# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R.G. Facilities (Victoria) Ltd. v. Liquor Control and Licensing Branch,*** 2009 BCSC 630

Date: 20090508
Docket: 08-3824
Registry: Victoria

***Judicial Review Procedure Act and the Liquor Control and Licensing Act***

Between:

**R.G. Facilities (Victoria) Ltd. dba Save on Foods Memorial Arena**

Petitioner

And

**The General Manager, Liquor Control and Licensing Branch**

Respondent

Before: The Honourable Mr. Justice N. Brown

## Reasons for Judgment

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| Counsel for the Petitioner: | M.T. Mulligan |
| Counsel for the Respondent | T. Mason |
| Date and Place of Trial/Hearing: | January 26, 27, 2009<br>Victoria, B.C. |

# 1 OVERVIEW

[1] An adjudicator found the petitioner, who holds a licence for the sale of liquor at the Save on Foods Memorial Arena in Victoria, B.C., contravened s. 33(1)(c) of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the "***Act***") by permitting a minor to consume liquor on the premises under its control. The petitioner seeks an order quashing the August 13, 2008 decision; alternatively an order for a rehearing before an alternative adjudicator because:

1 The general manger of the Branch lacked jurisdiction because she failed to specify the subsection that the Branch was proceeding under that ultimately led to the petitioner's conviction under s. 33(1)(c) of the ***Act***;

2 Alternatively, the said failure amounted to procedural unfairness that the adjudicator should not have allowed;

3 Similarly, that the Branch's pre-hearing refusal to produce witness contact information or witness evidence summaries ('will says') was procedurally unfair and that the adjudicator should have ordered their production before continuing the hearing;

4 The adjudicator imposed a licence suspension requiring that no liquor be served on intermittent as opposed to successive days, which he had no jurisdiction to do;

5 Other less significant issues that I will describe and dispose of later.

[2] The first of these complaints is the most meritorious and requires the most analysis. The fourth complaint has some merit and also requires more analysis, but I did not find the adjudicator's reasoning and the intermittent sentence he imposed outside the range of defensible outcomes.

[3] While no legal issues stem from the way the licensee contracts out management of its liquor sales, a general sense of them will be helpful when the facts are reviewed. The licensee R.G. Facilities (Victoria) Ltd. ("RG" or sometimes "the petitioner") contracted a third party to manage its liquor service. That third party is responsible for the sale of liquor from kiosks and the management of nearby designated surrounding areas where beer can be purchased and consumed. Another contractor is responsible for security and supervision of the seating areas in the bowl of the arena, which is the home of the Salmon King's hockey team franchise. RG also rents the facility for the offering of a wide variety of other large entertainment events besides hockey games, including speaking engagements, concerts and family entertainment.

[4] Liquor (beer in this case) can be sold to adults under the terms and conditions of RG's Liquor Primary Licence. The licensee is responsible for ensuring that the terms of the licence are complied with, and especially, within the context of this case, to ensure that it sells no liquor to a minor, s. 33(1)(a); and that no minor is permitted to consume liquor anywhere in the arena, s. 33(1)(c). The two said contractors carry out the day to day 'on the ground' management of these responsibilities on behalf of RG.

[5] I heard little disagreement about the events in the arena that led up to the issuance of a section '33 supplying minors' contravention notice given to RG by the respondent, the General Manger of the Liquor Control and Licensing Branch ("the Branch"). RG focused its complaints about the decision principally on matters relating to jurisdiction and procedural fairness, although it did also point to what it characterized as some inconsistent/irrational factual findings (misapprehension of evidence). While the adjudicator did appear to make some comments that appear inconsistent, I found none of RG's arguments sufficiently persuasive to justify setting aside the adjudicator's decision on these particular 'misapprehension of evidence' grounds. Therefore, the focus of this review will be on RG's jurisdictional and procedural fairness arguments, especially the latter.

## POSITION OF THE PARTIES

### Lack of Specified Charge

[6] The petitioner's primary complaint is that the Branch failed to specify the subsection that the adjudicator ultimately convicted the petitioner under. It says that s. 20(4) of the ***Act*** and s. 64(1) of the ***Liquor Control and Licensing Regulation*** B.C. Reg. 224/2002 (the "***Regulations***"), require that the Contravention Notice and the Notice of Enforcement Action ("NOEA") the Branch has to deliver to the licensee must specify the subsection contravention the licensee is charged with. Without this specification, the general manager has no jurisdiction to proceed. Counsel did not persuade that such a failure will lead to either the Branch's or the adjudicator's loss

of jurisdiction in this case. However, such a failure may speak to procedural unfairness.

[7] The petitioner does additionally argue that the Branch engaged in procedurally unfair conduct that the adjudicator should not have allowed because it was contrary to the rules of natural justice and the obligatory language of the ***Act*** and the ***Regulations*** that it says call for 'specificity' in the charges, (a requirement that obviously implies consistency as well). The petitioner refers to facts showing that even through pre-hearing the Branch several times clearly communicated that the alleged contravention related to supplying a minor with liquor, at the hearing itself, it fell back on s. 33(1)(c) (permitting consumption on the premises) for conviction. The petitioner submits that the Branch sent ambiguous and/or inconsistent signals; that at the hearing it 'switched subsection horses', and then only when it became obvious that the evidence of the in-possession minor J.S. could not support a s. 33(1)(a) 'selling' conviction. It is this procedural fairness argument that is the focus of this decision.

[8] The Branch replies, relying in part on three authorities to be discussed, that it gave sufficient information to the petitioner indicating the case it had to meet; and that it is sufficient to refer to s. 33 of the ***Act*** in a general way, without naming any subsection. The Branch says that all that was required here was that the adjudicator listen fairly to both sides, give RG a fair opportunity to correct or contradict any relevant statement prejudicial to their views," ***Kane v. Board of Governors of Province of British Columbia***, [1980] 1 S.C.R 1105. The Branch rejects any suggestion of a requirement for anything resembling the "rigid disclosure or

evidentiary requirements found in criminal law." However, the petitioner says it is not expecting that level of technical formality, only procedural conformity with the ***Act*** and ***Regulations*** together with principles of common law procedural fairness.

**Inadequate Disclosure**

[9] The petitioner complains also about the Branch's refusal to disclose a copy of the police file, or contact information for the minors, particularly the name of the youth, J.S., identified in the police report. And alternatively, about its refusal to provide a will say of the youth's evidence. The Branch replies that it took all reasonable steps required of the Branch in the circumstances, that there was sufficient information in the materials it provided to RG to anticipate the evidence to be called and that RG had an opportunity to cross-examine the youth at the hearing. While I have reservations about the Branch's position on disclosure, since the adjudicator dismissed the allegation that RG supplied J.S. liquor and the order I ultimately make here will afford RG the right to a further hearing, any prejudice associated with the disclosure issue is spent. I will further discuss this in brief later.

[10] This is a good place to note that although Mr. Mulligan for the petitioner submitted that the Branch had to choose and specify only one of the three subsections under s. 33 of the ***Act,*** I disagree that the Branch is restricted in that way. The question is whether and how much subsection specificity the statutory and regulatory provisions, considered together with the principles of procedural fairness, require the Branch to communicate to licensees.

**Wrong Date Specified**

[11] The petitioner also complained that the date of the contravention was not correctly specified in the Notice of Contravention. The evidence at the hearing did not reveal any contravention took place on the date specified in it. I found the adjudicator's reasons for rejecting this submission were reasonable and I found insufficient merit in the petitioner's submissions relating to this. The parties all were well aware of the date of the alleged contravention, which was quite clearly identified in material received by RG. I therefore set that aside and will not refer to it again.

**Unlawful Penalty**

[12] The petitioner also complained that the adjudicator, having found it in contravention of s. 33(1)(c) and ordering a 10 day suspension of the licence, exceeded his jurisdiction by failing to impose the suspension on succeeding business days, as specified by Regulation 67(1). The adjudicator instead imposed a discontinuous suspension in an attempt to see the suspension coincide with the days of arena 'events' when the licensee would see a large volume of sales. As discussed later in these reasons, I found that the adjudicator acted reasonably in doing so, and I agree with the Branch's submissions on this point.

**Background Evidence and Inconsistent Findings Argument**

[13] The petitioner also argued that the adjudicator made inconsistent findings in relation to the due diligence defence. To appreciate this argument a brief overview

of the facts and findings is required. This overview will also be useful to fully appreciate the procedural fairness issues fully analyzed later.

**Evidence**

[14] In his summary of the basic evidence that led to the Contravention Notice, the adjudicator notes that on November 3, 2007 two experienced Victoria police officers entered the arena in order to carry out a licensed premise check. A hockey game with about 1,500 fans in attendance was already underway. They observed two groups of abnormally boisterous young males who appeared to be minors. One of the boys in the first group appeared to be drinking beer out of the type of cup sold at the on site kiosks. The second group spotted the officers and left. After waiting 5-7 minutes, and observing no security personnel, the officers approached the group, and found that one of the males was a minor and was in possession of a cup of beer. The officers issued him a ticket and notified his parents.

[15] The officers then entered the arena from the other end. They found the second group behind the visitor goalie again. The officers watched the group for 15 minutes being unusually boisterous with no interference. They approached the group and found that though the group had spilled its drinks, a clear puddle of beer was still visible. The officers confirmed that at least one of the group was a minor.

[16] The officers testified that they saw “no security personnel monitoring the arena bowl or present in the seating area around the ice rink, until they went looking for security officers in the area where the concessions and offices are located.”

[17] J.S., the male from the first group served with a violation notice for his possession of beer, while a minor, testified. He said that he "paid a stranger to buy him a beer because he was under age." He corroborated the essentials of the officer's testimony and confirmed he was 17. Given there was no other evidence before the adjudicator that RG had 'sold, given, or otherwise supplied liquor to a minor', there was no solid evidentiary basis for a finding that RG had contravened s. 33(1)(a). The adjudicator found accordingly, but allowed the hearing to continue against the licensee on the charge that RG had permitted a minor to consume liquor on the premises, contrary to s. 33(1)(c). Therein lay the essence of RG's chief complaint, as argued both before the adjudicator and here -- the Branch had indicated it was proceeding under ss. (a) before the hearing, and had never indicated it was proceeding under ss. (c); and that in any event the Branch had failed to meet its obligation to specify the subsection RG had to defend.

[18] The branch 'liquor inspector' testified. He confirmed concern about the licensee's ability to:

> control the arena in all situations when the arena management determined it would be appropriate to open for liquor service […] the licensee's direct sales from liquor service kiosks; 'works pretty well, but that is where the appropriate supervision of patrons ends […] once patrons take beer into the stands, there is a lack of supervision and control.
>
> (p. 15 and 16 of the adjudicators decision dated August 13, 2008)

[19] Another member of the Victoria Police Department, who had attended an earlier September 19, 2007 meeting at the arena in order to address compliance issues, confirmed the licensee had been "cooperative with the police […] [and]

indicated that the licensee is 'doing all they can to achieve compliance at the [alcohol service] kiosks.'" (p. 17).

[20] RG's licence event coordinator "[…] said there was a security system including crowd management in place on November 3, 2007." He indicated that there was, on that occasion, adequate security personnel to do the job required, and that there were mobile "Rovers" on duty at the time of the alleged contravention. The Rovers actively go through the bowl of the arena looking for incidents as they occur. He listed the names of the security personnel on staff that night and described their level of experience and training. Regarding the security at the kiosks, he said that the management of the arena was "probably the most proactive management that [he] has ever worked with regarding compliance." RG did not call any of the security personnel on duty on November 3, 2007.

[21] The adjudicator found insufficient evidence to support a ss. (1)(a) contravention with respect to the 'selling, giving or supplying' of liquor to the youth in either the first or second group.

[22] With respect to ss. (1)(c), the 'permitting consumption in the licensed premises subsection,' he accepted the testimony of the police officers and on the balance of probabilities found: that the patron was a minor; that the minor had beer in his possession (liquor); and that he was within the seating area at the bowl of the arena. The adjudicator also accepted the testimony of the liquor inspector that the seating area in the bowl of the arena is within a redlined area of the licensed establishment. He likewise accepted the evidence of the police officers about the

second group of boys and found “on the balance of probabilities that this patron was a minor, and that the minor had beer in his possession (liquor) prior to it being spilled on the floor… within the red lined area of the licensed establishment.” (p. 26).

[23] The adjudicator applied the test laid down in ***Ed Bulley Ventures Ltd. v. British Columbia (Liquor Control and Licensing Branch General Manager)***, 2001 CarswellBC 3436 (B.C. Liquor App. Bd.), which requires the licensee to show whether they observed as high a degree of diligence as it should have in the circumstances or had shut its eyes to the obvious, or allowed something to go on, not caring whether an offence was being committed. The adjudicator found that the licensee did permit the minor to consume liquor contrary to s. 33(1)(c) of the ***Act***.

[24] The adjudicator then relied upon ***R. v. Sault Ste. Marie***, [1978] 2 S.C.R. 1299, at p. 1325 as authority to shift the onus onto the licensee to prove due diligence on a balance of probabilities that the directing mind of the licensee exercised “all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system”. The adjudicator found that the “evidence discloses that the licensee goes beyond its responsibility in carefully managing the distribution of liquor in the liquor distribution concession booths or kiosks. The standard of compliance and care at those locations is high.” The adjudicator found “no indication that [patrons] are monitored while in the seating area adequately or at all” (p. 29).

[25] In his reasons the adjudicator specified at p. 34:

> I accept the testimony of the event coordinator that the security personnel were experienced individuals who were highly qualified, but the evidence discloses that they were not on post to monitor the possibility of minors in possession of liquor in the bowl of the arena. In that respect I accept the evidence of the police officers that they watched the minors in possession and one of the minors consume for eight to ten minutes at one end of the facility without observing any roving security personnel, and observed a minor in possession at the other end of the facility again without noting any security personnel in the stands.
>
> [...]
>
> […] I find that neither the licensee nor the security contractor acted on the obvious. The police walked in and immediately saw minors interacting with liquor. The minors were in the open and were seated (first group) or walking (second group) in the usual areas and in the usual manner. They were not hiding their possession or consumption of liquor until spotting the police nearby. I find that any rovers or suitably trained and observant security forces in the area would have seen what there was there to be seen.
>
> I find that the licensee had inadequate policies or procedures in place to monitor patrons in the establishment, and failed to execute on any policies or procedures that might have been in place to monitor patrons in the establishment. Security and monitoring personnel either were absent from the critical seating area of the arena or fail to act on what was there to be seen.

**Argument on Inconsistency**

[26] RG alleges that there is an inconsistency between the adjudicator's acceptance of the event coordinator's evidence (that there were highly experienced security personnel on staff) and finding that any suitably trained security personnel would have seen the contraventions.

[27] I will not be setting out the evidence considered by the adjudicator about the security systems in place and their enforcement practices at Save on Foods Arena, or on the training of security personnel dealing with liquor consumption etc.

However, in my view his decision reveals that he made findings, based on the evidence before him, to sufficiently support a finding of inadequate policies or procedures in place with respect to s. 33(1)(c). On a reasonable reading of the adjudicator's decision, it is apparent that though he accepted the event coordinator's evidence that any staff on site was highly qualified, he rejected the coordinator's evidence that there were adequate numbers of Rovers assigned, i.e. in the face of the police officers observations over a 25 minute period.

[28] So far as the evidence before him went, the adjudicator's findings were within a range of defensible outcomes.

**ISSUES**

[29] Having disposed of a number of the petitioner's arguments, the focus of this judgment will be on:

1. The appropriate standard of review;

2. The lack of specificity of the charge;

3. The legality of the penalties imposed by the adjudicator (an issue not yet touched on); and

4. The deficiency of witness evidence disclosure complaints brought by RG.

[30] I will now turn to the more general of the legal principles relating to standard of review and principles of procedural fairness that I considered and which led to a conclusion that the appropriate standard of review is reasonableness. I will then turn

to an analysis of the parties' submissions, focused on the substantive ones, as noted.

## 2 JUDICIAL REVIEW & STANDARD OF REVIEW

[31] Judicial reviews of decisions made under the ***Act*** are excluded from the governing provisions of ***Administrative Tribunals Act***, S.B.C. 2004, c. 45. Common law principles that specify the right standard of review therefore apply. The Supreme Court of Canada recently reviewed and modified these principles in ***Dunsmuir v. New Brunswick***, [2008] S.C.J. No. 9, 2008 SCC 9. ***Dunsmuir*** is now the leading authority for establishment of the standard of review on a judicial review of the decision of an administrative tribunal.

[32] Broadly speaking, the reviewing judge on a judicial review such as this is not called on to substitute their decision for the tribunal's simply because he or she disagrees with its conclusions or the reasoning that led to it. The starting point for a judge embarking on a review of a decision is to engage it with a respectful attitude and a sliding scale level of deference appropriate to the issues being considered. McLachlin C.J., speaking for the majority in ***Dunsmuir,*** explained that the function of judicial review is to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes: ***Dunsmuir*** at para. 28.

**Basis for Review**

[33] It is the petitioner who bears the onus to demonstrate that the administrative process prejudicially failed to exhibit the earmarks of procedural fairness reasonably

expected, given the matters being decided: ***Dunsmuir****;* Jones, D. & de Villars, A., *Principles of Administrative Law*, 2nd ed, (Ontario : Carswell) at pg. 6-8.

**Standard of Review**

[34] After ***Dunsmuir***, reasonableness and correctness are the only available standards of review. Explaining reasonableness, the Chief Justice pointed out that "certain questions coming before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions": ***Dunsmuir*** at para. 47. She went on to explain the nature of the inquiry on judicial review:

> 47. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[35] A third factor to consider is the level of deference due to the administrative body. Deference is the lens through which the reasonableness standard is applied. The court explained that a move to a single reasonable standard is not intended to pave the way to a more intrusive review. Noting that the concept of deference to tribunal decisions has been "insufficiently explored in the case law," McLachlin C.J. explained that deference was both an "attitude of the court and a requirement of the law of judicial review": ***Dunsmuir*** at para. 48. She continued:

> 49. […] In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[36] In effect, ***Dunsumir*** directs an inquiry into reasonableness that engages an appraisal of the articulation of the reasons and the acceptability of the outcome while accounting for the appropriate level of deference called for. The level of deference called for in a case may be a more influential factor in some than in others; and depending on factors such as the subject matter and the tribunal's expertise, a wider range of acceptable outcomes and justifications may be encompassed on a review.

[37] The court also gave guidance about how to come to the appropriate standard of review, with the following factors signalling both deference, and review on a 'reasonableness' standard:

- where the question is one of discretion or policy;
- where the questions of law and fact are intertwined and cannot be readily separated;
- where it is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity;
- where an administrative tribunal has developed particular expertise in the application of the general common law or similar rule in relation to a specific statutory context;

- existence of a privative clause;

- Nature of the question of law — non-specialized questions should be reviewed on a correctness standard. The Court in ***Dunsmuir*** noted:

> 56. […] There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[38] Therefore, a call for deference can both signal the appropriate standard of review and, (depending on the *degree* of deference called for) whether the tribunal decision is defensible.

**Reasonableness standard of Review on this Review**

[39] Having now considered the guidelines laid down in ***Dunsmuir***, notably: the subject matter of the dispute; the fact that the nature of the material questions of law that arise relate to the respondent's "home statute and regulations"; and the fact that, while these do touch on important aspects of procedural fairness, they also are not central to the legal system as a whole; and the fact that the issues involved require a consideration of intertwined facts and law, I find that the applicable standard of review is reasonableness. However, I do not find any special expertise is involved in deciding the issues decided by the adjudicator, with the exception of the legality of the penalty imposed. This influences to some extent the degree of deference called for on this review.

**Reasons for Rejection of Correctness Standard**

[40] I reject the petitioner's submission that the alleged obligation of the Branch to specify the subsection allegedly contravened deprives the general manager of jurisdiction. Mr. Mulligan argued that before the general manager of the Branch owned jurisdiction to proceed and the adjudicator to decide, the general manager must have specified one of the subsections in the Contravention Notice. A failure to specify means the Branch lacks jurisdiction to proceed. However, the general manager's authority stems from the grant of authority in s. 3 of the ***Act*** and their appointment by the legislature. Subsection specificity is a matter that involves questions of procedural fairness. In cases of "serious deviation from fair procedure" jurisdiction may be lost, according to learned authors Daniel Philip Jones Q.C. and Anne S. de Villars Q.C. However, they hold that the better view is that

> …procedural error goes to jurisdiction, and entitles the superior courts to review the legality of the delegate's actions.
> *Principles of Administrative Law*, at pg. 8.
>
> (see also ***Bartel v. Manitoba (Securities Commission)***, 2003 MBCA 30)

[41] However, in the circumstances of this case, all the issues, including those connected with procedural fairness, can be decided based on the reasonableness standard. Any deviations from the fair procedure required in this case can be rectified through a partial rehearing or other remedial steps.

**Appropriate Level of Procedural Fairness**

[42] Procedural fairness was also considered in ***Dunsmuir***, albeit briefly and primarily in relation to public bodies 'in the exercise of their contractual rights as employers'. The court explained:

> 90. From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" ([D.J.M.] Brown and [J.M.] Evans, [*Brown, Donald J. M., and John M. Evans. Judicial Review of Administrative Action in Canada. Toronto: Canvasback, 1998 (loose-leaf updated July 2007)*.] at p. 7-3)

[43] Learned authors Brown and Evans summarized the context that the obligation of procedural fairness operates within:

> The content of any procedural requirement flowing from the duty of fairness will depend upon the nature of the decision-making involved. And given the diversity of administrative action, these requirements can vary, running from the full panoply of procedures commonly associated with judicial proceedings, to the right simply to be notified and to express one's views in whatever mode may seem appropriate. Despite the diversity of content, however, it is possible to identify a common core to the participatory rights that the duty of fairness requires. Its principal purpose is to provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker, and correlatively, to ensure that the decision-maker fairly and impartially considers them.
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> D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto): Canvasback, 2004),[Emphasis Added]

[44] The Supreme Court of Canada in ***Congrégation des témoins de Jéhovah de St.-Jérôme-Lafontaine v. Lafontaine (Village)***, 2004 SCC 48, 241 D.L.R. (4th) 83, fleshed out factors that help to establish, on a sliding scale, the appropriate level of procedural formality and safeguards.

> 5. The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body.

[45] Although ***Lafontaine*** shows that there is a sliding scale of procedural formality, the sliding scale must start above a certain bare minimum. Further, certain safeguards to ensure procedural fairness are foundational; such safeguards will be less 'responsive' to the sliding scale of influencing factors. These 'core safeguards' are derived not from a particular set of rules or legislation for a court or tribunal – such as the different discovery rules for various kinds of proceedings – but from principles of natural justice.

[46] One example of such a core safeguard is the universal expectation of any alleged contravener that he or she will be provided with clear notice of what they are alleged to have done wrong. Though the factors in ***Lafontaine*** may affect the amount, time and nature of such notice, there is no question that this core safeguard must be clearly manifest in some form in every hearing. The underlying purpose of the safeguard is to protect against hearing by ambush. Proceeding to hearing without the respondents having received adequate notice to allow preparation of

their response runs squarely against one of the cornerstones of natural justice, potentially rendering the hearing a moot, forgone proceeding.

[47] I therefore find that the ***Lafontaine*** factors influence only the degree and nature of the notice that the licensee is entitle to receive in this particular context; these may vary, so long as clear notice is ultimately given.

**The Branch's Decision Making Process**

[48] The ***Act*** gives the general manager the discretion to choose one of two enforcement regimes; either under administrative sanction, with or without a hearing, as set out in s. 20 of the ***Act***, or pursuant to the penal sanctions provisioned by s. 48 and the ***Offence Act***, R.S.B.C. 1996, c. 338. While with administrative process the petitioner is exposed to no possibility of imprisonment, the general manager still owns the considerable powers to fine, suspend and cancel liquor licences: ***Whistler Mountain Ski Corp. v. British Columbia (General Manger Liquor Control and Licensing Branch)***, 2002 BCCA 426 at para. 21, ***Zodiac Pub Ltd. (c.o.b Zodiac Neighbourhood Pub) v. British Columbia (General Manager Liquor Control and Licensing Branch)***, 2004 BCSC 96.

[49] In this case, the general manager proceeded administratively with a hearing under s. 20(4) of the ***Act*** and Part 7 of the ***Regulations***. Section 20(4) of the ***Act*** sets out some fundamental procedural rules that include the requirement that:

> 20(4) On taking action against a licensee under subsection (2), the general manager must

> (a) provide the licensee with written notice of the action in accordance with the regulations,
>
> (b) set out in the notice the reasons for taking the action,
>
> (c) set out in the notice the details of the action including
>
> (i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and
>
> (ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served.
>
> [Emphasis added]

[50] Therefore, the "decision-making process" of the Branch (per ***Lafontaine***) itself obligates notice; and as noted above, a sliding scale assessment of the level of procedural fairness required here involves consideration of only the *nature* of the notice requirements contained in s. 20(4) of the ***Act***, its regulatory counterpart, Regulation 64 and the principles of natural justice.

**Nature of the Statutory Scheme (per *Lafontaine*)**

[51] Underage drinking is a serious public health and safety issue, and one of the main focuses of the legislation. ***Butterworth Holdings*** at para.19:

> The Act is public safety legislation that balances various competing interests, including: the interests of a licensee to maximize profits and the interest of public safety to minimize the adverse and sometimes tragic consequences of underage drinking.

[52] Because the ***Act*** is a 'public welfare statute', it should be interpreted as a strict liability offence. Whether prosecuted under the s. 20 (administrative) or s. 48 (criminal), the defence of due diligence is available: ***Whistler*** at para.29.

[53] I agree with counsel for the Branch that it is the protection of the public, especially minors in this instance, not the protection of licensee's rights, that stands at the centre of the ***Act***. But I do not agree that the subtext of this is that a licensee charged with a contravention should necessarily thereby have an expectation of only the basics of procedural fairness, such as the 'right to be heard, to have its views independently and un-prejudicially decided, and the right to receive reasons'.

***Importance of the Decision & Expectations of the Party Challenging***

[54] It is also true that RG owns no inherent commercial right to sell liquor in the arena or any other place. The production and sale of liquor is a closely regulated activity in British Columbia; only parties who meet licensing requirements are legally entitled to sell alcohol on premises. No fundamental questions of personal liberty, or rights of conscience, or a loss of professional status are at stake here. No penal consequences attached to the contravention in this case either, since the general manager proceeded under the administrative enforcement regime.

[55] There is no question that the decision is a serious one from the economic perspective of RG. However, from the perspective of the public, underage drinking is a very serious matter; the public welfare focus of the ***Act*** is an influential consideration in finding the level of procedural formality and safeguards a licensee should reasonably expect.

[56] In short, the focus of the hearing was on whether RG met its licensing obligations in this instance. Viewed from that perspective, RG could not reasonably

expect to find the same level of procedural fairness safeguards that would mirror those found in a quasi criminal proceeding. However, as stated, the right to clear notice remains a core safeguard (and constitutionally enshrined in the Constitution for criminal and quasi-criminal matters at least) and must be unambiguously present in the NOEA given to the licensee. Section 20(4), Regulation 64, and the Branch's own manuals themselves, signal that the licensee is entitled to expect specificity. I therefore find that in relation to these notice requirements the licensee is entitled to a high level of procedural fairness.

[57] Moreover, given the strict liability nature of ss. 1(a) and (c) contraventions, I also find the licensee is similarly entitled to a high degree of procedural fairness on those aspects of the hearing touching on the only available defence of 'due diligence.'

[58] I further note the fact that the 'prosecutor' is a Crown agency, justifiably raises the expectation of an exhibition by the Branch of substantial fairness, openness and transparency in its dealings with licensees.

[59] As a general statement of the levels of procedural fairness expected at the hearing in this case, more precision than that is not necessary in this case.

## 3 QUESTIONS TO BE ANSWERED

***Specificity of the Alleged Contravention***

[60] Before proceeding further, the petitioner's arguments regarding the 'specificity' of the alleged contraventions provided by the Branch need clarification.

[61] The petitioner alleges that the Branch failed to specify which section it was proceeding with. But a review of the NOEA actually shows that the Branch made unambiguous statements declaring the Branch's intention to proceed under ss. (1)(a). When it came to the day of the hearing however, the petitioner argues that the Branch added in ss. 1(c), 'switching horses' in effect, without notice, which the adjudicator allowed. The petitioner raises multiple issues as a result.

[62] For reasons that are not clear, even at the hearing itself the petitioner remained uncertain about the Branch's subsection prosecutorial intentions, which the Branch declined to clarify even at that time.

[63] Since it was open to the Branch to specify both ss. (1)(a) and (c) contraventions, the issue is still whether the Branch provided sufficient subsection specificity, in this case notice of its intention to proceed under s. (1)(c) *as well as* (a)—and if not, for failing to do so, what consequences, if any, should have followed such failure. Put another way, what should the adjudicator have done in that event?

[64] Given submissions heard at the judicial hearing, RG's '*specificity of the alleged contravention complaint'* branches into these:

- Is the general manager when proceeding administratively obligated to specify the subsections it intends to proceed under, and if so in what way?

- Is naming just s. 33 with a stand-alone reference to its section heading, "supplying liquor to minors," sufficient notice to a licensee, as a matter of general principle and law?

- Could the Branch proceed and the adjudicator convict under ss. (1)(c) in the circumstances of this case?

- Does a suitably deferential analysis of the above and related factors yield a finding that the articulation of the adjudicator's reasons and his finding of adequate notice fall within a reasonable range that is defensible on the facts and the law?

**What do the Statutory and Regulatory Provisions Require?**

[65] The petitioner submits that, rightly read, the ***Act*** and the ***Regulations*** in and of themselves obligate the general manager to be specific when stating the alleged contravention of the ***Act***, and that this requirement extends to naming the s. 33 subsection that the general manager intends to proceed with.

***The Act***

[66] Section 20(1)(a) of the ***Act*** states:

> (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:
>
> [any of six listed reasons, inclusive of the petitioner's contravention in this case are listed]

[67] The statutory and regulatory provisions setting out the complaint and enforcement procedure are somewhat unclear, but distilled to their essence, this is the procedure mandated by the ***Regulations***:

> 64(1) If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.
>
> [Emphasis Added]

[68] Although the reference is not clear, the written notice referred to her is most likely the traffic-ticket-like Contravention Notice the inspector fills out. The small print at the bottom of the Contravention Notice warns the recipient that:

> The general manager may proceed with enforcement action on the basis of this contravention notice. The licensee will generally be notified within 45 days if enforcement action is proposed.

[69] Based on this wording, it appears that the licensee must await the general manager's decision and receipt of the NOEA before finding out if the Branch intends to proceed.

[70] Regulation 64 further provides:

> (2) If, after considering the alleged contravention, the inspector proposes that enforcement actions should be taken against the licensee in response to that alleged contravention, the inspector must, after forming that opinion, provide written notice to the licensee
>
> (a) specifying which enforcement actions the general manager proposes to take against the licensee should the licensee agree under subsection (3) that the licensee has committed the contravention, and

> (b) notifying the licensee that, unless the licensee provides a notice of waiver in accordance with subsection (3),
>
> (i) the general manager will determine whether the alleged contravention occurred and the enforcement actions, if any, that are to be taken in relation to that alleged contravention, and
>
> (ii) an enforcement hearing may be scheduled for that purpose.
>
> (Note: a waiver is similar to a guilty plea)
>
> [Emphasis Added]

[71] Accordingly, the general manager owns the discretion whether to proceed, with or without a hearing.

[72] At this point, the inspector has presumably considered the allegations it wishes to proceed with and discussed them with the general manager. The written notice to the licensee referenced here must be the NOEA.

[73] Finally, s. 20(4) of the ***Act*** requires that once the general manager has, pursuant to s. 20(2), received a complaint, presumably from the inspector in this case, and decided to take action for the "licensee's contravention of this Act or the regulations" the general manager must:

> (a) provide the licensee with written notice of the action in accordance with the regulations,
>
> […]
>
> (c) set out in the notice the details of the action including…
>
> [The ***Act*** then sets out various monetary and suspension penalties]

[74] The written notice referenced here would once again be the NOEA.

[75] Viewed from a wide angle, the ***Act*** and the ***Regulations*** clearly exhibit obligatory language providing for written notice of the alleged contravention, the reasons for taking the action and the details of the action, and the proposed penalty. There is no language stating that the Branch must state the allegedly contravened subsection(s). However, s. 33 is not a contravention - it is a list of contraventions, each with their own actions, "sell…", "permit….", "possess". Each of the subsections under s. 33(1) are different contraventions – if the Branch wishes to proceed under more than one of them, it is free to do so, but both a plain and contextual reading of the statute and regulations requires them to specify those it intends to proceed with.

[76] The Branch's own internal enforcement policies are noteworthy here. Section 11.1.7(5) of the *Compliance and Enforcement Policy and Procedures Manual*, filed as an exhibit by the Branch at the hearing, stipulates:

> Based on the evidence gathered, if the inspector forms the opinion that a contravention occurred, the inspector will issue a contravention notice to the licensee alleging a contravention of either: section 33(1)(a) of the Act "Supply liquor to a minor" or section 33(1)(c) of the Act "Permitting a minor to consume liquor."
>
> [Emphasis Added]

[77] While I do not suggest this manual is enforceable as law, it was in evidence before the adjudicator, and demonstrated in unambiguous terms the Branch's own understanding of the obligation the ***Act*** and regulations impose on it, acknowledging that these are distinct offenses. The adjudicator does not appear to have considered what is effectively the respondent's own policy to ensure fair procedure.

[78] It only makes sense that some specificity is not just obligatory, but also desirable from the practical perspective of both the licensee and the branch: how can a licensee admit to (or "waive," using the language of the regulations) an (unspecified) contravention otherwise?

[79] I do not suggest that a contextual and plain reading of the ***Act*** and ***Regulations*** demands explicit reference on the Contravention Notice to the subsection's numbers and words—for example, such as: 's. 33(1)(a), selling liquor to a minor'—though this is clearly advisable; the clearer the better.

[80] Consideration by the adjudicator of the whole of the NOEA in order to determine whether notice was given with sufficient clarity and detail is within the range of defensible readings of the provisions, and the expected level of procedural fairness. However, the words must specify the contravention(s) in a way such that licensees' facing the hearing (as in this case) has no doubt about the specific charges it must answer. Any reading that suggests that it is up to the licensee to puzzle its way through a notice containing inconsistent or ambiguous statements, and no clear communication of the allegation, is not a reasonable one. And any reading that suggests that the Branch can proceed where it has communicated an intention to proceed under a subsection and then add a new one at a hearing without notice is not a reasonable one either.

[81] I turn now to the adjudicator's decision on this aspect of the case.

**Evidence of Communications from the Branch to RG before the Hearing**

[82] The relevant communications from the Branch to the petitioner were unclear and conflicting, especially when considered against the backdrop of the way that the hearing unfolded. The Branch's communications understandably led to uncertainty on the part of the petitioner. Viewed through the lens of what occurred at the hearing, the communications could even be considered misleading. I have addressed only the most relevant communications below.

[83] On November 14, 2007 the petitioner received the handwritten Contravention Notice, which specifies "**Supply to minors** s. 33", without reference to any subsection by number or word, aside from "supply". The 'details' provided included the note that "Victoria Police observed minors in possession of liquor in licensed premises […]". This detail is of course suggestive of a ss. (1)(c) proceeding, (though it arguably could also be understood as circumstantial evidence of selling). But either way, in light of the Branch communications that followed, this could not reasonably be considered adequate notice: see" *Originating Handwritten Contravention Notice*: Fisher Affidavit "B" (emphasis added).

[84] The February 6, 2008 minutes of a pre-hearing at the Branch specifically confirms:

> The branch alleges that on November 8, 2007, the licensee contravened section 33 of the *Liquor Control & Licensing Act* by selling, giving or otherwise supplying liquor to a minor":

[85] I note that this language is virtually quoted from s. 33(1)(a):

> 33(1) A person must not
>
> (a) sell, give or otherwise supply liquor to a minor…

[86] At this stage, the Branch had provided clear notice to the petitioner under s. 33(1)(a), but no clear notice under s. 33(1)(c). Moreover, on February 6, 2008 petitioner's counsel specifically requested details to show which booth allegedly supplied the minor liquor; so that he would then be able to identify employees on duty. The Branch did not clarify this, but in another letter to the petitioner reiterated that the contravention alleged was “selling” alcohol to a minor and that the proposed penalty was 15 days.

[87] On February 14, 2008 the petitioner’s counsel requested contact information for the minor so that he could interview him with a view to finding out which concession booth he purchased liquor from.

[88] It is obvious from these communications that the petitioner was conducting his internal investigations and assessing his due diligence defence based on a s. 33(1)(a) charge. In this case, the relevant witnesses would be employees of the party managing the concession booths, not the Rovers employed by the party managing security in the arena.

[89] There are a number of other letters and notes of conversations on the record, none of which rectified any potential confusion, and ultimately left an impression that the Branch was proceeding under s. 33(1)(a) only.

**Adjudicator's Justification for Allowing the Branch to Proceed Under s. 33(1)(a)**

[90] At the start of the hearing, Mr. Mulligan had applied for a ruling that the adjudicator lacked jurisdiction to hear the case because the NOEA failed to specify a contravention as "required by the Act and Regulations". The adjudicator elected to proceed and to defer a final decision until all the evidence was in. Also at the commencement of the hearing, counsel repeated earlier requests for disclosure of the names and contact information of all the minors involved in the case, which the adjudicator refused. Mr. Mulligan asked that the following be noted in the adjudicator's decision at para. 20:

> Please note the licensee's objection to continuing. The decision is prejudicial. I do not know what to defend against. The section that we are dealing with is not specific enough. I have requested clarification as to which defence I am to mount based on the plethora of available allegations that the branch has made, and the adjudicator has indicated only that the licensee is free to defend the branch's allegations as it feels fit based on the documentation and the notice provided.

[91] The adjudicator responded to RG's submissions about the lack of subsection specificity:

> The [Notice of Enforcement Action] provides a summary of the evidence of the police officers and a description of the circumstances leading up to the allegation. It is hard to imagine one reading the complete NOEA and the other documents provided to the licensee and not coming away with an understanding of the details of the allegation. The police observed an individual who was later determined to be a minor, consuming liquor in the licence premise. The branch had no evidence of that liquor being served or sold to the minor. The police observed another individual who was later determined to be a minor, in possession of liquor in the licence premise. The branch had no evidence of the liquor being served or sold to that minor.

> The notice documents make repeated reference to the absence of any action taken by the licensee or its agents with respect to those minors.
>
> I find that the reference to section 33 is specific enough in the context of the whole of the documents provided to the licensee to constitute adequate notice of the allegations made against the licensee. I find also that the reference to section 33, without indicating which subsection or subsections the branch intends to rely on is in the context of the whole of the documents provided to the licensee specific enough to satisfy the requirements of section 20 of the *Act* and section 64 of the *Regulation*. The disclosure of documents and the opportunity presented to the licensee to participate in a pre-hearing conference together provided adequate notice of the case that the licensee would meet at the enforcement hearing.
>
> I heard no persuasive argument that the licensee has been denied notice or procedural fairness, or that the general manager of the branch lacks jurisdiction to hear, or decide this matter.
>
> [Emphasis added]

***Analysis of the Specificity Issue***

[92] As a preliminary note, in my view the adjudicator misapprehended the salient aspects of the notice issue. The issue was not whether the Branch had evidence of liquor being sold or served to a minor, but what information was communicated to RG. Irrespective of whether the Branch "had no evidence of liquor being served to a minor", it evidently never communicated this to RG and certainly never withdrew the s. 33(1)(a) allegation, since the adjudicator needed to dispose of that charge. It was not up to RG to infer that the Branch is proceeding under s. 33(1)(c), based simply on the fact that the Branch had no evidence for a contravention under s. 33(1)(a). Imputing such a duty to RG is not reasonable; especially in this case, where the Branch clearly specified that it was proceeding under s. 33(1)(a).

[93] The adjudicator concluded that it is "hard to imagine one reading the complete Notice and the other documents…and not coming away from an understanding of the details of the allegation". However, apart from a general précis of the police officer's evidence, no analysis is provided of those parts of the NOEA that explicitly confirm that the Branch was proceeding under s. 33(1)(c).

[94] There was no indication in the adjudicator's decision that he fully considered the rest of the NOEA against the obligatory language of s. 20(4) of the ***Act,*** Regulation 64, and the *Compliance and Enforcement Policy and Procedures Manual* (PM), apart from a recitation of certain sections. Read together, a finding that the Branch was obligated to clearly communicate to the licensee the alleged subsection contraventions is a compelling one. A finding that the Branch fulfilled its obligation in this case is not a defensible one.

[95] I base this conclusion on the said Branch communications to the petitioner, which can only be read as a specification by the Branch of an intention to proceed under s. 33(1)(a), with no mention of s. 33(1)(c). It is true that the available documentation contained details that indicated that the petitioner faced exposure to a s. 33(1)(c) prosecution. However, the fact remains that no notice came from the Branch at any time to raise this beyond the realm of speculation from the perspective of the petitioner. Further, the petitioner's fixation on obtaining witness statements or information from minors, most notably, J.S., was clearly driven by a perceived need to discover circumstances relating to the *sale* of the beer from the kiosks and related information in order to enable counsel to adequately investigate and defend the charge of selling to a minor.

[96] The adjudicator's conclusion cannot stand up to a somewhat probing examination and I find the conclusion unreasonable and contrary to the overwhelming weight of the evidence: ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748, at paras. 56 and 59.

[97] I am further confirmed in this conclusion by the uncontested fact that at the hearing, and even after the Branch had closed its case, the Branch still had not provided clear notice of an intention to proceed under s. 33(1)(c). The petitioner's brief states at para. 23:

> At the conclusion of the Branch's case, counsel for the petitioner asked counsel for the Branch if he would specify what contravention he was intending to rely upon, and he advised the adjudicator that he was not prepared to indicate this.

[98] How can the respondent plausibly maintain that clear notice was given the petitioner, if when asked point blank at the hearing, the Branch advocate refused to confirm his intentions?

[99] I am unable to discern any good reason for the refusal of the Branch, a representative of the Crown, to state its case. While it is true that the Branch is granted discretion to decide whether to even proceed by hearing, once this mode of inquiry is chosen, all the principles of procedural fairness must apply: ***Roberge v. Yukon Liquor Corp.***, [1998] Y.J. No. 94 (SC).

[100] The burden imposed on the Branch of notifying the petitioner that it was intending to proceed under s. 33(1)(c) as well as, (or instead) of s. 33(1)(a)—is a

light one, easily discharged. Yet also one that, discharged in a timely way, would have addressed practically all the petitioner's notice concerns, and have lead to a more transparent and fair hearing.

[101] The Branch argued that its obligations under the ***Act*** could be met by simply stating s. 33 'Supply to Minors', as set out in the Contravention Notice given to the petitioner. The implication of this is that the accused contravener should discern from the rest of the delivered contents of the NOEA either the specific subsection it should be prepared to defend against, or be prepared to answer any and all of them. As will be obvious by now, I reject this. The paragraph heading of s. 33 has no formal interpretative value. Further, it cannot be considered to specify a ss. (1)(c) contravention since the phrase "Supply to Minors" is wholly consistent with s. 33(1)(a) but unrelated to the contraventions under s. 33(1)(b) and 33(1)(c). If the inspector had wished to signal an intention in the space available to rely on both subsections and keep its options open, realizing that the NOEA could come later, he could have easily done so. If he failed to do so then, the NOEA allowed further ample opportunity to do so.

[102] The respondent referred me to ***Contini v. British Columbia (Superintendent of Motor Vehicles)***, [1983] B.C.J. No. 623 (Co. Ct.) and to the adjudicator's decision *In the Matter of Cambie Hotel (Nanaimo) Ltd.,* General Manager Liquor Control and Licensing Branch Decision, available online: <http://www.hsd.gov.bc.ca/lclb/enforcements/pdf/2005/EH04-112.pdf>, appealed in ***Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2006 BCCA 119. I did

not find these cases assisted the Branch, as the issue of the specificity required here was not directly addressed in either of those cases. Though it is true that the adjudicator in ***Cambie Hotel*** decided that the Branch could switch contraventions at the hearing, the fact pattern in that case was quite different. In any event, I obviously disagree with that as a general proposition, and the Court of Appeal was not asked to deal with that issue.

[103] The Branch referred me again to ***Sault Ste. Marie*** on this issue. This case involved quasi criminal charges of pollution by the Municipality and its contractor agent. In that case Dickson J. noted that only one generic offence was charged; the essence of it was "polluting", and that offence could be committed in one or more of several modes (p. 7):

> There is nothing wrong in specifying alternative methods of committing an offense, or in embellishing the periphery, provided only one offense is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.
>
> [Emphasis added]

[104] In the present case, s. 33(1)(a), (b), and (c) are different contraventions, not just forms of "supply to minors". As such, the reasoning in ***Sault Ste. Marie*** does not apply.

[105] In summary on this issue, and for the reasons outlined, I find the refusal of the Branch to indicate that it was proceeding under s. 33(1)(c) procedurally unfair; and that the adjudicator erred in allowing the hearing to continue in the face of this failure, (which continued even at the hearing itself), without some form of

remediation such as an adjournment, which the adjudicator should have specifically offered to the petitioner in the circumstances of this hearing.

[106] This leads to the question of whether another adjudicator ought to be appointed as requested. While doubtless the present adjudicator would do his utmost to give an independent decision without bias, in the circumstances, and given the need of the parties to have no concerns regarding impartiality at this stage, another adjudicator should be appointed to hear further evidence on the s. 33(1)(c) contravention.

## 4 DISCLOSURE

[107] The petitioner complained that the adjudicator breached the principles of natural justice by refusing to require the Branch to provide contact information and or witness statements for certain witnesses, including those the Branch did not intend to call.

[108] Given the decision reached on this review regarding the specificity issue, this point is somewhat moot. A review of the pre-hearing correspondence indicates that counsel for the petitioner was most concerned about J.S., the minor issued a *Violation Notice* by Victoria Police. This concern related to the petitioner's capacity to demonstrate due diligence on s. 33(1)(a). However, the adjudicator dismissed the s. 33(1)(a) charges, and with that dismissal went any prejudice operative at the time of the hearing in relation to that.

[109] Regarding any prejudice in relation to the s. 33(1)(c) charge, pre-trial disclosure can clearly be an element of procedural fairness in certain administrative proceedings. The level of disclosure in order to ensure procedural fairness required in an administrative hearing such as this may depend in large part on the consequences for the party facing the allegations, combined with an assessment of the Branch's disclosure obligations. However, now, at this stage of the litigation, the petitioner does know the case it has to meet, the subsection allegedly contravened, and the kind of due diligence it must demonstrate.

[110] The adjudicator that hears the case going forward will be in the best position to assess any prejudice the petitioner may claim in relation to its capacity to now prove due diligence (resulting from the Branch's failure to disclose its prosecutorial intentions.)

[111] Therefore, for the above reasons, I dismiss the petitioner's claim relating to failure to disclose.

## 5 UNLAWFUL PENALTY

[112] At the hearing the petitioner submitted to the adjudicator that the 15 day suspension recommended by the Branch was inconsistent with the ***Act***, suggesting that s. 33(6) is "one of very few penalties for which the legislature specifies a specific penalty." Therefore, he argues that the provisions of s. 20 of the ***Regulations*** do not apply. While admitting to some uncertainty about this, the adjudicator found that s. 33(6), which provided for a fine of not less than $500, "created a separate offence

separate and apart from the contravention of the Act." The adjudicator rejected the petitioner's submission and its stated preference for a monetary penalty in the range of $7,500-$10,000. He went on to say:

> I find that a penalty is warranted.
>
> I also find that a suspension is appropriate to send a clear message to the licensee, the third-party operator, its contractors and employees, and the community that the branch takes his public safety matter seriously.
>
> A fifteen day suspension was recommended based on several factors including the age of the youth involved, the target audience at the Salmon Kings hockey game, the previous warning to the licensee and the failure by the licensee to avoid this contravention notwithstanding previous discussions with the branch.
>
> I agree with the reasons put forth by the branch for the proposed penalty. However, in light of the atypical nature of the liquor primary establishment, a fifteen day suspension would prohibit the sale of liquor at individual events spanning a considerable portion of the establishment's calendar year. […]

[113] The adjudicator recognized the fact that "in a typical liquor primary establishment, a ten day suspension would be deemed to be ten business days", which would normally lead to a call for a suspension for the 10 days that the business would normally be open. However, the adjudicator concluded that the suspension should reflect the fact that sale of liquor was an adjunct to the hosting of *major events*:

> Pursuant to section 20(2) of the Act, I order a suspension of the Liquor Primary Licence […] for a period of ten (10) days to commence at the close of business on Friday, September 12, 2008, and to continue each succeeding business day until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (section 67 of the regulation), and

> at which liquor would normally be available to patrons at an event hosted by the Save on Foods Arena.
>
> (pgs. 39 and 40)

[114] For its part, the petitioner placed its own literal interpretation on Regulation 67(2)(b), with its requirement that a suspension continue on each succeeding business day, and on the accompanying Regulation 67(1) definition of “Business Day” as, in respect of a licensee, “a day on which the licensee's establishment is normally open for business". It pointed to the fact that the petitioner was in fact open for business and served liquor five days a week, Monday to Friday, from 11 AM to 2 PM at its restaurant facility, as well as at concerts, hockey games, and other special events.

[115] Braced with confidence its own not unreasonable reading of the legislation, the petitioner then unilaterally and voluntarily purported to serve out its suspension by not serving alcohol in the arena from September 15, 2008 to September 24, 2008. There was one major event during this interval. I should note here that I heard argument from the parties as to whether RG even had the right to sell alcohol other than at major events, but I am not going to comment on that secondary issue, unnecessary to my decision.

[116] Anyway, the petitioner submits that it has thus accordingly served the entirety of the 10 day suspension in accordance with the ***Regulations***; and that the adjudicator lacked authority to impose an intermittent suspension, which it therefore was not obligated to serve as handed down by the adjudicator.

[117] Following this, correspondence flowed between RG and the Branch over the legality of the intermittent sentence imposed by the adjudicator and the efficacy of RG's unilateral pre-emptive 'voluntary' suspension over 10 successive days. Matters were then placed in abeyance pending this decision.

[118] The issue therefore obviously revolves around the interpretation of "Business Days" and whether the penalty imposed based upon the adjudicators' interpretation is valid.

[119] The standard of review in this instance is also reasonableness. This question involves interpretation of 'home' regulations, and the imposition of penalties that involve a weighing and assessment of a wide variety of circumstances, such as the licensing history, conditions attached to the licence, and also involves questions of both fact—the nature of the licensee's business licence, and law—the interpretation of the word 'business' in the ***Regulations***. The question of law involved here is not one of general application or concern to the public at large.

[120] I agree with the submissions of counsel for the Branch on this issue. Even if I were unable to fully agree, I could not conclude that the adjudicator, (though his reasoning in relation to s. 33(6) might have somewhat tenuous), reached an unreasonable conclusion in the circumstances.

[121] The Branch proceeded administratively pursuant to s. 20 of the ***Act***, not the offence provisions under s. 48. The ***Offence Act*** does not apply, and accordingly neither does s. 33(6) of the ***Act***: ***Ocean Port Hotel Ltd. v. British Columbia (General Manager Liquor Control and Licensing Branch)***, [2001] 2 S.C.R. 781 at

para. 33. Imposition of a suspension of the licence was within the authority of the adjudicator.

[122] In assessing the validity of the adjudicator's interpretation of "Business Days" I am required to read the term in its "entire context and grammatical and ordinary sense harmoniously with the scheme of the ***Act***, the object of the ***Act***, and the intention of Parliament": ***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 SCR 27. I am also cognizant of the principle that the ordinary meaning of a legislative phrase cannot be the correct interpretation if such would lead to an absurd result.

[123] Turning to the purpose of the ***Act***, regulation and liquor control scheme, I note once again that it is designed for the protection of the public, especially minors (a vulnerable section of the public). As such, the general manager must have the ability to meet a contravention with an effective deterrent penalty.

[124] In this case, the petitioner's primary licence related to the hosting of events with many in attendance. It was during these large events that the petitioner earned most of its revenue. The adjudicator made it clear that it was on such major event days that the petitioner would be suspended from providing liquor in order to recognize that suspending the petitioner from serving liquor during its normal business day would not be a penalty or a deterrent.

[125] Though the petitioner has a decent argument for the adoption of the plain and ordinary meaning of Business Days, I cannot find the adjudicator's interpretation unreasonable when read within the context of the purposes of the ***Act*** and the said interpretive principles.

[126] These reasons need not be interpreted as a criticism of the petitioner's attempt to serve out its sentence based on its own interpretation of the ***Regulations*** and in a way that favours its own position, an interpretation that is not without some merit. The petitioner should obviously receive some credit for those days it suspended liquor sales, with the details of this left to negotiation. Failing agreement, the matter should be referred again to the adjudicator.

[127] Upon finally arriving at this decision, I stood back and considered it with a view to ensuring that it was in accordance with the guiding principles laid down by ***Dunsmuir***, notably the courts' explanation that the function of judicial review is to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes. In my view, this decision rectifies what was an unfair procedural process and hearing, and ensures the future fairness of the Branch's administrative process—to the benefit of both the Branch and licensees. No new heavy administrative burden is laid on the Branch—rather a ruling that for all practical purposes just requires it to follow its own policy manual by requiring the writing down of a few words in the NOEA. Deference to the Branch's own process is affirmed by referring the matter back with the following remedial orders.

## 6 CONCLUSION AND ORDER

- *Is the Branch when proceeding administratively obligated to specify the subsections it intends to proceed under, and if so in what way?*

  Yes. The adjudicator may, when determining whether proper notice has been given, consider the whole of the Notice of Enforcement Action, including correspondence between the Branch and the licensee, in order to determine

whether the Branch has satisfied its specificity obligation. But the subsections of s. 33 that the Branch intends to proceed under must be communicated in such ways that the licensee will clearly see the charge(s) it must answer to.

- *Is naming just s. 33 with a stand-alone reference to its section heading, "supplying liquor to minors," sufficient notice to a licensee, as a matter of general principle and law?*

  No.

- *Did the general manager of the branch lose jurisdiction for failing to specify the subsection?*

  The general manger did not lose jurisdiction. A question of procedural fairness was involved. The procedural unfairness was not serious enough to justify a finding that jurisdiction was lost. The procedural unfairness involved can be remedied by an adjournment that would allow the petitioner now to prepare a due diligence defence based on its knowledge of the subsection allegedly contravened. The issue of any remaining prejudice to the petitioner should be addressed by the new adjudicator.

- *Does a deferential analysis of the adjudicator's finding of adequate notice fall within a range of outcomes defensible on the facts and the law? Likewise, as to the adjudicator's decision to find RG in contravention under ss. 1(c).*

  The adjudicator's decision on this issue was not reasonable. However this can be remedied by a rehearing on the s. 33(1)(c) alleged contravention.

[128] Pursuant to s. 5 of the ***Judicial Review and Procedure Act*** I order a further hearing. The rehearing before a new adjudicator shall be confined to the alleged contravention of s. 33(1)(c) of the ***Act*** and the petitioner's due diligence defence. The petitioner is at liberty to recall witnesses or additional witnesses, to demonstrate its due diligence, as required by the case authorities. If the petitioner does not confirm within 14 days from the date of this order that it wishes to exercise its

rehearing rights granted by this order, the adjudicator's decision stands. If the petitioner confirms its desire for a further hearing, the adjudicator's finding of a contravention under s. 33(1)(c) is quashed, to be replaced the new adjudicator's decision.

[129] The exhibits and the adjudicator's decision shall be marked as exhibits at the rehearing. The new adjudicator may consider and apply existing evidence summarized by the first adjudicator, including that of the police officers, J.S. and other witnesses called by the Branch, as well as evidence summaries of witnesses already called by the petitioner, with a view to expediting the hearing and minimizing inconvenience to witnesses. The adjudicator may exercise his or her discretion with respect to other evidence at the hearing with a view to expedition and convenience, subject to weighing of any prejudice.

[130] Should the new hearing result in a finding that RG contravened s. 33(1)(c), the penalties imposed in the first adjudication shall stand; provided that the new adjudicator may consider mitigatory information derived from witness evidence that was not available at the first hearing.

[131] Since success is divided, each party shall bear their own costs.

"The Honourable Mr. Justice N. Brown"