTS. I am satisfied on a balance of probabilities that the serial number of the first ASD in the RTS is "101479", which is consistent with serial number in the Narrative and the Certificate.

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 you parked the vehicle at the Good Choice restaurant where you met a friend who drove you downtown. You said you went downtown for dinner and then to Kamei Royale for drinks. You did not say how much you consumed with dinner, but you said you had

been drinking wine earlier in the evening. You said you stayed at Kamei for some time with your friends, and the last thing you ordered there was beer.

You said when it was time to leave you paid your bill and quickly finished the last gulp of beer in your glass. You indicated that you immediately left the restaurant and went to your friend's car. Your friend drove you back to your vehicle at the Good Choice restaurant. Once there, you entered the vehicle and drove onto the lanes near Fraser Street. You said you were driving for less than a minute before you noticed a police vehicle following you. The police activated the lights and pulled you over.

You said when the officer asked you if you had anything to drink that night you told him you had just finished a glass of wine. You said you did not deny consuming alcohol, as Constable Gibbons indicated. You acknowledged that your statement about the wine was inaccurate, because you had just finished your beer, not wine. You attributed this error to the fact that you were nervous because of the police scrutiny.

You said you understood that the officer was asking you to blow into a roadside breathalyzer (or ASD), and that the device registered a "FAIL" upon analyzing your breath sample. You said you were shocked by this result and when Constable Gibbons explained the consequences of the "FAIL", you asked for a second test. You said you blew into the second device and you saw that again, your breath sample registered "FAIL".

You said you have considered the events of the evening and have learned about the effects of residual mouth alcohol. You said you are certain that your last drink was less than fifteen minutes from the time you blew into the first ASD. You noticed that in the RTS, the officer said you told him your last drink was at 0045 hours, which is exactly fifteen minutes before the first test result. You insisted that the officer did not ask you the time of your last drink and you said you did not tell him was at 0045 hours.

Your lawyer argued that based on the *Spencer* and *Scott* cases, I cannot assume the police evidence is correct. I agree with Ms. Lee in this regard; I believe a peace officer is just as likely to be careless or negligent when recording evidence as anyone else. I note the inconsistency between the officer's evidence in the RTS and the Narrative. In the latter, he did not address the time of your last drink. This inconsistency, and the fact that 0045 hours happens to be exactly 15 minutes prior to the first ASD test causes me to question the reliability of this aspect of the officer's evidence.

However, parts of your evidence raise questions in my mind, as well. You said you learned about the effects of residual mouth alcohol and you are "certain" that your last drink was within 15 minutes of the first ASD test. However, you did not explain why you are so certain of this. You said you travelled from the Kamei restaurant in downtown Vancouver to the vehicle, which was parked at the Good Choice restaurant. You did not say when you left the Kamei restaurant or how long it took to travel this distance. I infer from your evidence that there was no reason for you to pay attention to the time or how long it took, until you learned about the effects of mouth alcohol. Based on all the evidence before me, I am not persuaded to accept that it took

less than 15 minutes for all of the following to happen:

- drink your last gulp of beer,
- leave the restaurant,
- enter your friend's vehicle,
- travel from downtown to the Good Choice restaurant,
- say good-bye to your friend,
- get into the vehicle,
- pulled out into the lanes near Fraser Street, until you were pulled over,
- wait for the officer to approach the vehicle,
- provide your driver's licence and registration when asked,
- wait for the officer to examine your driver's licence and registration,
- respond to the officer's questions and the ASD demand,
- exit the vehicle, and
- blow into the device.

Based on all the evidence before me, I am not satisfied on a balance of probabilities that mouth alcohol affected the ASD test results.

Your lawyer submitted three decisions of other adjudicators in this office. She argued that I should consider these decisions as precedents to follow in your case. In the first decision dated February 18, 2013, the officer did not ask the driver the time of his last drink. However, contrary to your situation, the adjudicator in that case found there to be evidence that the driver had consumed liquor "seconds before being stopped." As a result, I find this decision distinguishable from your situation.

In the decisions dated March 7, 2013 and May 9, 2013, the reliability of the first ASD was in question, so effectively, the applicants were not afforded the right to a second test. In your case, I am satisfied that both ASDs were reliable. Accordingly, these decisions are also distinguishable from your situation.

You did not provide any persuasive evidence that has caused 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 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

s.22

IRP Review Decision
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driving record. A further prohibition may be imposed.

s.15

Adjudicator

cc. Kyla Lee
604-685-8308 (fax)

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

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

A representative of this office faxed disclosure documents to Kris Pechet on October 23, 2013, and the fax cover sheet indicated that any written submissions must be received in this office by the time scheduled for the hearing, which was October 29, 2013, at 9:30 a.m. We did not

receive any submissions from you or your lawyer, so I will base the review on the evidence before me at this time.

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 Riddall indicated that he witnessed you driving or in care or control of the vehicle at 0108 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 Riddall 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 0109 and 0135 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 Riddall 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 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.

cc. Kris Pechet
604 519-6071 (fax)

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);
- 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 your lawyer, Richard Hewson, was provided with full disclosure of the documents before me. I have proceeded 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

There is one issue that is determinative of my decision in this review.

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

After reviewing all of the evidence before me, I cannot be satisfied that you failed or refused to comply with the officer's ASD demand for sample.

Decision

I therefore revoke your driving prohibition and monetary penalty as required by section 215.5(4) of the Act. As a result, the prohibition has been removed from your driving record and you may resume driving once you have obtained a driver's licence.

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

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

The corresponding vehicle impoundment is also revoked. If you have not already done so, you may go directly to the location where your vehicle is impounded for the immediate release of your vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including September 30, 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

cc. Richard Hewson
fax: [250] 558-9935

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);
- 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.

Prior to the hearing, your lawyer, Jamie Butler faxed a letter dated October 18, 2013, to Appeal Registry to advise that he would not be representing you with this matter.

At the beginning of the hearing you confirmed that he had all of the documents. In reaching my decision I have considered all of the relevant information available to me.

During the hearing you stated that without a driver’s licence you will lose your job.

I acknowledge and appreciate your situation. However, under the Act I am not authorized to consider personal circumstances, or employment in this review. 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 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 0240 hours on October 6, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that he responded to a complaint of an impaired driver. He stated that he later determined that this stop was unrelated to the initial complaint.

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 Narrative the officer indicated that you provided a "FAIL" result at 0245 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?

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 stated that you declined the second test. As a result, the officer was not required to provide you with a second analysis.

Was the second analysis performed on a different ASD?

As noted, the officer was not required to provide you with a second analysis.

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

The officer recorded your only result 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.

Was the ASD reliable?

The qualified ASD calibrator certified that on September 12, 2013, he checked the calibration of ASD serial number 061466. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 10, 2013, and the service expiry date as October 30, 2013.

The officer's evidence in the Report is that the ASD test was conducted by a qualified ASD operator and that the ASD unit was functioning correctly.

Based on the evidence before me, I am satisfied that the ASD was 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 your speech was slurred, you walked with an exaggerated gait, and your eyes were very glossy. When asked the time of your last drink, you responded "20-30 minutes slammed a beer at a party".

Your evidence is that on October 6, 2013, you drove to Kitimat for a hockey game after work. You and your girlfriend got a hotel room for after the game. You stated that your girlfriend went to a party after the game and you went to the room to sleep. At approximately 2:00-2:30 a.m. your girlfriend phoned you for a ride. You went to the party for 20-30 minutes and just before leaving a friend of yours asked you to "slam" a beer with him as it was his birthday. After the beer you stated that you immediately left and within minutes after you were dropping off your friends at a nearby hotel you were approached by the officer.

You stated that that 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 stated that the officer misunderstood you with regard to when you had your last drink. You stated that you actually told him you were at the party for 20-30 minutes and you had "just" slammed a beer. You stated that you did not have slurred speech, the officer has no idea how you ordinarily speak, and you were not impaired by alcohol. You stated that if your eyes were glossy it was because you had just woken up.

You said that if the officer offered you a blood test you probably would have complied. I know of no requirement under the Act for an officer to provide a driver with a blood test when a breath sample has been provided on a roadside screening device.

While you admitted that you did not know about the effects of mouth alcohol this question and your response is vital part to the officer's investigation. The officer asked this question to establish whether or not to wait 15 minutes prior to taking a sample. 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. I am not persuaded that the officer misunderstood your response.

I have also considered your explanations for the indicia the officer observed when he stopped you and I find your symptoms are more consistent with someone who has consumed more than one beer.

With these considerations in mind, I am satisfied that your last drink was more likely 20-30 minutes before you were stopped as you advised the officer and not within minutes of providing your breath sample to the officer. 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 the ASD result accurately measured your BAC and that the result can be relied on when reaching my decision in this review.

In considering the evidence before me, I find you did not provide any compelling evidence that would cause me to doubt the "FAIL" reading on the ASD, which 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%. 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 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

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);
- 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 indicate three grounds for review. All grounds for review that apply to your case will be considered in this review.

In your written submission dated September 16, 2013 (the "Submission"), you describe yourself as a smart, level headed young woman who, "knows better than to drink and drive." Moreover, you assert that you know you were not drunk that night. The issue before me is not whether you were intoxicated, rather the issue I must decide is whether the ASD registered a "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 sworn Report to Superintendent (the "RTS"), the investigating officer, Cst. Bouwman, indicates that you were driving or in care or control of a motor vehicle at 2235 hours on September 7, 2013. Further, in the police narrative (the "Narrative"), Cst. Bouwman submits while driving south on the Island Highway in Campbell River he observed a vehicle, with four occupants, go over the double solid centre line and weave in its lane. He initiated a traffic stop, observed you as the driver, and confirmed your identity with a valid s.22 driver's licence.

In your Submission, you indicate that on the night of September 9, 2013 you were asked to drive friends home from a wedding. You assert that you were extremely confident in your ability to drive and are positive that you did not cross the centre line.

On the Notice, Cst. Bouwman indicates that your prohibition was served on September 7, 2013. Further, I note that in a signed submission dated September 10, 2013, you indicate that your Alberta driver's licence was seized by, "Campbell River RCMP effective September 7, 2013." I also note that the fax banner atop Cst. Bouwman's eight page disclosure appears as, "09/08/2013 04:06 FAX 250 286 3983 R.C.M.P. C. RIVER IRP ADP & VI". I feel a reasonable inference can be made that following the service of the Notice on September 7, 2013, at 2320 hours, the related IRP paperwork was completed and faxed from the Campbell River R.C.M.P. on September 8, 2013 at 0406 hours. Therefore, I am satisfied that the date noted in your Submission is a clerical error. I have proceeded with this review accepting that your prohibition was served on September 7, 2013, not September 9, 2013 as indicated in your Submission. Further, I acknowledge your assertion that you did not cross over the centre line; however, the reason why Cst. Bouwman conducted a traffic stop is not vital in making a decision in this review.

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 2236 hours, Cst. Bouwman made an ASD demand on you. At 2237 hours you provided a breath sample for analysis on ASD serial number 051209. The test result was a "FAIL". Further, at 2245 hours you provided a second breath sample for analysis on ASD serial number 051210. The test result was a "FAIL".

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. Bouwman submits that at 2244 hours he advised you of your right to 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.

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?

Police evidence indicates that you requested a second ASD test and that at 2245 hours you provided a sample for analysis. The test result was a "FAIL" and you were shown the result by Cst. Bouwman.

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. Bouwman indicates that two distinct ASDs were used to conduct your breath tests. Evidence indicates that ASD serial number 051209, with a temperature of 23 degrees Celsius and ASD serial number 051210, with a temperature of 26 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.

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, Narrative, and your Submission indicates that both ASD test results were a "FAIL". The lowest analysis 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 Certificates of a Qualified ASD Calibrator is as follows:

- ASD serial number 051209 was checked for calibration on August 28, 2013, with a service expiry date of June 18, 2014, and calibration expiry date of September 25, 2013;
- Qualified ASD Calibrator, Cst. Mark Roger Blacklock, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly;
- ASD serial number 051210 was checked for calibration on August 28, 2013, with a service expiry date of July 18, 2014, and calibration expiry date of September 25, 2013, and;
- Qualified ASD Calibrator, Cst. Mark Roger Blacklock, signed the Certificate indicating the ASD was found to be within the recommended limits and functioning correctly.

You submit that you blew into the first ASD for approximately ten seconds before it clicked off and registered a "FAIL". You indicate that you do alcohol testing as a requirement for your job and that you are certain the ASDs should have clicked off sooner and perhaps were not properly calibrated. On this point, you indicate that when you asked Cst. Bouwman he did not tell you what you blew and when the machine was last calibrated.

You state that you do alcohol testing as a requirement of employment, however, you do not articulate if this testing is conducted using an Alco-Sensor IV DWF. You also suggest that perhaps the ASDs were not properly calibrated. I have no persuasive evidence before me that the ASD calibrations were not valid. Certificates of a Qualified ASD Calibrator were disclosed for each of the two devices used in your investigation. Aforementioned, Cst. Blacklock confirmed that the service and calibration expiry dates for both ASDs were valid.

Further, the RTS is sworn and signed by a Commissioner for taking affidavits, as well as Cst. Bouwman. 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. As a qualified ASD operator, Cst. Bouwman is trained to understand the functionality of an ASD. I have no evidence before me that explicitly states that the ASDs were not functioning correctly, particularly when you were providing a sample of breath into each device. You submit that it took approximately ten seconds for the first ASD to register a "FAIL" and that you are certain it should have clicked off sooner. You do not provide evidence as to how long you blew into the second device before it registered a "FAIL". I have no evidence before me that indicates an ASD is supposed to "click off" in a certain amount of time nor that an ASD's reliability should be questioned if it takes ten seconds or more for a reading to register.

I also acknowledge your submission that Cst. Bouwman did not advise you what you blew, however, evidence in the RTS and Narrative indicates that you were shown both ASD "FAIL" results. Further, a peace officer is not required to show a driver the results of an ASD test.

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 the RTS, Cst. Bouwman indicates that at 2236 hours he 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. Bouwman submits that upon approaching the vehicle he noted a strong odour of liquor coming from the vehicle and asked if you had had anything to drink. You responded, "no." After confirming your licence was valid, Cst. Bouwman returned your licence. When you said thank you, he noted a smell of liquor on your breath. He advised you that he detected the smell of liquor on your breath but that there was a very strong odour coming from the vehicle. Accordingly, Cst. Bouwman asked you to exit the vehicle to isolate the smell. Once outside, he submits that he asked you again how much you had had to drink and that you stated you had had, "1.5 glasses of wine about an hour before driving."

In your Submission, you indicate that you agreed to drive friends home from a wedding because you had only had a glass of wine that you finished shortly before 9:20 pm. You assert that you were confident you were more than capable of operating a vehicle and that, "one glass of wine would not cause [you] to blow over the legal limit."

The times you provide in your Submission do not correspond with the times provided by Cst. Bouwman. Specifically, you indicate that your last drink was shortly before 9:20 pm and that you were stopped by Cst. Bouwman at 9:35 pm. Police evidence indicates that you were observed driving at 2235 hours (10:35 pm). Cst. Bouwman also indicates in the RTS that your time of last drink was one hour before driving. You do not refute this evidence. Accordingly, I am satisfied that you mistakenly indicated the vehicle was stopped at 9:35 pm, when you intended to write 10:35 pm. This is the conclusion I draw from the evidence before me.

I note that Cst. Bouwman submits you advised him you had consumed 1.5 glasses of wine about an hour before driving. However, in your Submission you assert that, "one glass of wine", would not cause you to blow over the legal limit. The amount of liquor you claimed to have consumed in your Submission does not correlate with the amount you advised Cst. Bouwman you had consumed. This causes me to question the credibility of your drinking pattern that evening. 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 you admitted consumption. Further, I have already determined that 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 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.

October 17, 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.

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 indicate that your last name is spelled incorrectly on the Report to Superintendent (the “RTS”). While I acknowledge your submission, I note that throughout the officer’s evidence your last name is spelled correctly. Therefore, I conclude that this was 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 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. Jodoin, indicated that you were driving or in care or control of a motor vehicle at 2229 hours on September 28, 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. Jodoin indicated that the ASD registered a “FAIL” at 2233 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, Cst. Jodoin 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, Cst. Jodoin indicated that he provided you with a second analysis. In section 8 of the RTS, under “RESULT” he indicated, “REQUEST WITHDRAWN”. Accordingly, in the Narrative

Text Hardcopy (the "Narrative"), Cst. Jodoin indicates that you agreed to take the second test, however, when the ASD was presented to you that you tried to grab it. He pulled it away and advised you that he would hold on to the device. When the ASD was presented again, Cst. Jodoin indicates that you would not supply a sample of breath and you stated that he took the device away so you could not supply a second sample.

In your Submission, you assert that you were not offered a proper second test. You indicate that when Cst. Jodoin held the device that your hand instinctively rose to hold it. However, that you did not attempt to remove the device from his hand, pull it away or say anything to imply that you were not willing to comply. You write that Cst. Jodoin told you that you were, "not complying; however, [were] not refusing." After the device was taken away, you were asked a number of questions and then served with the notice of driving prohibition and notice of impoundment.

The evidence before me is that the ASD was initially removed by Cst. Jodoin because you attempted to handle it. While I acknowledge your evidence that your hand instinctively rose to hold the device, police evidence indicates that after the ASD was removed, Cst. Jodoin advised you that he would hold it and presented you with the device a second time. Cst. Jodoin indicates that it was at this point that you would not supply a sample because the device had been taken away. However, the issue before me is not whether you complied with or refused the second test, I must make a finding if the second analysis was provided by Cst. Jodoin.

Under the Act, an officer is mandated to inform a person of their right to request a second ASD test. Once this right has been offered it is the person's choice to submit to a second test. The evidence before me indicates that you were presented with a second, different ASD and that you did not provide a sample of breath when the device was presented to you on two occasions. I have no evidence before me that you questioned why the ASD had been removed on either occasion or that you advised Cst. Jodoin that you wished to provide a sample after the device was removed the second time. On a balance of probabilities, I conclude that a second analysis was provided by Cst. Jodoin and that you chose not to provide a sample effectively withdrawing your request for a second test.

Based on the evidence before me, I am satisfied that a second analysis was provided by the officer and that the request was withdrawn.

Was the second analysis performed on a different ASD?

I have already made a finding that a second analysis was provided by the officer, however, that the request was withdrawn when you chose not to provide a sample.

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

Cst. Jodoin's evidence is that one ASD test was administered, the result of which 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 a Certificate of a Qualified ASD Calibrator in which Cst. G. Jodoin certified that the ASD was found to be within the recommended limits when he checked its calibration on September 28, 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"?

In the Narrative, Cst. Jodoin indicates that you were argumentative, confrontational, and would not answer some questions asked of you. Further, he detected an odour of liquor on your person and breath. When asked the time of your last drink, Cst. Jodoin indicates that you admitted to drinking a couple earlier and that your last drink was a while ago.

In your Submission, you write that when Cst. Jodoin asked you if you had had anything to drink that you responded, "no." Accordingly, you submit that your response is misconstrued in section 11 of the RTS where Cst. Jodoin wrote, "A while ago."

I acknowledge that your Submission and s.22 letter of support indicate that you replied, "no", when you were asked if you had had anything to drink. However, you do not refute Cst. Jodoin's evidence that an odour of liquor was detected on your breath and person. Further, I note that your response to Cst. Jodoin's query is indicated in quotations in both the RTS and Narrative, which leads me to conclude that these were your exact words.

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. As such, I am satisfied that your BAC was not less than 80 mg%. Moreover, I have already made a finding that a second analysis was provided by the officer and that the ASD used in your investigation was 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 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.

November 13, 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

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

In your IRP Application for Review you indicated five 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 an ASD test resulted in a “FAIL”. All grounds for review that apply to your case will be considered in this review.

During the hearing, you indicated that you have a really good [driving] abstract, have had no DUIs, and no seatbelt fines. Further, that you had a “24 hour” a long time ago but passed a cognitive test

IRP Review Decision

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that allowed you to get your licence back. While I acknowledge your submissions, I do not have authority to consider a person's driving record in this review.

You submit that you do not have a criminal record; however, an IRP is an administrative sanction and not a criminal process.

You emphasized that you asked the officer for a blood test but that he started getting "cranky" with you and said, "I'll cuff ya." The Act does not require a peace officer to provide a person with the opportunity to submit to a blood test in an IRP investigation.

You indicated that this prohibition is really worrisome for you. Specifically, that your life depends on your ability to drive and that there is no way that you would take a chance on your job and your life. You also wished to stress that you are a good, honest person that works hard. Further, you advised me that in the past when you felt that you were having an issue with alcohol that

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.

Referencing the two Certificates of a Qualified ASD Calibrator (the "Certificates"), you emphasized that you have no idea what the information recorded on these Certificates means. Accordingly, that due to the serious implications surrounding a 90-day prohibition, you feel that it should be made clear what the information on these Certificates is referring to. I have considered your submissions; however, the Certificates are documents created and provided by the RCMP. Therefore, any concerns that you have with respect to the Certificates must be made in writing directly 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 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 solemnly affirmed Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 2134 hours on October 26, 2013. Further, in the Narrative Text Hardcopy – Occurrence Report – 1 (the "Occurrence Report"), he indicates that a vehicle was observed leaving a licensed establishment without its lights on. A vehicle stop was initiated and you were observed as the lone occupant and confirmed as the registered owner of the vehicle.

You submit that you drove to a cold beer and wine store to purchase alcohol. However, that the officer was mistaken when he told you that he saw you coming from a dark alleyway, as you submit that you went around the building. You also indicate that you drive a s.22 that has automatic lights and as such, the officer could not have observed you driving without your lights on. Moreover, you indicated that the officer immediately pulled you over after you came out of the store; so quickly in fact that you did not have time to put your seatbelt on.

I acknowledge that your evidence and that of the officer's conflict, however the reason why you were stopped is not an issue I must consider in this review. Further, you do not refute driving when the officer stopped your vehicle.

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 2152 hours and 2200 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 100903 and 065856, 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?

You noted that the ASD service expiry dates are different on the two Certificates, yet that the ASD calibration expiry dates are the same. Accordingly, you questioned if this is an indication that the devices were somehow unreliable.

The ASD service expiry dates indicated on the two Certificates are, 2014-10-10, and 2014-04-19, respectively. Further, the calibration expiry date indicated on the Certificates is, 2013-11-23. I note that your prohibition was served on October 26, 2013, and as such, I am satisfied that the aforementioned dates are valid. Moreover, by signing the Certificates Cst. Gregory Jodoin certified that the ASDs were found to be within the recommended limits and that to the best of his knowledge the devices were functioning correctly when he checked their calibration on October 26, 2013. I note that this is the same day that your prohibition was served and thus, infer that the devices were very recently checked by a qualified ASD Calibrator (i.e. Cst. Jodoin). Moreover, I have no evidence before me that indicates the ASDs used for your tests were not 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 80 mg% even though the ASD registered a "FAIL"?

In the Occurrence Report, the officer indicates that you were very talkative, appeared clumsy, were slow and deliberate in your movements, and used your vehicle to steady yourself. When you were asked the time of your last drink, he indicates that you responded, "5 minutes." Accordingly, prior to the first ASD test being conducted the officer indicates that there was a delay of 13 minutes in order to allow for a minimum of 15 minutes between the time of your last drink (i.e. 2129 hours) and the time of the test (i.e. 2152 hours).

You indicate that you were at a residence five blocks away from where you were stopped when you left to go buy alcohol. When the officer stopped you, you submit that you told him that you had consumed one drink approximately five minutes before. On this point, you indicated that it was no wonder he could smell the alcohol on your breath and you questioned whether your recent drink may have still been in your lungs. Moreover, you questioned if a cough candy could have affected the test results.

I acknowledge your submission that due to your recent alcohol consumption that your drink may have still been in your lungs and somehow affected the 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. Aforementioned, police evidence indicates that the officer delayed your first test in order for a minimum of 15 minutes to pass from the time of your last drink. As such, I am satisfied that your ASD test results were not affected by mouth alcohol. Further, while you questioned if a cough candy could affect the test results, you did not provide me with any evidence that you had consumed a cough candy nor did you provide any evidence to support this query. Here, it is not sufficient to simply make suggestions about what might have happened without providing any supportive evidence.

You also submit that you were having a hard time breathing and that the officer did not allow much time between the first and second tests, even though you were coughing and "hacking". Specifically,

you explained that

s.22 Moreover, during the investigation the officer allowed you back into your vehicle to use your "puffer" and have a glass of water because you were feeling confined in the police vehicle which caused your breathing to suffer. You also submit that later the same evening you had to go to Emergency to use a nebulizer in order to address your shallow breathing. Accordingly, you emphasized that all of these factors prove that you were experiencing breathing problems that day. While I acknowledge your submissions, the evidence before me indicates that two "FAIL" results were obtained. As such, I am satisfied that your breathing difficulties did not interfere with your ability to provide a suitable sample of breath into the ASDs.

You indicated that due to an injury, s.22 As such, that you were leaning against your vehicle due to this injury, not because you were drunk. While I acknowledge your submission, how indicia observed by the officer can be attributed to factors independent of being under the influence of alcohol is not an issue I must consider in this review.

While you claim that it is impossible that you were over the legal limit because you do not drink and drive and that the officer could tell that you were not "loaded", you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs 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%.

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 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

September 24, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

In the hearing, Ms. Leamon stated that there is no specific evidence to indicate that your ability to drive was affected by alcohol. Ms. Leamon submitted that, based on the *Wilson v Superintendent of Motor Vehicles* decision, the officer must have reasonable grounds to believe that your ability to drive was affected by alcohol, in addition to the result of the ASD analysis. Ms. Leamon stated that you have provided a very reasonable explanation for your situation, and that none of the evidence indicates 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.

With regard to the photographic evidence you provided, the original photos in the file provided to me were indecipherable. I informed Ms. Leamon of this fact and she provided me with digital copies of the photos. One of the photographs did not transmit. I informed Ms. Leamon of the issue, but I never received another copy. I have continued 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 2319 hours on September 5, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that a witness phoned police to report a single vehicle accident where a vehicle had driven off the road into a swamp. The officer states that the driver admitted to police as being the driver and sole occupant of the vehicle, and was also identified as the

driver by a witness who maintained continuity until the police arrived. You were identified as the driver via your driver's licence.

In your affidavit you state that you had dinner at a restaurant and decided to drive yourself to your development site where you often stay in the show home when you are in town. You state that once you arrived at the gated community your remote control device would not open the gate so you could not gain access to the community. You state that you then remembered there is a back road that you could use to gain access to the community. You submit that the road is more of a path overgrown with weeds. You state that you slowly turned onto the road, misjudged its width, and your vehicle ended up off the track. You state that you were unable to move. You have attached a number of photographs and a map displaying where your truck was located. You state that you do not know how long you were stuck on the road, and as you had left your phone at home you could not call for help. You state that you continued to try to free your vehicle and eventually some people from a nearby hotel noticed your peril and came down to help you. One of these individuals contacted police. You state that some time after that the officer arrived on scene and approached your vehicle. When the officer asked what happened you explained your situation.

In the hearing, Ms. Leamon stated that the officer failed to determine an accurate time of driving or care or control. Ms. Leamon stated that 2319 hours is the time that the incident came to the officer's attention, and not the time that you were in care or control of the vehicle. Ms. Leamon stated that there is no reliable time of care or control and no way to know when you were the driver. 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.

With regard to the time of driving, the evidence before me indicates that the officer noted the time of driving or care or control to be 2319 hours. I note that your affidavit states that, "I do not know how long I was stuck on the construction road for." You also state, "some time thereafter, a police officer arrived on the scene." Your affidavit does not contain any specific times to cause me to question the evidence provided by the officer. The officer's Narrative states, "Witnessed (sic) phoned police to report a single vehicle accident where the subject vehicle went off-road right into a swamp." The officer further states, "The witness maintained continuity until police arrival." From this statement, I understand that the witness observed your vehicle to leave the roadway, and maintained visual continuity of you until the officer arrived. As you have not provided any details regarding your time line, I do not find that I have any evidence before me to cause me to question the time of driving or care or control provided by the officer.

I have studied the photographs provided and considered your reasons for pulling off the roadway; however, I do not find them to be relevant to the fact that you were a driver. You admitted to the officer at the time, and you state in your affidavit that you were a driver. I do not have any evidence before me to the contrary.

I have considered the decisions provided by Ms. Leamon; however, I do not find them to be relevant to your prohibition. I am satisfied that the time of driving is accurate.

I am satisfied that you were a driver within the meaning of section 215.41(1), of the Act, on September 5, 2013, at 2319 hours.

Did an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 2333 hours and 2336 hours, both resulting in "FAIL" readings.

In your affidavit you confirm that you provided two breath samples, 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 2334 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 2336 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 101101 and your second sample of breath into ASD serial number 101119. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101101 and 101119.

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 25, 2013, he checked the calibration of ASD serial number 101101. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 22, 2013, and the service expiry date as October 19, 2013.

For second ASD, the qualified ASD calibrator certified that on August 25, 2013, he checked the calibration of ASD serial number 101119. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as September 22, 2013, and the service expiry date as October 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 had two glasses of wine with dinner. In the officer's evidence he states that your response to the time of your last drink was, "at supper, around 5 o'clock." The officer indicates that your speech was, "very slow and deliberate, however slurred" and that your eyes were glassy. You submit that the officer has never seen or spoken to you before and it not aware of your regular speech or appearance. You deny the indicia indicated by the officer.

I acknowledge your denial of the indicia indicated by the officer, but as I have already found the ASDs used to be reliable, I do not find that I have any evidence before me to cause me to question the ASD results. You provided two samples of breath in two different ASD units which both returned "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 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 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* (the "Act") requires me to confirm your prohibition, along with 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 require your driver's license to get yourself to medical appointments which are out of town. While I understand and appreciate your situation, I am not authorized to consider hardship, personal circumstances, or transportation needs in this review. The scope of this review is limited to the grounds as defined by the Act.

In your submission you state that the officer had no reason to pull you over. You state that the officer told you that it was a random check. You state that you feel the matter should be dropped because you had done nothing wrong, and your ability to drive was perfect. I acknowledge your submission; however, the reasons for the traffic stop are beyond the scope of this review. I have considered all of 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 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 0055 hours on September 29, 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, both resulting 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 0101 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 0103 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 042065 and your second sample of breath into ASD serial number 042066. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 042065 and 042066.

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 21, 2013, he checked the calibration of ASD serial number 042065. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 19, 2013, and the service expiry date as March 20, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 21, 2013, he checked the calibration of ASD serial number 042066. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 19, 2013, and the service expiry date as June 21, 2014.

In your submission you state that there were no numbers given to you and you were only told that you had failed.

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 do not have any evidence before me to indicate that the results of the ASD analyses were not reliable.

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 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 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

You applied for this review on three grounds, one of which was not applicable to your situation because of the reason for which you were prohibited. For your benefit, I have considered all of the grounds available to you.

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

Mr. Butler submitted that the Report to Superintendent (the "Report") has not been sworn correctly. He said the Report does not indicate whether it was Sworn or Solemnly Affirmed and that there appears to be an underline mark under "solemnly affirmed" but it is ambiguous. Mr. Butler submitted the case of *Murray v. British Columbia (Superintendent of Motor Vehicles)* 2012 BCSC 1730 and argued that it is mandatory for the Report to be sworn.

In *Murray*, the Report was not sworn or solemnly affirmed by the officer before a commissioner whereas in this case, the words "solemnly affirmed" are underlined at paragraph 15 and there are two signatures, one signed on the line designated for the commissioner and the other signature on the line designated for the peace officer. In my view, it is a common sense inference that based on the underlined words, the officer "solemnly affirmed" the content of his Report. The case of *Tanner v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 2037 indicates that such defects would not render the Report inadmissible. The Report indicates that it was in fact sworn in British Columbia before a commissioner for taking affidavits. Therefore it is my finding that the Report is sworn and properly before me and I have proceeded with this review on that 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, the investigating officer reported that you were driving or in care or control of a motor vehicle at 03:42 hours on August 3, 2013. In the Narrative Text Hardcopy Occurrence Report (the "Narrative") the officer stated that while operating a clearly marked roadblock, he noticed a car make a quick right turn away from the roadblock and another quick right onto Cottrell Street. He said this maneuver is commonly done by impaired drivers trying to avoid the roadblock.

At approximately 03:42 hours, the officer stopped the vehicle he observed making the right turn at the roadblock. He said he waited for approximately 30 seconds while the female driver attempted to open the window to speak with him. The officer had to open the door to speak with the driver. You were identified as the driver by your BC driver's licence. The officer said that when asked why you made the turn, you told him you were trying to follow your friends. The officer noted that no other vehicle had driven that way for approximately ten minutes while he was located in that area.

You provided an explanation for your driving behavior. You said you were following a friend's car then lost sight of him. You said you did not notice the roadblock.

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 and the Narrative, the officer indicated that you provided breath samples into two ASDs and that both devices registered a "FAIL" result. There is no evidence before me to the contrary. I am satisfied that the ASDs registered "FAIL" at 03:43 and 03:44 hours, respectively.

Were you advised of your right to a second analysis?

In the Report and the Narrative, the officer indicated 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 analysis.

Was the second analysis provided by the officer 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 evidence provided by police in the Certificates of Qualified ASD Calibrator (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. 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"?

The officer stated that your breath smelled of liquor and your conversation was slow. He said when asked how much alcohol you consumed earlier that evening, you said you had one beer approximately one hour prior.

In your statement, you provided your drinking pattern. You said you consumed three alcoholic drinks, each consisting of one ounce of Grey Goose vodka mixed with cranberry juice between the hours of 11:30 pm and 1:15 am. You also drank a full can of Budweiser beer at your friend

s.22 condo between 1:45 am and 3:35 am. You said you recall cleaning up the beer cans and collecting them from the living room. You still had beer in your can and you finished it right before you placed it in the recycling box. You said the time on the stove was 3:35 am. You said you and your friends left the condo together in the elevator. You got into your car “at about 3:37 am to 3:38 am”.

You said that when the officer accused you of avoiding a roadblock, you became nervous. When asked if you had consumed any alcoholic drinks, you told the officer you had a beer, but you did not tell the officer about the other drinks. You said you did not tell the officer your last drink was one hour before as he reports; you said you told him your last drink was a half hour prior. You did not tell the officer that you had just finished the beer because you were nervous. You said you were nervous dealing with the police because you know that it is a serious issue to have alcohol and drive in BC.

Your friend, s.22 provided a statement in which she confirms that you looked after her s.22 and her condo while she was away. She stated that when she returned home, he s.22 was happy and that there were two beers in her fridge. As s.22 was not present on the night in question or a witness to the events, I do not find her statement to be relevant to the issues I must determine.

Additionally, your friend s.22 provided a statement in which he said that while at s.22 s.22 condo, you offered each of your guests a can of beer. He said he recalls “the girls shortly finished up their beer before we left s.22 place around 3:30 am as [his] girlfriend was getting tired”. I infer from s.22 statement that you all left the condo at or around 3:30 am, and that you and his girlfriend finished the last of your beer prior to that. This is inconsistent with your statement with regard to the time of your last drink and the time you left the condo. According to s.22 statement, you and your friends left the condo closer to 3:30, not between 3:37 and 3:38 am as you claimed.

Your friend s.22 provided a statement with details of the events that are somewhat similar to yours except that her statement is silent on the time at which you left the condo and the time at which you consumed your last drink. Consequently, I do not find, as Mr. Butler submitted, that your friends’ statements corroborate your version of the events on critical details.

Your admission to being untruthful with the officer draws the credibility of your evidence into question. The lack of corroborating evidence from your friends coupled with your untruthfulness, leads me to find that your evidence is not credible. Therefore, I do not believe that you consumed your last drink at 3:35 am. I prefer the officer’s evidence and I accept his evidence that you told him your last drink was one hour prior.

Mr. Butler submitted a report from Shajani Forensic Consulting Inc. and stated that Mr. Shajani’s expert opinion provides guidance regarding the inaccuracies that can occur in the use of ASDs as a result of mouth alcohol if a 15 minute waiting period is not observed by police prior to the provision of sampling into an ASD. He said in Mr. Shajani’s opinion, “proper procedure in obtaining reliable breath-test results mandates that a subject be observed for at least 15 minutes prior to any breath test.” He further stated, “a false FAIL can result on an Approved Screening

Device (ASD), if there was mouth alcohol due to recent consumption, burping, belching or regurgitation and a fifteen minute waiting period was not observed prior to the test”.

Mr. Butler submitted that the officer did not conduct the proper observation period as is mandated. He said that it is not appropriate for police officers to rely upon “ANY” statements regarding the time of any last drink to circumvent the “MANDATORY” 15 minute observation period that must be conducted prior to the two breath tests. Mr. Butler submitted that given human nature, people often lie to police when stopped about what they drank, when, and how much. He said it does not make sense to have police rely on such statements to circumvent proper and mandatory procedures.

I acknowledge Mr. Shajani’s expert opinion with respect to mouth alcohol, however with respect to the “mandatory” 15 minute waiting period Mr. Butler described, there is no authority before me stating that this procedure is required by all police in all circumstances. 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 what you reportedly told the officer, I can see no reason why the officer would have disbelieved your statement with respect to the time of your last drink. There is no evidence before me that the officer saw you leaving a drinking establishment, or that he observed you consuming alcohol, or that he found any open liquor in your vehicle. On this basis, I am satisfied that the officer had no reason to believe that you had consumed alcohol in the fifteen minutes preceding the time at which he stopped you. I am also satisfied that the officer turned his mind to the issue of mouth alcohol because the evidence confirms that he asked you the time of your last drink.

Additionally, Mr. Butler submitted that there is no evidence within the disclosure that the readings achieved were over 80 mg%, other than the officer’s evidence in the Narrative and the Report that the ASDs registered “FAIL”. Mr. Butler referred to section 215.41(2) of the Act which defines what “FAIL” means and stated that the officer never indicated in his reports what the actual numerical reading was. He argued that in order for an officer to succeed, he must show what the term “FAIL” means because without an explanation, the displayed result is meaningless. Mr. Butler further submitted that with the current state of law in BC, it now requires that:

- a) The ASD machine provide a digital numerical reading on the machine;
- b) The officer translate what a “FAIL” means;
- c) An amendment to the Act which would better define a “FAIL”; and
- d) An additional report to disclose how OSMV will interpret the digitally printed out “FAIL”.

Mr. Butler also referred to the “Superintendent’s Report on Approved Screening Devices”; however, given the case of *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, it is not evidence before me.

I acknowledge the whole of Mr. Butler’s submissions; however, the issue before me is “was your BAC less than 80 mg% even though the ASD registered a “FAIL”?”

Section 215.5(1) of the Act states that if, after considering an application for review under section 215.48, the superintendent is satisfied that the person was a driver, in respect of a 90-day driving prohibition resulting from a sample of breath for analysis by means of an approved screening

device and the approved screening device registering a "FAIL", the superintendent must confirm the driving prohibition.

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 milligrams of alcohol in 100 millilitres of blood (emphasis added). There is no authority before me stating that the officer must interpret for the superintendent what the actual BAC of the driver was at the relevant time or that the officer must provide evidence of such in his report. Consequently, the requirement is that after considering the evidence before me, I must be satisfied that your BAC was not less than 80 mg%.

Mr. Shajani's opinion with respect to your BAC at the time of the test is based on your reported drinking pattern. I have not found your evidence to be credible. As a result, I reject your stated drinking pattern.

There is no persuasive evidence before me that convinces me your BAC was lower at the time of the tests. As well, I have already made a finding that the ASDs used in your case were reliable at the time of your tests. 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 8, 2013. I note that as you have already served 19 days of the prohibition, you need only serve the remaining 71 days, which commences on November 1, 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

cc: Jamie Butler
by fax: 604-739-9888

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);
- 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 four 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.

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 told me you are a good driver and said this is why you submitted information about your s.22 I acknowledge your submission, but under the Act I am not authorized to consider a person's driving record in this review. I can consider only those grounds that are directly related to the issues outlined below.

You told me you were leaving for s.22 after the oral hearing, and that you anticipated being there until mid-December. You gave me the name and telephone number of your friend who said she will pick up the vehicle for you. I recommended that you provide her with your written authorization to pick up the vehicle in your absence. I will call your friend to advise her of the result of this review and tell her when the vehicle will be available for pick-up. She will have to pay the towing and storage charges owing when the vehicle is eligible for release.

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 Bech indicated that he witnessed you driving or in care or control of the vehicle at 0035 hours, on October 18, 2013. In the Narrative Text Hardcopy (the "Narrative"), the officer said he observed a vehicle you were later identified as driving, travelling north on Granville Street. He said the vehicle was indicating a left hand turn onto Smythe Street, but as the light turned green, it swerved into a curb lane and proceeded north on Granville into an unauthorized lane. Constable Bech said in the Narrative that the vehicle took some time to pull to the curb and the driver seemed to be confused.

In the oral hearing, you explained that you were following a yellow taxi when you heard the police siren behind you. This is why you erroneously entered the lane for authorized vehicles only. You also told me it was an unmarked police car, so it took you a few seconds to realize what was going on. You said this may be why the officer said you appeared to be confused.

A peace officer's reason for pulling you over is not directly relevant to the issues I must consider in this review. Your evidence is consistent with that of the officer regarding his having

witnessed you driving the vehicle at the time and date in question. 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 Bech said you provided breath samples into two ASDs and that the devices both registered "FAIL", as a result of the analyses. The officer indicated in the RTS that the ASD results occurred at 0043 and 0054 hours, respectively. As you noted in the oral hearing, the officer's evidence in the Narrative is that the second test result occurred at 0055 hours. I note this inconsistency between the two documents, but I also note that the officer wrote "approx 0055 hrs" [emphasis added] in the Narrative. You said it did not take as long as the officer indicated between being pulled over and providing a breath sample into the ASD. However, you did not indicate how much time did pass and why you were aware of this at the time.

You noted that Constable Bech referred to the ASDs by serial number in the RTS, but he used three-digit numbers in the Narrative. It is my understanding that police often use a three-digit as an asset or inventory number. The evidence in the RTS indicates that the two devices used by the officer in the investigation each registered a "FAIL" upon analyzing your breath sample. Each device has a serial number that corresponds to the same numbers in the Certificates. The Narrative provides a context for the IRP investigation. I find it is more likely than not that ASD serial number 101804 corresponds to ASD #208 and ASD serial number 028669 corresponds to ASD #108 in the Narrative.

Based on all the evidence before me, I am satisfied on a balance of probabilities that the ASDs registered "FAIL", as indicated in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS and the Narrative, Constable Bech 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.

In the oral hearing, you said you do not recall seeing Constable Bech take out another ASD for the second analysis. You said you saw him put a small case on the hood of the cruiser, from which he removed the device for the first analysis, but you do not remember if he replaced it with another case and another ASD for the second analysis. Given your uncertainty in this regard, in contrast to the officer's sworn evidence of having used two separate ASDs, I prefer the officer's evidence in this regards.

I am satisfied on a balance of probabilities 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.

You told me the officer left the ASD in a case on the hood of the vehicle, which would have been hot because of the engine. You suggested that this may have affected the reliability of the ASD. I understand your concern about the effect of the vehicle engine 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 suggestions in order to persuade an adjudicator to accept your argument. Evidence to support the suggestion is required in an administrative review. In contrast, the officer's evidence in the RTS is that the two ASDs used had internal temperatures of 17 degrees and 18 degrees Celsius, respectively, prior to analyzing your breath samples. Constable Bech also provided a disclosure document entitled "Technical Information on the Operation and Calibration of ASDs in British Columbia" (the "Technical Information on ASDs"). On the first page of this document, there is a paragraph with the heading: "ASD Operating Temperature". This section indicates that the type of ASD used here is designed to provide maximum accuracy when the internal unit temperature is between 10 and 40 degrees Celsius.

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"?

In the Narrative, Constable Bech said he detected a strong odour of liquor on your breath. He also said your eyes were red and glassy. When he asked you how much liquor you had consumed, he noted that you initially said nothing. After telling you he smelled alcohol on your

breath, the officer said you told him you had one glass of white wine while eating dinner with friends. He said you told him your last drink had been at 2300 hours.

In the oral hearing you told me you felt insulted when you read his comment about red and glassy eyes. You said you have been diagnosed ^{s.22} you said this causes you to have hyper-sensitivity and pain in your eyes. You said your eyes might appear red, even in the daytime. You said wearing makeup and the late hour when you were stopped could have worsened the redness of your eyes. You provided a sheet with lab test results that has an Excelleris Technologies logo on the top. I do not have the expertise to interpret the test results, but I accept your diagnosis, as described.

You told me that the officer's allegation that you had "glassy" eyes is a total exaggeration. You acknowledged that you initially denied having consumed alcohol, but then told him you had one glass of sweet wine with dessert. You said you were not "drunk" and you were talking normally. You could not believe that your breath samples registered "FAIL" on the ASDs. You said you were smoking an electronic cigarette in the vehicle, just as you were pulled over. You suggested that this might have been what the officer smelled. You told me the cigarette contains "glycol methyl something", but when you said this to the officers they just smiled at you. As noted above, it is not sufficient in an administrative review to make suggestions about what might have happened. There is no evidence before to support your suggestion that the electronic cigarette produced an odour similar to that of liquor on a person's breath or that it would affect the result of an ASD test.

You told me that prior to the police stop, you had dropped a friend off on Nelson near Smythe. After the friend left, you sprayed a substance into your mouth called Bach Rescue Remedy, which you use for fatigue and stress release. You included a note from a walk-in clinic indicating that you told the doctor you use this medication. The doctor's note and a copy of a label you provided indicate that this substance contains 27% alcohol. You argued that using this spray caused you to have alcohol in your mouth, which the ASDs misinterpreted as alcohol in your blood.

The Technical Information on ASDs that Constable Bech provided addresses the possibility of mouth alcohol under the heading "Breath Samples and the Last Drink". It states that breath samples should be taken at least 15 minutes after the last drink was consumed to allow for elimination of mouth alcohol. Mouth alcohol can cause falsely high breath test readings. While you did not have an alcoholic beverage shortly before the ASD tests, I infer that spraying the mouth with a substance containing alcohol could have a similar effect.

You did not say how much time passed between using the spray and being stopped by the police stop, but I infer from your evidence that it was not very long. However, even if you used the spray within 15 minutes of the first test, I find that it was reasonable of Constable Bech to administer the first ASD test without delay, based on what you told him about your last consumption of alcohol.

The officer reasonably relied on the results of the first test to inform you of your right to a second analysis. I also note that the officer had observed you swerving before you entered the lane for

authorized vehicles only, he detected a strong odour of liquor on your breath and you admitted to having consumed alcohol. These observations support the reasonableness of the officer relying on the result of the first ASD analysis.

The second test was taken 19 minutes after the time of driving, so it was undoubtedly more than 15 minutes after you sprayed your mouth with Bach Rescue Remedy.

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 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.

November 7, 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 (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

Mr. Carr provided principles from three 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;
- *Ssemaluulu*: submissions by counsel should be accorded full weight in review.

I am mindful of these principles and have applied them in conducting this review.

Mr. Carr makes submissions based on the officer’s initial contact with you, his discussion with you without initially separating you from your vehicle, and the formation of a ‘reasonable suspicion’ that you had alcohol in your body while operating a vehicle. He questions the accuracy of the officer’s inquiry as to the time of your last drink as a component of the reasonable suspicion, and the fact that he issued a demand from memory, which cannot satisfy the requirements of a proper ASD demand.

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, the reasonable suspicion as a component of the demand, and the validity of the officer’s demand, are not issues 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 -- Sgt. LeBlanc -- indicated that you were driving or in care or control of a vehicle at 2308 hours on August 9, 2013. Sgt. LeBlanc provides in the Synopsis that: he observed your vehicle approach a roadblock; you were identified as the driver with your BC driver’s license.

In the submissions prepared by your lawyer Mr. Carr, 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 2313 and 2322 hours. Mr. Carr does not directly call this evidence into question; he questions the reliability of the testing procedure and devices. I address his evidence and submissions on these points below.

I am satisfied that the ASDs registered “FAIL” results as they appear in the evidence of Sgt. LeBlanc.

Were you advised of your right to a second analysis?

In the Report, Sgt. LeBlanc 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 Synopsis, he notes specific details:

At 2319 hours, Sgt LeBlanc read to Gagnon the Right to Request a Second Test verbatim from a purple IRP informational card. This included an explanation that the second test would be conducted on a different ASD and that the lowest test would prevail. Gagnon requested a second ASD test.

Mr. Carr has submitted that you were not advised of this right to a second test in a timely manner. Specifically, he adds:

- Sgt. LeBlanc proceeded under the *Criminal Code* rather than the Act;
- the right of a driver to request a second test depends on when the officer provides that information;
- “at no time prior to being arrested” were you advised of your right to request a second test.

In the Synopsis, immediately prior to the passage quoted above, I note specific detail provided by Sgt. LeBlanc: “Sgt. LeBlanc told Gagnon that the criminal investigation had been suspended and that police would be proceeding by way of IRP.” I find this sufficient evidence to illustrate that he took the time to rule out whether he should proceed by way of *Criminal Code* in this incident. There is no evidence that you were arrested, and therefore no need for him to read your *Charter* rights or “police caution.”

I am satisfied that the evidence of Sgt. LeBlanc establishes the fact that an investigation was occurring at roadside; once that incidental investigation was concluded, he advised you of your right to a second test on a different ASD. There is no evidence that he proceeded outside the boundaries dictated by the Act.

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. In the Synopsis, after describing his reading of your right to a second analysis, he notes the time of 2322 hours and the result “being a second fail reading.”

Mr. Carr questions the evidence in the Synopsis on this point: he notes the same serial number for both tests at 2313 and 2322 hours: 101305.

Sgt. LeBlanc also provides other identifying numbers in the Synopsis for the ASDs: 9717 and 9713, in addition to two different serial numbers in the Report. He included Certificates of a Qualified ASD Calibrator (the "Certificates") for each of these devices. I find it more likely than not that a different ASD was used for each of the first and second tests.

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

Sgt. LeBlanc 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 the "Certificates for ASD serial numbers 101305 and 101301 which he used to test the samples of your breath. These Certificates form part of the sworn Report.

For the ASD 101305 (also identified by id IT 9717 on the Certificate), the qualified ASD Calibrator, E Wagg, certified that on July 17, 2013, he checked the calibration. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as August 14, 2013 and the service expiry date as October 1, 2013.

For the ASD 101301 (also identified by id IT 9713 on the Certificate), the qualified ASD Calibrator, K Whitbread, certified that on July 17, 2013, she checked the calibration. She found the ASD to be within the recommended limits. She recorded the ASD calibration expiry date as August 14, 2013 and the service expiry date as October 1, 2013.

Mr. Carr presents that you did not state "a glass of wine 20 minutes prior" to the officer at roadside. Rather, he provides on your behalf that you stated two glasses of wine, with dinner, five minutes prior to being stopped. By this evidence, he questions whether the officer truly considered the possibility of mouth alcohol, and therefore the results of the samples are not accurate "FAIL" results.

I note the officer presents in the Synopsis that you initially denied consumption: "When asked, s.22 said that he had not been drinking that evening." You then admitted to one glass of wine, then two. This is not addressed by Mr. Carr; I draw this out from the officer's evidence and attach weight to this statement against your submission on this point as presented by Mr. Carr. Also, I attach less weight to the possibility of "two glasses of wine with dinner five [5] minutes prior to being stopped" - it does not provide ample detail on the dinner, nor the time span of consumption that evening. I should think if you were relying on this evidence, more detail would be provided. As such, I attach little weight to this evidence, especially considering your initial denial of consumption to the officer at roadside.

I accept the officer's evidence as fact, and find that he had no reason to impose a waiting period to eliminate the possibility of mouth alcohol. Therefore, I am satisfied of the reliability of the sample obtained on each ASD.

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 17 days of your prohibition, you must serve the remaining 73 days which commences on November 8, 2013. Your prohibition ends at 23:59 hours on January 19, 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. Jeremy Carr
Carr Buchan & Company
fax: 250-388-7327

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

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 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?

Having reviewed the evidence before me, I agree with Ms. Lee that the officer has not provided sufficient evidence to indicate how he determined that you were a driver at 0445 hours.

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

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

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

s.15
Adjudicator

cc: Kyla Lee
fax: 604 685-8308

OCTOBER 24, 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;
- 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, Sarah E. Leamon. I have proceeded with this review based on that confirmation.

In her written submission, Ms. Leamon said that your rights pursuant to sections 8 and 10(b) of the *Canadian Charter of Rights and Freedoms* (the “Charter”) have been violated. Ms. Leamon attached copies of *R v. Suberu*, *R. v. Collins*, *R. v. Conway*, *R v. Grant*, and *Hunter v. Southam 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. In addition, 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 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 5, 2013, at 01:03 hours, Officer Zacher (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 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 is that a citizen called in regarding a possible impaired driver passed out in a "drive thru". When the officer engaged with you, he said he noted that your speech was somewhat slurred and you appeared uncoordinated. When the officer asked you "how much have you had to drink" you stated "no thanks, I'm good." You admitted to consuming "a couple" after the officer asked you a second time. The officer also noted an overpowering odour of liquor.

The officer said that at 01:05 hours, he read the ASD demand to you from the Charter card.

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 he waited for fifteen minutes to elapse before administering the first ASD test because he observed that you had burped. The officer said you were asked several times "will you provide a sample?" and you stated "no", insisting on speaking to a lawyer. The officer advised you of the consequences for refusing and you again refused. During the fifteen minute waiting period, he allowed you to call your lawyer. However, the officer said you refused to provide a sample once that fifteen minute window had passed.

The officer said that he explained to you twice in no uncertain terms that a refusal carried the same penalty as a fail. The officer said you were belligerent but appeared to understand and stated that you did not care what police said, that you would "sue the RCMP and the government and we'd see who was right."

I am satisfied that you did fail or refuse to comply with the ASD demand.

Did you have a reasonable excuse?

The officer indicated that you did not convey any reasons why a sample was not provided. There is no evidence to the contrary 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 5, 2013. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

s.15
Adjudicator

cc: Sarah Leamon
by fax 604 370-2505

October 8, 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) 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.

You said that after you failed the first test, you asked Officer Sahota if you could call a lawyer rather than take the second test. You said rather than allow you your right to speak to a lawyer, Officer Sahota placed handcuffs on your wrists. You told her you could not go to jail because you had

s.22

I am not aware of any statutory requirement for police who are conducting an impaired driving investigation to allow a person to contact a lawyer until such time as that person is charged with an offence. In addition, the scope of this review is limited to the grounds defined in section 215.5(1) of 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?

The police evidence in the Report to Superintendent (the “Report”) is that on September 24, 2013, at 23:13 hours, Officer Sahota (the “officer”) established you as a driver or having care or control of a vehicle. The evidence in the Narrative Text Hardcopy (the “Narrative”) is that the officer was advised by Highway Patrol of a vehicle bearing licence plate s.22 that was observed swerving in and out of lanes. The vehicle was observed by a truck driver, who stated that the vehicle nearly collided into his truck. At approximately 23:12 hours, the officer observed the vehicle in the Chevron gas station located at 3505 Grandview Highway. The vehicle was reversing from the parking stall. The officer initiated a traffic stop and identified you as the driver of the vehicle.

You said that although you were in your vehicle, you were parked and not even driving when the officer asked you to step out of your vehicle. You said you had driven from Maple Ridge where you were watching a Canucks game at a friend’s house.

I have before me the officer’s sworn evidence from the Narrative in which it states that there was a report from Highway Patrol indicating that a vehicle identified as yours was observed swerving in and out of lanes. When the officer arrived at the Chevron gas station, he said he observed you reversing your vehicle out of the parking stall. You said you drove from Maple Ridge where you were watching a Canucks game at a friend’s house. Some things I must consider are the following: your car was functional at the time in question, it was not parked at your final destination, and the officer said he observed you to be reversing out of the parking stall.

Section 215 (1) of the Act defines a driver as a person having care or control of a motor vehicle on a highway, whether or not the motor vehicle is in motion. Care and control of a motor vehicle includes 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. The officer was advised that your vehicle had been seen swerving in and out of lanes, and almost colliding with a truck. You do not dispute this report of your driving behavior.

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 23:20 hours and at 23:27 hours, the officer used ASD serial numbers 069357 and 101563 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 101563 at 23:27 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 069357 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 June 27, 2014.
- ASD serial number 101563 was checked for calibration on September 17, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 15, 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.

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.

s.15
Adjudicator

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 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

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, Kevin Filkow, 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 Yamamoto and your lawyer's submissions, I find there is one determinative issue in this review.

Was the ASD reliable?

As part of her evidence, Constable Yamamoto submitted a document called, "Technical Information on the Operation and Calibration of ASDs in British Columbia". This document provides information on the proper operation of ASDs. However, upon reviewing the officer's evidence in the Narrative Text Hardcopy regarding the first ASD test, I find it is more likely than not that Constable Yamamoto's evidence indicates that the first ASD was unreliable.

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

Decision

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

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

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

s.15
Adjudicator

cc. Kevin Filkow
604-270-3787 (fax)

October 10, 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

You applied on eleven 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.

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

Mr. Filkow provided me with the BC Supreme Court decision *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443. I am familiar with this decision and as such, the "Superintendent's Report on Approved Screening Devices" (the "Report") which was disclosed to your lawyer is not admissible in this review hearing and, accordingly, I have not relied upon it 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 01:51 hours on July 27, 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 01:52 hours and 01:55 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 RTS, the officer indicated that she 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 RTS, the officer indicated that she 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 058810 and 086046, 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 (the "Certificates") which bear the same serial numbers as those noted in the RTS and the Narrative. In the Certificates, J. Schwenneker certified that the ASDs were found to be within the recommended limits when he checked their calibration on July 9, 2013. The ASD calibration expiry dates are recorded as 2013-08-06 and the ASD service expiry dates are recorded as 2013-11-15. Mr. Schwenneker also certified that to the best of his knowledge the ASDs were functioning correctly.

Mr. Filkow submits that without the Report, I cannot rely on the results of the ASD. He indicated that this is because there is no evidence before me how or when the ASDs were serviced or that the devices were properly calibrated. He submits that it is problematic if this evidence is not given by the officer.

I respectfully disagree with Mr. Filkow on this point. I do so because section 215.47(e) of the Act states that a peace officer who serves a Notice on a person under section 215.41 must promptly forward to the superintendent "in the case of a driving prohibition resulting from the analysis of a sample of breath, information relating to the calibration of the approved screening device on the basis of which the notice of driving prohibition was served." On this issue, I am satisfied that the officer has submitted sufficient information with respect to the calibration of the ASDs as he is required to under the Act, in the form of the Certificates.

Mr. Filkow also drew my attention to the Narrative where the officer provided "ASD INFO" for each of the ASD tests and reported the following:

First test:

"ASD # 167

Temp: 26

SN: 058810

SERVICE: 2013-08-06"

Second test:
"ASD # 1203
Temp: 24
SN: 086046
SERVICE: 2013-08-06"

Mr. Filkow submits that from these entries, the officer has reported that the service expiry date for the ASDs is 2013-08-06, whereas in the Certificates it is noted as being 2013-11-15. He submitted the case of *Ema v. Superintendent of Motor Vehicles*, referencing paragraphs 19 and 20, to support that it would not be right for me to say that the date in the Narrative appears to be the calibration expiry date, or to say that it is not problematic because the date is after the event. Mr. Filkow submits that I cannot just come up with an explanation.

I have read and considered *Ema*; however, I find it important to note that in the Narrative the officer did not specifically write "SERVICE EXPIRY: 2013-08-06"; therefore, it does not appear to me that he has reported that the ASDs have a service expiry date of 2013-08-06, which is noted as being the calibration expiry date in the Certificates. The qualified calibrator has certified that the service expiry dates of the ASDs are 2013-11-15 and the calibration expiry dates are 2013-08-06. On this point I find I have no compelling evidence to suggest otherwise; therefore, I accept the evidence in the Certificates.

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 20 days of the prohibition, you need only serve the remaining 70 days. Your prohibition commences October 11, 2013. The prohibition ends at 23:59 hours on December 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 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);
- 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, 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 your lawyer, Jeremy Knight. I have proceeded with the review based on that confirmation.

Mr. Knight has pointed out that Constable Eccleston (the “officer”), did not incorporate any of his supporting evidence into the sworn Report to Superintendent (the “Report”) whereas the entirety of your evidence has been provided by way of a sworn affidavit. Mr. Knight submits that sworn

evidence is preferable to unsworn evidence, but that an impartial decision maker must also consider the evidence as a whole and rely on common sense, and be mindful of statements or other evidence that does not correspond with evidence found to be credible.

I acknowledge Mr. Knight's submissions and I have proceeded with the review with them in mind.

Mr. Knight also noted that in his Narrative, the officer stated that all paperwork was forwarded off to the Superintendent; however, he states that he did not receive any copies of the violation ticket, the accident report, or the notice ordering a safety inspection. Mr. Knight submits that the officer has sworn that he has provided these documents to the Superintendent.

I disagree that the officer has sworn that he provided these documents to the Superintendent because I have already accepted Mr. Knight's submission that the Narrative is not sworn. In any event, these documents were not provided to the Superintendent, nor do I require them in this review. I am satisfied I have sufficient evidence before me to render a 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 his Narrative, the officer reported that at 10:01 p.m. on October 14, 2013, he and Constable Halliburton (the "constable") were dispatched to a motor vehicle collision involving two vehicles. The officer reported that the other driver reported that she was rear ended by another vehicle and that the driver of that vehicle was possibly impaired. The officer indicated that he arrived on scene moments after the constable, who advised him that the offending driver was in the back of his police vehicle. The officer indicated that you were identified as the registered owner and driver of the vehicle that rear ended the other vehicle. The officer reported that he went to the police vehicle to speak with you and could immediately tell that you were intoxicated by alcohol. The officer further reported that at 10:16 p.m. he had a reasonable suspicion that your ability to operate a motor vehicle was impaired by alcohol.

In the Report, the officer indicated that you were driving or in care or control of a motor vehicle at 22:16 hours on October 14, 2013.

Your evidence is that on that evening you attended a dinner party at a friend's house. You indicated that you consumed your last two drinks between about 9:50 p.m. and 9:55 p.m. and then you left right away. You acknowledged the accident but indicated that it was due to the other driver's erratic driving. You also acknowledged that the police arrived 15 to 20 minutes after the accident.

Mr. Knight has made numerous submissions with respect to the time of driving or care or control being reported by the officer as 10:16 p.m. In summary, he notes that the police were dispatched to the accident at 10:01 p.m. and there is no evidence from the police with respect to the time they arrived on scene. He stated that it is impossible that you were in care or control at 10:16 p.m. and at the very latest, you were last in care or control at 10:00 p.m. Mr. Knight indicated that the evidence from the officer on this point is unreliable.

I acknowledge that you were not operating or in care or control of the vehicle at 10:16 p.m. and I do not know why the officer recorded this time. However, because the officer was not on scene when the accident occurred, it appears to me from his evidence that upon his arrival he obtained some information from the constable, spoke with you in the police vehicle, he determined you were intoxicated, and formed his reasonable suspicion for the demand. As such, I find it likely that these events occurred at approximately 10:16 p.m. and that at that time the officer determined you operated or had care or control of the vehicle at the time of the accident.

With respect to the actual time that you were driving or in care or control of the vehicle, I note from your evidence that you left your friend's house at about 9:55 p.m. and began driving. The officer's evidence is that they were dispatched to the accident scene at 10:01 p.m. Therefore, it seems likely to me that the accident occurred sometime between 9:55 p.m. and 10:01 p.m. As such, I am satisfied that the time of driving or care or control was between 9:55 p.m. and 10:01 p.m.

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 22:19 hours. 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. In the Narrative, the officer indicated that he read you your right to the second analysis from "the card".

You indicated that after you failed the first test the officer asked you if you wanted to take another test.

Mr. Knight submits that I do not know what the contents of the "ASD card" are.

While I agree with Mr. Knight, under the Act officers are not mandated to advise drivers of their right to a second analysis in any specific way. The uncontested evidence before me appears to be that you were advised of your right to take 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?

In the Report, the officer indicated that you declined a second analysis. In the Narrative, the officer reported that he encouraged you to provide a second test but you continued to decline.

You stated that the officer seemed pushy to do the second test. You felt awkward and distrustful and had the impression that they would take you to the station for the accurate machine. You also felt that if you went to the station to do a second breathalyzer you would be detained for much longer, or possibly charged or put in jail. You did not want this, you just wanted to go home and be in bed because you were feeling quite ill.

I am mindful that the issue before me is whether the officer provided you with a second analysis; however, I find it important to address some of the evidence you have provided which I find relates to your declining a second test.

I note that in paragraph four of your affidavit you stated that after dessert you consumed one 1 – 1.5 ounce “dessert shot” and then “...chased it down quickly with a beer knowing that it would affect me within 20 minutes, decided to leave right away. I knew I would be home within 5 minutes and the beer and shot wouldn’t affect me until I was safely at home.” You said that you know that when consuming alcohol, it takes 15 to 20 minutes to enter the bloodstream and have an impairing affect, and that you have read scientific studies that have determined this. You also stated that you are very careful about consuming alcohol when you may be driving as s.22 is reliant on you being able to drive. In the last paragraph of your affidavit you stated, “...I am very diligent about not driving while impaired. In fact, I was not impaired by alcohol when I drove on the night in question.”

I do not know why you felt you would be taken to the station to do a second test because you did not explain this. You did not tell me that the officer led you to believe that this would occur, or that you asked any clarifying questions with respect to the second test. More importantly though, it appears that the evidence you want me to accept is that you have obtained specific knowledge about alcohol consumption from scientific studies, from which you based the timing of your last two drinks, and you are diligent about your alcohol consumption if you are going to be driving because your business is dependent on you being able to drive, and you were not impaired on the night in question. However, I note that there is no evidence before me that you were shocked by the result of the ASD test. Further, you specifically stated that you thought the police would take you to the station for the “accurate machine”. As such, based on your submissions, I do not understand why you would not want to do another test on an “accurate machine”. It does not make sense to me that you would not want to take any opportunity available to prove that you were not impaired by alcohol, and that you would accept a 90-day driving prohibition simply because you were not feeling well and wanted to go home to bed.

I do not find your evidence I have outlined above to be at all credible, and I find that it damages your credibility with respect to the remaining evidence you have provided for this review.

I am satisfied that a second analysis was not provided by the officer because you declined it.

Was the second analysis performed on a different ASD?

As you declined a second analysis, I am satisfied that 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 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 a Qualified ASD Calibrator for the ASD bearing the serial number 101150. In the Certificate, Cpl. Kelly Butler certified that the ASDs were found to be within the recommended limits when he/she checked their calibration on October 5, 2013. The calibrator also certified that to the best of his/her 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 Narrative, the officer stated that he could immediately tell you were intoxicated by alcohol. He indicated that your eyes were very red, your face was flushed, there was a very strong odour of liquor coming from you and your breath, that you slurred every word you said, and that you stated you had been drinking at a friend's place for Thanksgiving dinner. In the Report the officer indicated that your response to the question of the time of your last drink was "While ago @ dinner more than 15 min ago".

You stated that you arrived at your friend's place at 5:00 p.m. You said that there were several close friends there and you consumed a beer before dinner. You indicated that you had a bad cough and runny nose and although you do not ever take anything like Benylin, you took the two tablets the host offered you because you wanted to enjoy yourself. At about 7:00 p.m. you had dinner and a beer was spilled on your pants. From 7:10 p.m. to 9:30 p.m. you consumed 2 six ounce glasses of wine. Between about 9:50 p.m. and 9:55 p.m. you consumed a 1 – 1.5 ounce dessert shot and a beer and then began driving home.

You indicated that after the accident you stood around on the sidewalk and had a cigarette or two and you were feeling quite dizzy after the accident. You said you were stressed out and slightly disorientated because you had been having some health issues lately. You have recently had blood work done because of experiencing s.22 and you have been overtired. You stated that your doctor told you that you s.22

s.22 You stated that you never returned to your vehicle which was moved off the street and out of traffic. You also stated that the other driver and their passengers were acting weird and you needed some space from them.

You said that during this period of time you began feeling ill, and that all the food you ingested and the beer you had "slammed back" was trying to come back up. You stated that you were burping and swallowing some regurgitation back down, and this continued right up to the time that you were escorted into the police vehicle. You said that the feeling of illness continued until you went to bed.

You stated that the next day you were trying to figure out why you could have blown a fail. You submit three reasons for this:

1. The last two drinks you consumed entered your bloodstream and caused a fail.
2. You were unaware that Benylin should not be taken with alcohol, and operating a motor vehicle with them is not recommended. You submitted two Benylin product information sheets – one on side effects and one on precautions.
3. You had been belching and regurgitating stomach contents just after the accident until the police arrived.

Mr. Knight submitted a report from Dr. Nizar Shajani, an expert in forensic toxicology and a blood alcohol expert. He acknowledged that this report is not specifically related to your circumstances; however, he directed me to two paragraphs with respect to the effects of mouth alcohol and ASD results, stating that they are relevant and applicable generally.

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. Mr. Knight indicates that while there is no requirement that a 15 minute observation period be observed prior to taking a breath sample in order to issue a lawful IRP, the absence of any face to face observation is relevant to your case.

In addressing reason #1 above, I refer to 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 evidence before me from both sides, your breath sample was taken more than 15 minutes after you last consumed alcohol. As such, I am satisfied that your last two drinks did not cause the fail result.

In addressing reason #2 above, while I have read the product information sheets you have provided, there is no evidence before me that by having Benylin in your system, it would have caused or contributed to a “FAIL” result on an ASD.

Last, I will address reason #3, which is that burping and regurgitating caused the fail result. You provided evidence that after the accident you were quite dizzy, and you were stressed out and slightly disoriented due to your recent health issues which are

s.22 In addition, you were feeling ill, and you were burping and swallowing regurgitation from all the food you ate and the beer you had “slammed back”. Yet, despite how ill it appears you want me to believe you were, you chose to stand around on the sidewalk and smoke a cigarette or two. It does not make sense to me that someone who was dizzy, disoriented, feeling ill and swallowing regurgitation would be standing around on the sidewalk smoking, and that they would more likely be trying to find somewhere to sit down, such as in their vehicle, and I note that yours had been moved out of traffic. As well, while you stated that you needed to get away from the other driver and their passengers because they were acting weird, I do not understand why you did not re-enter your vehicle to accomplish this.

Further, if you started burping and regurgitating from the time of the accident, it seems very odd to me that it would cease just when you were placed in the police vehicle, as your evidence seems to be, when this is the time that the officer or the constable would have likely observed you up close.

After considering all of the evidence before me, I do not find your evidence to be credible on this point and I do not believe that you were burping or regurgitating at any point prior to the ASD test.

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 ASD was 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 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 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);
- 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

One of the grounds that you applied on is not relevant to your circumstance. I will consider all the applicable grounds in this review.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Jaspreet S. Malik, prior to your scheduled hearing. 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 AnalysisWere 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 1848 hours on September 21, 2013. The officer submitted an Occurrence Report (the "Narrative"), which forms part of the Report and is also sworn. In it, he reported that while travelling south on King George Boulevard (KGB) near 76th Avenue he observed a vehicle stopped in the middle of KGB blocking traffic. The officer reported that you were found in the driver's seat, the engine was running, and you were the sole occupant.

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 1850 hours and read the ASD demand at 1859 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 "45 minutes ago".

In the Narrative, the officer stated that he formed the suspicion that you were impaired by alcohol given the following:

- You were passed out.
- It took several attempts to wake you and then you kept saying, "I fucked up, I love you."
- The strong odour of liquor on your breath.
- When asked if you had been drinking, you responded, "yes, I fucked up."

Mr. Malik submitted that the officer indicated in his Report that there was a delay in making the demand yet in the Narrative he stated that there was no delay in administering the test.

Here, I find that the suspicion was formed at 1850 hours and the demand was read at 1859 hours (nine minutes later). While this may appear to be an unacceptable length of time the officer explained that he had to wait for traffic to pass, then help you out of your vehicle, and walk you to a safe place off the road. He stated that this took a few minutes as you were having extreme difficulty standing. Moreover, I do not have to consider if there was a delay in administering the device.

Mr. Malik submitted that the officer stated that he formed his suspicion at 750pm yet he recorded the refusal at 701pm.

While I acknowledge that the officer did record 1950 as the time he formed his suspicion in his Narrative. I note that he recorded in his Report that he formed his suspicion at 1850 hours, read the ASD demand at 1859 hours, and recorded that you refused at 1901 hours. All of these times are sequential; therefore, I accept that the officer made an error in his Narrative in recording "1950" as the time he formed his suspicion.

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 1901 hours. In the Narrative, the officer stated that you were given 4 chances to provide a breath sample. The first time you puffed up your cheeks but no air came out, the second time you sucked back instead of blowing. The officer stated that he then explained the proper process and advised of the repercussions of a refusal.

In your Statutory Declaration you stated that s.22 . You stated that you did not understand what was expected of you. You believe if you were instructed properly, by the officer, you would have been successful in your attempts.

The evidence before me suggests that your actions were consistent with someone who understood that you had to blow into the device. Specifically, your statement that you would provide a sample is consistent with someone who understands what is expected of him. However, I find by your actions that you were intentionally avoiding providing a suitable sample.

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

Did you have a reasonable excuse?

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 21, 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

pc: Jaspreet S. Malik by fax 604 543 9112

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);
- 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.

In your written submission, you said you noticed that there were some important events that the investigating officer left out of the disclosure documents he submitted. One of the items left out relates to the reason the officer pulled you over. However, this matter is not relevant to the

issues I am authorized by the Act to consider in this review. I am authorized to consider only those grounds that are directly related to the issues outlined below.

You also stated that the officer told you the reason you had to take the ASD test was because of your previous record involving a 12-hour suspension. In contrast, the officer indicated in the Occurrence Report (the "OR"), that he formed the reasonable suspicion to make the ASD demand, because he detected a moderate odour of liquor on your breath. The inconsistency between your evidence and that of the officer in this regard relates to the validity of the 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 "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 Lee indicated that he witnessed you driving or in care or control of the vehicle on September 27, 2013, at 2245 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 Lee stated that you provided a breath sample into an ASD and that the device registered "WARN" as a result of the analysis. There is nothing before me to the contrary. I am satisfied that the ASD registered "WARN" at 2252 and 2259 hours, as set out in the officer's evidence.

Were you advised of your right to a second analysis?

In the RTS, the OR, and the Synopsis, Constable Lee indicated that he informed you of your right to a second breath test analysis. There is nothing before me to the contrary.

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 "WARN". I am satisfied that the Notice was served on the basis of the lowest available result, which was "WARN".

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 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 50 mg% even though the ASD registered a "WARN"?

Constable Lee's evidence in the Synopsis and the OR, is that he noticed a moderate odour of liquor emanating from your breath, but that you denied having consumed any alcohol that night. As you pointed out, the officer also noted that you were very cooperative and calm, you had no slurred speech and your balance was stable.

In your written submission, you said you were confused by the officer's evidence of having noticed the odour of alcohol on your breath. You said you know for a fact that your breath did not smell like alcohol, but it smelled fresh, because you had consumed mouthwash earlier that night.

You said you had been DJ'ing that night, you had eaten a meal prior to working, and you said you drank iced tea throughout the evening. You also mentioned that on three visits to the men's washroom you were offered mouthwash by a bathroom attendant. You said you consumed the mouthwash and did not spit it out. You indicated that the mouthwash was an Antibacterial Life Brand with a fresh mint flavour. You said this indicates that one of its main ingredients is alcohol.

You said the last time you drank the mouthwash was when you completed your shift, but there is no evidence before me of how long this was prior to being pulled over by the officer. I infer from your evidence that you are arguing that the ASD test results were caused by the alcohol you ingested in the mouthwash. The Act does not differentiate between sources of alcohol in a person's body. While you may not have consumed a typical alcoholic beverage, according to your own evidence you did consume alcohol on the night in question.

You did not provide me with any compelling evidence that would cause me to doubt the "WARN" readings on the ASDs, which I 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%.

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 27, 2013.

I understand the vehicle was eligible for release on October 1, 2013. You are responsible for towing and storage charges that have accumulated during the storage and any other additional charges. 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 7, 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);
- 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, Jennifer L. Currie. On October 28, 2013, I received a fax from Ms. Currie indicating that you would not be forwarding any statements or submissions for the review. Accordingly, I have proceeded with this review with the evidence I have before me.

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, this ground is not applicable to your situation because you were served with a 90-day prohibition. 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 2305 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 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 – Occurrence Report – 1 (the “Occurrence Report”), the officer submits that after speaking with you and verifying your identity with a British Columbia driver’s licence, he detected the smell of liquor on your breath. After requesting that you exit the vehicle, he questioned you with regard to when you last finished your last alcoholic beverage. Accordingly, the officer indicates that you responded, “I drank and finished my last drink over 3 hours ago.” Further, he indicates that you had slurring speech, were holding the side of your vehicle to stand up, and staggered side to side when you were asked to walk to the front of the police vehicle for further questioning. Accordingly, in the Occurrence Report, the officer submits that he made the ASD demand on you at 2309 hours from the, “RCMP Issued Charter Card.”

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 multiple indicia indicative of being under the influence of alcohol including a smell of liquor on your breath. Further, he provides evidence that you admitted to consumption. There is no evidence before me to the contrary.

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. After the ASD demand was made on you, the officer indicates that you blew a “NOGO” reading and that the result was visually revealed to you. Accordingly, the officer advised you to blow a valid breath sample so it would register on the ASD. The officer’s evidence is that you blew a “NOGO” four more times and that each time the result was visually revealed to you. Further, he indicates that you were advised that a refusal to provide a breath sample carried the same penalty as a “FAIL” result; however, that it was, “quite evident”, that you were purposely not providing a sample of your breath.

There is no evidence before me that you provided a sample of your breath.

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

Did you have a reasonable excuse?

The officer's evidence is that following five attempts to provide a suitable sample, all of which resulted in "NOGO" readings, that you stated, "I don't want to blow man, just give me my papers." Further, he submits that you were advised of the consequences of refusing and that you, "clearly understood." I have no evidence before me with respect to 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 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.

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". 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 your lawyer, Baldev Sandhu, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

Mr. Sandhu asked whether there is a possibility that your driving prohibition could be reduced considering your good driving history and the fact that you need a vehicle and driver's licence

for your employment. While I do 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.

Your lawyer pointed out that the police officer did not show you the results of the breath test; however, there is no requirement within the Act for a police officer to do so.

Mr. Sandhu also said that you were stopped by police at 1:37 a.m. but the Narrative Text Hardcopy (the "Narrative") indicates you were stopped at 1:34 a.m. I acknowledge Mr. Sandhu's submission on this point; however, on page 1 of the Narrative the officer has indicated that he conducted a traffic stop at 0134 hours. The time is the same in the Report to Superintendent (the "Report"). On page 2 of the Narrative, the officer indicates that he formed reasonable suspicion for the ASD demand at 0136 hours, and made the ASD demand at 0137 hours. Both of these times are also the same in the Report.

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 is that on October 27, 2013, at 01:34 hours, Officer Lee (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 02:13 hours and at 02:16 hours, the officer used ASD serial numbers 042902 and 045924 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 045924 at 02:16 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 both ASDs used to take your breath samples 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.

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

Mr. Sandhu submits that the officer formed his reasonable suspicion quickly. He explained that you were giving a ride to your brother-in-law and said the officer did not ask you to exit your vehicle. He further submits that the odour of liquor that the officer smelled was actually coming from your brother-in-law’s breath. He said that you were sleepy and tired because it was 1:34 in the morning, and explained that your eyes were red and watery as a result of fatigue and not because you consumed alcohol. Mr. Sandhu said that the delay before conducting the first ASD test is unreasonable. Mr. Sandhu also said that you have a limited knowledge of English and that you did not understand what the officer was saying. A Punjabi interpreter was called to attend the scene; however, no independent interpreter was provided to you. Mr. Sandhu also submits that you did not admit to consuming any alcohol and this fact goes to the officer’s reasonable suspicion. He referred me to paragraph 24 of *Spencer v. British Columbia (Superintendent of Motor Vehicles)* 2011 BCSC 1311 to assert that the officer did not have “reasonable grounds” to suspect that you had alcohol in your body.

The officer's evidence is that he followed your vehicle and observed you to be travelling at 80 km/h in a 50 km/h zone. He observed that your driving was very erratic, you were severely swerving within your lane, crossing the double solid yellow line and then the clearly broken white line to the right of your vehicle. The officer goes on to say that you said "never" in response to what time your last drink was. Because he could not rely on that statement, he waited a full fifteen minutes from the time of driving to administer the ASD test. At 0150 hours, he indicated that you pretended to blow multiple times and did not provide a suitable sample. The officer demonstrated the proper technique to you and you continued to pretend to blow. You then said you did not understand the officer's instructions, at which time he warned you on the failure to provide a breath sample. At 0156 hours the officer called for a Punjabi translator to ensure that you understood the consequences of your actions and the penalty for refusal. Officer Lot arrived at the scene and provided Punjabi to English translation of the ASD demand, instructions to provide a proper breath sample, and the consequences of failing to provide a breath sample. The officer had you under direct and constant observation and ensured that you did not consume anything, and did not belch nor vomit. The Narrative goes on to indicate that you provided two "fail" ASD tests, the results of which were both shown to you.

Although Mr. Sandhu concluded that the officer did not ask you to exit your vehicle, I find it is reasonable to conclude otherwise. I note that while the officer indicated on page 1 of the Narrative that you "stayed in the driver's seat the entire time", he also indicates on page 2 of the Narrative that you were "very unsteady on [your] feet, swaying back and forth." My understanding of what the officer has put in the Narrative is that you stayed in your vehicle the entire time as the officer walked up to your driver's side window. The officer then asked you to step out of your vehicle and observed you to be very unsteady on your feet and sway back and forth. The officer has also said that "the driver had a strong odour of liquor on breath...", from which I can conclude that it was your breath and not your brother-in-law's breath that the officer was referring to.

Mr. Sandhu said that the delay before administering the first ASD test is unreasonable; however, in my opinion there was no delay in administering the first ASD test. The ASD demand was made at 01:37 hours; however, after not providing a suitable sample multiple times, the officer called for a Punjabi translator to attend at the scene. After the translator arrived and explained the process to you, you provided your first suitable breath sample. I find it noteworthy that it was not until after the officer explained how to provide a breath sample and also explained about the consequences for failing to provide a breath sample, that you said you could not understand the officer's instructions. In addition, although Mr. Sandhu says that an independent interpreter was not made available to you, there is no evidence before me that the Punjabi translator was biased.

Mr. Sandhu said that the officer formed his reasonable suspicion very quickly and that it was unreasonable for the officer to suspect that you were impaired by alcohol. While I acknowledge this submission, with respect I do not agree. The officer said he observed your driving to be very erratic, that your eyes were red and watery, your speech was slurred and you were very unsteady on your feet and swaying back and forth. You went on to blow two "fail" ASD test results on two different ASDs, both of which I have already found to be fully functional. 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%.

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 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: Baldev Sandhu
by fax 604-592-5401

November 7, 2013

s.22

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

Introduction

On August 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

At the beginning of the oral hearing I confirmed with your lawyer, Kyla Lee, that full disclosure of the documents before me was provided to her. I have proceeded with the review based on that confirmation.

Ms. Lee submitted the case of *Wilson v. Superintendent of Motor Vehicles* 2013 BCSC 1638, to support her argument that your prohibition should be revoked because the police evidence does not establish that the officer had reasonable grounds to believe that your ability to drive was affected by alcohol.

I have read and considered the *Wilson* case 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 sworn Report to Superintendent, (the "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 18:10 hours on August 21, 2013. In addition, the officer stated that he formed his reasonable suspicion at 18:13 hours, he read you the ASD demand at 18:15 hours, and your ASD tests were administered at 18:17 hours and 18:34 hours, respectively.

In your affidavit you indicated that you did not leave the pub until 6:18 p.m. and once in your vehicle you returned a missed call from your wife, s.22 and spoke to her for one minute before pulling out of the parking lot. You said that you had only been out of the pub for three minutes before the officer pulled you over. In a submission from your step-son, s.22 he stated that you and he left the pub after watching a dancer on stage, you called his mother from the vehicle, and that you left the parking lot at approximately 6:20 p.m. In a submission from a server at the pub, s.22 stated that at approximately 5:55 p.m. you ordered two more beers from her, which is consistent with your evidence and that of s.22

Ms. Lee stated that the officer's timeline is not accurate and that this calls the reliability and credibility of the Report into question.

In my view, part of an officer's training and responsibility would include recording accurate times during any sort of police investigation. To the contrary, I do not understand how you came to conclude that you left the pub at precisely 6:18 hours, particularly when there appears to be no reason for you to have paid attention to the time. Further, although I acknowledge the cell phone record you submitted which shows a call to s.22 cell occurred at 6:19 p.m. and which lasted one minute, I find it noteworthy that s.22 did not submit any supporting evidence for this review, such as that you called her prior to being stopped by the police. As this call occurred at 6:19 p.m. which is two minutes after the recorded time of the first ASD test, I find it

entirely possible that either you or s.22 called s.22 from your phone after you provided your first breath sample. However, as I previously stated, there is no evidence before me from s.22 to confirm your version of events. As well, I find it very unlikely that two days later a server would have the ability to recall the time a customer ordered a drink, nor did s.22 explain how she was able to do that.

After considering all of the evidence before me, I do not find yours to be convincing or very credible. I prefer the officer's evidence and I am satisfied that he has provided an accurate timeline, and that the time of driving or care or control was at 18:10 hours.

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 18:17 hours and 18:34 hours, respectively.

In your submission you stated that you are certain that your last drink was at 6:18 p.m., which was after the time recorded by the officer for the first tests, and that no more than 15 minutes passed between your last drink of alcohol and the time you blew into the second machine.

While I will address your argument with respect to mouth alcohol in another issue, I have already made a finding that the officer has provided me with an accurate timeline. As such, I accept the test times as noted by the officer.

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 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 provided evidence that different ASDs were used for each test. 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".

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 D. W. Jones 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 stated that you had a strong odour of liquor on your breath and watery eyes, and that your response to the question of the time of your last drink was "finished a beer 15 minutes ago".

In your affidavit you indicated that on August 21, 2013, you went to a dump site with s.22 and he gave you some gum which you began to chew. Following this, you said the two of you went to a pub, arriving at 5:00 p.m., where you consumed two bottles of beer. Prior to this, you had a one ounce Caesar at home with your wife at 3:30 p.m. You indicated that you finished a small amount of beer just prior to leaving the pub and were stopped by the officer three minutes later.

You stated that when the officer asked you if you had anything to drink you told him "no". You stated that you were intentionally dishonest with the officer; you knew you did not have to tell the truth and you chose not to. You said that you did not want to give the officer grounds to ask for anything; you had done nothing wrong; you were not over the limit and you were not impaired by alcohol. You stated that the officer told you he could smell alcohol and you told him that you had one beer. The officer asked when you finished the beer and you told him that he had just seen you leave the pub. You told him that you just finished. The officer asked how long ago it was and you said "At most, it would be ten to fifteen minutes." You indicated that you did not know the exact time you last had a sip of alcohol was important to obtaining a reliable reading on the ASD.

You stated that you provided a breath sample which registered a "FAIL". You thought that the reading could not be right. You knew that two beers would not put you over the legal limit. The officer asked you if you were certain that you only had one drink and you told him that you were. You indicated that after the second analysis also resulted in a "FAIL" the officer asked you if you were sure there was nothing else you had to drink. You told him about the Caesar and explained that it had been so long ago.

You stated that you have since considered the events of the evening and you have learned about the effects of residual mouth alcohol. You stated that your last drink was at 6:18 p.m. and no more than 15 minutes passed between your last drink of alcohol and the time you blew into the second machine. You also stated that the gum remained in your mouth during both samples. You said that you were chewing it right in front of the officer and he would have had to see it, but he never asked you to remove it from your mouth. You now realize that alcohol could stay trapped in the gum you were chewing.

You stated that you understand your obligations in making an affidavit. You said that although you were untruthful at the roadside, you are being truthful in your evidence now. You stated that you were not under oath at the roadside, you were aware of your right to silence, and aware that you did not have to provide information to the officer about what you had to drink.

Ms. Lee noted that the officer did not report indicia such as a flushed face or slurred speech; only that your eyes were watery. She also submits that the officer saw you leaving a pub, he misrepresented your answer about the time of your last drink, he knew mouth alcohol would be an issue, and he crafted his evidence accordingly. She stated that people do not tell the truth at roadside and they should not always be believed about the time of their last drink. She stated that officers are trained in this regard and they should know that people lie. She stated that you knew you did not have to tell the truth at the roadside and you should not be penalized for this.

She submitted the cases of *R. v. Seivewright*, *R v. Kirton* and *R. v. Bensmiller* to support that the officer should have waited 15 minutes before proceeding with the ASD test in order to eliminate the possibility of mouth alcohol. While I acknowledge these cases, I am mindful that this is an administrative review and not a criminal proceeding. Ms. Lee also submitted what appears to be the results of an informal study done in November 2005 with respect to obtaining breath samples after the subject consumed alcohol and continued to chew gum. However, I note that the study was done using the BAC Datamaster C, not the Alco-Sensor IV DWF which was used in your case. Further though, there is no evidence before me that this study has been recognized and accepted by the RCMP with respect to administering breath tests in the province. That aside, I acknowledge the possibility that alcohol trapped in chewing gum in the mouth can affect breath sample results.

First, I am mindful that I have already found your evidence with respect to the time you allegedly left the pub to be neither persuasive nor very credible. As well, I note that the officer's evidence does not include any notations with respect to your alleged untruthfulness about your alcohol consumption. In fact, his evidence in the Report and the Narrative appears to be very straight forward and the officer quoted you as saying that you "finished a beer 15 minutes ago" when asked the time of your last drink. I take this to mean that these were your exact words. I note that s.22 provided no evidence in this regard, yet he was with you at the time. I disagree with s.22 that because the officer saw you leaving a pub that he should not have believed your stated time of last drink. It does not make sense to me that police would delay obtaining a breath sample from every individual they stopped simply because they were observed leaving a licensed establishment. I do not find your evidence on this point to be persuasive or credible either, and I prefer the officer's evidence that you advised him that your last drink was 15 minutes prior.

I have also considered your evidence that you were chewing gum before and during the ASD tests right in front of the officer, that he would have seen you doing this, but never asked you to remove it. I agree that if you were chewing the gum the officer would have seen you doing it; however, I do not believe that you were. I say this because in the Report, the officer has indicated that any ASD tests referred to were conducted by a qualified ASD operator. My common sense tells me that these qualifications would include watching for gum in a person's mouth and asking them to remove it when they see it. I find it highly unlikely that the officer would observe you chewing gum from 18:10 hours to 18:34 hours and not ask you to remove it from your mouth.

I have already made a finding that the time of the stop was 18:10 hours. Further, as I have already made a finding that I have evidence from you that is not credible, I find that I do not know the time you last consumed alcohol; however, you advised the officer that it was 15 minutes prior, which would have been at 17:55 hours. As such, there was no evidence before the officer at the time which would have caused him to delay the ASD test or to doubt the accuracy of the "FAIL" result. Therefore, I find that he was reasonable in administering the test and relying on the accuracy of the result and to inform you of your right to a second test as per the Act. I note that both tests were taken more than 15 minutes after your admission of when you last consumed alcohol.

I am satisfied 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 serve the remaining 71 days. Your prohibition commences November 8, 2013. The prohibition ends at 23:59 hours on 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 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);
- 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 point 1A of your written submission, you argued that the investigating officer did not fully complete the documents he served you with, but he inserted the missing information on the police copy of the documents later. The missing information you mentioned was on the Notice of Impoundment and included the province, driver's licence class and expiry. This information was completed on the police copy that was faxed to the Superintendent.

In point 1B in your submission, you noted that the officer indicated that the registered owner of the vehicle is you, and not, s.22 your wife and the actual registered owner.

In point 2 of your submission, you argued that the officer was mistaken in not indicating if you failed or refused to provide a breath sample. You were not prohibited from driving for failing or refusing to comply with the demand for a breath sample, so this is not relevant to the investigation.

In the next point, you argued that the officer did not read the demand from a card, but recited it from memory.

In your fourth point, you argued that the officer inaccurately reported the time he served you with the Notice as 0254 hours. You provided screen shots in attachments 9A, 10A and 11A to as evidence of this error. The screen shots that are before me are mainly black and contain no time of calls and do not support your argument in this regard.

In your final point on the first page of your submission, you noted that the officer said he offered you a ride, but you argued that this statement is false – no such offer was made.

I appreciate that you are indicating the officer's carelessness in his recording of details, but you did not indicate how any of these errors prejudiced you in any way. Further, none of them are relevant to the issues I am authorized to consider in this review. Regardless, I will keep these errors in mind, should I have to make a credibility assessment when considering the evidence before me.

On the last page of your written statement, you explained that you are a mature, responsible family man. You provided details of your work and other obligations and noted that you have a clean driving record. You said the whole experience has been financially tough, as well as difficult for maintaining your family responsibilities. You said you know better, and this has opened your eyes, and what should or should not be done is crystal clear to you now. You said you give your word that you shall not put yourself in a situation like this ever again.

I understand and appreciate your situation. 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.

You also indicated that if I am unable to revoke the prohibition, you feel that you should be

penalized with “time served”, so you can get your licence back and get your life back on track. I do not have the authority to vary a prohibition in this way. 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 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 Johnny indicated that he witnessed you driving or in care or control of the vehicle at 0143 hours, on September 18, 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 Johnny 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 0146 and 0151 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 Johnny 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"?

You stated that on the night of September 18, 2013, after a very busy and long day, you attended an engagement ceremony. You stayed there from 8:25 pm to about 1:30 am. During this time, you ate, danced and had four drinks. Your last drink was at around midnight, just before you had a final plate of food.

You said you were extremely tired when you left at 1:30 am, and you feel this must have been why someone reported that you dozed off at an intersection. You said when the officer pulled you over, you were still feeling the effects of sleep and having your head nod, but you pulled over upon seeing the lights. You said at that time you did something in haste. You said you worried that the drinks you had consumed may cause an issue, so you grabbed your cologne bottle in your truck and quickly sprayed your tongue with it six times. You said you were not thinking logically and you noted that it is straight alcohol in the cologne.

In the Narrative, Constable Johnny did not mention having noticed the odour of cologne; he said he observed the odour of liquor on your breath. I find a reasonable person would be taken aback at the thought of spraying cologne on the tongue, and that six sprays of cologne in a vehicle would be noticeable to the officer, if you did this just as you were pulled over.

Your primary argument focuses on the officer's sloppiness in completing forms, which you indicate decreases the reliability of his evidence. However, none of the errors you noted affected your ability to apply for a review or influenced the prohibition you received.

You also implied that the reason your breath samples registered “fail” on the ADPs is because you sprayed your tongue with cologne just prior to being stopped. This statement suggests to me that you were concerned about the liquor you had consumed and you wanted to do something to avoid the consequences you faced. Your conscious attempt to conceal the truth from the officer raises questions in my mind about the reliability of your evidence. I am not persuaded to believe that you sprayed your tongue with alcohol-based cologne.

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 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.

November 7, 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 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 L. Currie. 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 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.

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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 2315 hours on August 18, 2013. Further, in the Narrative Text Hardcopy - Occurrence Report - 1 (the "Occurrence Report"), the officer indicates that he observed a vehicle driving in reverse, at a high rate of speed. A vehicle stop was initiated and you were observed as the sole occupant and driver.

In your written statement, you submit that you reversed to confront three individuals that had thrown an object at your vehicle's passenger side door.

While I acknowledge your evidence and that of the officer's conflict, you do not refute driving when the officer initiated a vehicle stop.

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 2320 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 Occurrence Report, under the heading "RIGHT TO REQUEST SECOND ASD TEST", the officer indicates that the information pertaining to this right was read from the, "purple OSMV Card." When the officer asked if you understood your right to a second test, he indicates that you initially stated that you did not understand. Accordingly, he repeated the statement in common language advising you what the second test would entail and that the lower of the two results would prevail. He indicates that you stated you understood and when asked if you would like to provide a second sample that you replied, "no, there is no point." Additionally, in section 7 of the sworn RTS, he indicated that you were informed of your right to a second test on a different ASD and that the lower of the two ASD test results would prevail. Moreover, in response to the question, "Did the driver request a second ASD test?", the officer indicated, "NO".

IRP Review Decision
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In her written submission, Ms. Currie submits that the Act mandates that a driver who blows "FAIL" on an ASD must be informed that they have the option of requesting a second ASD test, on a different ASD, with the lower of the two results governing. Accordingly, in paragraph 57 of your statement, you indicate that a younger officer informed you that, "The Superintendent of Motor Vehicles says you have the right to a second test and that the lower of the two results will prevail." However, when the officer asked you if you understood, you submit that you responded, "Not really", because you did not understand the terminology he had used. As such, in the subsequent paragraph, you submit that the officer informed you that a second test would require you to be taken down to the police station where a second reading would be taken on the Datamaster, which would give him a true reading of your blood alcohol level. Moreover, you were advised that if you blew over, you would be released on a Promise to Appear in court and if convicted, it would result in a criminal record.

Ms. Currie submits that the officer does not indicate what was written on the, "purple OSMV Card", nor does he state what his explanation in common language was. Therefore, she submits that little to no weight should be given to this evidence. Specifically, that it is more likely than not that the officer indicated "YES" to account for advising you of a second test, though it was not the test he was obligated to offer you under the IRP legislation.

You indicate that you, "did not understand the terminology that the officer was using." However, I am left wondering what exact terminology it was that you did not understand. Specifically, in your statement you did not specify what terminology it was that you did not understand or why. Further, the evidence you provided with regard to the officer's "common language" explanation does not clarify any terminology mentioned in paragraph 57 of your statement. Rather, the alleged explanation centres around the Datamaster and criminal proceedings. I find it unlikely that if you specifically advised the officer that you did not understand the terminology that he had used, that he would then shift his common language explanation to a different subject matter altogether (i.e the Datamaster and criminal proceedings). While I acknowledge Ms. Currie's submission that the officer does not provide an explanation of the common language he used, I find it more likely than not that the explanation he provided articulated any terminology that you did not understand when, "Information was read from the purple OSMV Card."

On this point, while I acknowledge your submission that at no point did either of the officers read you anything from a purple card, I find it odd that the investigating officer would specify that he read off of a, "purple OSMV Card." Although I do not know exactly what a, "purple OSMV Card", is, I infer that it is likely some type of card issued by the Office of the Superintendent of Motor Vehicles (i.e. OSMV), with respect to conducting an IRP investigation. On this point, an IRP is an administrative sanction and as such, does not involve criminal proceedings. Therefore, I find it more likely than not that the officer read from a, "purple OSMV Card", and that the information contained on this card referred to procedures related to an IRP investigation.

I note that section 7 in the sworn RTS is broken down into three distinct questions regarding the second ASD test and do not simply work to determine if a second test was offered. Rather, they inquire if the driver was informed that a different ASD must be used, that the lower of the two ASD test results will prevail, and ultimately, if a second ASD test was requested. Accordingly, all three questions specifically reference an ASD, not the Datamaster that you claim the officer informed you would be used to conduct your second test. Therefore, I find it more likely than not that by indicating that he had informed you of your right to request a second test that the officer also informed you that it would be conducted on an ASD. Moreover, by indicating "NO" to the question, "Did the driver

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request a second ASD test?", I am satisfied that the officer was imparting that you had not requested a second ASD test.

On this point, in section 8 of the RTS, I infer that the officer had a second, different ASD available on scene to conduct a second test, if you chose to request one. Specifically, he recorded serial number 101527; however, a line was drawn through the numbers. I feel a reasonable inference can be made that because you chose to decline your right to request a second ASD test, that the officer put a line through 101527 and did not provide a corresponding Certificate to denote that the second device was not used.

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 a second analysis was not provided by the officer because a second analysis was not requested. The officer's evidence is that one ASD test was administered 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 officer submitted a Certificate in which John Allen Wilcox certified that the ASD was found to be within the recommended limits when he checked its calibration on July 29, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly.

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, the officer indicates that upon approaching your vehicle that you were cooperative. Further, he indicates that he detected an odour of liquor on your breath, that you displayed glazed eyes, and had slurred speech. When asked the time of your last drink, he submits that you initially stated that your last drink was five hours prior to the vehicle stop, however, that when you were re-questioned on this issue that you admitted your last drink was actually twenty minutes prior. Police evidence also indicates that you admitted to consuming 4-5 beers and that an open, half-full can of beer was located in your vehicle's centre console.

In your written statement, you indicate that you did not consume any alcohol on August 18, 2013, aside from four and a half cans of Budweiser beer. Specifically, you purchased an 8-pack of Budweiser beer, four of which you consumed between 8:15 pm and 10:30 pm at a friend's barbeque. After finishing your fourth beer at 10:30 pm, you left your friend's house and went grocery shopping until approximately 10:55 pm. You then proceeded to a 7-11 convenience store (the "7-11"), pulling into the parking lot at 11:10 pm or 11:11 pm. However, you observed a group of individuals that appeared to be drug addicts so you decided to drive home and proceeded through the parking lot, turning onto McCallum Road.

While on McCallum Road, you opened one of your four remaining beers because you were thirsty and had nothing else to drink in your vehicle and intended on heading straight home. While driving,

you raised the can to your mouth and counted to four while drinking. You then rested the can on your knee and while continuing to drive down McCallum Road, raised the can to your mouth and counted to two while you drank. After finishing this drink, you placed the can in a cup holder between the vehicle's driver and passenger seat.

When you reached Switzer Avenue, you turned left, and drove 60 metres. You heard something hit your vehicle's passenger side door and drove another 20 to 30 metres before stopping and reversing the same distance to confront a group of individuals standing where the object had hit your vehicle. You submit that a female in the group yelled, "Cops!", and everyone ran off in various directions. As you resumed driving, you did not see any police or police vehicles. After passing a laneway, you noticed a police vehicle with its headlights off, saw emergency lights flash in your direction, and immediately pulled your car to the side of the road.

After providing your licence and registration, an older officer returned to your vehicle a couple of minutes later and stated that he detected an odour of alcohol. Accordingly, he asked you if you had had anything to drink that night, to which you replied, "Yes." When he asked you how many drinks you had had, you submit that you replied, "I don't know, about four or five." He then asked you how long you had been drinking and you submit the following conversation occurred:

- you replied, "I'm not sure, two, three, four, five hours";
- the officer stated, "I don't believe you. When was your last drink?";
- you replied, "I'm not sure";
- the officer stated, "Are we talking minutes or hours here?";
- you replied, "Minutes";
- the officer asked, "How many?";
- you replied, "I'm not sure...five, ten, fifteen, twenty" and;
- the officer stated, "So 20?"

However, you submit that you did not respond to the officer's query because at that exact moment a younger officer came up behind you with an ASD. He subsequently explained that it was used to determine your blood alcohol level and that when you blew into it, it would register a pass, warn or fail. You were then instructed to blow into the device's mouthpiece until you were told to stop. When you finished blowing, the officer indicated that you had blown a "FAIL".

Ms. Currie submits that the result of your ASD test is unreliable because you had consumed alcohol less than fifteen minutes before blowing a "FAIL" on the ASD. Specifically, referencing an attached opinion of forensic expert Nizar Shajani, she submits that a false "FAIL" reading can result if there was mouth alcohol due to the consumption of alcohol less than fifteen minutes before an ASD test was conducted. Consequently, in your statement, you submit that you finished consuming a half-can of beer approximately two minutes prior to being stopped and seven minutes prior to the ASD test being conducted.

Referencing the opinion of Mr. Shajani, Ms. Currie indicates that based on your weight of s.22 pounds and claimed pattern of alcohol consumption, your theoretical maximum BAC at the time you provided a sample of your breath would have been between 31 and 62 mg%. However, referencing Mr. Shajani's opinion, when accounting for the half-can of beer that you finished consuming two minutes prior to encountering police, Ms. Currie indicates that it takes at least half an hour after the end of consumption for the peak BAC to be reached. Therefore, she submits that the alcohol you

consumed while driving would not have been absorbed at the time of the ASD test and your theoretical maximum BAC would have been between 21 to 52 mg% at the time of the "FAIL" result.

After reviewing the evidence before me, I find that there are a number of details that cause me to question your credibility. I find it odd that you were forthcoming with the times and details of your activities prior to encountering police, yet when the officer questioned you about your drinking pattern, you provide evidence that you were vague in your responses. On this point, in paragraph 74 of your statement, you indicate that you did not understand the significance of the questions regarding the time of your last drink and that the officer never explained the significance or relevance. As such, you submit that you did not appreciate the importance of providing the officer with the precise time of your last drink. While I acknowledge your submissions, after reviewing your evidence, I am satisfied that the officer was diligent in attempting to obtain an accurate time of your last drink. I infer that by him repeatedly seeking clarification on this issue, that you would have understood that it was important to provide an accurate response.

You also provide evidence that you alluded to the fact that you had finished your last drink minutes prior to being stopped, yet submit that you were never provided the opportunity to confirm that your last drink was 20 minutes prior. However, I have before me three police documents (i.e. the RTS, the RTS Vehicle Impoundment, and the Occurrence Report) that make up part of the investigating officer's sworn report. All three documents indicate that you informed the officer that your last drink was consumed 20 minutes prior to being stopped. In the Occurrence Report, the officer indicates that it was after you were re-questioned on the issue of the time of your last drink that you, "admitted [your] last drink was actually 20 minutes prior". I find that your evidence regarding how the officer determined that your last drink was, "20 minutes prior", corresponds with the officer's evidence that he re-questioned you on this issue. Therefore, I find it more likely than not that you advised him that your last drink was consumed 20 minutes prior to being stopped. As such, I am satisfied that he had no reason to suspect that mouth alcohol was a factor in your test result or that the result was not valid at the time.

Moreover, in paragraph 22 of your statement, you indicate that you pulled into the 7-11 parking lot at, "11:10 or 11:11 p.m." However, I find that your recollection of exact times in your statement ceases following this submission and that you proceed to rely on police evidence to confirm the times that were stopped and provided a sample of breath into the ASD. Accordingly, this causes me to question the credibility of your claim that you consumed your last sip of beer two minutes prior to being stopped. On this point, I acknowledge your submission that you have OCD and count to two or four when consuming liquids. I infer that by providing this evidence, that you would like me to find that you were conscious of the amount of time it took you to consume this alcohol in relation to when you were stopped by police. However, I find this submission does nothing to bolster the actual time your last sip of beer was consumed. Rather, it simply indicates that you counted to four then to two while consuming beer and that your vehicle was in motion. I have also reviewed the map you provided; however, I find that it does not assist me in determining the time your last drink of beer was consumed. I also question why you opened a can of beer when you were less than three minutes away from your house. I find it very odd that you would limit yourself to four beer between 8:15 pm and 10:30 pm, then consume a half-can of beer when you were less than three minutes away from home simply because you were thirsty and had nothing else in your vehicle to drink.

In paragraphs 16 and 17 of your statement, you submit that you consumed four cans of beer. Specifically, that your first beer was consumed at 8:15 pm and your fourth beer was finished at 10:30 pm. However, you do not provide evidence as to when your second and third beer were finished.

I find this significant because Mr. Shajani indicates that he based his opinion with regard to your BAC on an assumption that the four cans of Budweiser beer were consumed evenly spaced, yet there is no evidence before me to validate this assumption. I infer from the information that Mr. Shajani provided that if your second and third beer were consumed consecutively and/or closer to 10:30 pm that your BAC would increase as a result. While I acknowledge the letter of support from s.22 it simply indicates that you attend a barbeque, purchased an eight pack of Budweiser beer, and consumed four beer between 8:15 pm and 10:30 pm. Based on the evidence before me, I find the credibility of your alleged, "precise pattern of alcohol consumption", to be lacking and as such, I do not find it to be sufficiently reliable.

While I have considered Mr. Shajani's opinion regarding your BAC, I note that it is based on the assumption that your stated drinking pattern is accurate and that mouth alcohol may have caused the ASD to register a "FAIL". However, I have already made a finding that your credibility regarding your drinking pattern is unreliable. Therefore, I have not considered his findings with regard to your BAC.

Further, I acknowledge your submission that your eyes always appear glazed because you use prescription eye drops and that you did not slur any of your words while speaking to officers that evening. However, I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a "FAIL", not how indicia observed by the officer can be explained by factors independent of being under the influence of alcohol or your belief that certain indicia were not present. I acknowledge your submission that you were confident that you had not consumed enough alcohol to have a blood alcohol level over the legal limit for driving. However, 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 % and I have already made a finding that the ASD used for your test was 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 11 days of the prohibition, you need only serve the remaining 79 days. Your prohibition commences November 8, 2013. The prohibition ends at 2359 hours January 25, 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 10, 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. I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the “Act”) requires me to confirm your prohibition, along with 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. No written information was received from you. On October 8, 2013, the date set for this written review, a letter was received from Brian Juriloff advising that no submission on your behalf would be filed. In reaching my decision in this written review I have considered all of the relevant information available to me.

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 Analysis

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

The officer's evidence is that on September 28, 2013 at 0136 hours a vehicle was observed failing to stop at a four way stop. As the vehicle was being followed it crossed over the sidewalk on the right side of the road, almost going into the ditch, before it was stopped by police. You were in the driver's seat, the vehicle's keys were in the ignition, and the vehicle was running. After your ASD analysis you stated that you were not the driver and the police were lying about finding you in the passenger seat.

I note that the Report to Superintendent and the Notice you received state that the date of driving was September 27, 2013. The officer provided supplemental information, which was disclosed to you, noting this error and correcting the date to September 28, 2013. I am satisfied that the evidence clearly sets out the correct date and that you are not prejudiced by this error. I am also satisfied from the officer's Narrative Text Hardcopy that the date of driving should be September 28, 2013.

I am satisfied that on September 28, 2013 at 0136 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 0137 hours you provided a sample of your breath into an ASD. You were shown that the ASD registered a "FAIL."

There is no evidence to the contrary.

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

Were you advised of your right to a second analysis?

The officer's evidence is that at 0138 hours 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.

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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 Narrative Text Hardcopy the officer states that you understood your right to a second analysis and that you did not want a second test. The Report states that you requested a second ASD test. I consider the fact that the officer is a qualified ASD operator and that you were advised of your right to a second analysis. Based on the evidence before me, in the absence of any evidence to the contrary, I am satisfied that you declined to exercise your right to a second analysis and that the Report is in error when it indicates that you requested a second ASD test.

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

Was the second analysis performed on a different ASD?

A second analysis was not performed because you did not request one.

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

The evidence of the officer is that you provided only one sample of your breath for analysis into an ASD which recorded a "FAIL." The Notice was served on the basis of this single result.

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 analysis of your breath was performed on an ASD with the serial number 41148. Constable Froese provided a Certificate of a Qualified ASD Calibrator for this ASD confirming that the calibration of this ASD had been checked on September 25, 2013. This ASD had a Calibration Expiry Date of October 23, 2013 and a Service Expiry Date of July 25, 2014.

This Certificate confirms that this ASD was within the recommended limits and was functioning correctly. In the Report to the Superintendent, Constable Froese swore that your ASD test was performed by a qualified ASD Operator and that the ASD was functioning correctly

There is no evidence 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"?

The officer's evidence is that there was an odour of liquor on your breath, you had droopy, unfocused eyes, and slurred speech. You admitted consuming alcohol and, when asked the time of your last drink, replied "About an hour ago." Prior to being stopped you had failed to stop your vehicle at a four-way stop and had driven your vehicle over a sidewalk almost into a ditch.

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Sub-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 accept the "FAIL" result from an ASD I have found reliable and which was certified to be correctly functioning. There is no persuasive 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 September 28, 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: Brian Juriloff (by fax)
(604) 504-5880

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

You applied on only one ground 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 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.

In your written submission you explained that you require your licence for your job and for family responsibilities. You expressed the hardship this IRP will cause you and you have asked for leniency in the form of a reduced penalty. You also indicated that you have an impeccable driving

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history, and you submitted letters of support from

s.22

s.22 I acknowledge these submissions and appreciate your situation. However, under the Act I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. Nor do I have the authority to consider your driving record or to alter the terms of the prohibition, such as reducing the penalties. 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 23:38 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 Report, the officer indicated that the ASDs registered a "FAIL" at 23:42 hours and 23:46 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 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 breath test analysis.

Was the second analysis provided by the officer?

In the Report, the officer indicated that she 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 072484 and 101058, 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 Colin Gordon Brandt certified that the ASDs used in your case were found to be within the recommended limits when he checked their calibration on September 17, 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 were reliable.

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

In the Narrative, the officer indicated that as she stood at the passenger window several feet away from you, she could instantly smell liquor on your breath as you spoke. The officer stated that your speech was slurred and that you admitted to consuming liquor, and you advised that your last drink was around 6 o'clock.

In your submission, you stated that on the evening of September 20th you consumed three regular size glasses of wine over the course of approximately a four and a half hour dinner. You said that when preparing to leave you felt reasonably confident that the minimal amount of alcohol over a long time period would not have an adverse affect on your sobriety. You stated that you are very conscious about road safety, you often arrange cabs for transportation for yourself and clients, and you volunteer as the designated driver for friends and coworkers on a regular basis.

In her submission, s.22 stated that you often serve as a designated driver for your friends and you have driven her home on several occasions. She stated that, "But this particular time – after only a small bit of wine – s.22 did not realize a breathalyzer would blow her 'over' the safety zone." I acknowledge that you have provided or arranged a safe ride home for various people; however, there is no evidence before me that s.22 was with you on the night in question. As such, I do not find that she can attest to your drinking pattern on September 20th.

Further, I note that you did not address or deny the officer's evidence that your speech was slurred, an odour of liquor was instantly detected on your breath from several feet away, and that you advised the officer your last drink was around 6 o'clock. I find this odd because the officer stated that she stopped you at 23:38 hours, which is 11:38 p.m. It does not make sense to me that if you consumed three glasses of wine some five and a half hours prior to the stop that an odour of liquor

would instantly be detected on your breath from several feet away, and you would be slurring your words. As well, I note that although you did not provide me with a specific time, you said that you drank the wine in the “evening” over the course of a “four and a half hour dinner”, yet you told the officer your last drink was at 6 o’clock. I do not find your evidence on this point to be consistent with what you advised the officer.

Last, 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 do not find your stated drinking pattern to be very 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 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 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);
- 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 the “Facts and evidence” portion of your submission, you write that in s. 254(3) [of the *Criminal Code*] the requirement that reasonable and probable grounds exist is not only a statutory but a constitutional requirement under s. 8 of the *Canadian Charter of Rights and Freedoms* (the “Charter”). Accordingly, you believe failure by the investigating officer to take the necessary precautions to ensure the reliability of the ASD test indicates that he did not have reasonable and probable grounds to make the ASD demand under s.254(3). 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*.

In the “Facts and evidence” portion of your submission, you reference the Superintendent’s Report on ASDs (the Report on ASDs). However, in accordance with the BC Supreme Court’s decision in *Buhr v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1443, information sourced from the “Superintendent’s Report on Approved Screening Devices” is not admissible in this review. Accordingly, I have not relied upon this information in making my decision.

I have before me a British Columbia Driving Record Search. Further, in the “Sequential events” portion of your submission, you ask me to consider that in your five years of driving, you have never had any driving infractions or tickets. 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 sworn Report to Superintendent (the “RTS”), the officer indicated that you were driving or in care or control of a motor vehicle at 2143 hours on September 21, 2013. Further, in the Narrative Text Hardcopy (the “Narrative”), the officer submits that police were conducting a high visibility road safety check stop on Hugh Alan Drive in Kamloops. A vehicle approached from the north and was witnessed doing a u-turn. The officer pulled the vehicle over as it completed the u-turn. A lone occupant was observed and your identity was confirmed with a valid British Columbia driver’s licence.

In your written statement, you submit that in the darkness you noticed what looked like barricades and that you assumed it was a rockslide detour that had been in the same location a few months prior.

I have reviewed the article you submitted titled, "Rockslide blocks portion of Hugh Allan". I infer that by providing this article you would like me to find that you performed a u-turn because you assumed the police check stop was in fact a detour. Although I acknowledge your submission that you thought the barricades were a sign of detour, you do not refute driving at the time the 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 "FAIL"?

In the RTS, the officer indicated that the ASDs registered a "FAIL" at 2147 hours and 2156 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?

The officer provided two unique Certificates of a Qualified ASD Calibrator (the "Certificates"), which bear ASD serial numbers 066743 and 066744, respectively.

In your written statement, you indicate that the officer waved a device at you and indicated that it was a new machine by saying, "This is a new machine, see?". However, you indicate that he never showed you what happened to the first device. Further, in the "Review of IRP number s.22 portion of your submission, you indicate that the ASD serial number indicated in the RTS does not match the serial number on the Certificate provided for that device. Specifically, that the RTS indicates 066244 whereas the Certificate indicates 066744.

Although I acknowledge your submission that you were not shown what had happened to the first device, the officer has provided evidence that two different ASDs were used for your tests. I have no compelling evidence before me to the contrary.

Further, in the RTS, I note that the "7" and "4" in ASD serial number 066743 have a small leading pen mark at their base. When compared to ASD serial number 066[7]44, I note that the same leading pen mark is indicated on the first "6" and first "4". This leading pen mark is also evident on the digit you submit is a "2". However, I infer that this leading pen mark indicates that the digit is in fact a "7". I have also examined the other 2's and 7's written by the officer in the RTS and conclude that there is a distinct difference between these digits. Specifically, the 2's have a looped, rounded bottom whereas the 7's do not. Having made these findings, I conclude that the handwritten serial number for the second ASD test in the RTS corresponds with the Certificate that bears the same serial number.

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 Colin Gordon Brandt certified that the ASDs were found to be within the recommended limits when he checked their calibration on August 29, 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.

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

In the Narrative the officer's evidence is that you had a moderate odour of liquor on your breath that was sweet smelling and strong when you spoke. When you were asked when your last drink of alcohol had been the officer submits that you denied drinking any liquor. After the officer confronted you with the fact that he could smell liquor on your breath he asked you again when your last drink of alcohol had been. You denied consuming any liquor. When you were presented with an ASD and the officer explained the importance of being honest about drinking liquor on that date, he submits that you stated an hour ago and that you had worked until 9:00 pm and were heading home.

In your written statement, you indicate that you worked from 1:00 pm to 9:00 pm PST in an office where your cubicle is directly connected to other employees making it impossible for you to have consumed any alcohol without someone noticing or smelling it. You provided an "Agent State Detail Report" that indicates you logged out from work at 10:00:37 PM MST. After leaving work you went to a Shoppers Drug Mart, purchased two items, and provided a receipt that indicates your purchases were made at 9:15 pm. From there you went to Save-on-Foods, purchased a DVD, and provided a receipt that indicates your purchase was made at 21:20:11 hours.

In your written statement, you indicate that at 9:25 pm PST you purchased a four pack of Jaw Drop Squeezing Melons coolers and provided a receipt that indicates this time of purchase. You then proceeded to a Chevron gas station and purchased gas and food. While preparing to leave the gas station parking lot, you submit that you reached for a cooler, drank it, and put the empty can behind your seat. You provided a photo titled "Empty can in bag behind drivers seat" to this point. After exiting the gas station parking lot, you took the 367 exit for Pacific Highway between 9:40 pm and 9:43 pm MST. On this point, you indicate that you took the 367 exit between 9:40 pm and 9:43 pm MST. I note that when referring to the other times in your statement, apart from your scheduled shift, that you indicate PST. Accordingly, I have accepted this as a clerical error.

After being pulled over by the officer he asked you if you had had anything to drink that night. You indicate that you were untruthful and told the officer, "no." The officer responded by asking you if you understood how bad it was to lie to an officer. He asked you again if you had had anything to drink that night and again you replied, "no". The officer advised you that he could smell alcohol on your breath and stated that he would like to perform a breathalyzer test. He explained what the machine was and that it should come up 0.0. He asked you the time you had your last drink once more and you responded, "I got off work an hour ago and just had one." You blew into the machine and it registered a "FAIL", which the officer advised you meant that you were impaired.

In the "Facts and evidence" portion of your submission, you provide evidence that forensic scientist, Nizar Shajani, outlines information in an affidavit that the presence of alcohol in the mouth can falsely elevate the reading on a screening device. Accordingly, you submit that unless a peace officer ascertains when a driver consumed their last drink of alcohol or waits at least 15 minutes before administering an ASD test, that the officer cannot rely on a "FAIL" reading registered by the ASD. In your written statement, you provide evidence that you had consumed a cooler approximately two minutes prior to being stopped by the officer. Further, in the "Review of IRP number s.22 portion of your submission, you indicate that four minutes passed from the time you were pulled over to the time you completed the first test and a total of nine minutes passed between your first and second test.

The officer's evidence is that he inquired on three occasions as to the time of your last drink. On the second occasion, he advised you that he could smell an odour of liquor on your breath and on the third occasion, the importance of being honest about the time of your last drink. When confronted with this question, you admit to being untruthful about your drinking pattern on two occasions because you were in fear of the fact that you had just been drinking a cooler two

minutes prior. On this point, I note that you provided several documents and receipts to corroborate the exact timing of your activities leading up to being stopped by the officer. However, the evidence before me is that when the officer asked you the time of your last drink you provided a vague response of an hour ago.

Further, in the “Review of IRP number s.22 portion of your submission, you submit that the officer did not ask you if you had just used mouthwash, had drank sweet juice or used mints. I note that the officer’s evidence is that the detected a moderate odour of liquor on your breath that was sweet smelling and strong when you spoke. He does not provide evidence that he detected an odour of mouthwash, juice or mints. Further, you indicate that the officer did not smell your vehicle after you got out, that your eyes were not bloodshot, and that you were not displaying behaviours associated with someone who had been drinking. However, in this review I must make a finding on whether your BAC was less than 80 mg% even though the ASD registered a “FAIL”, not what your symptoms of impairment should have been. You also question why no sobriety tests were performed on you such as walking in a straight line. 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 sobriety tests.

You admit that you chose to withhold information, known only to you, about your consumption (i.e. time of last drink). By providing this evidence, I infer that you would like me to consider that the alcohol you consumed approximately two minutes prior to being stopped may have affected the ASD results. However, I conclude that by providing this evidence you are attempting to undermine an investigation where the officer appropriately turned his mind to the time of your last drink and provided you with several opportunities to be forthcoming about your actual consumption. As such, I am satisfied that the officer proceeded with your first ASD test because you advised him that your last drink was an hour ago after you were advised multiple times about the importance of being honest about your consumption.

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 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 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 (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 had a reasonable excuse for refusing or failing 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”.

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You cited a number of sources in your written submission, however, you did not provide these sources in their entirety as part of disclosure for this review. While I have considered the excerpts from these sources, I am mindful that I do not have the information before me in its entirety and have considered this when making my decision.

You submit that if you did have a presupposed BAC above 0.1% that the officer should have arrested and detained you at a detachment to do further testing with an approved instrument or charged you with an Administrative Driving Prohibition (an "ADP"). The IRP legislation allows a peace officer to obtain a sample of breath at roadside removing the necessity to transfer a person to detachment to obtain a reading on a different device. Further, the reason why the officer did not proceed by way of an ADP it is not an issue I must consider in this review.

You indicate that the officer never required you to perform physical tests. 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.

You submit that there was no evidence that your driving skills were impaired or abnormal. 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 indicate that a comment made by the officer who first encountered you at the roadcheck condemned you to be subjected to the ASD demand made by the investigation officer. Further, you believe that having the ASD demand made on you was a violation of your constitutional rights because there was no presence of indicia associated with being under the influence of alcohol. 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 sworn Report to Superintendent (the "RTS"), the investigating officer indicated that you were driving or in care or control of a motor vehicle at 1925 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 RTS, the officer indicated that the ASDs registered a "FAIL" at 1927 hours and 1935 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 101055 and 065867, 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 Colin Gordon Brandt 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.

You indicate that after the officer served you with the Notice that you questioned him regarding the certificate/identification numbers and expiration dates for the ASDs used in your tests. The officer refused to give you the certificate or identification numbers; however, he showed you that the devices were due for calibration on October 29th. On this point, you cited sources that suggest there have been confidential police reports that demonstrate when ASDs are not calibrated correctly they can give incorrect readings by as much as 50% and that an Alco-Sensor IV DWF has an error ratio of approximately +/- 0.01%. Further, another source suggests that calibration periods for ASDs are not always followed correctly and that our government does not have any legislation to regulate how often these devices are maintained.

Aforementioned, the officer submitted two Certificates that bear the same ASD serial numbers he indicated in the RTS. These Certificates indicate that both devices have a calibration expiry date of 2013-10-29. Moreover, the service expiry dates are indicated as 2013-11-20, and 2014-01-28, respectively. Your prohibition was served on October 4, 2013, therefore, I am satisfied that the calibration and service expiry dates indicated on the Certificates are valid. I acknowledge your submission that our government does not have any legislation to regulate how often ASDs are maintained. However, 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 disclosure, I am satisfied that the officer fulfilled the requirement to provide information on the maintenance of the devices used in your investigation.

Further, you cite a source that suggests when an ASD is malfunctioning that the device may indicate that the person is not blowing properly when there is nothing wrong with how he or she is performing the test. On this point, another source suggests that the harder and deeper a person exhales the more the presence of alcohol is concentrated. Specifically, you provided a quote from, Dr. Michael Hlastala, Professor of Physiology, Biophysics, and Medicine that indicates the last part of the breath has an alcohol concentration that is much higher than the equivalent BAC and can be over 50% above the alcohol level. Further, Dr. Hlastala has found that when a person is asked to blow hard, breath is captured from the bottom of the lungs, near the alveolar sacs, which will be richest in alcohol.

I have no compelling evidence before me that either ASD was malfunctioning when you were providing a sample of your breath for analysis. Rather, I find that the officer instructed you to blow harder because you were not blowing properly into the device. He provides evidence in the Narrative Text Hardcopy – Synopsis – 1 (the "Synopsis"), that your first breath sample was a "NOGO", as you were not blowing hard enough and blocking the mouthpiece; evidence you do not refute. Further, I infer that by providing two quotations that discuss the findings of

Dr. Hlastala that you would like me to conclude because you followed the officer's instructions to blow harder that this deep blowing falsely elevated the amount of alcohol in the breath samples you provided into the ASDs. While I acknowledge your submissions, you did not provide Dr. Hlastala's findings in their totality. Therefore, I cannot conclude that these findings were based on tests conducted with an Alco-Sensor IV DWF. Moreover, I cannot conclude that the conditions in this study were similar to the conditions present when you provided your breath for analysis.

Based on the evidence before me, 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 when you were asked the time of your last drink that you stated twice your only drink was one, 18 ounce beer that you had finished about 30-45 minutes ago. The officer indicates that he could smell an odour of liquor on your breath while you were inside the vehicle as well as when you were standing on the roadway. Further, in the Synopsis, he indicates that following the two ASD results, you indicated that you had had some drinks the night before, at a birthday celebration until around 0230 hours. After going to work at s.22 for 0700 hours, you cooked food all day, and had not eaten until your dinner that night.

You wrote that you and your mother received your bill from s.22 at 18:56:19 and went through a roadside check between 19:10 and 19:15 hours. After being asked to pull aside, you admitted to the investigating officer that you had had one, 18 ounce pint of beer with your dinner approximately 30 minutes ago. Following the first "FAIL" result, the officer proceeded to ask you more questions about how much you had had to drink that evening. Specifically, he questioned you about the previous 24 hours. You told the officer that the previous night you had attended a birthday party, had a few drinks, got home at approximately 0030 hours, got to sleep around 0200 hours, went to work for 0800 hours, and went home before meeting your mother for dinner. The officer asked you if you had had anything to eat during that time and you responded, "no." Accordingly, he advised you that that may be why you were blowing a "FAIL" into the device and that how much you had slept, ate, and had to drink determines what your BAC is. After the second ASD registered a "FAIL", the officer informed you that your BAC was above 0.1%. He then advised you that he did not believe the amount of alcohol that you had consumed that evening was responsible for your BAC being over 0.1% and he admitted it was probably due to the circumstances of the last 24 hours.

The officer provides no evidence that he informed you that alcohol consumed hours earlier could affect the reliability of the ASD. Further, you refer to a 24 hour time period, yet submit that you were at a birthday celebration until around 0230 hours. However, you indicate that you entered the roadside check between 19:10 and 19:15 hours, which would have been well before 24 hours had passed since drinking at the birthday party. What I find noteworthy is that you move away from this submission by indicating that you had a minimal amount to drink at this party. Instead you indicate that you believe the actual grounds that caused the officer to question the reliability of the ASD was your admitted consumption of alcohol approximately

40 minutes before being stopped.

Accordingly, you indicate that studies have shown that an ASD test will, within approximately forty minutes of the introduction of alcohol to the mouth, cumulate the supposed BAC based not only on the alcohol in the blood, but also alcohol in the mouth. Further, that the Alco-Sensor IV DWF does not include a feature to determine if a sample has been contaminated by mouth alcohol. Your evidence is that you consumed alcohol approximately 40 minutes before being stopped, yet throughout your submission you indicate that you advised the officer multiple times that your last drink was 30 minutes ago. I find that you have not provided any authoritative evidence on this issue. Therefore, I am satisfied that your ASD tests results were not affected by mouth alcohol.

You also indicate that you do not believe that the officer has been properly trained on the specifications of an Alco-Sensor IV DWF because he advised you that the ASD was not capable of producing an actual BAC level. Specifically, that according to specifications, this class of ASD is capable of producing an actual BAC level if programmed correctly. Consequently, you do not believe that he had the right to accuse you of having a BAC above 0.1% because the two "FAIL" results did not provide him with this information.

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. With respect to the officer's training, 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 I have no compelling evidence before me that the officer's training with regard to the operation of an ASD should be questioned.

Moreover, I note that the s.22 receipt you provided indicates that three beers were purchased (i.e. 2 Blonde Pint, 1 Blonde Pint). While you submit that you highlighted what you had, you do not provide any evidence that your mother had consumed alcohol that evening. I am also left wondering why your mother has not provided any evidence for this review if she could have supported your alleged drinking pattern that evening. While you may believe that your BAC was above 0.1%, you did not provide any compelling evidence that would cause me to doubt the "FAIL" readings on the ASDs 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 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.

September 25, 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 your lawyer, Grant J. Gray, 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.

Mr. Gray submitted that the officer does not provide a basis for him to have reasonably suspected you had alcohol in your body, which gives rise to whether or not there is a lawful demand.

However, I conclude that the validity of the demand is not an issue before me 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.

Mr. Gray submitted that there is nothing in the evidentiary record which demonstrates a basis for belief that your ability to drive was affected by alcohol. To support his position Mr. Gray cited the recent court decision *Wilson v British Columbia (Superintendent of Motor Vehicles)* for my consideration.

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 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 0059 hours on September 8, 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 two ASD "FAIL" results.

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 the officer 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 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.

Adjudicator s.15

pc Grant Gray by fax 250 491 9764

October 3, 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 (“OSMV”) for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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 18:17 hours on August 10, 2013. In the Narrative Text Hardcopy (the “Narrative”), the officer stated that while conducting a road check in the 23100 block of Fern Crescent in Maple Ridge, BC, you were identified as the driver of a vehicle he stopped. He indicated that he made eye contact with you as your vehicle approached and signaled for you to stop, but you veered right and continued to drive past him. The officer said he yelled, “stop!” and the vehicle stopped approximately three car lengths away.

You provided an explanation for initially failing to stop for the officer. You indicated that you misunderstood his hand signals. Your evidence confirms you were the driver of the vehicle when the officer stopped 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 18:24 hours and 18:34 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 in the Report and the Narrative indicates that you were informed 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?

The officer's evidence in the Report and the Narrative indicates that you were provided with the opportunity to provide a second analysis and that you registered a "FAIL" result.

You said that you have no recollection of being shown the result of the second ASD test. You said the officer "took it out of [your] mouth and said 'nope! Sorry still failed' and put the kit on the hood of his car". At the time, you did not know of your right to see the results. You said that in hindsight, you should have asked.

While you said it was your right to see the results, I am not aware of any requirement under the Act for police to show a driver ASD test results. In the Narrative, which forms part of the officer's sworn Report, the officer indicated that he showed you the result of both ASD tests. By contrast, your evidence is that you have no recollection of being shown the result of the second ASD test. I find your evidence to be less certain and the officer's evidence to be more compelling on this point.

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

Was the second analysis performed on a different ASD?

The evidence in the Report, the Narrative and the Certificates of an ASD Calibrator (the "Certificates") indicates that a different ASD was used for your second analysis than was used for your first analysis.

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?

As both results were "FAIL", I am satisfied that the Notice was served on 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. Paragraph 14 of the officer's sworn Report states that the ASD tests were conducted by a qualified ASD operator and that the ASD units were functioning correctly. 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 Report, the officer noted that you told him the time of your last drink was, "maybe two hours ago". In the Narrative, the officer stated that your speech was suspect and your voice was choppy. He said you hesitated before all of your answers, your eyes were glassy, and there was

a light odour of liquor coming from your breath. When the officer asked you how much liquor you had consumed, he said you replied, “just one”. When asked the time of your last drink, the officer said you replied, “maybe two hours ago”.

You said that when the officer asked the time your last drink, you were unsure and not informed of the reason for his question. You confirmed telling him approximately two hours prior. You said you only had one drink at the beach, a vodka cooler, and you took the last sip just before packing up to leave. You said that before blowing into the ASD, you asked the officer if it would affect the results if you could still taste alcohol in your mouth. You indicated that he said it should not. You said you then asked the officer “if [you] had [your] first sip of beer right before this test it wouldn’t affect the result?” You said the officer replied, “probably, but it measures BLOOD alcohol levels”.

You indicated that it is obvious that test was unreliable because you now know that drinking alcohol within 15 minutes of an ASD test greatly affects the results. You indicated several times that you believe the investigation was hurried and happened very quickly. You also indicated that you requested to drink some water in between the time of the two tests but were not permitted to do so and you questioned the reason for this.

Your written submission contrasts with what you told the officer at roadside. You said you were unsure and not informed of the reason for his question when the officer asked the time your last drink. It is unclear to me how knowing the officer’s reason for asking the question would change your answer if you were answering truthfully. Your evidence in your submission is that you had the last sip of your vodka cooler just before packing up and leaving which suggests you believe your breath samples were conducted within 15 minutes of consuming your last drink. However, you did not provide a time at which this occurred in relation to the time you were stopped by police and the time you provided breath samples. Consequently, I do not find your evidence to be persuasive or credible.

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. Given that you confirm telling the officer your last drink was approximately two hours prior and that the officer would not have evidence to suggest otherwise, the officer was not required to wait any period of time before administering the first breath analysis.

The undisputed evidence before me is:

Time of driving	18:17 hours
Time of first ASD test	18:24 hours
Time of second ASD test	18:34 hours

There is no evidence before me that you were drinking up to the point the officer stopped you and no evidence of open liquor in your vehicle. Given that your second test was 17 minutes after the time of driving, I am satisfied that the results were not due to mouth 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%. I am satisfied on a balance of probabilities 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 10, 2013. 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, which commences on October 4, 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 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* (Act) requires me to confirm your prohibition, along with 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 was 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, Dudley Edwards, confirmed that he received full disclosure. I have proceeded with the review based on that confirmation.

Mr. Dudley argued that there is no evidence before me that your ability to drive was affected by alcohol. Mr. Dudley 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. Dudley'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 (RTS) the officer noted that you were a driver or had care or control of a motor vehicle on September 7, 2013, at 20:00 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 20:00 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. 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 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.

s.15

Adjudicator

cc: Dudley Edwards
604-433-8209

September 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 (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 Lisa Helps as your lawyer. On September 12, 2013, this office faxed Ms. Helps 15 pages of disclosure documents which included a fax cover sheet. The fax cover sheet stated that the written review was scheduled for September 19, 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. Ms. Helps faxed this office a letter on September 16, 2013, stating “Please note that counsel will not be providing submissions...” To date I have not received any submissions from 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 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 19:55 hours, on September 7, 2013.

I am satisfied that you were a driver within the meaning of section 215.41(1) of the Act, at 19:55 hours, on September 7, 2013.

Did the ASD register a “FAIL”?

In the RTS, the officer indicated that the ASDs registered a “FAIL” at 20:01 hours and 20:18 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 20:18 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 101797 and the serial number for the second ASD as 101790. 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 September 5, 2013, he checked the calibration of ASD serial number 101797. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 3, 2013, and the service expiry date as July 25, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 5, 2013, he checked the calibration of ASD serial number 101790. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 3, 2013, and the service expiry date as July 25, 2014.

There is no evidence before me to suggest that the specific ASDs used in your case were not functioning properly on September 7, 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 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

Adjudicator

cc: Lisa Helps
Fax: [604] 669-5558

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

You applied for this review on all the grounds; however, not all grounds are applicable to your situation. For your benefit, I have considered all the grounds that apply to your circumstances.

Records at this office confirm that full disclosure of the documents before me was provided to your lawyer, Philip Cote. 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 officer stated that you were driving or in care or control of a motor vehicle at 00:17 hours on October 20, 2013. In the Narrative Text Hardcopy (the “Narrative”), the officer stated that while travelling Westbound on Dewdney Trunk Road in Maple Ridge, BC, he observed a vehicle driving Eastbound cross the centre line and almost hit the police vehicle.

The officer said that he spoke with the male driver through the open driver’s window and the driver provided a valid BC driver’s licence, number s.22 bearing the name of s.22. The officer said, he “recognized s.22 as a former employee from a local bar and was satisfied s.22 was the driver”.

Mr. Cote submitted that your IRP should be overturned on the grounds that you were not proven, on a balance of probabilities, to be driving or in care or control of a motor vehicle on the date and time in question. Mr. Cote said that in order to find you in care or control of a vehicle, I must first be satisfied that the person identified by the officer was in fact, you. He argued that no such identification was properly made. He said the officer was provided with a s.22 paper licence which does not contain a photograph; a copy was provided with his submissions.

Mr. Cote further submitted the Report indicates that a rental vehicle was impounded but the rental vehicle was not registered to you. He said the officer stated that he recognized the driver of the rental as having worked at a local bar; however, he did not explain to what extent he knew the driver. He also did not indicate if he knew the driver by name or that he “recognized s.22 specifically”. Mr. Cote argued that the officer did not pursue a more thorough investigation by obtaining a description of the person, s.22 from CPIC or ICBC.

With respect to the issue of the rental vehicle, I can see no reason why a rental vehicle would be registered to a person renting a vehicle. It is my understanding that vehicles are registered to the actual owner of the vehicle, and rented to persons via a rental agreement. The Notice of Vehicle Impoundment identifies Dollar Thrifty Automotive Group Canada Inc. as the owner of the impounded vehicle. In the Vehicle Impoundment Report to Superintendent, the officer stated. “Rental veh, Driver was Renter”. I infer this to mean that the officer confirmed that the vehicle was rented by the driver he stopped.

As for the identity of the driver, the Court in *Johnson v the Superintendent of Motor Vehicles* 2002 BCSC 89, 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. Evidence to support the suggestion is required in an administrative review. Mr. Cote submitted that the officer did not pursue a more thorough investigation by obtaining a description of the person s.22 from CPIC or ICBC; however, as Mr. Cote was not a witness to the events and you did not provide any direct evidence to support this suggestion, it is not unequivocally known whether or not the officer checked CPIC or ICBC. While it is not noted in the officer's reports, the absence of such information is not evidence to the contrary. Rather, it merely calls for speculation.

The officer's evidence is that he recognized you as a former employee from a local bar and was satisfied that you were the driver. I infer from this evidence that the officer was familiar enough with you so as to positively identify you as the person driving the vehicle he stopped. It does not make sense to me that you would have any knowledge of this prohibition or apply for a review of it, if you were not the driver and had not been served with the Notice. There is no evidence before me that someone else was in possession of your licence and driving the vehicle on the date and time noted in the Report. Ultimately, I do not find Mr. Cote's submissions persuasive.

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 Report, the officer indicated that the ASDs registered a "FAIL" at 00:18 and 00:20 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, 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.

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.

Adjudicator

cc: Philip Cote
Fax: 778-395-6226

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

You checked the boxes next to eight of the grounds on the application form. However, the grounds 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.

At the beginning of the oral hearing, I confirmed with you, that you had received full disclosure of all of the 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 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 0137 hours on October 5, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer reported that you were travelling west bound on Dewdney Trunk Road when you were stopped at a road block near the 20500 block of Dewdney Trunk Road.

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.

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.

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”.

In the hearing you stated that the investigating officer requested a second ASD and while waiting for the device you were going to have a cigarette. The officer advised you that the cigarette would affect the reading. You stated that you did not believe the cigarette would not have any effect on the result. You stated that the officer then placed you in handcuffs and you were placed in the back of the officer's vehicle until the ASD arrived. You stated that while in the vehicle you were having a panic attack. You were experiencing shortness of breath and sweating. When presented with the second ASD you attempted to provide a sample on numerous occasions. You could not provide a second sample.

In his Narrative the officer stated that there was a 5 minute delay in administering the test as you were not blowing hard enough into the ASD on several attempts. Further, he stated that the device registered a “FAIL” and the result was shown to you.

In considering this issue I find the officer's evidence more compelling. It seems more likely than not that if you were not successful in your attempts the officer's evidence would be quite different. Specifically, with regard to recording the “FAIL”, reporting that he showed you the result and finally attaching the Certificate that corresponds with that device.

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 October 3, 2013, he checked the calibration of ASD serial number 043878. 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 September 20, 2014.

For the second ASD, the qualified ASD calibrator certified that on September 27, 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 October 25, 2013, and the service expiry date as September 20, 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 were reliable.

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

You stated that you consumed two pints of Pale Ale. You acknowledge that the officer detected an odour of liquor on your breath, observed you to have slurred slow speech and red glossy eyes. You stated however, that the odour of liquor is also consistent with recent drink and you believe the officer mistook your mumbled speech for slurred speech and you had just worked all day; your eyes would naturally have been red. You stressed that you do not drink and drive. You shared two personal stories with me that relate to excess alcohol and these incidents have left you more aware of the consequences associated with too much alcohol.

You stated that you had finished your last drink at 1:30 a.m. You are certain of this time as it was "last call". You stated that you were disclosed a paper labeled: Technical Information on the Operation and Calibration of ASDs in British Columbia where it states that breath samples should be taken at least 15 minutes after the last drink was consumed to allow elimination of mouth alcohol.

In section 11 of the Report, the officer stated that when asked you advised him your last drink was "20 minutes ago". In the Narrative Text Hardcopy (the "Narrative"), the officer indicated that your response to "time of last drink" was you had two beers throughout the night and your last drink was 20 minutes ago.

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. Ultimately, given the totality of the evidence before me I am not persuaded that you had just consumed your last beer. Notably the second sample was taken 20 minutes after the time you submitted that you had your last drink. On that basis I am satisfied that the result was not due to mouth alcohol.

I have already found that the ASDs were 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 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

October 8, 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

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

You applied on two grounds. However, the twelfth ground is not relevant because you were prohibited on the basis of a “FAIL” result on an ASD. I will consider all relevant grounds.

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?

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

Having made this finding, 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.

Adjudicator s.15

OCTOBER 3, 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);
- 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.

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 told me that what you did was totally wrong, but it was the first time you had done this and it was your first offence in 24 years. You said you would like this to be revoked or the prohibition decreased in order to keep your wife happy. You want to get everything back to normal. You admit you were in the wrong, but you need to make it easier on her, to make her happier. You said the last week has been hell. You said that even if only the motor vehicle could be released, then someone else could drive it. It is a special van that you use to transport your wife to s.22 If she cannot go for three more weeks, it will set her health back.

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

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.

I told you that you could apply for a separate hearing to have the vehicle released on compassionate grounds. You said you have tried this, but because your wife s.22 s.22 you are not eligible for this option. I confirmed that there are no exceptions to this rule, but I called you back to recommend you try the local handyDART system in your community.

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 Draper indicated that he witnessed you driving or in care or control of the vehicle at 2353 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 RTS, Constable Draper 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 2356 and at 0000 hours (or midnight), 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 Draper 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 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.

October 16, 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 written submission you asked for an early release of your vehicle from the impound lot. You stated that you wish to have the penalties lessened because of your financial situation. Last, you stated that you will never let this happen again. 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.

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 sworn Report to Superintendent for the IRP (the "Report"), the officer indicated that you were driving or in care or control at 1616 hours on October 2, 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 stopped your vehicle because your vehicle was not insured. The officer indicated that you were very agitated and waving your hands in the air.

In your submission you deny that you were flailing around. You stated that you motioned to the officer that you would stop at a more practical stop than a bus stop.

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 1623 hours and read the ASD demand at 1628 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 you denied having a drink.

In the Narrative, the officer stated that he formed the suspicion that you were impaired by alcohol given the following:

- An odour of liquor on your breath.
- An empty beer can under the passenger seat; accessible to the driver.
- Rapid and slurred speech.
- You were extremely agitated.

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 1628 hours. In the Narrative, the officer stated that after he read the demand you agreed that you would provide a sample.

When presented with the device the officer reported that you:

- Put your bottom lip so that it blocked the mouthpiece; and blew air around the mouthpiece.
- You barely took the tip of the mouthpiece into your lips, and blew air out the side.
- You sucked back, producing a "VOID."
- You puffed your cheeks out in a ridiculous fashion and blew air out the side of your mouth.
- Were given six opportunities, with three different mouthpieces.

As there is no evidence to the contrary, I am satisfied that you failed or refused to comply with the ASD demand.

Did you have a reasonable excuse?

In your submission you stated that you have been s.22 and you have learned to compensate for your health issues.

In the officer's Narrative he stated that you advised him that you s.22 and couldn't breathe properly. He also stated that:

- You were talking non-stop, shouting at the officers.
- The officer could clearly see that you were blowing ample amounts of air.
- The device was tested on your passenger.

There is no evidence of any impediments to you providing an adequate breath sample. The ASD was operated by a qualified ASD operator. Here, the vast majority of the evidence suggests that it was not your medical condition that prevented you from complying with the officer's demand; rather, the only reasonable inference to be drawn is that your failure to provide a suitable sample was intentional.

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 October 2, 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 11, 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) 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, John Green, confirmed that he had received all of the disclosure documents before me. I have proceeded with the review based on that confirmation.

I confirm receipt of Mr. Green's submission and your Statutory Declaration received in our office on October 7, 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?

The police evidence in the Report to Superintendent (the “Report”) is that on September 24, 2013, at 20:15 hours, Officer Rice (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 20:35 hours, the officer used ASD serial number 101814 “FF” to take a breath sample from you. The result of your ASD test 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 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?

The officer’s evidence at section 8 of the Report is that your request for a second ASD test was withdrawn. The Narrative Text Hardcopy (the “Narrative”) indicates that at 20:50 hours, the officer read your right to request a second ASD test from the official card, and that you stated you wanted to provide a sample. The officer said that seconds later as he went to collect the new ASD instrument, you walked away in haste into the hotel. You walked to your room s.22 according to hotel staff. As such, the officer assumed that you withdrew your request to provide a second sample. The Narrative further indicates that at 21:10 hours the officer, along with two

other members, attended to your room at the request of hotel management to keep the peace as hotel security removed you and your guest from the hotel. At this time, the officer served you with copies of the Prohibition and Vehicle Impoundment Documents.

Your evidence is that after checking into the s.22 you headed towards your rental car to get your dog and your friend, who was waiting in the car. On the way to your car, you were stopped by a police officer. After some conversation, you said you did your first ASD test and the officer told you you had failed the test. You said that shortly after that, the officer asked if you would like to try again on another machine and you said "yes, I would." The officer then returned to his vehicle and from what you could see, he was doing something on his computer. You said it was cold and raining and the wind was blowing. After about ten minutes, you told the bell boy you were going to your room and to tell the police where you were if they came back. You said you left the car where it was because you had been told by the officer that it was impounded and would be towed. After ten or fifteen minutes, the officer knocked on your door accompanied by hotel staff. At that time you were told you had to leave the hotel, and the officer served you with the prohibition and vehicle impoundment paperwork. The officer did not say anything to you about another breath test and you assumed he had decided not to do it. You say you did not know that you had a legal right to the second test and that at no time did you "withdraw" any request for a second test. If you had been given an opportunity to provide a second sample, you would have done so.

Your lawyer said that the provision of a second ASD test is mandatory once it has been requested and this did not happen in this case. The officer assumed that you were withdrawing your request for a second ASD test because you walked away from the scene. However, Mr. Green states that there is no evidence in the officer's material that establishes this assumption was correct.

I acknowledge Mr. Green's assertion on this point, however, in my view the evidence in the officer's report does establish that his assumption was correct. The officer's evidence is that you were displaying the following indicia of impairment: glossy eyes, strong odour of alcohol, slurred speech, unsteady footing, angry and argumentative, belligerent toward police. You have not disputed any of this in your statutory declaration, nor has Mr. Green. In addition, after reading the first ASD demand to you, you stated you understood but the officer said that you continued to argue and question who reported you impaired. Also, when asked the time of your last drink, you continued to be belligerent and refused to answer. The officer said you continued to slur your speech as you berated police. In my view, the above-described behavior combined with your action of walking away from the scene of the investigation, makes it reasonable to conclude that the officer assumed correctly that you were effectively withdrawing your request for a second ASD test.

In addition, you said you did not know that you had a legal right to do a second ASD test and if you had been given the opportunity, you would have provided a second sample. The officer had advised you of your right to have a second ASD test done on a different device. You had already indicated that you understood that right and did want to provide a second sample. Second, I question why you walked away from the scene before the second ASD was presented to you. You said it was cold and raining and the wind was blowing. I do not understand why you would not have waited in your vehicle until police were ready with the second ASD.

I am satisfied that the second analysis was not provided by the officer because you withdrew your request.

Was the second analysis performed on a different ASD?

As indicated above, a second ASD test was not provided by the officer.

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

There being only the one ASD test conducted, which resulted in 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 the following:

- ASD serial number 101814 “FF” 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 July 15, 2014.

As there is no evidence to the contrary before me, 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 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.

s.15
Adjudicator

cc: John Green
by fax (250) 361-9181

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 02:06 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 02:06 hours and 02:12 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 RTS, 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 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 101464 and 042156, 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 J. Schwenneker 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. In the RTS, the officer indicated that at the time of the tests the ASD temperatures were 21 degrees Celsius and 20 degrees Celsius, respectively. 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.

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 temperatures of the ASDs are 21 and 20 degrees respectively. Therefore, I am satisfied that the ASDs were within the range of accepted operating temperatures.

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.

s.15
Adjudicator

cc: Mikhael Magaril
Fax: 604-637-1617

October 24, 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;
- 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

One of the grounds you applied on does 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 have proceeded with this review based on that confirmation.

I have your October 7, 2013 letter in which you told me that you are a responsible and respectable person that would never drive under the influence of alcohol. You said that you continuously give back to the community by doing volunteer work at a variety of charitable and fundraising events. The night before you received your driving prohibition, you made the responsible decision making sure that you all made it home in a cab.

I do commend you for doing volunteer and fundraising work in your community, and for ensuring you and your friends took a cab home the night before your driving prohibition. 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.

You said that if your options were explained to you properly and the right questions were asked, you would have gone with the officer down to the station and used an approved device for an accurate reading. I understand what you are saying, however, when an officer is investigating a person for impaired driving, there is no requirement in the Act for that officer to provide testing on anything other than an Approved Screening Device 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 "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 Report is that on October 6, 2013, at 10:13 hours, Officer Dale (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 an ASD register a "WARN"?

The police evidence in the Report is that at 10:16 hours and at 10:19 hours, the officer used ASD serial number 056984 and ASD serial number 061464 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 police evidence in section 7 of 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. There is no evidence before me to the contrary.

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

Was the second analysis provided by the officer?

As noted above, the officer conducted a second breath test at 10:19 hours on ASD serial number 061464.

I am satisfied that the officer did provide the second analysis.

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

The officer noted the result of your first and second ASD tests as a “warn”. You were served with a three day driving prohibition based on the “warn” result.

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

- ASD number 056984 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 May 2, 2014.
- ASD number 061464 was checked for calibration on September 25, 2013 and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 23, 2013, and a service expiry date of May 2, 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 told me that the night before you received your driving prohibition, you were out with friends and you had approximately three alcoholic beverages. You were going to have more drinks so you called a cab to get to the bar safely. At the bar, you had approximately three drinks, with your last drink being just before twelve. You called a cab and returned back to the Lake Country Lofts at approximately 1 a.m. and you all immediately went to sleep. When you woke up you got a call from a friend who wanted to go for breakfast. You said you quickly got ready and proceeded to your destination. You knew you had not drank excessively the night before

and were 100% sure you would be capable of driving. You said that approximately eleven minutes after leaving the Lofts, the officer saw you using your cell phone and pulled you over.

You said that the reason for disputing your driving prohibition is that you know your BAC was above 0.00. After doing the math from a study done at Brown University, basing your calculations on a consumption of six drinks over a four hour period your BAC would be 0.13 and, with a normal metabolizing body, it would reduce your BAC 0.015 an hour. After 10 hours of not having a drink your body should have burned all the alcohol consumed leaving you with a zero BAC. You go on to say that you do not believe that the officer was trained on how to handle the unfortunate situation that occurred. You said that after the officer left, you called the Kelowna dispatch to ask about your options because they were not explained to you. You understand that screening machines are not always very accurate and there are many variables that were not explained to you that have an effect on the machines. You said that now knowing your options, you know the outcome would have been different. You then provided me with the reasons the ASD reading was not correct:

- You have always dealt with having a s.22 . Two years ago you were diagnosed with s.22 and in the past year you have had a low carb diet to help with weight control. You said that extensive articles report that men and women with low carb diets have bodies that produce excess acetone that will send an ASD reading to a level that would read up to 0.06. Also, the morning of your driving prohibition you had no water and the day prior only one meal.
- Just before you left the Lofts, you brushed your teeth and used mouthwash. Listerine is 27% alcohol. Having braces you were unaware that the Listerine could stay in the pockets of braces and stay in gum tissue for up to thirty minutes. This can also be another reason for the ASD to read a false “warn”.

Finally, with respect to the officer saying he smelled alcohol on you, you said that you did not have a change of clothes. Your parents have used their vehicle to transport beer cans and bottles in the back seat and the smell has leaked into the fabric. You understand the smell of alcohol is a reason for a test, however the smell was not on your breath.

The officer’s evidence is that when he engaged with you at roadside, he detected a moderate odour of liquor from your breath. The officer asked when your last alcoholic beverage was and you said at midnight at the Liquid Zoo. The officer conducted two ASD tests, both of which resulted in a “warn”.

You told me that you did the math to determine your own BAC based on a study from Brown University. However, you told me you had “approximately” three drinks at the Lofts and then “approximately” three drinks at the Liquid Zoo. You did not tell me the time you drank at the Lofts, or the time that you drank at the Liquid Zoo. Therefore, I cannot rely on the fact that you consumed your alcoholic beverages within a four hour time period. In addition, in my view you cannot determine a reliable BAC if you know only the “approximate” number of drinks you had. I realize you used “six” in your calculations, but you provided me with “approximate” numbers only. Finally, and with respect, you are not a toxicology expert. Consequently, I do not find your calculations to determine your own BAC to be very reliable.

You told me that you have always dealt with having a s.22 and that two years ago you were diagnosed with s.22 . However, although you have referred to extensive articles, I have no evidence before me to suggest that having a slow metabolism, being on a low carb diet or being diagnosed with s.22 would affect an ASD test result or result in a falsely high reading.

You also told me that you brushed your teeth and used mouthwash just before leaving the Lofts, however, you do not tell me exactly what time that was. You go on to explain that Listerine is 27% alcohol; however, you did not provide any evidence to substantiate this. Regardless, you said you were driving for approximately eleven minutes when the officer pulled you over. I note that the ASD tests were conducted three and six minutes after you were stopped by police. I assume some time had passed between when you used the mouthwash and when you left the Lofts. Eleven minutes had passed between when you left the Lofts and when you were pulled over by police. In my view, enough time had passed from the time you say you used mouthwash to the time of the ASD tests to eliminate the possibility of the existence of residual mouth alcohol.

You said that you were 100% sure you would be capable of driving. I cannot comment on how impaired you may have felt at the time; however, I note that section 215.41(2) states that a “warn” means an indication on an ASD that the concentration of alcohol in a person’s blood is not less than 50 mg%. I have already found that the ASDs used for your two ASD tests were functioning properly at the time and, ultimately, you have not provided me with any evidence on which I could conclude 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 6, 2013.

s.15
Adjudicator

October 11, 2013

s.22

AMMENDED

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* (the "Act") requires me to confirm your prohibition, along with 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.

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"?

Having reviewed the evidence before me, I do not find that the "FAIL" result on the ASD was reliable.

I am satisfied that your BAC was less than 80 mg%.

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.

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: Kyla Lee
fax: 604 685-8308

November 1, 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);
- 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.

On October 16, 2013, this office (“Appeals Registry”) received a letter from your lawyer, Jeremy Knight’s office requesting an extension of date of review set for 9:30am October 17, 2013. Mr. Knight submitted that his assistant collected the disclosure documents on October 6, 2013, and he prepared his submissions based on this disclosure package. Mr. Knight submitted that he then received a second disclosure package on October 11, 2013 containing identical documents, with the addition of a Certificate of a Qualified ASD Calibrator (the “Certificate”).

Mr. Knight stated that the addition of this document significantly changed the submissions you were making on review.

Records at this office indicate that on October 16, 2013, Mr. Knight was informed by the Appeals Registry that submissions would be accepted until the end of the day October 17, 2013. Records also indicate that Mr. Knight was informed that a request for a driving record, intended for ICBC, was also received by this office.

A second submission was received from Mr. Knight on October 17, 2013, stating that the extension to the end of the day October 17, 2013 was not sufficient. Mr. Knight requested the review be extended to the end of the business day, Monday October 21, 2013, due to the late disclosure of the Certificate and the fact that the request for the driving record had, as of 2PM that day, not been fulfilled.

On Friday, October 17, 2013, I personally telephoned Mr. Knight's office and spoke to the receptionist. I informed her that I would accept submissions until the end of the business day, Monday October 21, 2013. I also informed her that this office is not responsible for fulfilling driving record requests, and that the requests were addressed to ICBC, but were perhaps sent to this office in error. The receptionist stated that she would inform Mr. Knight of the extension, and would inquire about the ICBC fax.

On Wednesday, October 23, 2013, a representative from Mr. Knight's office contacted Appeals Registry to inquire about the status of the request for extension. A message was then left by Appeals Registry with Mr. Knight's office that an extension had been granted until end of day Monday, October 21, 2013. The representative from Mr. Knight's office also stated that you had yet to receive a copy of the driving record.

I then contacted Mr. Knight personally to determine an appropriate course of action. Mr. Knight informed me that he had not received the message from the receptionist, and had not been made aware of the extension granted on Friday, October 17, 2013. Mr. Knight requested a further extension be granted until 9:30am Monday, October 28, 2013. I informed Mr. Knight that the file was due to be completed on that same date, and that I would not be able to provide a decision in that short of a timeframe. Mr. Knight was informed that the time to receive any submissions would be extended to Monday October 28, 2013, but your vehicle would not be released, and you would not receive a temporary licence in the interim. Mr. Knight agreed to these terms.

A letter containing the above was provided to you and Mr. Knight's office on October 23, 2013.

I note in the officer's evidence he has provided two versions of the Narrative Text Hardcopy. I note that they are referred to as "Occurrence Report – 1" and "Occurrence Report – 2." For the purposes of this review I will follow the officer's organization and refer to the documents as "Narrative 1" and "Narrative 2."

Mr. Knight references *Spencer v. Superintendent of Motor Vehicles* and *Scott v. Superintendent of Motor Vehicles* to affirm the necessary principles when determining credibility, and determining that the onus is on the officer to justify the prohibition. Mr. Knight also notes that *Hathaway v. Superintendent of Motor Vehicles* states that the driving record and personal circumstances of an individual must be considered by an adjudicator if they are submitted by the Applicant. Mr. Knight submits that your driving record is practically spotless and that you have been a licensed driver for s.22 Mr. Knight states that such evidence may show the

propensity of the individual to either refuse a lawful demand or to drive while impaired or over the legal limit.

I am aware of and have read the *Scott*, *Spencer*, and *Hathaway* decisions and have conducted my determinations of credibility accordingly.

I acknowledge your statement that you have never driven while impaired; however, the purpose of this review is not to determine whether or not you drove while impaired, but whether or not you refused or failed to comply with the officer's demand for a sample of your breath.

Issues

The following are the issues in this review:

- Were you a driver within the meaning of section 215.41(1) of the Act?
- Did 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 0150 hours on October 5, 2013. In Narrative 2 the officer indicates that you failed to stop at a roadblock, the officer then attempted to pull you over, and continued to follow you to your residence.

In your submission you state:

- You noticed a lone male officer wearing a "glow-in-the-dark" jacket standing on Greenfield Ave. He was not looking at you and did not wave at you or signal for you to pull over. There were other police vehicles present but you did not see any other officers.
- When the officer told you that you nearly ran him over you replied, "I did not almost run you over. I saw you very clearly and you were not paying attention and I was sure to go slowly and give extra space because you were looking in a different direction than my car."
- You parked your truck and walked to your house door and stepped inside. Just as you did this you saw the lights of a police officer pull into your driveway.

In his submission, Mr. Knight states:

- It is more likely than not that by the time the constable arrived at your home, you were already out of your truck and had briefly entered your home. Your home is only a block and a half from the roadblock and the officer would have had to get in his cruiser and follow you. There is not enough time for the officer to have done this, and therefore, it is more likely that your version of events is accurate.
- You do not deny being the driver and readily admit to driving home from the pub and passing the constable along the way.

I have considered your submission that you exited your vehicle and were about to enter your home when the officer arrived at your residence. I respectfully disagree with Mr. Knight that it is more likely than not that you were already out of your truck and had set foot in your home when the officer arrived. I note that in Narrative 2, the officer states that you failed to stop at the road

block, and failed to pull over while he was driving behind you. The officer notes that you turned left onto Fleetwood Avenue and right onto Oxford Street before pulling into your driveway. I do not find it likely that the officer would be able to provide your driving pattern (which you confirm in your evidence), and subsequently arrive at your residence, if he was not following closely behind you. I also note that the officer indicates that he approached the driver's side of the truck and observed you to be the lone occupant of the vehicle. The officer witnessed you driving on the roadway, witnessed you to exit the vehicle, and you confirmed that you were a 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 Narrative 1, the officer states that you admitted to consuming alcohol two hours prior, you had the odour of alcohol on your breath, your speech was slurred, and you had watery bloodshot eyes. The officer states that there was a delay in reading the ASD demand as you were arrested for obstruction, and that the ASD demand was read from a prepared card.

In your evidence you state, "(the officer) produced a small breath machine and told me that I had to provide a breath sample."

Mr. Knight submits that the officer indicates that your speech was quite slurred, but there is no evidence that the officer has ever spoken to you before, or would know how you normally speak. Furthermore, Mr. Knight submits that the slur is consistent with the remainder of the evidence regarding your false teeth.

I acknowledge Mr. Knight's claim that slurred speech is important to the credibility of your evidence as you could not provide a sample of breath due to your lip adhering to your dentures, and slurring-like speech is consistent with that. I also acknowledge that your dentures may have been a factor in your slurred speech; however, I do not find that this negates the possibility that your speech was also slurred due to alcohol consumption. As such, I do not find Mr. Knight's argument to impact your credibility either positively or negatively.

In addition to slurred speech, I also note that you admitted to consuming alcohol two hours prior, and you had the odour of alcohol on your breath. The officer also notes that you struggled to retrieve your driver's licence from your wallet. I am satisfied that the officer had sufficient grounds to suspect that you had alcohol in your body. The officer indicates that he read the ASD demand to you from a prepared card, and I do not have any evidence before me to the contrary.

I am satisfied that the peace officer made a valid ASD demand.

In Narrative 2 the officer summarizes your behavior with regard to the ASD as follows:

- First mouthpiece
 - o You sealed your lips on the mouthpiece and blew for less than one second. The ASD showed a single "+" which showed the officer that a minimal amount of air was provided. The officer told you that it was like blowing up a balloon and you

said that you were a smoker. You then put your lips on the mouthpiece but no “+” sign was displayed, meaning no air was provided.

- Second mouthpiece
 - o The officer readied the ASD and held it up to your mouth. You argued with the officer and the ASD timed out, displaying “VOID”.
- Third mouthpiece
 - o As the officer was readying the ASD you were told that if you did not provide a sample you would be charged with a refusal. The officer held the ASD up to your mouth and you sealed your lips on it and pretended to blow through it. Not one “+” sign was displayed which meant that no air was pushed through. You stated that your lips were dry and you needed some water. The instrument timed out and displayed a “VOID”.
- Fourth mouthpiece
 - o You put your lips on the mouthpiece and again pretended to provide a sample, no “+” sign was displayed. You stated that you had false teeth.
- Officer’s Sample
 - o The officer then put a new mouthpiece in and showed you how to provide a sample by providing his own breath into the ASD which resulted in 000 being displayed.
- Fifth Mouthpiece
 - o The officer held the ASD up to your mouth and you leaned back and said you couldn’t because your lips were stuck to your false teeth. The officer could see that they were not. You claimed that you could not bring your lips down to make a seal on the mouthpiece. The ASD timed out and “VOID” was displayed.

In your submission you state:

- The officer presented the ASD machine to you and told you to blow. He did not provide any specific instructions.
- You tried to provide a sample many times but could not. The officer told you that you were not blowing properly and warned you that if you refused to provide a sample he would arrest you for refusing.
- The officer did not provide you with specific instructions regarding how to provide a sample.
- The officer went through four to five mouthpieces and you tried to provide a sample eight or nine times.
- Each time you were giving an honest effort to provide a sample.
- You have very weak lung power due to being a heavy smoker for s.22
- You have upper dentures, and you were finding it difficult to close your upper lips over the mouthpiece.
- The officer’s only instructions were to “make a seal” and to provide a “big breath.”
- You explained to the officer that you could not make a seal because of your dentures and dry mouth, and you also could not take a big breath because your lung capacity is very low.

Mr. Knight submits that:

- The officer has not provided sufficient evidence that you were purposely providing inadequate samples.
- You provided several explanations to the officer at the time as to why you were having difficulty making a seal and providing an adequate breath.

- The officer's belief that you failed to stop at the roadblock set the tone of the interaction.
- The officer's evidence with regard to the allegedly feigned attempts is not helpful, and is in fact consistent with your explanations. Due to your dry lips you were unable to form a seal on the ASD mouthpiece, and due to the fact that you are a smoker, you were unable to provide a sufficient sample of breath.
- The officer does not provide evidence indicating that you were "pretending" to provide a sample of your breath. It appears the officer is assuming the fact that no air was going into the ASD was evidence of pretending.
- You stated that your lips were dry and you could not form a seal on the mouthpiece. You requested a drink of water but this request was ignored and went unaddressed.
- The officer provided a sample into the ASD himself. This was likely because he had his own doubts that you were really pretending.
- The constable states that he could see that your lips were not stuck to your teeth, however, you state that your lips were sticking to your teeth, and not stuck to them. Your explanation is more reasonable and likely situation.

I have considered the evidence before me, and I do not find your claim that you were, "giving an honest effort to provide a sample" to be credible. The officer indicates that on two of your attempts you argued with the officer and the ASD timed out. On your other attempts you either did not provide any air into the ASD, or provided minimal air insufficient for a valid sample. I acknowledge your claim that you were unable to form a seal on the ASD mouthpiece; however I note that if you were in fact unable to form a seal around the mouthpiece, the officer would detect some air escaping from your mouth. I acknowledge Mr. Knight's submission that the officer has not provided an explanation for what he intended when he states that you were "pretending" to provide a sample; however, I find it reasonable that if you were making an honest attempt to provide a suitable breath, but were unable to form a seal on the mouthpiece, the officer would note air escaping from your mouth, even if no air was accepted by the ASD. The officer does not note that any air was escaping around the mouthpiece, and indicates that no air was accepted by the ASD. I do not find it reasonable that the officer would state that you were "pretending" to provide a sample, if you were in fact providing a sample of air, but were unable to form a seal of the mouthpiece. As such, I find it reasonable that the officer did not base his observation that you were "pretending" to blow solely on the fact that no air was introduced into the ASD, but on the observation that you were providing no air whatsoever.

The officer's evidence is that he explained and demonstrated how to provide a sample twice, once by blowing in your face, and again by providing his own sample into the ASD. I respectfully disagree with Mr. Knight that the officer provided a sample in the ASD himself because he had his own doubts about your ability to provide a sample. In Narrative 2 the officer states, "Cst. KOESTER put a new mouth piece in and showed the driver again how to provide a breath sample by actually providing a sample into the ASD." I find it more likely than not that the officer was demonstrating the correct method of providing a sample.

I am mindful of your statement that you were honestly attempting to provide a sample of your breath; however, I do not find that your claim is supported by the evidence before me. As stated above, I am satisfied that the officer made a valid ASD demand on you, and I do not have any compelling evidence before me to indicate that you provided a sample of your breath, suitable for analysis.

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

Did you have a reasonable excuse?

I have considered your submission that you could not form a seal around the mouthpiece, and that your limited lung capacity prevented you from providing a sample of breath; however, I do not find this to be compelling. There is no evidence before me to indicate that you were attempting to provide a sample of your breath but the air was escaping around the ASD mouthpiece.

I have also considered your claim that due to smoking you have a decreased lung capacity. I acknowledge your claim that your decreased lung capacity may cause you to have difficulty exhaling; however, the evidence before me indicates that on a number of attempts you did not provide any air whatsoever. I do not have any compelling evidence before me that your decreased lung capacity prevented you from providing a suitable sample of your breath for analysis.

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 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.15

Adjudicator

cc: Jeremy Knight
fax: 250 374-7777

November 5, 2013

s.22

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

Introduction

On January 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) 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.

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 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 the ASDs reliable?

After considering the evidence before me, I am not satisfied that the ASDs were 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.

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.

November 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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.

Your lawyer, Bradley Hickford, submits that the officer did not have grounds for a reasonable suspicion that you had alcohol in your body. Mr. Hickford states that the officer indicates that his suspicion was formed based on the odour of liquor and your response regarding the time of

your last drink. Mr. Hickford submits that you responded that your last drink was at 6 o'clock, and the officer formed his suspicion at 2131 hours, and this would not provide a reasonable suspicion to the officer. Mr. Hickford also submits that it is clear from the Narrative that a series of events occurred between the time of driving, and the officer's suspicion; however, the officer indicates that both of these events occurred at 2131 hours. Mr. Hickford further submits that in paragraph 2 of the Report to Superintendent (the "Report") it is difficult to determine the date of driving or care or control.

I have considered Mr. Hickford's submissions; however, I respectfully disagree. I am satisfied that based on the odour of liquor detected from your breath, and your admission of consumption, the officer had reasonable grounds to suspect that you had alcohol in your body. Regardless, I note that 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 grounds for suspicion are not a stated ground in section 215.5(4) of the Act.

With regard to the date on the Report, I find that paragraph 2 clearly indicates "2013-10-19" which is consistent with the remainder of the evidence.

Mr. Hickford also submits that the officer failed to indicate that your ability to drive was affected by alcohol. Mr. Hickford states that the officer does not provide any information regarding your ability to drive, and the only indicium of impairment noted is the odour of liquor. Mr. Hickford also provided *Wilson v. Superintendent of Motor Vehicles* in support of his position.

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 related to your 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 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 2131 hours on October 19, 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.

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 sample of your breath which both resulted in a "FAIL" readings.

In your evidence you state that you did not provide a second sample of your breath for analysis.

I acknowledge your submission and have addressed it in the following section.

I am satisfied that an ASD 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 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 2138 hours, and you indicated that you understood. The officer indicates in the Report and Narrative that you provided a second sample of your breath at 2144 hours.

Mr. Hickford states:

"Despite the officer's General Occurrence Hardcopy report wherein he indicates that he advised her of her right to a second test after that, my client is adamant that this did not occur. The officer says that a second test result occurred at 21:44 showing a second fail. My client is adamant that this did not occur and is certain that she only blew into the instrument on two occasions. The one being the first blow which resulted in a void after three attempts and the second after the officer changed the mouth piece on the same machine wherein she provided a valid sample."

I have considered Mr. Hickford's submission; however, I do not have any further information before me regarding your version of events. I acknowledge that you adamantly deny providing a second sample of your breath; however, I find that the officer has provided significant evidence indicating that you were informed of your right to request a second test, and that you provided a second sample of breath. I note that the officer has provided the exact time that the right to request was read to you, the exact time of your second analysis, as well as the operating temperature and calibration information for the second ASD. The officer also notes that it was difficult to get you to focus on the ASD demand, and you continued to state that you "were fine" and had kids at home. Due to your distracted nature at the scene, in comparison to the detail and precision of the evidence provided by the officer, I find the officer's evidence to be more compelling.

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 officer indicates that you provided your first sample of breath into ASD serial number 066745 and your second sample of breath into ASD serial number 066740. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 066745 and 066740.

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 compelling 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 4, 2013, he checked the calibration of ASD serial number 066745. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as April 17, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 4, 2013, he checked the calibration of ASD serial number 066740. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as April 17, 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 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.

November 5, 2013

s.22

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

Introduction

On March 16, 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.

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 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 the ASDs reliable?

After considering the evidence before me, I am not satisfied that the ASDs were 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.

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: Jon Duncan
fax: 1 888 899-4906

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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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. I have proceeded with this review based on that confirmation.

In your submission you state that you feel that your constitutional rights are not being respected. You state that you have the right to be presumed innocent until proven guilty. You state that in this case you were presumed guilty without the right to present your case in a court of law.

I acknowledge your submission; however, The IRP is an administrative sanction and not a criminal process. In conducting this review I have considered all of the review 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 0235 hours on October 27, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that she observed your vehicle come close to striking a curb and she subsequently initiated a traffic stop. The officer states that you parked and began to exit and she informed you to remain in the vehicle. You were identified via your driver's licence.

In your evidence you state that you were dropping your friend off at a restaurant and had pulled over at the curb to let him out. You state that your passenger then asked you to take him to the gas station instead. You state that once you parked the car you decided to go into the gas station to buy some water, and it was only when you were out of the car that you noticed that a police car had pulled in behind you. You state that the officer could not have pulled in behind you as quickly as she states, as the distance from where you pulled over to the curb, and the gas station was only one block. You state that the officer would not have had time to put her vehicle in drive and turn on her lights, before you parked at the gas station.

I have considered your evidence; however, I do not have any evidence before me to indicate that you were not the driver of the vehicle when you were approached 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 0239 hours and 0246 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 0242 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 0246 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 101313 and your second sample of breath into ASD serial number 061497. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 101313 and 061497.

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 30, 2013, he checked the calibration of ASD serial number 101313. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 28, 2013, and the service expiry date as November 23, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on September 30, 2013, he checked the calibration of ASD serial number 061497. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 28, 2013, and the service expiry date as January 29, 2014.

In your submission you state that you asked to be taken to the police station to provide a sample on a proper breathalyzer. You state that you were told that this was not an option for you. You state that the ASDs sit in the police car where they are prone to bounce around and

they are handled all the time which can affect their readings. The breathalyzer at the station remains stationary and is more reliable.

I acknowledge your submission; however, the officer is not required to allow you to provide a sample into the breathalyzer at the station. I also acknowledge your submission that the ASDs remain in the officer's vehicles and are prone to bounce around; however, I do not have any information before me to indicate that this causes the ASDs to be unreliable. I am satisfied that the ASDs were reliable.

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

In the Narrative, the officer states that when asked, you responded that your last drink was 45 minutes prior. The officer states that when you exited your vehicle you swayed, and your movements were careful and planned. The officer also indicates that you had the odour of liquor on your breath.

In your evidence you state that you had three beers over four hours while at a friend's house and around 12:30pm you went to sleep on the couch. Sometime later a friend asked you to drive him to a restaurant, and as you had only had three beers, and had slept for some time you felt okay to drive. You state that when the officer asked the time of your last drink you responded "45 minutes" as you did not know what time it was. In reality it was closer to two hours. You also state that you broke your leg a year ago and you need to be careful when you walk. You also state that you had been asleep until moments before your interaction with the officer, which explains why you were moving slowly, and had a "slack face."

I have considered your submissions; however, I do not have any evidence before me to cause me to question the results of the ASD analyses. I note that you provided two samples in two different, calibrated 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 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 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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 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?

After reviewing the evidence before me, I do not find that I have sufficient evidence to indicate that the ASD used in your analysis 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.

s.15
Adjudicator

cc: L.J. Shelling
fax: 250 245-4896

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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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. 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 2055 hours on October 25, 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 the hearing you stated that you were pulled over by the officer and when you asked why you were pulled over the officer told you that you had a broken 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 and in the Narrative that you provided a sample of your breath at 2100 hours which resulted in a “FAIL” reading.

In the hearing you confirmed that you provided a sample of your breath, and the officer informed you that it was a “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 2103 hours, from “the provided card that was provided to Cst. BIGGAR by his detachment.”

In the hearing you stated that you are s.22 and asked the officer what your options were with regard to the second test. You stated that you were told that you had the option of a second breathalyzer, but that the officer told you that the consequences could get worse. You stated that you have since learned that your consequences could not have gotten worse, and in fact could only have improved if you provided a “WARN” or even a pass. You stated that due to the false information you received, you did not request to provide a sample of your breath, but if you had received accurate information you would have provided a second sample. You stated that the officer said the phrase, “it could be worse,” exactly.

I acknowledge your claim that the officer stated, "it could be worse," however I do not find this to be likely. The undisputed evidence before me indicates that the officer read the demand from a prepared card. You did not provide any further evidence beyond the officer's statement, "it could be worse," regarding the dialogue between you and the officer at the time. I do not find that I have sufficient evidence before me to indicate that the officer failed to inform you of your right to request a second breath test analysis, and that the lower of the two results would be used. I find the officer's version of events to be more credible.

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 Narrative 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 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 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 October 7, 2013, he checked the calibration of ASD serial number 066887. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 4, 2013, and the service expiry date as November 23, 2013.

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 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.

November 19, 2013

s.22

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

Introduction

On November 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

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. I have proceeded with this review based on that confirmation.

In the hearing you stated that you have a full time job and work five, and sometimes six days a week. You stated that you are s.22 and you need to drive down island to pick up s.22 or to attend events in the Comox Valley.

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 1335 hours on November 4, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that he received a complaint about a vehicle possibly being driven by an intoxicated person. The officer indicates that he stopped the vehicle and you were identified as the driver via your BC driver's licence.

In the hearing you stated that someone made a call to the police because of the people who were in your car. You stated that you were just picking up friends, and do not know why the caller thought you were impaired.

The officer's reasons for conducting the traffic stop, and the observations of the caller are beyond the scope of this review.

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 an ASD register a "FAIL"?

The officer indicates in the Report that you provided two samples of your breath, at 1338 hours and 1342 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 1340 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 1342 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 072951 and your second sample of breath into ASD serial number 066885. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 072951 and 066885.

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 23, 2013, he checked the calibration of ASD serial number 072951. 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 21, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 23, 2013, he checked the calibration of ASD serial number 066885. 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 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 stated that your vehicle and your person smelled like alcohol because you had been drinking the previous evening, but you had not consumed any alcohol for almost 12 hours. You stated that you failed because you had not brushed your teeth or eaten anything yet that day.

I have considered your submission; however, I do not have any evidence before me to indicate that the ASD results were not reliable. I note that you provided two samples of your breath on two different, calibrated ASDs, both resulting in a FAIL reading. 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 November 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.

November 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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 submission you provided indicates that it was submitted by you on October 29, 2013, but refers to you in the third person. There is no indication as to the author of the submission. For the purposes of this review I have assumed that you are the author.

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 your submission you state that at no time did you exhibit any manner of unsafe driving, or display any behavior congruent with the effects of alcohol. You state that there is no evidence to indicate that the officer had reasonable grounds to indicate that your ability to drive was affected by alcohol. You cite *Wilson v. Superintendent of Motor Vehicles* in support of your position.

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.

In your submission, you state that no consideration was given to your record of zero prior incidents. Your driving record is not an issue in this review. I have considered all grounds relevant to your 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 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 0323 hours on October 19, 2013. In 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 submission you confirm that you were stopped at a police road check.

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 0324 hours and 0327 hours, both resulting in "FAIL" readings.

In your submission you confirm that your second ASD analysis resulted in a "FAIL" reading.

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 0324 hours.

In your submission you state that you were surprised by the result of the first ASD analysis and requested a second.

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 0327 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 051761 and your second sample of breath into ASD serial number 101500. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 051761 and 101500.

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. In the Synopsis and the Narrative, the officer indicates that you provided two samples of your breath, both resulting in "FAIL" readings. In the Narrative, the officer indicates that the results of both ASD analyses were shown to you.

In your submission you state that you provided a sample of your breath which resulted in a "WARN" reading, and then provided a second sample of your breath which resulted in a "FAIL" reading. You further state that the copy of the Notice you received at roadside indicates a 3-day prohibition, whereas the officer's copy does not indicate this.

With regard to the “Driver’s Copy” of the Notice provided, I have observed the document, and there is a marking near the box for the 3-day IRP. I do not agree, however, that this is indicative that the officer intended to serve a 3-day IRP. It is my knowledge that the “Driver’s Copy” is a carbon copy of the original document filled out by police. There is no marking on the original copy indicating that the officer intended to indicate a 3-day prohibition. On a balance of probabilities, I find it more likely than not that the indication on the original copy is correct.

With regard to your submission that you provided a “WARN” result on your first ASD analysis, I find the officer’s evidence to be more compelling. I do not find that you have provided any compelling evidence to support your claim that your first ASD analysis resulted in a “WARN” reading, whereas the officer has provided detailed and consistent evidence that your first ASD result was “FAIL.”

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 17, 2013, he checked the calibration of ASD serial number 051761. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 14, 2013, and the service expiry date as September 30, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 17, 2013, he checked the calibration of ASD serial number 101500. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 14, 2013, and the service expiry date as September 30, 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 submission you state that you were playing in a late night hockey game and later attended a downtown club before driving an intoxicated friend home. You stated that you nursed one beverage over the course of the night, from approximately 1:00am-3:00am, swallowing the remaining amount before departing. You state that the odour of alcohol emanating from your vehicle and person was due to the proximity of the passenger. You also submit that the blood-shot eyes noted by the officer were due to tiredness. You submit that the elevated ASD results were due to residual mouth alcohol.

In the case of *Giesbrecht v. Superintendent of Motor Vehicles* 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.

In your evidence you state that you nursed one drink during the evening from approximately 1:00am until 3:00am, at which time you finished the remainder prior to departing. I note that the officer indicates that your first ASD analysis occurred at 0324 hours and your second at 0327 hours. The evidence before me does not indicate that your last consumption of alcohol was within 15 minutes of either ASD analysis. I do not find that I have any compelling evidence before me to indicate that mouth alcohol was a factor in your analyses. I acknowledge that you have provided a possible explanation for the odour of alcohol, and the blood-shot eyes noted by the officer, however, I also note that the officer indicates that the odour of alcohol was detected

directly from your breath. I do not find that I have any compelling evidence before me to cause me to question the results of the ASD analyses. 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 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.

November 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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. I have proceeded with this review based on that confirmation.

In your submission you state that you are not disputing your charge, and you made a onetime mistake which will never happen again. You state that this is your first offence and you have never been in trouble with the law, or with the Office of the Superintendent of Motor Vehicles

("OSMV") before. You state that you recently started a career as s.22 and you depend on your car for business. You state that as a law abiding citizen you deserve a lesser prohibition. You state that this was one of the stupidest decisions you have ever made and that you will never drink and drive again.

While I understand and appreciate your situation, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I applaud you for accepting responsibility for your actions; however, the scope of this review is limited to the grounds as defined by the Act. In addition, the Act allows me to alter the terms and conditions of a prohibition only where a higher prohibition has been applied in error and a lesser prohibition is required by the Act. There is no evidence before me that this is the case here.

You also state that the officer never disclosed to you what your BAC was, despite you asking the officer. You state that it is your understanding that there are more grounds for review available if you have this information.

The officer is not required to provide you with your precise BAC at the time of the analysis. I note that the officer has provided a document which states, "ASDs used in BC are currently calibrated to display a "Warn" reading at a blood alcohol concentration of 60mg% to 99mg%, and a "Fail" reading at a blood alcohol concentration of 100mg% or over."

In your submission you also state that you will not be able to comply with having the breath sample device ("Ignition Interlock") in your car. You state that your career as s.22 requires you to drive clients and that this would affect your professionalism. You also state that you have heard that the device is dangerous as you need to stop and pull over regularly to use it.

The Ignition Interlock device is not an issue in this review. The grounds of this review are listed below. I have considered all grounds relevant to your 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 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 2349 hours on October 22, 2013. In the General Occurrence 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 2350 hours and 2354 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 to do so.

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 2354 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 101479 and your second sample of breath into ASD serial number 058122. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 101479 and 058122.

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 1, 2013, he checked the calibration of ASD serial number 101479. 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 November 15, 2013.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on

October 8, 2013, he checked the calibration of ASD serial number 058122. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 5, 2013, and the service expiry date as May 14, 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 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

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 your lawyer, Sacha Roudette. 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?

Having considered 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 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.

November 19, 2013

s.22

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

Introduction

On November 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;
- 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.

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. 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 your submission you state that you will lose your job if you are not able to drive, and your job is your sole source of income. You state that due to the prohibition you were not able to attend the funeral of a family member on November 3, 2013. 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.

In your submission you state that you were supposed to receive a phone call at 9:00am on November 13, 2013 to state your case. I note that on the IRP Application for Review form you requested a written review, and the review was scheduled for 9:30am on November 13, 2013.

In your submission you also state that you appealed your Vehicle Impound as well but were denied. You state that you were given two documents indicating that your impound occurred on October 29, 2013, which is incorrect. I have examined the Vehicle Impound documents before me and I note that all documents indicate October 31, 2013. I note that the document you are referring to is the Certificate of a Qualified ASD Calibrator, which indicates that the ASD was calibrated on October 29, 2013, not that your prohibition occurred on this date.

You also state that you wish to appeal the Vehicle Impound review decision. The Vehicle Impoundment appeal is beyond the scope of this review. This review is limited to the grounds defined by the Act. 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 2350 hours on October 31, 2013. In the Narrative the officer indicates that he received an anonymous complaint about a vehicle driving erratically. The officer states that he located the vehicle and 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 and in the Narrative that you provided a sample of your breath at 2358 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 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 2359 hours. In the Synopsis the officer states, s.22 was advised that she has the right to second breath test on different machine. s.22 declined.”

In your submission you state that you were not informed of the second test.

Aside from your denial that the officer informed you of the second test, you have not provided any further evidence regarding your conversation with the officer. I note that the officer indicates in the sworn Report that you were informed of your right to request a second test, and in the Narrative he provides the exact time you were informed. Based on the evidence before me, I find the officer’s evidence to be more compelling.

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

Was the second analysis provided by the officer?

I find that 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, the officer was not required 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 in the Certificate that on October 29, 2013, he checked the calibration of ASD serial number 101672. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 26, 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 Act. You are prohibited from driving for 90 days. Your prohibition took effect 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.



September 30, 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 the review based on this confirmation.

You applied on grounds which cover a Notice served on the basis of a ‘sample refused’, which does not apply in your case. Similarly, there is no consideration on this review of your driving record, and there is no authority to reduce this prohibition to a 7- or 3-day prohibition. All grounds relevant to this review are considered below.

The correct city being identified on the documents the peace officer served on you is also not an issue I consider in this review; it is not an error that affects the issues I must consider below, and does not otherwise impugn on the officer’s evidence overall.

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 -- Cst. Pinto -- indicated that you were driving or in care or control of a vehicle at 2212 hours on September 15, 2013. Cst. Pinto provides in his narrative report that: he observed your vehicle stopped at the intersection during a green light signal; he then observed your vehicle proceeding with "swerving and unsure acceleration." Upon stopping your vehicle, he identified you as the driver of the vehicle.

You provided no evidence to contradict that of the officer. In your submission you describe driving acquaintances home, and then driving yourself home. 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 2215 and 2226 hours.

There is no evidence to the contrary on this point. In your statement you state: "Upon receiving the "fail" readings I was shocked." I accept this as recognition that two "FAIL" results registered on the ASDs.

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 your understanding of the right, he included: "... the most basic form of the offer was given to ensure understanding."

On this point, you state: "I was asked if I wanted to take another reading, I was unsure on how this works and had to ask Cst. Pinto questions regarding this."

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 2226 hours.

With no evidence to the contrary, and your statement “Upon receiving the “fail” readings I was shocked.”, 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 2226.

You state: “I do not know if it was on a different machine or not, but a female officer did arrive when this occurred.”

You do not present certainty with this statement regarding the second ASD; by contrast the officer has provided two distinct ASD serial numbers, as well as evidence in the narrative confirming the arrival of a second ASD: a delay occurred due to “Just driving time for a second member to bring the ASD.”

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.

Was the ASD 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 D.W. Jones certified that on September 4, 2013, he checked the calibration of ASD serial number 101734. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 2, 2013 and the service expiry date as February 12, 2014.

For the second ASD, the qualified ASD Calibrator D.W. Jones certified that on September 4, 2013, he checked the calibration of ASD serial number 101685. He found the ASD to be within the recommended limits. He recorded the ASD calibration expiry date as October 2, 2013 and the service expiry date as February 12, 2014.

You present your challenges on “the functionality and calibration of the device” by making the following points:

- the RCMP “screening device course manual” prescribes a 15-minute delay to satisfy an officer that mouth alcohol is not present;
- a “fail” reading does not accurately represent the “exact amount of alcohol in the blood system”
- other factors can affect the reading of an ASD;
- ASDs are “required to be calibrated twice in a row to ensure the calibration is in fact correct.”

On the first point, I note that you told the officer that you had one shot at 1600 hours earlier that afternoon. The officer proceeded on the investigation with that information, and there is no evidence that you informed the officer at any time otherwise. In your submission you also state: "I asked Cst. Pinto if there are any other factors that can cause this as I was being responsible and waiting hours before driving." From this I conclude the officer had no reason to impose a waiting period and proceeded correctly based on the information you gave him. You did not present the RCMP manual as part of your evidence during this review, and I cannot verify your evidence on this point.

On the second point, the legislation governing this prohibition states a "FAIL" reading to be "not less than 80 mg% on an ASD. The officer presented evidence that this was what occurred on two ASDs in this case, and that is all that is required. There is no evidence to suggest that the ASDs displayed anything other than "FAIL" and I am satisfied that is what occurred.

In stating "many factors can alter the reading of an ASD", you give the examples of incorrect calibration, "the device being booted up normally", and possible medication affecting the results. You make these statements without providing authority; I therefore cannot give much weight to these statements. You included a record of your visit to a doctor and a prescription from that visit, but there is nothing authoritative to describe how medication can affect the result of an ASD. I note also the records you provided refer to a visit that took place four days after the Notice was served on you, and I can't logically conclude that medication four days later would affect ASD results.

Similarly, I cannot ascribe much weight to your statement that ASDs must be calibrated "twice in a row" -- you included nothing to prove that as fact. By contrast, the officer included two Certificates of a trained ASD calibrator as part of the Report.

These suggestions you make are not verifiable through independent means, and cannot serve to cast doubt on the process used to obtain a sample of your breath. On analysis of a balance of probabilities, I am therefore satisfied 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.

November 8, 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);
- 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.

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.

In your submission you provide details regarding the accident which lead to the service of your IRP. The reasons for the accident are beyond the scope of this review. I have considered all of 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 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 2212 hours on October 19, 2013. In the Narrative Text Hardcopy (the “Narrative”) the officer indicates that you were involved in a two vehicle incident and were detained by another officer. The officer states that you were identified as the driver via your BC driver’s licence.

In your evidence you confirm that you were a driver and were involved in an incident. 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 2229 hours and 2233 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 2231 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 2233 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 039266 and your second sample of breath into ASD serial number 039268. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 039266 and 039268.

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 4, 2013, he checked the calibration of ASD serial number 039266. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as November 12, 2013.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 4, 2013, he checked the calibration of ASD serial number 039268. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 1, 2013, and the service expiry date as November 12, 2013.

In your evidence you state that the ASD is not dependable. You state that you tried at least three times to get a result and two mouthpieces that attach to the device fell on the ground prior to your results.

I have considered your submission; however, I note that you provided two breath samples on two different ASDs, which were both calibrated at the time of your analyses. I also note in the Report the officer indicates, "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 have any compelling evidence before me to indicate that the ASDs were not reliable.

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 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.

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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

Section 215.5(1) of the *Motor Vehicle Act* (the "Act") requires me to confirm your prohibition, along with 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, Sylvia Andrews. I have proceeded with this review based on that confirmation.

In your submission you state that you are the sole proprietor of s.22 which is the sole source of income for your family. You state that the impounded vehicle is a large s.22 which is used on a daily basis in the conduct of your business. You submit that your s.22 is dependent on the truck, and without it, your business comes to a halt.

Your lawyer, Sylvia Andrews, requests that the difficulty that you will face without your licence to be addressed. Ms. Andrews also asks for your clear driving record – particularly in relation to alcohol related offences – to be taken into account.

While I understand and appreciate your situation, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I acknowledge Ms. Andrew's request to consider your driving record; however, I do not have it before me. Even so, your driving record is not a ground upon which I can revoke or vary the prohibition. I have considered all of 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 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 1927 hours on October 25, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were involved in an incident with a pedestrian, 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 1947 hours and 2009 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 2005 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 2009 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 054479 and your second sample of breath into ASD serial number 054485. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 054479 and 054485.

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 23, 2013, he checked the calibration of ASD serial number 054479. 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 October 7, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 23, 2013, he checked the calibration of ASD serial number 054485. 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 October 7, 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 25, 2013.

IRP Review Decision
Page 4

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: Sylvia Andrews
fax: 604 244-0617

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

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. Doroshenko stated that there is no indication in the officer's evidence that your ability to drive was affected by alcohol. Mr. Doroshenko submits that the only indicium of impairment noted by the officer is the odour of liquor on your breath. Mr. Doroshenko submitted that this office must adhere to the law as laid on in the decision *Wilson v. Superintendent of Motor Vehicles*.

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 0009 hours on October 13, 2013. In 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 home when you encountered a roadblock on Columbia Avenue.

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 0010 hours and 0013 hours, both resulting in "FAIL" readings.

In your submission you confirm that you provided two samples of 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 0011 hours.

In your submission you state that the officer told you to take the second test, and he did not present it as an option.

I note in the Narrative the officer indicates that the right to request a second test was read from a prepared card and that you understood.

I do not have any evidence before me to confirm the officer's exact wording with regard to the right to request a second test, however I note in the Synopsis the officer states, "at 0011 hours he was read his right to a second test again verbatim off issue card." Unlike the previous decision provided by Mr. Doroshenko, I do not find that I have sufficient evidence to indicate that the officer made the ASD demand on you twice. On a balance of probabilities, I find it more likely that the officer read the right to a second test from the prepared card, than the ASD demand read a second time.

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 0013 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".

In your submission you confirm that both of the ASD analyses resulted in "FAIL" readings.

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.

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

In the Narrative, the officer indicates that you responded to the time of your last drink, "1 beer about an hour ago." The officer also notes that you had the strong odour of liquor on your breath.

In your affidavit you state:

- You arrived at Chom Chom Fusion Restaurant around 10:00pm and you ordered one beer at approximately 11:00pm.
- You stayed at the restaurant until shortly after midnight, and at this time you paid your bill and finished the small amount of beer remaining in your glass.
- When you got into your vehicle you used Binaca breath spray to take the taste of beer and food out of your mouth. You have reviewed the ingredients of Binaca and have found that it contains alcohol.
- You did not intend to be untruthful with the officer when asked the time of your last drink. You had ordered your last drink about an hour before. You did not realize that he needed to know the time you last had a sip of alcohol as you did not think it was important.
- You did not think that one mouthful of alcohol could make any difference. If you had known, you would have told the officer that your last drink was less than nine minutes prior.
- You have since considered the events of the evening and have learned about the effects of mouth alcohol. No more than thirteen minutes passed from the time of your last sip of alcohol to the time of the second ASD analysis.
- You are also certain that the breath spray you used had an impact on the test results. You used the breath spray only five minutes before you were stopped.

You also provided a number of statements from individuals who were with you that evening. I have summarized their submissions:

- You were at Chom Chom Fusion Restaurant from 10:00pm until 12:00pm and ordered a beer at 11:00pm.
- You did not intend to drink because you had to drive but your friends pressured you to have at least one beer with them because they were drinking.
- You left the restaurant around midnight and you finished your remaining beer before you left.
- You did not appear impaired when you left, and seemed totally fine.

You have also provided a printout which states that one of the ingredients in Binaca is alcohol.

In the hearing, Mr. Doroshenko stated:

- The officer's version of events lacks credibility. The time of driving, reasonable suspicion, and ASD demand all occur within one minute (0009 hours) which is highly unlikely.
- The majority of people do not know about the issue of mouth alcohol until after they are served with a prohibition and begin to do internet research. It cannot be expected for people to know this information and it is up to the officer's to clarify.
- The officer ought to ask what time the last sip of alcohol was, or explain the effects of mouth alcohol and the importance of providing an accurate time of last drink.
- In a society with an abundance of amazing technology, why would someone assume that alcohol in their mouth would affect their BAC readings on a machine?
- A slope or CO2 detector would rectify this issue, but the Alco-Sensor IV DWF is not equipped with either of these.
- I should prefer your evidence over that of the officer because your evidence is in keeping with common sense and ordinary human experience, whereas the officer's is not in keeping with the number of events the officer claims to have occurred at 0009 hours).
- If the officer had conducted himself appropriately with regard to the second test, and recorded his evidence accurately at the time, the issue would likely have resolved itself, as the mouth alcohol would have dissipated and you would likely have blown a WARN or less.

I have considered your submission that you consumed one beer earlier in the evening, and proceeded to use Binaca mouth spray prior to driving. I note that the officer states in the Synopsis that he detected, "the overwhelming odour of liquor from the lone occupant." In the Narrative, the officer indicates that he formed his suspicion based on a "strong odour of liquor." I do not find it likely that the officer would detect a strong odour of liquor if you had only consumed one beer and had used breath spray to mask the taste. Consequently I am not persuaded that you used Binaca spray prior to the time of your stop.

You have provided supporting evidence from your friends indicating that you consumed one beer while at the restaurant; however, this only speaks to the alcohol you consumed while in their presence. I note that your evidence is silent regarding any alcohol consumption prior to your arrival at the restaurant. I also find it odd that the manager of the restaurant you attended would be able to remember what you had to drink and what time you departed. Her submission is silent as to how or why she remembers these details. As such, I have given her submission little weight. I also note that the submissions of your friends vary with regard to the amount of beer you had remaining, and the time you departed the restaurant. You state that you had, "a small amount of beer left in my glass," and your friend states, "there were less than half bottle of beer left." You submit that you consumed the last of your beer just after midnight, whereas some of your friends submit that it was just prior to midnight. As the issue of mouth alcohol is highly time sensitive, I do not find that the evidence before me to be definitive with regard to your last sip of alcohol being within 15 minutes.

I acknowledge your statement that you responded, "an hour ago," as that was the time that you ordered your drink, but I am not convinced that this was your interpretation. In the Synopsis, the officer notes, "Cst. CHUNG asked him how much he had to drink and he stated he had only 1 beer about an hour ago." I do not find that your response implies anything other than that your last beer was about an hour prior. If you believed that the officer was wondering when you

ordered your last drink, I find it more reasonable that you would respond with, "I ordered my last drink about an hour ago."

Mr. Doroshenko provided an RCMP document which states, "Alcohol present in the subject's mouth as a result of recent consumption of alcoholic beverages, belching, or burping, can cause inaccurate test results; if the peace officer honestly believes that the motorist has engaged in the above activity within the last 15 minutes, the officer should delay the test until 15 minutes from the occurrence of the activity." (My Emphasis Added). This is in keeping with the case of *Giesbrecht v. Superintendent of Motor Vehicles*. 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. There is no evidence before me that the officer saw you leaving a drinking establishment, that he observed you consuming alcohol, or that he found any open liquor in your vehicle. On this basis, I am satisfied that the officer had no reason to believe that you had consumed alcohol in the fifteen minutes preceding the time you arrived at the roadblock. I am satisfied that the officer turned his mind to the issue of recent consumption, and I do not find that there was any evidence before the officer at the time to indicate that the ASD analysis was not reliable.

I am not convinced that the beer you consumed at the restaurant represents the totality of your consumption. Furthermore, I do not find your submission to have used Binaca mouth spray to be compelling. The evidence indicates that you provided two samples of breath in two different, calibrated 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 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 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 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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. I have proceeded with this review based on that confirmation.

In the hearing, you stated that you felt that you had been racially profiled by the police officer. You stated that you felt that the officer saw two Indo-Canadian males driving a nice car and subsequently pulled you over for no reason. You stated that when your wife picked you up from

the scene you confronted the officer about why he pulled you over and he was unable to give an answer. You also denied accelerating rapidly away from the pub, as stated by the officer. You stated that you did not enter the pub and only pulled into the driveway to pick up a friend, and then departed. You stated that you could not have accelerated rapidly as you only made it half a block before the officer pulled you over.

I acknowledge your submission; however, the reason for the traffic stop is beyond the scope of this review. This review is limited to the grounds as defined by the Act. I have considered all of the grounds available to you. If you feel that you were unfairly profiled by the officer, you may wish to contact the officer's detachment directly, as the conduct of the officer is not an issue I have authority to consider under the Act.

In the hearing you stated that you have been driving for s.22 and have never had an incident before. You stated that you stand to lose your job, leaving s.22 as your sole source of income. You stated that you are unable to take your daughter to soccer practice, and that you just had a s.22 daughter as well.

I understand and acknowledge the far-reaching impacts that a driving prohibition can have; however, 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 0100 hours on October 27, 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.

While you took offence to the officer's reasons for initiating the traffic stop, you did not deny that you were a driver.

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 0105 hours and 0111 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 0111 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 0111 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 101550 and your second sample of breath into ASD serial number 101546. The officer also provided the Certificate of a Qualified ASD Calibrator (“the Certificate”) for ASD serial numbers 101550 and 101546.

In the hearing you stated that as far as you know the officer used the same machine twice. You stated that the officer never introduced a second machine, and never told you, “this is a different machine.” You acknowledged that the officer provided two calibrations, but to the best of your knowledge you were never introduced to a second machine.

I note that the officer has indicated in the Report and the Narrative that two different ASDs were used. The officer has provided significant evidence indicating that a second ASD was used for your second samples, whereas your evidence indicates that you are not aware of whether a second ASD was used or not. Based on the evidence before me, on a balance of probabilities, I find the officer’s evidence 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 indicates in the Certificate that on October 17, 2013, she checked the calibration of ASD serial number 101550. She found the ASD to be within the recommended limits and functioning correctly. She recorded the ASD calibration expiry date as November 14, 2013, and the service expiry date as November 21, 2013.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 17, 2013, she checked the calibration of ASD serial number 101546. She found the ASD to be within the recommended limits and functioning correctly. She recorded the ASD calibration expiry date as November 14, 2013, and the service expiry date as November 21, 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 you stated that you had two or three beers during the evening and had a full dinner, followed by dinner again at 11:30pm. You stated that if a sobriety test had been conducted you would have passed no problem, and you were not stumbling, and there was no speech impairment whatsoever. You stated that the officer notes in his Report that your last drink was at 11:00pm, but you clearly remember stating that it was between 9:00 and 9:30pm. You do not know where from, or how the officer obtained 11:00pm.

I have considered your submissions; however, I note that you provided two samples of breath in two ASDs which were calibrated and functioning at the time. I do not have any compelling evidence before me to indicate that the results of the ASD analyses are not reliable. Both of your ASD analyses resulted in "FAIL" readings, and I note that 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 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 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);
- 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

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. I have proceeded with this review based on that confirmation.

In your submission you state that the Notice you received is not the same as the version provided to you in the disclosure package. You state that there are two check marks on your copy, which indicate that you took the breath test, which you did not.

I am aware that the Notices which officers complete at the roadside are a multiple page carbon paper form, and it seems likely to me that officers would carry more than one form with them while on duty. Upon a close review of both copies of the Notice before me, I note that the driver’s copy appears to show an indication in the 90-days FAIL box. I find it likely that

information from a previously completed Notice transferred onto yours. For example, there are light-toned impressions all over the driver's copy in the form of lines and scattered dots, as well as faint illegible writing underneath the bolder information. Moreover, the impressions to which I refer are distinguishable from the information pertaining to your prohibition because they are lighter in tone or are displaced from boxes or lines where notations or information would be expected or where darker toned information is written. The OSMV/Police copy presents one dark check-mark in the box beside the "90 days Refusal" and does not contain any further impressions or marks. On the driver's copy the lighter-toned, almost faint check-mark that appears in the box beside the "90 days FAIL" and the darker more visible check-mark appears in the box beside the "90 days Refusal".

I am satisfied on a balance of probabilities that this lighter-toned faint check-mark was not intended for your Driver Copy Notice, but rather is an impression through carbon paper, as I have discussed above. In this way, I find the officer has identified one box only, namely the "90 days Refusal" and not two boxes, as you suggest.

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 1337 hours on October 23, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that a witness called to state that a driver had been drinking and had recently left the farmer's market. The officer indicates that he conducted a search for the vehicle, and once it was 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 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 states that your face was flushed and he detected a strong odour of liquor on your breath. The officer states that you denied consuming any alcohol that day or at the market. The officer indicates that you were read the ASD demand verbatim from a prepared card.

In your submission you state that you did not consume any alcohol while at the market. You state that you consumed two cups of coffee, which was witnessed by your mother. You state that you have s.22 which may explain why your face was flushed, and you take s.22 which can leave you anxious. You had consumed alcohol the night

before, and spilled some beer on the sweater which you were wearing at the time. You state that this smell was likely what the officer detected and not the odour of liquor on your breath.

With regard to your submission that the odour of alcohol detected by the officer was from your sweater, I note that the officer states, “Cst. BRYDON could smell a strong odour of liquor on s.22 breath as he stood outside.” I do not find it likely that if the odour of alcohol was from a beer spilled on your sweater the night before that the officer would note a strong odour of liquor detected directly from your breath. I note that you have provided explanations for the indicia observed by the officer; however, I do not have any evidence before me to indicate that you provided these explanations to the officer at the time. I am satisfied that the officer’s observations, listed above, were sufficient for him to have formed a reasonable suspicion that you had alcohol in your body.

I also note that the officer read the ASD demand verbatim to you.

I am satisfied that the peace officer made a valid ASD demand.

In the Narrative, the officer states that when he read the ASD demand, you responded, “No,” and “No, no, no, what’s the point?” The officer also states that when explained that refusing to provide a sample carried the same penalty as providing a “FAIL” result on the ASD, you stated that you understood, and again stated, “no, no, no” and shook your head vigorously.

I have 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?

I do not have any evidence before me to indicate that you had a reasonable excuse to 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 section 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.

November 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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.

In the hearing, I spoke to you and s.22 who spoke on your behalf. s.22 stated that he has known you for 30 years and you are an upstanding, contributing member of society. s.22 submitted that it will be very difficult for you to continue with your life without access to your vehicle or the ability to drive as you work s.22 and need to drive to medical

appointments and such. You asked to have your vehicle released from impound so that you could winterize it, and to have it available for friends to use when you need to be driven somewhere. You stated that you made an error in judgment and you respect the RCMP and the legal system, but you asked for some leniency to be allowed in your situation. You stated that you admit that you made a mistake, but that you have learned your lesson to never ever do this again.

While I understand and appreciate the effects that a driving prohibition can have, I am not authorized to consider hardship, personal circumstances, employment or transportation needs in this review. I am unable to alter the terms of your prohibition, or to arrange for the early release of your vehicle. The scope of this review is limited to the grounds as defined by the Act. I have considered all of 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 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 1532 hours on October 23, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that he received a report that there was a male, who appeared to be passed out, sitting in a vehicle. The officer indicates that the witness observed the male drinking beer, and last saw him walking towards the washroom. The officer indicates that he arrived at the location and observed a male in the driver's seat. The officer states that he noticed that the male put his seat belt on and the brake lights for the vehicle came on. The officer states that you were identified as the driver via your driver's licence.

In the hearing you stated that you were at a medical appointment to s.22 until approximately 11:45am, and you then did your banking and other errands. You stated that you had not slept, and you went to the park to exercise, and ended up nodding off in your vehicle. You stated that it was cold, and you started your vehicle in order to use the heater to stay warm. You stated that it was not your intention to drive, but that you are aware of the law that if you are able to put the vehicle into motion, you are in care and control of the vehicle.

The evidence before me indicates that you were parked in a parking lot, and you were behind the wheel of a vehicle with the engine running. I acknowledge your statement that it was your intention to use the vehicle to stay warm; however, the evidence before me indicates that you were in care and control of the vehicle when you were approached 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 1551 hours and 1554 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 1552 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 1554 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 101161 and your second sample of breath into ASD serial number 101282. The officer also provided the Certificate of a Qualified ASD Calibrator (“the Certificate”) for ASD serial numbers 101161 and 101282.

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 22, 2013, he checked the calibration of ASD serial number 101161. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 19, 2013, and the service expiry date as September 11, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on

October 22, 2013, he checked the calibration of ASD serial number 101282. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 19, 2013, and the service expiry date as October 10, 2014.

In the hearing you stated that you admit to consuming some beer while you were seated in your vehicle. I note that in the officer's evidence he indicates that there was an open can of beer in your vehicle when you were approached by the officer. The officer's evidence indicates that he delayed the ASD analysis by approximately 15 minutes to ensure that your sample was not affected by mouth alcohol.

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 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.

November 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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.

In your submission you state that you understand that hardship cannot be taken into consideration in this review, but you are s.22 and there is no other job that you can do to provide for your family.

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 1545 hours on October 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.

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 1556 hours and 1610 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 from the “IRP cover” at 1607 hours.

In your submission you state that you were not advised that the second test was done on a different ASD.

I note that the officer has indicated in the Report that you were informed that the second analysis would be performed on a different ASD, and that the right to request was read from a prepared source. I also note that the officer’s evidence indicates that the ASD analyses were performed on different ASDs. On a balance of probabilities, I find it more likely than not, that you were informed that your second analysis would be performed on a different ASD.

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 1610 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 072478 and your second sample of breath into ASD serial number 101224. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 101224 and 072478.

In your evidence you state, "The two tests that were administered on the one ASD..."

I have considered the evidence before me, and I find that the officer has provided significant evidence to indicate that the ASD used in the second analysis was different than the first. You have not provided any further information regarding your claim that both tests were completed on the same ASD. I find the officer's evidence 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 indicates in the Certificate that on October 5, 2013, he checked the calibration of ASD serial number 072478. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 2, 2013, and the service expiry date as April 10, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 10, 2013, he checked the calibration of ASD serial number 101224. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as November 7, 2013, and the service expiry date as September 27, 2014.

In your submission you state that the ASDs are not reliable because they were calibrated on October 5, 2013 and October 10, 2013 respectively. You state that your ASD test occurred 17 days after and the ASD may have been dropped or tampered with since that time. You question if the ASD has been in the officer's possession the whole time, or whether or not it was contaminated from previous use.

I note that the Certificate indicates that the ASDs were calibrated on October 5, 2013 and October 10, 2013, and that the calibration expiry dates are November 2, 2013, and November 7, 2013, respectively. I note that in the Report, the officer indicates, "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 have any compelling evidence before me to indicate that the ASDs were not functioning properly at the time.

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 the ASD used in your analysis did not register a "WARN" and that this may be an internal problem with the ASD itself. You state that you informed the officer that you had not consumed alcohol that day, and your BAC was less than 0.08. You state that the officer did not administer a physical blood test and you were not told what your BAC was.

The evidence before me indicates that you provided two samples of breath on two, different, calibrated ASDs, which both resulted in FAIL readings. 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 80mg%. I do not have any compelling evidence before me to cause me to question the results of the ASD analyses. I do not have any authority before me to indicate that the officer is required to provide you with the opportunity for a blood sample.

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 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.

November 8, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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 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 the ASDs reliable?

After reviewing the evidence before me, I do not find that I have sufficient evidence to indicate that the ASDs used in your analyses were properly calibrated.

I am satisfied that the ASDs were 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 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 (Notice). You applied to the Superintendent of Motor Vehicles for a review of your driving prohibition and I am delegated the authority to conduct this review.

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

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?

Having considered the evidence before me, I do not find that I have sufficient evidence to indicate that the ASD used for your second analysis was properly calibrated.

I am satisfied that the ASD was not reliable.

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.

Records at this office indicate that your vehicle was impounded for 30 days for a matter unrelated to your IRP. As such, your vehicle will not be released at this time.

November 8, 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);
- 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

I will consider only the grounds of review which are relevant to the type of prohibition indicated on the Notice the peace officer served you with.

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 officer told you that you were receiving a 24-hour prohibition, which you later discovered was a 3-day prohibition. You state that you went into the

Government Agent's office and were told that you had a 3-month driving suspension that was issued in February this year. You state that you still do not have your licence back and you do not know why. You also state that you believe that you were pulled over solely because you have an "N" on your vehicle and the officer targeted you.

The circumstances of your driving record and the officer's reason for conducting the traffic stop are beyond the scope of what I am permitted to consider in this review. This review is limited to the grounds defined by the Act. 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 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 officer indicates in the Report to Superintendent (the "Report") that you were the driver of a motor vehicle at 2340 hours on September 27, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you performed a U-turn 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 "WARN"?

The officer indicates in the Report that you provided two samples of your breath, at 2344 hours and 2348 hours, both resulting in "WARN" readings.

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

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 2347 hours.

In your submission you state, "I was then offered a second test on another machine and of course accepted."

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 2348 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 103666 and your second sample of breath into ASD serial number 053334. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 103666 and 053334.

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 6, 2013, he checked the calibration of ASD serial number 103666. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 4, 2013, and the service expiry date as November 20, 2013.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on September 6, 2013, he checked the calibration of ASD serial number 053334. He found the ASD to be within the recommended limits and functioning correctly. He recorded the ASD calibration expiry date as October 4, 2013, and the service expiry date as May 3, 2014.

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

Was your BAC less than 50 mg% even though the ASD registered a "WARN"?

In the Narrative, the officer indicates:

- You spoke in a slow deliberate manner and appeared to have a slight delay in your answers.
- The officer noted a slight odour of liquor on your breath.
- You had blood shot/glassy eyes.
- You admitted to consuming one beer an hour prior.

In your submission you state:

- You speak slowly and deliberately normally.
- You have been sick with a chest and throat infection and were recently diagnosed as
s.22 The medicines you take are preserved in alcohol and you take 10-15 drops at a time and hold them under your tongue to be absorbed. This explains why the officer smelled alcohol.
- You do not know if your medication affects the ASD analyses, but you have read that the ASDs used in BC cannot differentiate alcohol in the breath, and alcohol in the mouth.
- Your vehicle smelled strongly of alcohol because the person you had just dropped off was intoxicated.
- You later learnt that the officer is supposed to wait 15 minutes between the two ASD analyses.
- The officer asked you repeatedly if you had been drinking and you answered, "no" because you had one earlier that night before deciding to be the designated driver.
- You finally said you had a beer because the officer would not drop it and you felt pressured.

In the case of *Giesbrecht v. Superintendent of Motor Vehicles* 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 note that the officer indicates that you stated that your last drink was one beer an hour prior. I acknowledge your statement that you currently use a homeopathic remedy which is preserved in alcohol; however, you have not provided a timeline to indicate when you last used it. I do not find that I have any evidence before me to indicate that your last use was within 15 minutes of the analysis. I note that you also consumed a beer one hour prior which could also account for the odour of liquor on your breath. I acknowledge your submission that the officer is supposed to wait 15 minutes between the first and second ASD analyses; however, I do not have any authority before me to indicate that the officer is required to do so purely as a matter of course. I do not have any compelling evidence before me to indicate that the officer was required to delay the ASD analyses, or that the results of the analyses are not reliable. Section 215.41(2) of the Act indicates that a "WARN" result on an ASD indicates that the concentration of alcohol in a person's blood is not less than 50mg%.

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 September 27, 2013.

November 19, 2013

s.22

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

Introduction

On November 2, 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, Erin Dance. I have proceeded with this review based on that confirmation.

In the hearing, Ms. Dance stated that there are no reasonable grounds upon which the officer could determine that your ability to drive was affected by alcohol. Ms. Dance drew my attention section 215.41(3.1)(b) which states, “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.” Ms. Dance also drew my attention to the Notice which states that you were served with a 90-day FAIL, “because a sample of your breath on an approved screening device registered FAIL **AND** your ability to drive is affected by alcohol” (emphasis added). Ms. Dance stated that the officer formed his reasonable suspicion based on the odour of liquor on your breath and your admission of consumption. Ms. Dance stated that there is no evidence to indicate that your ability to drive was affected by alcohol, and submitted that the existence of the cigarette and glassy eyes noted by the officer are not compelling. Ms. Dance stated that the officer does not note any gross or fine motor skill impairment, and there is no evidence regarding your driving behavior. Ms. Dance stated that in fact, the evidence of the officer supports the claim that your ability to drive was not affected by alcohol, as you were able to pull your vehicle to the side of the road, and comply with all demands made on you by the officer.

Ms. Dance referenced *Wilson v. Superintendent of Motor Vehicles* to state that the fact pattern in your prohibition is very similar, and that the decision in *Wilson* established that the officer must provide evidence indicating that the ability to drive was affected by alcohol. Ms. Dance also referenced *Spencer v. Superintendent of Motor Vehicles* to state that the burden is upon the officer to provide evidence to support the all aspects of the driving prohibition.

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 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 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 2035 hours on November 2, 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 two samples of your breath, at 2038 hours and 2041 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 2040 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 2041 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 101576 and your second sample of breath into ASD serial number 101577. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 101576 and 101577.

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 101576. 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 January 16, 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 101577. 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 January 16, 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 November 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: Erin Dance
fax: 604 687-3022

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);
- 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.

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”.

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?

The officer indicates in the Report to Superintendent (the “Report”) that you were the driver of a motor vehicle at 0150 hours on October 20, 2013. In the Narrative the officer indicates that you stopped abruptly and then parked illegally on the road. The officer states that you were getting out and were advised to remain in the vehicle. The officer states that you were identified as the driver via your BC driver’s licence.

In your submission you state that you pulled your vehicle into a designated parking spot on the side of the road and began exiting your truck. You state that as you were walking away you observed a police car behind you. You feel that you were targeted due to your recognizable truck and the fact that you had an incident with police a few weeks ago.

The reasons for the traffic stop are beyond the scope of this review. The evidence before me indicates that you were driving in your vehicle, and were subsequently identified via your driver’s licence.

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 officer indicates in the Report that the first ASD sample you provided resulted in a “WARN” reading.

In your evidence you state, “I blew a warning.”

I am satisfied that an ASD registered a “WARN”.

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 0155 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 0156 hours.

In your evidence you state, "I asked for a second one. And that one a fail (sic)."

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 101793 and your second sample of breath into ASD serial number 051765. The officer also provided the Certificate of a Qualified ASD Calibrator ("the Certificate") for ASD serial numbers 101793 and 051765.

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 your first ASD analysis resulted in a "WARN" reading, and your second ASD analysis resulted in a "FAIL" 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.

Were the ASDs reliable?

For the first ASD, the qualified ASD calibrator indicates in the Certificate that on October 3, 2013, he checked the calibration of ASD serial number 101793. 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 July 26, 2014.

For the second ASD, the qualified ASD calibrator indicates in the Certificate that on October 1, 2013, he checked the calibration of ASD serial number 051765. 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.

In your submission you state that the ASDs are not reliable. You state that you told the officer that you had two beers nearly six hours prior and that you had been drinking cough syrup all night. You state that you told the officer that your last drink of cough syrup was 15-20 minutes prior. You state that the officer could not give you an answer why the two ASD analyses were different. You claim that you do not believe that you were over the legal limit or intoxicated in any way. You submit that the reason for the warning and the fail was from consuming cough syrup prior to the breath sample.

I note that in the case of *Giesbrecht v. Superintendent of Motor Vehicles* 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 you state that you last

consumed cough syrup 15-20 minutes prior to the analysis, I do not find that it was a factor in your ASD results. I note that you provided two samples of breath in two, different, calibrated ASDs, registering a "WARN" and a "FAIL." The "Technical Information on the Operation and Calibration of ASDs in British Columbia" document provided by the officer states, "ASDs used in BC are currently calibrated to display a "Warn" reading at a BAC of 60mg% to 99mg%, and a "Fail" reading at a BAC of 100mg% or over." I do not find that I am required to provide an explanation for the discrepancy between the results.

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. Your prohibition took effect on October 20, 2013.

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);
- 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

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

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 0305 hours on October 27, 2013. In the Narrative Text Hardcopy (the "Narrative") the officer indicates that you were pulled over for speeding and were identified as 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 states, "PC 2669 LONDON spoke with s.22 and could smell a strong odour of liquor coming from his breath and his eyes were red and glossy." In the Report, the officer indicates that he formed his reasonable suspicion based on the odor of liquor on your breath and your admission of consumption. The officer notes that you stated that your last drink was, "about three hours ago," and when asked how many drinks you consumed you stated, "I don't know." In the Report the officer indicates that you were read the ASD demand at 0310 hours. In the Narrative the officer indicates that you were read the demand and you understood.

In your affidavit you state that your eyes may have been blood shot, but this was because it was late and night and you were tired and sick with bronchitis.

In the hearing, Mr. Myers stated that the officer notes in the Narrative that you had blood shot eyes, but failed to tick the box on the Report indicating, "Other – See Narrative". Mr. Myers stated that the officer fails to articulate in the Narrative that blood shot eyes formed a part of his reasonable suspicion. Mr. Myers submitted that the blood shot eyes are not enough to indicate anything, and are a neutral factor, as they could be evidence of consumption, but more likely are evidence that you were just tired, or sick. Mr. Myers stated that your admission of consumption does not add to the reasonable suspicion, and it in fact detracts from it, as three hours prior is not a relevant time period. Mr. Myers also submitted that the odour of liquor on your breath is not sufficient, as there were other people in the car who had been consuming alcohol, and there is a strong possibility that the odour of liquor detected by the officer was from the individuals in the vehicle, or from open alcohol in the vehicle. Mr. Myers submitted that the officer made a valid demand, but it was not based on reasonable grounds and was therefore not lawful.

I have considered Mr. Myers' submission; however, I respectfully disagree. I concur with Mr. Myers that your explanation for your blood shot eyes is reasonable given the time of day that your interaction with the officer occurred. However, I also note that the officer states that he detected "a strong odour of liquor" directly from your breath. I do not find it likely that the officer would mistake the odour of liquor in your vehicle, or from your passengers, for an odour on your breath. With regard to your admission of consumption, I note that when asked how much alcohol you consumed you stated, "I don't know." The evidence before the officer was that you had the odour of liquor on your breath, and you had consumed an unspecified amount of

alcohol three hours prior. I am satisfied that the officer had grounds for a reasonable suspicion that you had alcohol in your body.

The officer's evidence indicates that you were read the ASD demand, and that you understood. I have no evidence before me to the contrary.

I am satisfied that the peace officer made a valid ASD demand.

In the Narrative the officer states that when read the ASD demand you asked, "I can refuse, right?" to which the officer responded, "Yes, but the penalty will be the same as blowing a fail." The officer states that he then asked if you were refusing to provide a breath sample and you stated, "Yes."

I have 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 your affidavit you state:

- You had bronchitis on October 27, 2013
- You had a prescription for medication (Exhibit A), and an inhaler was provided by your doctor (Exhibit B and C)
- You advised the officer that you had bronchitis when you were initially removed from the car.
- You were absent from work on the afternoon of October 23, 2013, and the entire days of October 24 and 25 due to bronchitis
- You experienced coughing as well as strong pain in your chest when breathing heavily, including exhaling.

In the hearing, Mr. Myers stated:

- Whether or not the officer was advised of your bronchitis is not relevant.
 - o The issue is whether or not you had a reasonable excuse to refuse to comply with the demand, not that you must inform the officer of this at the time.
 - o There is no difference in you informing the officer of your bronchitis, or raising the issue upon review, as the reasonable excuse still exists
- "It is clear that he has established on a balance of probabilities that he was being treated for bronchitis at the time of the incident."
- Having bronchitis constitutes a reasonable excuse, as stated in paragraph 10 of your affidavit, "I experienced coughing as well as strong pain in my chest when breathing heavily, including exhaling."
- "It does not matter whether he failed to provide a sample due to the bronchitis, or he refused, because the reasonable excuse applies in either case."
- *R v. Lee* established that bronchitis can be a reasonable excuse.
- *R v. Wegner* established that the onus is upon the applicant to establish the reasonable excuse.
 - o "Reasonable excuse must be some circumstance which renders compliance with the demand either extremely difficult or likely to involve a substantial risk to the health of the person on whom the demand had been made."
- There is a range of reasonable excuses, and somewhere between a cold sore, and a brain aneurism, lays bronchitis.

- You had missed three days of work and providing a sample was a “substantial risk” to your health because you were still suffering from difficulty breathing and fits of coughing.
- At the very least, it is “extremely difficult” because of the “strong pain” you experience when exhaling.
 - o Your situation is not “imaginary” or “speculative” as it is objectively verifiable by the evidence you provided.

In your affidavit you swear that you were suffering from bronchitis at the time, and you have provided a doctor’s note dated October 25, 2013, and photocopies of your inhaler and its packaging. I accept that you have provided evidence indicating that you were suffering from bronchitis on October 27, 2013

I acknowledge your claim that you informed the officer that you were suffering from bronchitis; however, I note that the officer does not note that you were coughing, or having difficulty breathing. Furthermore, I also note that the officer indicates that you would not provide the keys to your vehicle, and even when prompted, continued to deny knowledge of the whereabouts of your keys. As stated above, I am satisfied that you were in care or control of the vehicle, and thus, in possession of the keys. In the Report to Superintendent Vehicle Impoundment, the officer states that you were uncooperative. On a balance of probabilities, I find that your actions at the scene indicate that you did not intend to cooperate with the officer’s demand that you provide a sample of your breath, not that you were unable to do so.

I have read *R v. Lee* and I note that in that case the judge states, “We have letters from doctors stating that the representations of the accused with respect to his lung conditions are in fact the case, and that he is not in a very good position to use his lungs to give a deep lung air sample.” I do not agree with Mr. Myers that *Lee* establishes that bronchitis constitutes a reasonable excuse. In *Lee*, it was not the existence of bronchitis that constituted a reasonable excuse, but rather, medically supported evidence provided by the defendant indicating that he suffered from a number of health issues which prevented him from providing a sample.

Aside from your claim that you experience “strong pain” while exhaling I do not have any evidence before me to indicate that you were unable to provide a sample of breath. I do not have any compelling evidence before me to indicate that providing a sample would pose a substantial risk to your health, or that the pain in your chest would constitute “extreme difficulty.” I find your situation is similar to that in *R v. Wagner* in that, “The only evidence before the trial judge in this case was Mr. Wegner’s subjective belief that to blow would adversely affect his cold sore.” You state that there was strong pain in your chest when you exhale, but I do not have any evidence before me to indicate that you were physically unable to provide a sample of your breath. Furthermore, I do not have any evidence before me that you intended, or attempted to provide a sample of your breath. I do not agree with Mr. Myers that “strong pain” is equivalent to “extreme difficulty.”

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 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: Justin Myers
fax: 604 688-8350

October 15, 2013

s.22

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

Introduction

On October 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 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

On your Application for Review, under the heading labeled Request for Review it shows that the written review was scheduled for October 10, 2013, at 9:30 am. Additionally, it indicates that written submissions should be provided in advance of the review. To date I have not received any submissions from you with regards to your IRP. As such, I have proceeded with this review on the evidence before me.

You applied on two grounds; however, one of those grounds is not applicable to you because the IRP was issued on the basis of a “FAIL” result, not a “REFUSAL”

Facts, Evidence and Analysis

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

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

Having considered 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.

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 15, 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.

Adjudicator s.15

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 applied for this review by checking two grounds listed on the application form; however, one of these grounds is 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.

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.

Your friend, s.22 represented you with this 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 “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 2223 hours on October 6, 2013.

In the Narrative Text Hardcopy (the “Narrative”) the officer reported that he responded to a report of a single motor vehicle incident. The officer stated that he was on scene within approximately 5 minutes. Beneath the heading labeled: “How was person identified as the driver of the vehicle?” The officer recorded: “Driver identified himself.”

s.22 stated that you have been s.22 stated that you had not driven at all that evening. The driver, s.22 did not admit to driving because you had already advised the officer that it was you.

In the hearing s.22 read a letter from s.22 admitting that he was the driver and stated that his finger prints would be all over the steering wheel. s.22 stated that if I could check the finger prints s.22 would pay any costs that would incur.

I infer from s.22 statements that you don’t know your own mind and you did not know what you were doing when you admitted that you were the driver. There is evidence however that you were able to respond to the officer’s questions with regard to when you consumed your last drink, your consumption, and the second ASD test.

In considering this issue I find that I do not consider your evidence very compelling. First, I find it difficult to accept that you would admit to driving if you hadn’t been given the nature/consequences of this 90 day driving prohibition. Second, given the results of the ASDs it seems unlikely that you would remain silent. Last, you did not provide any evidence to support your claim s.22

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 2245 hours and 2249 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 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 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.

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 L.E. Ewanyshyn certified that the ASDs used in your case were found to be within the recommended limits when he checked their calibration on September 26, 2013 and October 1, 2013, respectively. 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.

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

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);
- 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 six 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 have been driving for fifteen years and you have never received a speeding ticket. You also indicated that you have never been spoken to by a person

of authority in the manner in which the investigating officer spoke to you. You said you have always obeyed the law and you tried to cooperate during the investigation, so you do not feel it was necessary for him to use the tone he did. In addition, you said you were shocked by the length of the driving prohibition.

I understand and acknowledge that receiving a 90-day driving prohibition can have serious consequences on a person's life. However, under the Act, I am not authorized to consider a person's driving history in this review.

Further, while I appreciate that police scrutiny can be unsettling, it is not something I can consider in this review. You could take any concerns you have with the officer to the appropriate authorities.

Please note, 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 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 Bevan indicated that he witnessed you driving or in care or control of the vehicle on September 20, 2013, at 0217 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 Bevan said you appeared to be surprised by the roadblock, as you only stopped the vehicle at the last second. In your written submission, you explained that your eyes were extremely dry, because of your contacts and you were squinting to try to moisten them when you were driving home. You said when you opened your eyes you came to a sudden stop, because a police officer was standing in the middle of the road. I find it reasonable to infer that there would have been police lights and possibly pylons indicating the roadblock ahead of you on the road. This raises questions in my mind about how

you could be driving with your eyes squinting or closed so long that you did not see the lights or police until the last minute. This gives me concern about the reliability of your evidence.

The officer said he noticed an odour of liquor on your breath and that you admitted having consumed alcohol prior to driving. Constable Bevan said he made an ASD demand of you at 0218 hours. There is nothing before me to the contrary. 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. In the Narrative, Constable Bevan said you placed your lips around the ASD mouthpiece to provide a sample of breath, but you refused to blow into the device. He said he gave you additional instructions on how to provide a sample of breath, but again, you refused to blow into the device after you placed your lips around the mouthpiece.

The officer said that after your second refusal to blow air into the device, he informed you of the penalty of refusing to provide a breath sample, and he indicated that you understood.

In your written submission, you said you have never been exposed to an ASD before and you had no idea how to use it. You said when you attempted to blow, you were told you were not doing it right and to try again. You said you tried again, but the officer yelled at you to stop holding your breath. You said you told him you were not holding your breath.

You said after your second attempt to give a sample, your “stubborn personality came into play and [you] told the officer that ‘[you] didn’t want to do this anymore’.” You said he asked if that meant you were refusing, and you replied “I suppose so.”

I am satisfied that you failed or refused to comply with the demand at 0224 hours, as set out in the officer’s evidence.

Did you have a reasonable excuse?

In your submission, you said you found the officer’s manner intimidating, however, this is not a reasonable excuse to fail or refuse to comply with a valid demand. There is nothing else before me to explain why you did not provide a breath 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 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.

s.15
Adjudicator

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 before me confirm that disclosure documents were faxed to your lawyer, Sacha Roudette. 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.

Ms. Roudette cited two cases which guide the adjudication process: *Spencer v. the Superintendent of Motor Vehicles* where the judge held that police are not deemed to have a credibility advantage and *Gillies v. the Superintendent* where the judge held that credibility must be reviewed on a standard of reasonableness and adjudicators must weigh evidence.

I am mindful of these principles and have applied them in conducting this review.

Ms. Roudette made submissions based on the officer's not having a reasonable suspicion to issue an ASD demand. However, the validity of the demand is not at issue in this review; the relevant provisions of the Act which govern this ASD "FAIL" review do not incorporate an examination of the validity of 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 for the IRP (the "Report"), the investigating officer indicated that you were driving or in care or control of a vehicle at 0200 hours on October 6, 2013.

In the Narrative Text Hardcopy (the "Narrative") the officer stated that he observed you driving without your lights on after dark. He stated that you were the sole occupant and you were identified by way of your 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"?

In the Report, the officer indicated that you provided a "FAIL" result at 0206 hours and 0217 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?

Ms. Roudette submitted that you advised her that the officer did not use a different ASD. Ms. Roudette submitted that you advised her that you blew twice into the same instrument and the officer did not show you either of the ASD results.

In the Report the officer indicates that you provided your first sample of breath into ASD serial number 101242 and your second sample of breath into ASD serial number 055634. The officer also provided the Certificate of a Qualified ASD Calibrator for ASD serial numbers 101242 and 055634.

Further, in sections 6 and 8 of his Report he indicated that the results were shown to you and recorded ASD temperatures as 19 and 27 degrees. In the officer's Narrative he reported that you were shown the results after each test and he recorded the ASD temperatures as 19 degrees and 27 degrees respectively; which correspond with the Report.

I acknowledge Ms. Roudette's submission; however, I respectfully disagree. I find that it is more likely than not by recording the second ASD information in such detail as the officer did; the officer used a second ASD.

Further, I note that you have not provided any sworn evidence; rather you provided a statement via Ms. Roudette. As such, I find the sworn evidence of the officer to be more persuasive and therefore, I prefer 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 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 23, 2013 he checked the calibration of ASD serial number 101242. He found the ASD to be within the recommended limits and functioning correctly. 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 certified that on September 25, 2013, she checked the calibration of ASD serial number 055634. She found the ASD to be within the recommended limits and functioning correctly. She recorded the ASD calibration expiry date as October 23, 2013, and the service expiry date as June 26, 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 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. Sacha Roudette
Carr Buchan & Company
fax: 250-388-7327

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);
- 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 four 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 your lawyer, Neville McDougall. We received a two-page faxed submission from Grant Gray

saying that you retained him to represent you in this matter. Mr. Gray indicated that he reviewed the disclosure documents noted above. I proceeded with this review based on that confirmation.

Mr. Gray stated that nothing in the evidence demonstrates that your ability to drive was affected by alcohol, so I should revoke the prohibition. He relied on the *Wilson* case to support this argument. I have read and considered the *Wilson* decision 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"), Constable Bevan indicated that he witnessed you driving or in care or control of the vehicle at 0203 hours, on October 7, 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 Bevan 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 0206 and 0220 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 Bevan 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 Bevan submitted a 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 23rd day of September, 2013, he checked the calibration of ASD with serial number 101242 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 21, 2013 and a service expiry date of August 30, 2014.

Constable Bevan also submitted a Certificate stating that Amanda Shannon Bain certified that she is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Ms. Bain stated that on the 17th day of September, 2013, she checked the calibration of ASD with serial number 033301 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 15, 2013 and a service expiry date of June 26, 2014. I note that the ASD serial numbers on the Certificates match the serial numbers of the ASDs referenced on the RTS. I am satisfied that both ASDs were reliable.

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

Mr. Gray submitted a one-page document entitled "Timelines for October 6, 2013". He said you provided this statement to him and it indicates your consumption of liquor in the hours prior to

being pulled over by the police.

You stated that you between approximately 7 and 10:15 pm, you consumed 12 ounces of wine, half an ounce of liqueur, half an ounce of rum, and 36 ounces of draft beer. You said you are
s.22 Mr. Gray argued that based on the Superintendent's Report on Calculating BAC (the "Superintendent's Report"), your BAC would have been approximately 50 mg% at the time you encountered the police. I have considered your lawyer's submissions, but I note your statement is not signed or sworn, which reduces the weight I can give it in my considerations. Further, without having more precise times of when you consumed the various drinks, it is difficult to make an accurate calculation of your BAC from the Superintendent's Report. Mr. Gray did not submit a copy of his calculations. I find it is more likely than not that the ASD results more accurately reflect your BAC than does Mr. Gray's calculation.

Mr. Gray argued that the only reference noted by the officer to your physical condition is that your "speech appeared normal". I disagree. The officer also said he observed the vehicle you were driving to slowly drift left and right in its lane and to speed on the William R Bennett Bridge. Constable Bevan said you were cooperative and polite at first, but "quickly turned argumentative." The officer also noted an odour of liquor on your breath and that you acknowledged having consumed alcohol. These factors are more supportive of a higher BAC than a lower one.

There is no persuasive evidence that causes me to doubt the "FAIL" readings on two separate ASDs, both of which 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 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.

s.15
Adjudicator

cc. Grant J. Gray
250-491-9764 (fax)

November 8, 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);
- 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

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.

Your lawyer, Keven Schechter, drew my attention to some errors which occurred with regard to the names on the affidavits provided as part of your evidence as well as the hospital records. I have examined the documents in light of Mr. Schechter’s explanations and I do not find that the errors affect the credibility of the submissions. I accept them as valid.

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 the officer made a valid 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. 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 22, 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.

I acknowledge receipt of your letter dated October 9, 2013. You said you have been driving for s.22 and have a good driving record. 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. 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?

The police evidence in the Report to Superintendent (the “Report”) is that on October 6, 2013, at 02:15 hours, Officer King (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 02:21 hours, the officer used ASD serial number 101063 to take a breath sample from you. The result of your ASD test was a “fail”. There is no evidence to the contrary before me.

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. 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?

The Report indicates that you did not request a second ASD test. The Narrative Text Hardcopy (the “Narrative”) indicates that at 02:26 hours, the officer read verbatim the Right to Request Second Test. When asked if you understood you replied “yep”. When asked “would you like to

provide a breath sample?”, you replied “no”. The officer said he explained the Right to a Second Sample again and that the lower of the two tests would prevail. You again said “no”.

I am satisfied that the officer did not provide a second ASD test because you did not ask for one.

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

There was only one ASD test conducted and the result 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 101063 was checked for calibration on September 23, 2013, and found to be functioning correctly and within the recommended limits. This ASD has a calibration expiry date of October 21, 2013, and a service expiry date of October 26, 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 you had four beers and appetizers between the hours of 7:30 p.m. – 2:00 a.m. You also said you have reason to believe that it (I assume you mean the “fail” ASD test result) was the result of your medication. You are

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I acknowledge your submission; however, I have no evidence before me that indicates the medication you are taking could or did adversely affect the ASD test result on the night in question.

I cannot comment on how impaired you may have felt; however, I note that you blew a “fail” on an ASD that I have found was functioning reliably at the time. Further, 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 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.

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Adjudicator

November 8, 2013

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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 (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 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 Knight. I have proceeded with this review based on this confirmation.

Mr. Knight pointed out that while your prohibition occurred on October 19th, the officer did not submit his evidence to our office until Saturday, October 26th and Mr. Knight did not receive this disclosure until October 28th, which was 9 days after you were served with the Notice. He indicated that the evidence was not “promptly” forwarded to us as is set out in section 215.41 of the Act. Mr. Knight indicated that he was provided only two working days to make submissions on your behalf which is a highly unusual window of time in his experience and would, in normal circumstances, be a patently unreasonable period of time. He also submits that such unexplained late disclosure is suggestive of

carelessness and, to some extent, a lack of satisfactory regard for the officer's statutory duties and to respecting your protected rights and interests.

I acknowledge that the Act states that officers are to "promptly" forward the related documents to the Superintendent. However, the term "promptly" is not further defined in the Act, such as that these documents must be forwarded within a specific number of days following the incident. As I do not know why the officer did not submit his documents any sooner, I find I cannot agree that the officer was careless and showed a lack of regard for his duties and to respecting your rights and interests. Further though, Mr. Knight was welcome to contact our office and request a different review date so as to allow him additional time to review the disclosure and prepare submissions for the review; however, records at our office do not show that he made any such requests.

Mr. Knight submits that the evidence before me must establish that the officer had reasonable and probable grounds to believe that your ability to drive was affected by alcohol. He referred to the case of *Wilson v. Superintendent of Motor Vehicles* to support his argument and indicated that there is nothing in your case to distinguish it from *Wilson*, to the extent that the Court's ruling should not be followed here.

I am familiar with *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.

Mr. Knight stated that the officer exercised his discretion given under section 215.46 of the Act to serve you with a Notice of Impoundment on the basis that you told him that you would drive your car again, and that you needed to drive for work. In your submission you indicated that the officer did not ask you if you would drive even though you were being prohibited from driving. You said that you were simply stating that you drive to work every day and you drive your kids to school.

As Mr. Knight submits, the officer exercised his discretion under the Act to impound your vehicle. Specifically why he did so is not an issue before me in this review. The issues I may decide are those 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 "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 "Report"), the officer indicated that you were driving or in care or control of a motor vehicle at 21:17 hours on October 19, 2013.

In your submission you have provided me with details concerning the events that you say occurred on October 26, 2013. However, I note that the Report and the accompanying attachments from the officer have an occurrence date of October 19, 2013, and Mr. Knight has acknowledged receiving disclosure on October 28, 2013, - 9 days after the incident. As such, I am satisfied that you erred in your submission and that the incident occurred on October 19, 2013.

You acknowledged 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 the ASD register a "WARN"?

In the Report, the officer indicated that the ASDs registered a "WARN" at 21:20 hours and 21:24 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 Report, the officer indicated that he advised you of your right to a second test on a different ASD. 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 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 you were provided a second analysis.

Was the second analysis performed on a different ASD?

In the Report, the officer recorded the serial numbers of the ASDs used for your tests as 055642 and 066744, respectively. There is no evidence before me 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 result of both ASD tests was a "WARN".

As both results were the same, I am satisfied that the Notice was served on the basis of the "WARN" result.

Was the ASD reliable?

The officer provided two Certificates of Qualified ASD Calibrator in which Colin Gordon Brandt certified that when he checked the calibration of the ASDs used in your case, he found them to be within the recommended limits. 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 50 mg% even though the ASD registered a "WARN"?

In the Synopsis, the officer indicated that he was conducting a road check when he observed a vehicle "quickly pull off" when the driver spotted the road check. He stated that the vehicle then immediately turned into a driveway, where police attended and detected a very strong odour of liquor on your breath.

You stated that you consumed 2 beers between approximately 7:00 p.m. and 9:00 p.m. You said that you were not impaired nor was your thinking fuzzy or unclear.

I note that you did not address or deny the officer's evidence and as such, it causes me to conclude that you were attempting to avoid the road check. In any event, section 215.41(2) of the Act states that a "warn" result on an ASD indicates that the concentration of alcohol in an individual's blood is not less than 50 mg%, and I have already made a finding that the ASDs were reliable.

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 19, 2013.

October 24, 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.

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”.

I have before me a British Columbia Driving Record Search. Moreover, in your written submission you indicate that you have had no previous prohibitions or serious driving infractions in the last five years. I do not have authority to consider a person's driving record in this review.

You indicate that you provided a written submission in hopes that your driving prohibition, at the very minimum, will be varied to a 30-day prohibition. I do not have delegated authority to shorten or alter the terms of a 90-day IRP.

You submit that over the last three years you have

s.22 However, you assert that without the ability to drive to different arenas it greatly reduces the chances of this program succeeding. 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 Report to Superintendent (the "RTS"), the investigating officer, Cpl. Smith, indicated that you were driving or in care or control of a motor vehicle at 2105 hours on August 30, 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, Cpl. Smith indicated that the ASD registered a "FAIL" at 2108 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 Narrative Text Hardcopy – Occurrence Report - 1 (the "Occurrence Report"), the author, Grant Blanchette, indicates that you were advised of your right to request a second ASD test at

2110 hours. Evidence in the Occurrence Report also indicates that you stated you understood this right but declined the second test.

You submit that you were not properly advised of the total legality of taking the second test. Specifically, that after viewing the reading from the first test, Cpl. Smith instructed you that if you were to give a second sample that there may be a chance you may have to go to RCMP headquarters and take an actual reading, thus risking the chance of receiving a criminal record. You submit that Cpl. Smith advised you, "this is not something you want." Accordingly, you submit that because of the information Cpl. Smith provided, you did not provide a second sample as you did not want to risk receiving a criminal record that may impede your ability to cross the border in the USA. Additionally, you indicate that Cpl. Smith did not read from a card when providing you with this information.

While I acknowledge your submission that Cpl. Smith advised you that if you were to give a second sample that you may have to go to RCMP headquarters and take an actual reading, risking the chance of receiving a criminal record, I note that police evidence does not include any evidence that this information was imparted to you. I also question why a third breath sample would have been required and note that you have not provided any evidence that articulates what the purpose of this "actual reading" would have been. The evidence before me indicates that Cpl. Smith conducted an IRP investigation. Accordingly, the legislation allows a peace officer to obtain a sample of breath at roadside removing the necessity to transfer a person to detachment to obtain a reading on a different device.

You also indicate that Cpl. Smith did not read the information regarding your second test from a card. In the Occurrence Report under the heading "Right to Request a Second ASD Test" in response to the question, "Was right to second test read or from memory? If read, from what source?", it indicates Cpl. Smith, "read from purple card." Although I do not know exactly what this "purple card" is, I infer that it is likely some type of police issued document with respect to conducting an IRP investigation. I have no persuasive evidence before me that indicates Cpl. Smith provided information from a source other than the "purple card". I also think it is unlikely that Cpl. Smith would have advised you that by providing a second sample it may result in a criminal record when reading from a card referenced in an IRP document (i.e. the Occurrence Report). You have not convinced me that the information regarding your right to a second test was not read from a purple card or that the officer instructed you if you were to give a second sample that you may risk the chance of receiving a criminal record; as such, I prefer the officer's evidence on this issue.

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?

Based on the evidence before me, 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?

Cpl. Smith'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?

Cpl. Smith submitted a Certificate of a Qualified ASD Calibrator (the "Certificate") in which Grant Aaron Blanchette certified that the ASD was found to be within the recommended limits when he checked its calibration on August 29, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly.

You submit that in your opinion the ASD used in taking your sample was not totally reliable. You also indicate that you are aware ASDs used in British Columbia are calibrated on a regular basis. On this point, you submit that it took an extremely long time to obtain a result. In fact, it took so much time that Cpl. Smith himself seemed surprised and was ready to use another ASD. Further, that the ASD flashed "WARN" and then "FAIL" and that it is your understanding the device is to provide one reading.

Aforementioned, Cpl. Smith submitted a Certificate that indicates the ASD used for your test was checked for calibration on August 29, 2013, with a calibration expiry date of September 26, 2013. Your IRP was served on August 30, 2013; therefore, I conclude that the ASD's calibration was valid at the time of your test. While I acknowledge your submission that it took an extremely long time for a result to register, I have no evidence before me that indicates an ASD is supposed to produce a result in a predetermined amount of time. Moreover, on the Certificate certified ASD Calibrator, Grant Aaron Blanchette, indicated that to the best of his knowledge the ASD was functioning correctly. I have no persuasive evidence before me that the device was not functioning correctly at the time your test was administered. On this point, you indicate that the ASD flashed "WARN" then "FAIL". However, I have already made a finding that the ASD registered a "FAIL".

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"?

Cpl. Smith's evidence is that he noted a moderate odour of liquor on your breath and that your actions were slow. Further, he indicates that you admitted to the consumption of one beer and that when you were asked the time of your last drink, you responded, "40 minutes ago."

You write that you feel the "FAIL" result of your ASD test is unreliable because of the amount of time from your last drink to the point you provided a sample. Specifically, you submit that when Cpl. Smith asked you the time of your last drink that you responded, "like 4 minutes ago", not 40 minutes ago as police evidence indicates. You write that you were just around the corner from the Black Bear Pub (the "Pub") where you had dinner with friends. While there you had one beer before your dinner arrived, one beer after, and then promptly left because you had to get up early the following day. Accordingly, you submit that it has been pointed out to you by

other RCMP officers that an ASD test may not be accurate if alcohol has been consumed in the last 10 to 15 minutes of a person's last drink. As such, you are of the opinion that the ASD used for your test was not reading accurately.

You indicate that an ASD test may not be accurate if alcohol has been consumed in the last 10 to 15 minutes. 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. On this point, I acknowledge your submission that Cpl. Smith indicated an incorrect response with regard to the time of your last drink. However, I note that your alleged response of, "40 minutes ago", is included in the RTS and Occurrence Report. Moreover, this response is enclosed in quotations in both documents, which leads me to conclude that these were your exact words. I also infer from your submission that the officer responded, "I guess one must be your limit", when you advised him that you had had one beer before your dinner arrived and one beer after, that he erred in his evidence regarding your recent alcohol consumption. However, I am left wondering why your friends that joined you at the Pub that evening have not provided any evidence for this review to support your alleged drinking pattern. On a balance of probabilities, I conclude that your last alcoholic drink was finished more than 15 minutes before you provided a sample of your breath into the ASD. Therefore, I am satisfied that your ASD test result was not affected by mouth alcohol.

Further, you submit that you feel you were in complete control of your vehicle and have, in the past, had two beers at the Pub, gone through a roadblock at the same location, and registered nothing on an ASD. 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 "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 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 25, 2013. The prohibition ends at 2359 hours 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.

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);
- 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 four 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 statement, you said you do not make a habit of drinking and driving. When you have friends over to your house for drinks, you usually take their keys and call them a cab. You said you have children and grandchildren and you would never want them hurt by a drunk driver. I appreciate your submissions in this regard, but I am not authorized by the Act to consider personal circumstances or driving history in this review.

You also commented on and provided photographs of the pot holes and low manholes on the North Island Highway. You explained that you may have been seen swerving on this road, because you were trying to avoid these hazards. The reason you were pulled over is not directly relevant to the issues I can consider in 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 to Superintendent (the “RTS”), Constable Lanthier indicated that he witnessed you driving or in care or control of the vehicle at 2043 hours, on September 14, 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 Lanthier 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 2047 and 2051 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 Lanthier 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, Constable Lanthier 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 Lanthier submitted two Certificates, the first of which states that Norman Eric Smith certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Mr. Smith said that on the 21st day of August, 2013, he checked the calibration of the ASD with serial number 101398 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG312901, expiry: 2015-05-09. This ASD was found to be within the recommended limits. It had a calibration expiry date of September 18, 2013 and a service expiry date of October 01, 2013.

The second Certificate states that Grant Aaron Blanchette certified that he is a qualified ASD calibrator, qualified to calibrate the Alco-Sensor IV DWF. Mr. Blanchette stated that on the 29th day of August, 2013, he checked the calibration of the ASD with serial number 066129 by means of a dry gas Alcohol Standard, manufactured by Airgas, with lot number: AG312901, expiry: 2015-05-09. 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 August 16, 2014. I note that the ASD serial numbers on the Certificates match the serial numbers of the ASDs referenced on the RTS.

In your written statement signed on September 20, 2013, you said you understand that roadside breathalyzers (ASDs) are not accurate. You said if the officer thought you were truly impaired, you feel that he should have taken you down to the station for “proper testing”.

You did not provide any evidence to support your suggestion that the ASDs used in your case were inaccurate or malfunctioned in any way. It is not sufficient for an applicant to make ‘suggestions’ about what might have happened. Evidence to support the suggestion is required in an administrative review.

Further, a peace officer is not required by the Act to take a driver to the police station if the officer has reasonable grounds to suspect that a person has alcohol in his body while operating a motor vehicle.

Based on all the evidence before me, I am satisfied that both ASDs were reliable.

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

In your written statements you said you consumed one rye and coke between approximately 5:00 and 8:30 pm on the day in question. You noted that you had been up early for work that day and did not eat anything. I infer you are arguing that you did not consume enough liquor to be affected by alcohol and/or you were affected by alcohol because you had not consumed any food that day.

The officer’s undisputed evidence in the Narrative is that he noticed you had an overwhelming odour of alcoholic beverage on your breath, slurred speech and watery eyes. He also said you told him your last drink was two days prior. Constable Lanthier said that in order to get out of the vehicle without falling, you had to hold onto the window frame of the door. He said your balance was extremely unsure and you staggered when you walked. Based on all the evidence before me, I find that it is more likely than not that your stated drinking pattern is unreliable.

You did not provide any compelling 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 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

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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

November 15, 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.

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, Jeremy Carr, on November 4, 2013. However, to date I have received no submissions from you or Mr. Carr to support your review. 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 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 23:25 hours on October 28, 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 23:27 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?

In the Report, the officer indicated that you did not request a second analysis. There is no evidence before me to the contrary.

Therefore, I am satisfied that 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, I am satisfied that this issue is not applicable to your case.

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

The officer recorded the result of the ASD test as a "FAIL".

As only one test result was obtained, 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, in which J. Schwenneker certified that the ASD bearing the serial number 024941 was found to be within the recommended limits when he checked the calibration of the device on October 22, 2013. He also certified that to the best of his knowledge the ASD was functioning correctly.

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 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.

October 28, 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 (Notice). You applied to the Superintendent of Motor Vehicles for a 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, Hugh McCallum, received full disclosure. I have proceeded with this review based on that confirmation.

Mr. McCallum noted that the Report to Superintendent (RTS) is defective on its face as the date on which it was sworn is indecipherable. He cited the decision of *Murray v. the Superintendent of Motor Vehicles* where the judge held that the RTS must be properly sworn. He also stated that when, where, by whom and before whom a report is sworn are material requirements of such.

I have read and considered the decision of *Murray* and find it is markedly different than your case. In the case of *Murray* the jurat had not been signed. In your case the RTS has been signed by a commissioner for taking affidavits. I recognize that the date is not very clear. However, in my view I do not find this grounds under which to revoke a driving prohibition. I have considered Honourable Justice Harvey's statement in the Supreme Court of British Columbia decision in *Ramirez vs. the Queen* that "no defect in the jurat can alter the fact that an oath was in fact administered and that the information was in fact sworn." In addition, I also note that the section 67 of the *Evidence Act* states that "a defect, by misdescription of parties or otherwise, in the title or jurat of an affidavit, or an irregularity in the form of an affidavit, affirmation or declaration, does not prevent its reception in evidence if the court, judge or other officer before or to whom it is tendered thinks its receipt is proper, and the court, judge or other officer may direct a memorandum to be made on the document that it has been so received". I am satisfied that the RTS has been 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 Analysis

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

In the RTS the officer noted that you were a driver or had care or control of a motor vehicle on October 7, 2013, at 22:18 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 7, 2013, at 22:18 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.

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

The officer stated that a complaint was made of a possible impaired driver. The officer noted that your appearance was messy and un-kept {sic}, your eyes were glassy and tired looking, and you had an odour of liquor emitting from your breath. He indicated when he asked if you had consumed any alcohol before driving, you said you had drunk a nine ounce glass of wine about two hours prior. The officer stated in the Narrative after your first "FAIL" result that "this

reading of "FAIL" on the ASD, was proof that DICKSON had at least 100 milligrams of alcohol per 100 millilitres of blood in his system".

Mr. McCallum noted that there is nothing in the material supplied to show that you had a blood alcohol level of not less than 80 mg%. He argued that the officer's statement in the Narrative is not proof. He stated that the officer is not a qualified ASD calibrator and he did not test the instrument. Mr. McCallum noted that the Certificates do not confirm that the "FAIL" reading could only occur if the blood alcohol level of the subject was not less than 80 mg%. He noted that the documents say "the ASD calibration was conducted in accordance with training that I received", but what this calibration was in terms of the correlation of a "FAIL" is not stated. He submitted that without this information it is impossible to say that a fail reading could only occur as a result of the concentration of alcohol in the person's blood being not less than 80 mg%. Mr. McCallum noted that nowhere is it stated that a fail reading on a properly functioning machine means the test subject has more than 80 mg% of alcohol in 100 millilitres of blood and nowhere is it stated that the machine is calibrated to provide fail readings only when the concentration of alcohol in the blood exceeded this standard. He also noted that how the machine is calibrated is unknown. Mr. McCallum submitted that it is impossible to say that you had a blood alcohol reading of not less than 80 mg% based solely on the "FAIL" test results without an expert interpretation of these results. Mr. McCallum cited the decision of *Sivia v. the Superintendent of Motor Vehicles* and *Bhur v. the Superintendent of Motor Vehicles* in support of his position.

I have read and considered the decisions of *Sivia* and *Bhur*. I acknowledge the Mr. McCallum's submissions; however, the issue before me is "was your BAC less than 80 mg% even though the ASD registered a "FAIL"?"

Section 215.5(1) of the Act states that if, after considering an application for review under section 215.48, the Superintendent is satisfied that the person was a driver, in respect of a 90-day driving prohibition resulting from a sample of breath for analysis by means of an approved screening device and the approved screening device registering a "FAIL", the Superintendent must confirm the driving prohibition.

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 milligrams of alcohol in 100 millilitres of blood. There is no authority before me stating that the officer must interpret for the Superintendent what the actual BAC of the driver was at the relevant time or that the officer must provide evidence of such in his report. Consequently, the requirement is that after considering the evidence before me, I must be satisfied that your BAC was not less than 80 mg%.

There is no persuasive evidence before me that convinces me your BAC was lower at the time of the tests. As well, I have already made a finding that the ASDs used in your case were reliable at the time of your tests.

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 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.

s.15

Adjudicator

cc: Hugh McCallum
604-534-8551