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**BY EMAIL**

## **RE: Submission by Coalition of Local Restaurants Re: Liquor Policy Review**

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We are writing on behalf of the Coalition of Local Restaurants, a group of leading B.C. restaurants that was formed for the purposes of strategic liquor policy engagement. All of the coalition members are licensed food primaries within British Columbia. We provide a list of the coalition members at the attached **Schedule “A”**.

The purpose of this submission is to diagnose and provide solutions for fundamental structural barriers to the success of the hospitality industry that have been created by regulation and government policy. The resolution of these issues will provide for sustainability and longevity in the hospitality industry at a time of increasing costs and pressures on businesses and dramatic increases to the cost of living in British Columbia.

Three principles govern this submission: 1. Competitiveness; 2. Regulatory Fairness; and 3. Supporting livable wages. The requests and recommendations in this submission are also careful to respect the principles and obligations of international trade law, consider health and social impacts, and be revenue-neutral for government.

### **Economic Context for the Hospitality Industry**

The hospitality industry is part of both the domestic foodservices industry and the global tourism industry.

British Columbia is in a global competition for tourism. According to Destination BC’s Tourism Snapshot, in 2015 the tourism industry generated \$15.7 billion in revenue – a 5.3% increase over

2014, and a 37.3% increase from 2005. Tourism-related provincial tax revenue was \$1.1 billion in 2015, an increase of 8.9% over 2014, and an increase of 28% since 2005.<sup>1</sup>

In 2015, tourism exports generated revenue of \$4.1 billion, an increase of 7.4% over 2014. Tourism export revenue was similar to that of agriculture and fish (\$3.8B) and mineral (4.4B) primary resource industries, but lower than that of energy (\$5.8B) and forest (\$12.8B) products. The tourism industry contributed \$7.4 billion of value added to the BC economy, as measured through GDP (in 2007 constant dollars). This represents 5.6% growth over 2014 and 17.5% growth since 2007.<sup>2</sup>

In 2015, 18,938 tourism-related businesses were in operation in BC, an increase of 1.4% over 2014. In 2015, 127,700 people were employed in tourism-related businesses, a 1.2% increase over 2014 and an 16.0% increase since 2005. In 2015, the tourism industry paid \$4.5 billion in wages and salaries, up 4.0% from 2014, and a 36.1% increase since 2005. Average compensation in the tourism industry, in 2015 was \$35,000, up 2.8% from 2014, and 17.4% since 2005.<sup>3</sup>

The British Columbia foodservices industry in particular generated \$13 billion in annual sales (5% of BC's GDP) and employed 174,200 people (7.3% of BC's workforce).<sup>4</sup>

Destination British Columbia's February 2018 Service Plan highlights the general theme of adapting the local market to compete and win against global competition. For instance, the report states, "The nature of tourism marketing and global competition has changed dramatically in recent years. To compete and win, British Columbia's tourism sectors and operators must be sophisticated marketers using advanced marketing technology, which can best be achieved by working together."<sup>5</sup>

Because tourism is a global industry, the hospitality industry must compete globally and not just locally. Foodservices restaurants in Vancouver, for instance, must compete with those in San Francisco, New York, Toronto, Montreal, London, and Paris.

The regulatory environment is one of the primary barriers to effectively competing with these global players to create desirable experiences for both locals and tourists (not forgetting that competition for local business is also global, given that locals travel internationally). For instance, British Columbia is one of the only jurisdictions in North America that does not provide a wholesale discount to the hospitality industry. All of Vancouver's major international competitor cities have a more favourable regulatory environment for the hospitality industry, including wholesale discounts and efficient and flexible wholesale delivery models. In contrast, in British Columbia, wholesale delivery delays, errors, and inefficiencies handicap the local industry by frustrating attempts to develop sophisticated beverage programs and effectively and

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<sup>1</sup> : <http://www.tiabc.ca/wp-content/uploads/tourism-by-the-numbers/Value-of-Tourism-2015-Snapshot.pdf>

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> [https://www.restaurantscanada.org/wp-content/uploads/2016/07/British-Columbia\\_Infographic\\_June\\_2017.pdf](https://www.restaurantscanada.org/wp-content/uploads/2016/07/British-Columbia_Infographic_June_2017.pdf)

<sup>5</sup> Destination BC Service Plan at pp. 7-8; <http://bcbudget.gov.bc.ca/2018/sp/pdf/agency/dbc.pdf>

profitably manage inventory. The lack of a wholesale discount stifles creativity, selection, and profitability.

This submission requests that the government properly modernize the regulatory environment for the hospitality industry so that hospitality businesses can operate with the same advantages as other markets competing for tourism dollars. Regulatory fairness is necessary for true competitiveness and to effect the principles and economic advantages of competition.

In addition to enabling effective competition for global tourism, the cost of business in British Columbia is increasing, putting significant cost pressures on the restaurant industry. These costs include large increases to commercial lease rates, increases to payroll taxes, labour shortages, increases to the minimum wage, and increasing food costs. Regulatory reforms are necessary to support businesses' ability to innovate in order to meet these demands and contribute to making life more affordable for both their employees and customers.

Last, compliance with Canada's international trade obligations requires a fairer approach to wholesale pricing and distribution for all liquor products.

### **Wholesale Price for Hospitality Licensees**

The lack of a wholesale price for hospitality licensees is the most concerning and most damaging aspect of British Columbia's regulatory environment. Addressing it would have immediate positive effects on BC's economy.

#### **Reforms Sought**

The Coalition of Local Restaurants seeks the following reform:

1. Hospitality licensees be given a wholesale price for liquor based on a flat markup of wholesale plus 5%.

#### **Revenue-Neutral Proposal**

The Coalition proposes funding a hospitality wholesale price by raising the minimum floor price for liquor by 50 cents (or another number that government finance deems sufficient to off-set the immediate cost of hospitality wholesale).

The minimum price for liquor has not been raised in 18 years. Alcohol at the low end does not need to be as cheap as it is. Increasing the minimum price is consistent with health advocates' requests to government as it would serve to reduce problem consumption while also providing funds to facilitate the development of a mature foodservices industry that supports healthy attitudes toward consuming alcohol responsibly with food. A wholesale price will also ensure longevity in a sector facing unprecedented pressures from labour shortages, increased labour costs, increased food costs, changing customer attitudes and demand for innovation, increased commercial leasing costs, and greater competition locally and internationally.

## Trade Law Compliance

British Columbia's preferential treatment given to the domestic wine and beer industries is currently facing a major trade challenge at the WTO for breach of the GATT. Both the United States and Australia have launched significant trade challenges that include challenges to the preferential markup exemption provided to BC wineries as well as the model permitting direct delivery to hospitality customers that is granted only to local producers. This sort of preferential treatment is not sustainable from the perspective of international trade law unless all international liquor products are provided similar mechanisms to access the local market.

Providing hospitality licensees with a wholesale price for liquor would greatly allay the unfair treatment provided to local producers without undermining the viability of local manufacturers. Moreover, reforms that permit far greater efficiency and flexibility for wholesale distribution and access to product through the LDB wholesale division (see the second set of requests in this letter) would greatly off-set the direct-delivery advantage provided to local manufacturers, again without undermining their viability.

## Rationales for Wholesale Price Reform

A February 2013 study by Civil Economics titled "Independent BC: Small Business and the British Columbia Economy" found that local retailers in BC recirculate 45% of their revenues into the local economy, compared to just 17% for international corporations, which amounts to more than 2.6 times more money returned to the local economy (p. 11). The study also concludes that local independent businesses create more jobs and spend more on wages than international corporations (p. 15).<sup>6</sup>

The May 2013 study "The Power of Purchasing: The Economic Impacts of Local Procurement" conducted by the Columbia Institute, the ISIS research centre, LOCO BC, and the Sauder School of Business explains the benefits of local businesses that support local products over international commodity products and provides a case study of the office supply industry in British Columbia. Its conclusions were that the local office supply company being studied recirculated 33.1% of its revenue locally as compared to the international large chain stores, which recirculated only 16.6 to 18.7% of their revenues locally.<sup>7</sup> It is reasonable to draw an analogy from this study to the liquor hospitality industry. The study suggests that local hospitality businesses recirculate a greater percentage of their revenues into the local economy than international corporations.

As such, it is good economic policy to support the success of local businesses. Local hospitality businesses employ thousands of workers and recirculate their revenues into the local economy at the greatest rate of all business types. Providing local businesses with a revenue-neutral

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<sup>6</sup> [https://ccednet-rcdec.ca/sites/ccednet-rcdec.ca/files/ccednet/pdfs/independant bc small and the british colombia economy.pdf](https://ccednet-rcdec.ca/sites/ccednet-rcdec.ca/files/ccednet/pdfs/independant_bc_small_and_the_british_colombia_economy.pdf)

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[http://www.sauder.ubc.ca/Faculty/Research\\_Centres/Centre\\_for\\_Social\\_Innovation\\_and\\_Impact\\_Investing/Core\\_Themes/Social\\_Innovation/~/\\_media/Files/ISIS/Reports/Social%20Economy%20Reports/The\\_Power\\_of\\_Purchasing\\_-\\_The\\_Economic\\_Impacts\\_of\\_Local\\_Procurement.ashx](http://www.sauder.ubc.ca/Faculty/Research_Centres/Centre_for_Social_Innovation_and_Impact_Investing/Core_Themes/Social_Innovation/~/_media/Files/ISIS/Reports/Social%20Economy%20Reports/The_Power_of_Purchasing_-_The_Economic_Impacts_of_Local_Procurement.ashx)

wholesale discount would (1) have no negative impact on government liquor revenues as the increased minimum price would compensate for any immediate losses; and (2) in the long-run create more tax revenues and more jobs for British Columbians as it would enable more small restaurants (who operate on small margins) to succeed. In particular, liquor revenues in general account for over one third of all revenues of Coalition members. Profit margins for restaurants in the group range from 6-12%. As such, liquor sales essentially make the difference between a restaurant being profitable and a restaurant being unprofitable and inevitably closing.

The foodservices industry employs a disproportionate number of young employees compared to other sectors. One in four young people between the ages of 15 and 24 are employed in the restaurant industry and 22% of Canadians' first job was in the restaurant business.<sup>8</sup> Young British Columbians are facing very real cost of living increases. The restaurant industry is proud to support these young individuals, including with respect to the increased minimum wage. However, this support comes with a cost. An increase to the minimum wage is not built into the current business model of hospitality licensees. Moreover, the increase to BC's payroll tax similarly is not something that hospitality licensees projected in their business plans.

The increase to the minimum wage in Ontario has hit the hospitality industry hard in that province. According to a study by market research company NPD Group, "several major foodservice operators announced they would cut employee benefits, change tipping policies, and raise prices to help offset the expense of the wage increase."<sup>9</sup> The Coalition of Local Restaurants does not want to see this happen in our province.

Additionally, the NPD Group has concluded that as a result of Ontario's increase to the minimum wage, "one thing is certain: prices will rise across the board".<sup>10</sup> Restaurants Canada's data supports this conclusion: "On a weighted basis, menu prices in Ontario are forecast to climb by 4%. This compares to menu inflation of 2% in the first half of 2017. By segment, there was no statistically significant difference in the projected menu inflation rates between quick-service restaurants and table-service restaurants."<sup>11</sup> Price inflation will negatively impact the cost of living for all British Columbians, particularly young British Columbians who have less disposable income.

Price increases could also result in a reduction in the volume and average purchase of those dining out in the province, especially among the Millennial generation, who are already spending less on foodservices than their predecessors. The NPD Group makes this trend clear: "Millennials, born 1981-1996, a large population group in most countries, are in their prime years for restaurant use but they cut back during the global economic crisis and although they are returning, they are visiting foodservice outlets less than the previous cohort did at their age. There are also structural, long-term behavioral shifts, like consumers spending more time at

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<sup>8</sup> [https://www.restaurantscanada.org/wp-content/uploads/2016/07/British-Columbia\\_Infographic\\_June\\_2017.pdf](https://www.restaurantscanada.org/wp-content/uploads/2016/07/British-Columbia_Infographic_June_2017.pdf)

<sup>9</sup> <https://www.npdgroup.ca/wps/portal/npd/ca/news/latest-reports/ontario-restaurants-face-the-reality-of-minimum-wage-increases/>

<sup>10</sup> <https://www.npdgroup.ca/wps/portal/npd/ca/news/latest-reports/ontario-restaurants-face-the-reality-of-minimum-wage-increases/>

<sup>11</sup> <https://www.restaurantscanada.org/foodservice-outlook-2018-less-optimism-higher-menu-prices/>

home, called homing, cocooning, or nesting, that will have a lasting impact on the foodservice industry.”<sup>12</sup>

Foodservice businesses in British Columbia face the added pressure of massive increases to commercial lease rates across the lower-mainland.

While the Coalition strongly supports a living wage and building an economy that supports our young workers, it does not want to be forced to reduce working hours, lay off employees, and raise prices simply to survive. A wholesale discount on liquor would allay all these concerns and provide a basis for growing BC’s economy while supporting an affordable cost of living.

### **Rebuilding Trust at the Liquor Distribution Branch Wholesale Division and Improving Flexibility for Hospitality Customers**

The second major barrier inhibiting the hospitality industry is a lack of trust that has developed between the private sector and the LDB Wholesale Division. The following major issues present a substantial challenge to the hospitality industry’s ongoing success and ability to innovate and satisfy customer demands:

1. Delays in shipment and delivery of liquor. For example, product failing to arrive or arriving too late for holiday seasons, special events, summer season, etc. There is a strong perception that the Wholesale Division prioritizes the needs of government retail stores over hospitality customers. There appears to be a general attitude at the LDB Wholesale Division and Retail Division that the hospitality industry does not need or deserve a high level of service.
2. Short shipping and delivery of incorrect products are a regular occurrence.
3. Inconsistent delivery schedules. The inconsistency in delivery schedules, coupled with short shipping, and shipping delays prevent hospitality customers from maintaining consistent and innovative beverage programs. Regular and reliable access to the specialty products that fuel restaurants’ beverage programs is essential to maintaining inventory integrity and cash flow. The relative ease of accessing “listed” versus “spec” products results in a regulatory environment that favours a small number of “listed” products to the detriment of the large number of “spec” products, reducing competition and innovation in beverage programs.
4. Industry fear of retaliatory measures. There is a genuine perception in the hospitality industry that businesses face the risk of retaliatory measures from the LDB Wholesale Division or Retail Division if a hospitality licensee makes a complaint about the customer service or other issues at the LDB. This substantially erodes trust.

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<sup>12</sup> <https://www.npdgroup.ca/wps/portal/npd/ca/news/latest-reports/another-year-has-come-and-gone/>

## Reforms Sought

Given the issues listed above, the Coalition of Local Restaurants seeks the following reforms:

1. Increased visibility into product ordering and delivery of inventory for restaurants and agents.
2. Improved timeliness and accuracy for deliveries.
3. Improved access for all hospitality customers to all wholesale products, regardless of size. All licensees should have access to store 100, or a similar wholesale mechanism, and secure online ordering.
4. Hospitality licensees should be permitted to split case-lots of liquor with other licensees.
5. Hospitality licensees should be given flexibility to purchase liquor from a private store for the purpose of accessing specialty products, for convenience, and to fulfil short-term needs.
6. Implement new guiding principles for Liquor Distribution Branch Wholesale Division operations that require adherence to administrative law principles of procedural fairness and reasonableness as well as adherence to the principles of competition law as set out by Canada's Competition Bureau.

## Rationales and Principles for Reforms

The following rationales strongly support the reforms sought above. The Coalition seeks fair and efficient regulation that enables effective competition that spurs innovation and benefits consumers. These goals are consistent with the policy rationales behind the *Liquor Distribution Act*, R.S.B.C. 1996, c. 268 ("LDA") and the federal *Competition Act*, R.S.C. 195, c. C-34 and are consistent with the general principles of fairness that govern the exercise of statutory authority.

### *Commercial v. Regulatory Decision-Making*

The LDA establishes a provincial monopoly over the wholesaling of liquor within British Columbia. Section 4 of the LDA prohibits a person from possessing liquor except, *inter alia*, liquor that was purchased from an "authorized vendor". In practice, s. 4 operates to establish total provincial control of liquor distribution and wholesaling within the province. Originally, the province used s. 4 to establish a monopoly over retailing as well as wholesaling. However, since 1988, British Columbia has permitted the operation of private retail stores within the province. The number of private retail outlets has expanded considerably to approximately 700 in 2018. By contrast, currently there are approximately 196 government operated liquor distribution branch retail outlets in the province. British Columbia maintains a monopoly over the wholesaling and distribution of liquor.

The purpose of the *Liquor Distribution Act* is both to control the market for liquor within British Columbia and to enable the effective and efficient regulation of a competitive market for liquor sales within British Columbia. Though the government has elected to maintain a monopoly over the wholesaling of liquor in the province, the sale and marketing of liquor is a fully competitive environment supported and encouraged by government policy.

In 2015 the government of British Columbia implemented a new pricing model for the sale of liquor in British Columbia. Prior to the changes, retail prices were set by the liquor distribution branch, based upon a large “markup” applied at the distribution level. Private retailers were given a “discount” from the government-set retail price. The level of discount provided depended on the license class. For instance, Liquor Retail Store licensees were provided a 16% discount from retail whereas Independent Wine Store licensees (that could sell only wine but not beer or spirits) were provided a 30% discount from the government set retail price. This model was reformed in 2015.

Since 2015, the liquor distribution branch no longer sets retail prices for liquor. Instead, the branch establishes a single “wholesale” price. All retailers pay the same wholesale price, regardless of their licence class or whether they are a public or a private retailer. The retail price is no longer restricted and retailers may set whatever final price they wish. The ‘wholesale’ price that is currently set is generally equivalent to what would have been the “retail price” set under the previous model, minus 16% (though there is variation). The government’s stated purpose in making this reform was to “level the playing field” between public and private retailers.<sup>13</sup>

All retailers, whether public or private, must purchase their liquor from the Liquor Distribution Branch wholesale division, which satisfies orders through its wholesale warehouse and its distribution network. Liquor that originally lands in British Columbia is stored within a bonded warehouse operated by a private company. Once an order for liquor is placed by a government liquor store or a licensee, the Liquor Distribution Branch controls the distribution of the liquor from the bonded warehouse, to the government warehouse, and then out for delivery to individual wholesale customers.

Hospitality licensees, by contrast, must pay a “hospitality” price for liquor that is akin to a retail price. The hospitality price fluctuates greatly and is not predictable for agents or hospitality licensees. This creates great confusion and risk in the market.

The LDB categorizes liquor products into different classes. “Listed” products are those that are widely available on government retail store shelves. “Listed” products are generally high-volume, low-cost products. “Spec”, or speculative, products are those that have been imported by an import agency on a speculative basis and stored in a bonded warehouse until a customer places an order. The majority of small-lot and high end/luxury products are “spec” products. All restaurants in British Columbia must purchase their liquor from the LDB Retail Division, which satisfies orders through physical locations. This means they only have easy and convenient access to “listed” products but not “spec” products. “Spec” products can only be accessed by

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<sup>13</sup> <https://engage.gov.bc.ca/app/uploads/sites/121/2018/02/Liquor-Policy-Review-Report.pdf> at pp. 4-5

liquor licensees who are willing to purchase an entire case of the “spec” product because government liquor stores do not carry such products on their shelves.

Restaurants and bars in B.C. are competitors. As in many other parts of Canada, they specialize in different foods, regions, price points, etc., offering B.C. consumers many different options. Bars and restaurants also compete in respect of the selection of liquor they offer to their customers. Restaurants and bars that emphasize a strong beverage program require access to a wide variety of “spec” products to differentiate themselves from their competition. The *Liquor Distribution Act* enables and encourages this competition.

The *Liquor Distribution Act* provides the general manager of the Liquor Distribution Branch with a range of powers to effect the operation of the wholesaling of liquor within British Columbia. These statutory powers are both broad and discretionary. However, they must be exercised consistently with the purpose of the Act and government policy.

Section 13 of the LDA provides:

**13** Subject to this Act and regulations the general manager has the following responsibilities:

- (a) to determine the localities in which liquor stores are to be established in British Columbia and the number, kind and situation of the liquor stores in each locality;
- (b) to establish all necessary warehouses for storing and bottling stocks of liquor and products for the purposes of this Act;
- (c) to provide for constructing, acquiring or leasing in the name and on behalf of the government premises for warehouse and store purposes, and for obtaining furnishings, fixtures and supplies;
- (d) to appoint or designate a person the general manager considers advisable as an analyst for the purposes of this Act;
- (e) to perform all other acts required to properly and efficiently administer the general manager's responsibilities as defined by the minister and under this Act.

The Act explicitly requires the general manager to exercise his or her powers “properly and efficiently”.

The general manager's power to govern sales of liquor to licensees is established by s. 27 of the LDA as follows:

## Sales

**27** (1)A store manager may sell liquor to a licensee for resale in accordance with the *Liquor Control and Licensing Act* and the regulations under it.

(2)The general manager may stipulate the liquor store at which a licensee or agent must place orders and take deliveries and the dates and times the licensee or agent must take deliveries.

(3)Subject to the regulations and on special order, a person or licensee may purchase, and the general manager may process the purchase of,

(a)a liquor that is not listed on the liquor store's list of liquors for sale, or

(b)a size of package that is not available at a liquor store.

S. 27 is a discretionary section that does not require the general manager to exercise any of the powers. In other words, the general manager is not required to stipulate government retail liquor stores from which licensees must purchase liquor. Additionally, we note that s. 27(3) provides that the general manager (i.e. not a store manager) may process the purchase of liquor beyond that which is listed in government liquor stores. Section 13(b) and (e) grant the general manager broad powers to effect the purpose of the Act, which is to facilitate wholesaling of liquor for a competitive retail and hospitality sales market. These sections create a broad, discretionary power for general manager that facilitates the creation of a wholesale division for liquor that is entirely separate and distinct from the retail division. The 2015 reforms ostensibly set up this division. In practice, however, the general manager has not “properly and efficiently” created a fully independent wholesale division that does not favour “listed” products over “spec” products and that provides full, efficient, and fair access to the entire range of products to all hospitality customers.

Instead, the LDB Wholesale Division works in tandem with the terms and conditions guides established by the Liquor Control and Licensing Branch that favour government retail stores. In particular, the terms and conditions guides impose conditions that prohibit licensee to licensee sales and require all hospitality licensees to purchase liquor from a Liquor Distribution Branch retail store. We quote from the food primary terms and conditions guide at p. 14 and the liquor primary terms and conditions at p. 16 (the language is identical): “You must purchase your liquor

from a Liquor Distribution Branch (LDB) liquor store or other outlet designated (in writing) by the general manager of the LDB. [...] It is a serious contravention to buy liquor from an unauthorized source or to purchase liquor that is not recorded against your licence number.”

The Liquor Retail Store and Wine Store terms and conditions state: “You are restricted to selling wine [liquor for the LRSs] to retail customers. You cannot sell wine to licensed establishments, such as restaurants or bars, or to other types of establishments that are authorized to sell liquor.”

We will address the statutory construct for this licensing branch power in the following section of this letter. However, these licence terms and conditions are relevant to understand the regulatory mechanisms used to favour government retail operations over a fully independent and properly and efficiently run LDB Wholesale Division.

The *Liquor Distribution Act* grants the general manager of the LDB discretion to properly and efficiently conduct wholesale operations in the province. That power is a statutory, not commercial, power. It serves a broad statutory purpose in the public interest and is not a power to favour the interests of one competitor (government retail stores and “listed” products) over another (private retail stores and “spec” products). The current operations of the wholesale division, coupled with the Liquor Control and Licensing Branch’s use of terms and conditions to improperly restrict and control the market for liquor products, amounts to a structural disadvantage for hospitality customers who build and wish to build business models based on “spec” products rather than “listed” products. This is tantamount to government favouritism of (1) the commercial buying decisions of the LDB retail store buyers; and (2) liquor import agents who have “listed” products. These outcomes are inconsistent with the statutory purpose that animates the general manager’s powers under sections 13 and 27 of the *Liquor Distribution Act*.

Additionally, statutory powers are governed by the principles of administrative law. Administrative law requires that government decisions and processes be exercised in a procedurally fair manner, consistently with the principles of natural justice (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). As such, decisions by the LDB wholesale division that have a regulatory effect by impacting the operation of the market for liquor in the province must be made with notice to the impacted members of the hospitality industry and must provide those hospitality businesses with an opportunity to provide a response or submission about the impact of any major decision or reform. Moreover, decisions are required to be exercised reasonably (*Dunsmuir v. New Brunswick*, 2008 SCC 9). Arbitrary decisions are not permitted (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 SCR 650, 2004 SCC 48, at para. 7). The LDB regularly makes decisions without adhering to these fundamental legal requirements by, for example, setting arbitrary cut-off dates for the delivery of “spec” products (which inherently favours “listed” products). In addition to these fairness concerns, decisions made to maximize government liquor retail store revenue are unreasonable as they are not consistent with the purpose of the LDA and supportive government policies to “properly and efficiently” administer and operate a monopoly wholesale division that supports a competitive marketplace for the sale and marketing of liquor in the province.

The principles of natural justice also prohibit discrimination. It is impermissible at law for a decision-maker to exercise discretionary authority in a manner that is discriminatory in nature unless doing so is explicitly authorized by statute (*Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231). In particular, the Supreme Court of Canada has held that “discrimination in the granting of licences, taxes and municipal privileges is generally viewed as requiring express authorization by the empowering legislation” (*Shell, supra*, at para. 60). In the absence of express provisions, the enabling legislation only allows for distinctions where they are “rational and reasonable” (*Shell, supra*; *R. v. Sharma*, [1993] 1 S.C.R. 650 at para. 19; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 at 413 (S.C.C.); *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241). These principles apply equally to the liquor licensing context.

The current operations of the LDB Wholesale Division, coupled with the terms and conditions imposed on hospitality licensees by the Liquor Control and Licensing Branch, discriminate against hospitality licensees whose business model relies on access to “spec” products rather than “listed” products. Not incidentally, the LDB operations and LCLB terms and conditions also discriminate against private liquor retail licensees and import agents who specialize in “spec” products.

In summary, the LDB Wholesale Division should be governed by an explicit policy that is consistent with the proper interpretation of the *Liquor Distribution Act* and that is consistent with the government policy to encourage competition in the sale and marketing of liquor within the province. The policy manual should clearly set out the appropriate interpretation of the general manager’s powers under the Act, should clearly articulate the principle of non-discrimination, should clearly mandate that the LDB Wholesale Division is not permitted to favour government retail stores and “listed” products, and should mandate adherence to the principles of administrative law, while explaining in plain language how to comply with those principles.

This policy should be supported by structural reforms that ensure fair, accurate, and timely delivery of spec products to licensees, permit split cases, and create visibility into the entire process. The LDB Retail Division should either be completely excluded from the wholesaling of liquor product to the hospitality sector or should be placed on a level playing field with all private operators. Granting the LDB Retail Division a monopoly over hospitality sales is inconsistent with the purpose of the *Liquor Distribution Act*.

### Federal Competition Act

The federal *Competition Act*, R.S.C. 195, c. C-34 now applies to government corporations:

**2.1** This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

Section 77 of the act establishes that “exclusive dealing” and “market restriction” are impermissible anti-competitive activities:

*exclusive dealing* means

- **(a)** any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to
  - **(i)** deal only or primarily in products supplied by or **designated by the supplier or the supplier’s nominee, or**
  - **(ii)** refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and
- **(b)** any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; (**exclusivité**)
- *market restriction* means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market; (**limitation du marché**)

Section 78 sets out the various anti-competitive aspects to “abuse of dominant position”, including

- **(b)** acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or **preventing the competitor’s entry into, or eliminating the competitor from, a market;**
- **(h)** requiring or inducing a supplier to sell only or primarily to certain customers, or to **refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market; and**

Moreover, the Competition Bureau has issued a bulletin expressing their view of the proper approach to regulation of a marketplace as follows:

- *Regulate only when really necessary;*
- *Use the best available evidence to inform decisions;*
- *Strike the right balance between policy objectives and minimal intrusion; and*
- *Review regulations regularly.*<sup>14</sup>

The LDB Wholesale Division operations that favour government liquor stores and “listed” products over private liquor stores and “spec” products, and the Liquor Control and Licensing Branch’s restrictive terms and conditions that require all hospitality customers to purchase from a BC government liquor retail store are not consistent with these principles.

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<sup>14</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04141.html>

### The Liquor Control and Licensing Act

The *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19 (“LCLA”) creates the Liquor Control and Licensing Branch and authorizes the general manager of that branch to exercise a broad range of policy-making powers respecting the licensing of retailers, restaurants, bars, and manufacturers of liquor. The general manager has used that power to create various classes of liquor licence and to impose standard terms and conditions on each of those classes of licence. For the purposes of this letter, the relevant licence classes are the Liquor Retail Store licence, the Food Primary licence (restaurant), and the Liquor Primary licence (bar).

Section 8(2)(a) of the LCLA prohibits a person from keeping liquor for sale or selling liquor except as provided under the LCLA and LDA. Section 8(3) of the LCLA prohibits a licensee from selling or serving liquor except liquor purchased from the Liquor Distribution Branch or liquor purchased as authorized by the terms and conditions of the licensee’s licence.

Section 57(1)(a) of the LCLA makes it an offence for a person to contravene s. 8(2) and s. 8(3) of the LCA. Offence penalties range from fines up to \$100,000 and up to 12 months imprisonment. Additionally, the general manager may take administrative action against a licensee for a contravention of the LCLA, the regulation, or the terms and conditions of a licence (s. 51(1)). These penalties range from fines, to licence suspensions, to outright cancellation of licences.

### The Power to Impose Terms and Conditions

Section 14 of the LCLA authorizes the general manager to grant licences for the sale of liquor. Section 15 of the LCLA grants the general manager discretion to impose terms and conditions on a licence or a class of licenced establishment, including terms and conditions “respecting all matters related to the manufacture, purchase, sales, service and consumption of liquor under a licence.”

The general manager’s licensing power is the basis upon which he or she may permit “authorized vendors”, as that term is used in the LDA and the Liquor Distribution Regulation, to sell liquor directly to licensees. There is no statutory prohibition on the general manager authorizing a licenced private retailer from selling to another licensee: section 8(3) of the LCLA permits the general manager to authorize such a vendor by the terms and conditions of the licensee’s licence and s. 4 of the LDA permits authorized vendors to sell liquor to persons. Moreover, ss. 13 and 27 of the LDA authorizes the general manager of the LDB to establish a direct-to-wholesale ordering system that bypasses the retail system.

In general, the general manager uses standard terms and conditions for each licence class that do not vary from licensee to licensee. The terms and conditions guides are published on the LCLB website and are regularly updated by the general manager to reflect policy changes.

### The Competition-Restricting Terms and Conditions

Currently, the terms and conditions for all food primary and liquor primary licences require those licensees to purchase liquor from a designated Liquor Distribution Branch store or another store

designated in writing by the general manager. As a matter of course, no private retail stores are designated in writing by the general manager other than rural agency stores serving remote communities.

In particular, the food primary terms and conditions guide states at p. 14 and the liquor primary terms and conditions guide states at p. 16, in identical language: “You must purchase your liquor from a Liquor Distribution Branch (LDB) liquor store or other outlet designated (in writing) by the general manager of the LDB. [...] It is a serious contravention to buy liquor from an unauthorized source or to purchase liquor that is not recorded against your licence number.”<sup>15</sup>

The Liquor Retail Store terms and conditions guide states at p. 15: “You are restricted to selling liquor to retail customers. You cannot sell liquor to licensed establishments, such as restaurants or bars, or to other types of establishments that are authorized to sell liquor, or to special event permit holders.”<sup>16</sup>

These terms and conditions guides apply to all licensees within the relevant licence categories across British Columbia. As a result, all food primary and liquor primary licensees are required to purchase all of their liquor for resale to customers from government owned Liquor Distribution Branch retail stores. Private stores have been entirely cut-out of the market for supplying restaurants and bars with liquor. Moreover, as noted above, government liquor stores generally carry “listed” and not “spec” products. The restaurants that are members of this Coalition regularly seek to differentiate themselves by selling “spec” products, but this business practice is inhibited by the restrictive terms and conditions.

The terms and conditions for food and liquor primary licences explicitly state that the general manager may authorize the licensee to purchase liquor from an “other outlet designated (in writing) by the general manager”. As noted above, there is no statutory prohibition on the general manager designating a private retailer or direct access to the LDB Wholesale Division and wholesale pricing. As such, the failure of the general manager to consider such designation amounts to a fettering of her discretion (*Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Maple Lodge Farms Ltd. v. Canada*, [1980] F.C.J. No. 171 (C.A.), aff'd [1982] 2 S.C.R. 2; *Halfway River First Nation v. B.C. (Ministry of Forests)* (1999), 64 B.C.L.R. (3d) 206 at 230 (C.A.)).

#### *Negative Impact of LCLCB Policy and LDB Wholesale Division Practices on Competition*

The LCLB terms and conditions that favour government stores and prohibit licensee to licensee sales, and prevent direct access to the LDB Wholesale Division and wholesale prices, create significant logistical and revenue issues for food and liquor primary licensees, reduce customer

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<sup>15</sup> The food primary terms and conditions can be found at <https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/guides-and-manuals/foodprimary-handbook.pdf> and the liquor primary terms and conditions at <https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/guides-and-manuals/liquorprimary-handbook.pdf>.

<sup>16</sup> <https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/guides-and-manuals/licenseeretailstore-handbook.pdf>

choice, and prohibit competition among products and their manufacturers/agents seeking hospitality licensee sales.

Moreover, the LDB Wholesale Division's favoritism of "listed" products and government liquor stores amounts to "restraint of trade" and "market restriction" and thus is not consistent with the principles of effective regulation of competitive marketplaces.

As a result, restaurants who rely on "spec" products are at a competitive disadvantage to those who do not. Such restaurants face regular delays on shipping, short shipping, and the unfair requirement to purchase entire cases of liquor rather than single bottles. These issues play havoc on maintaining consistent beverage programs, by the glass pours, special event beverage pairings, and a unique and innovative product selection that separates restaurants from their competition. These issues reduce operating efficiency and waste staff time, further making such restaurants less competitive.

These policies and operational guidelines, coupled with a lack of wholesale discount, also contribute to a general lack of innovation in beverage programs across British Columbia as it is easier, more efficient, and more profitable for most restaurants to simply create beverage programs from the extremely limited number of "listed" products rather than take the risk of stocking and selling the wide variety of "spec" products. This has a significant deleterious impact on the BC hospitality and tourism industry's ability to compete globally.

### **Summary**

In summary, the number one priority for the Coalition of Local Restaurants is to secure a revenue-neutral wholesale price for hospitality liquor. This reform alone will have the greatest impact on improving competitiveness, innovation, and securing longevity for businesses facing ever-mounting costs of doing business in this province. It also provides support and an economic basis for minimum-wage increases and increased payroll taxes.

The second priority of the Coalition is to reform the efficiency, fairness, and governing principles of the Liquor Distribution Branch Wholesale Division and the Liquor Control and Licensing Branch policies that favour government retail stores, favour "listed" products over "spec" products, create inefficiency, and create unfair competitive disadvantages for the hospitality sector.

### COULSON LITIGATION

*Shea Coulson*

Mr. Shea Coulson\*

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**Schedule “A”**  
**Members of the Coalition of Local Restaurants**

<b><u>Restaurant / Hospitality Group</u></b>	<b><u>Location(s)</u></b>
Moxies Restaurants LP	11 locations across British Columbia
Vij’s	4 locations across British Columbia
Annalena	1 location in Vancouver
Chambar	1 location in Vancouver
Burdock & Co.	1 location in Vancouver
Kitchen Table Restaurants Group	7 locations across Vancouver
L’Abattoir	1 location in Vancouver
Viaggio Hospitality Group	8 locations across the lower mainland