



August 15, 2011

REVIEW DECISION Immediate Roadside Prohibition No. 20

Introduction

On July 29, 2011, 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* and that the approved screening device (ASD) registered a fail.

I must revoke your driving prohibition, cancel the monetary penalty, and revoke any vehicle impoundment if I am satisfied that you were not a driver within the meaning of section 215.41(1), or that the ASD did not register a fail.

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

In reaching my decision on this review, I must consider all relevant information provided to me, including the peace officer's report.

Preliminary Matters

Records at this office indicate that disclosure was provided to your lawyer, Mr Dil Gosal. I proceeded with the hearing based on this information.

Issues

There are two issues in this review:

1. Were you a driver within the meaning of section 215.41(1) of the *Act*?
2. Did the approved screening device register a 'fail'?

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Facts, Evidence and Analysis

Did the ASD register a fail?

In the Report, Constable Jenk noted that a test result of 'fail' registered on an ASD at 22:00 hours on July 30, 2011, following the demand for a breath sample. The constable noted that he informed you of your right to request a second analysis, but indicates you did not request one. In Response to the peace officer's request, you provided a second breath sample for analysis, using the same ASD, at 22:00 hours. In his Occurrence Report, the constable stated he asked you the time of your last drink, and you stated it was about 15 minutes prior. Due to concerns over potential [redacted], the constable waited another 15 minutes and re-tested you using the same ASD at 22:31 hours, which resulted in a reading of 'fail.' Later in the Occurrence Report, the constable stated that at approximately 22:00 hours he informed you of your right to a second test on a different instrument, but you declined.

In his submission, your lawyer argued that where a person requests a second test that analysis must be [redacted] 945.12 (2) of the Act. In your affidavit you acknowledge blowing a 'fail' on the first test. The constable stated that you would have to serve a 90 day prohibition, and asked you if you wanted to take another test. You said, 'yes, absolutely, this machine must be wrong.' The constable offered to give you another test, provided there was a [redacted]. You said OK, and waited with the officer at the roadside. Then he gave you the second test, which he told you was a 'fail' again. He did not use a [redacted] and you did not know he was supposed to use a different machine, until you were informed by your lawyer.

In section 4 of the Report, Approved Screening Device – Test Result, Constable [redacted] recorded identical information for the ASD Type, Calibration and Expiry dates for the first and second test results. While the constable describes giving you a 're-test' out of concern for possible [redacted], the results are recorded in the Report as the second, and determinative test. There is no provision in the Act for a peace officer to test a person using the same ASD; nor is there an opportunity for a third analysis.

Based on the evidence before me, I find that it is more likely than not that the constable has not satisfactorily met the conditions of [redacted]. As a result, I cannot consider the second and governing reading of the ASD. Given the evidence before me, I am not satisfied that an ASD registered a 'fail' on July 30, 2011, at 22:00 hours.



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Decision

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(c)(i) of the *Motor Vehicle Act*. You may resume driving once you have obtained a driver's licence from the Insurance Corporation of British Columbia.

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 leased vehicle. The Superintendent of Motor Vehicles will pay towing and storage costs up to and including August 15, 2011. 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: Dil Gosal
Fax: (604 598 1117)