



REVIEW DECISION Immediate Roadside Prohibition No.

Introduction

On [redacted] 2011, 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) 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

In his written submission, your lawyer, Dil Gosal, argued that when Constable [redacted] made a demand that you provide a sample of breath forthwith, the officer did not have sufficient grounds to form a reasonable or probable suspicion. In the Report to Superintendent (Report), the constable observed the presence of empty beer bottles in the vehicle, along with the odour of alcohol coming from inside. When the constable [redacted] suspicion, at 17:00 hours [redacted] you admitted to the consumption of alcohol. The validity of the demand, [redacted] in this review. Section 215.5(1)(b)(ii) of the Act [redacted] a prohibition if I am satisfied that a driver failed or refused to comply with a demand to supply a sample [redacted] means of an approved screening device, 215.41(4) specifies that that demand must be made under the *Criminal Code*. Section 215.5(1)(b)(i), w [redacted] is review [redacted] incorporate [redacted]

driver includes a person having the care or control of a motor vehicle, whether or not the motor vehicle is in motion.

Part of the test for whether a person has care or control of a vehicle requires some use of the vehicle or its equipment that involves a risk of putting the vehicle into motion so that it could become dangerous. Your lawyer argued that you were merely in the driver's side of the vehicle when the peace officer came upon the vehicle. You were not a driver; you did not have care or control. Your lawyer referred me to the case of *L.*

(BCSC) and argued that although there is a presumption of care or control when a person occupies the driver's seat, that may be rebutted if you never engaged in a course of conduct that involved a risk of putting the vehicle in motion. Mr Gosal also drew my attention to *R v. BCSC*. Your lawyer submitted that to establish care or control, a person must voluntarily consume alcohol and be impaired; while in such a state use the vehicle or its equipment and fittings in such a way as to create a risk of setting the vehicle in motion so that it could become dangerous. At the time the police officer approached the parked vehicle, I find that the engine was running, and the ignition key was in the ignition and there were no accessories or equipment in use. The officer could only determine that you were in the driver's seat. The vehicle was parked with the engine on and the passenger side door was open. I accept that you did not intend to drive the vehicle and had made prior arrangements with your friend to drive you.

Based on the evidence before me, I find that it is more likely than not that you were not a driver within the meaning of section 215.41(1) of the Act on the date of the offence at approximately 10:00 hours. As a result, there is no need for me to consider the issue of whether or not the ASD registered a 'fail'.

Decision

I therefore revoke your driving prohibition and the monetary and other penalties you received, as required by s. 215.5(4)(a) 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 the date of the offence. 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)