



**DECISION OF THE  
GENERAL MANAGER  
LIQUOR AND CANNABIS REGULATION BRANCH  
IN THE MATTER OF  
A hearing pursuant to Section 51 of  
*The Liquor Control and Licensing Act, S.B.C. 2015, c. 19***

Licensee: Fets Fine Foods Ltd.  
dba Fets Whisky Kitchen  
1230 Commercial Drive  
Vancouver, BC V5L 3X4

Case: EH18-003

For the Licensee: Daniel H. Coles

For the Branch: Maria Caduhada

General Manager's Delegate: Nerys Poole

Date of Hearing: May 2 & May 7, 2019

Date of Decision: June 6, 2019

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**Liquor and Cannabis  
Regulation Branch**

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## INTRODUCTION

The corporate licensee Fets Fine Foods Ltd. (the “licensee”) operates Fets Whisky Kitchen (the “restaurant”) under Food Primary Licence #169939 (the “licence”). The restaurant is located at 1230 Commercial Drive in Vancouver.

The licence specifies hours of liquor sales from 11:00 a.m. to 1:00 a.m. Monday to Saturday and from 11:00 a.m. to midnight on Sunday. The licence is, as are all food primary liquor licences issued in the province, subject to the terms and conditions contained in the publication Food Primary Terms and Conditions (the “handbook”).

Daniel H. Coles represented the licensee as its legal counsel at the hearing. Licensee witness 1 and Licensee witness 2, both principals of the corporate licensee, attended the hearing.

## ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor and Cannabis Regulation Branch’s (the “branch”) allegations and proposed penalty are set out in a Notice of Enforcement Action dated July 2, 2018 (the “NOEA”). The NOEA refers to the fact that the terms and conditions included in the handbook are incorporated into and form part of the terms and conditions of the licence.

The branch alleges that the licensee contravened a term or condition of its licence by purchasing liquor other than from the Liquor Distribution Branch (“LDB”) or from a designated outlet. On January 18, 2018, branch liquor inspectors attended at the restaurant and seized 242 bottles, described as Scotch Malt Whisky Society (“SMWS”) product. The licensee has not produced any receipts or other evidence to show that the bottles were purchased from the LDB or a designated outlet.

The proposed sanction is a \$3,000 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 54, schedule 2 of the Regulation. The range of penalties for a first contravention of this type is a 1 to 3 day licence suspension and/or a \$1,000 to \$3,000 monetary penalty.

The licensee is disputing the alleged contravention. The licensee's defence is that the seizure of the 242 bottles was unlawful as the bottles were seized without a search warrant. The licensee seeks an order excluding the bottles and their seizure from the evidence at this hearing.

## RELEVANT STATUTORY PROVISIONS

### *Liquor Control and Licensing Regulation, B.C. Reg. 241/2016*

#### Schedule 2

#### Monetary Penalties and Licence Suspensions

54	Contravention of any provision of the Act or this regulation or failure to comply with a term or condition not specifically referred to in this Schedule	1-3	3-6	6-9	\$1 000– \$3 000
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### **Food Primary Terms and Conditions Handbook**

(August 2017) at page 14 (exhibit 4, tab 11)

#### **Buying Liquor**

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. The LDB also authorizes many liquor manufacturers to make direct sales and deliveries to licensees on behalf 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.

As the licensee has raised a number of questions with respect to the powers of the general manager and the compliance and enforcement regime, I have added an Appendix to this decision, with the relevant sections of the *Act*.

## ISSUES

1. As a delegate of the general manager hearing and deciding whether a contravention has been proven and the appropriate penalty, what is my authority to consider whether the seizure of the unlawful liquor was conducted with lawful authority?
2. If I determine I have the authority, was the search of the restaurant and subsequent seizure of SMWS product conducted with lawful authority?
3. If I find the seizure was conducted lawfully, did the contravention occur?
4. If so, has the Licensee established a defence to the contravention?
5. If the contravention is proven, what penalty, if any, is appropriate?

## EXHIBITS

- Exhibit 1: letter dated April 26, 2019 from branch registrar to licensee's counsel and branch advocate, with attachments
- Exhibit 2: letter dated February 14, 2018 from licensee's then legal counsel (S. Coulson) to the Deputy General Manager, Compliance and Enforcement
- Exhibit 3: letter dated March 8, 2018 from Deputy General Manager, Compliance and Enforcement to licensee's legal counsel (S. Coulson)
- Exhibit 4: Branch Book of Documents, tabs 1 to 13
- Exhibit 5: Licensee's Book of Documents, tabs 1 to 37
- Exhibit 6: Notice to Produce dated February 1, 2018

## PRELIMINARY ISSUE

At the start of the hearing on May 2, 2019, the licensee requested an adjournment with an order for further document disclosure from the branch. The licensee provided a written submission with reasons for its requests.

## Licensee's Submission on Adjournment and Document Disclosure

The licensee submitted as follows:

- On January 18, 2018, the branch conducted a warrantless search and seizure of alcohol at the restaurant, resulting in the seizure of 242 bottles of alcohol with a value of approximately \$40,000.
- The search and seizure was conducted without statutory authority.
- The branch has maintained that the search and seizure was in fact, and in law, an "inspection" authorized by section 42 of the Act.
- A plain reading of section 42 of the Act confirms that it does not confer on liquor inspectors search and seizure powers. These powers are only available under section 44 of the Act – by way of prior judicial authorization in the form of a search warrant.
- Prior to the hearing, the licensee requested, in writing and at various intervals, that the branch provide meaningful and fulsome document production so that the licensee can understand the source of the legal authority for the search and seizure and make informed and meaningful decisions with respect to the same.
- The branch advised the licensee that its only recourse to obtaining the documents is to apply for documents through the *Freedom of Information and Protection of Privacy Act* (the "FOIPPA").
- The licensee made a request under the FOIPPA and on April 18, 2019 received 192 pages of heavily redacted documents in partial response to the licensee's requests. (the "FOI documents")
- The FOI documents are proof-positive that a body of relevant information exists that the branch refused to disclose and the registrar declined to order. The FOI documents go some distance to illustrate the planning and investigation undertaken by the branch in advance of the search and seizure of the licensee's liquor, the chain of events that led to the search and seizure, and the merits of the allegations made against the licensee.
- The FOI documents make reference to relevant reports and emails in the branch's possession that have not been disclosed.

- The branch's approach to document disclosure betrays a misunderstanding of the principles of administrative fairness. The branch's conduct evidences that its intention at the hearing is to secure a finding of a contravention of the *Act*, with little regard to the public interest or principles of fair play.
- It is in the General Manager's [of the branch] interest that it have before it all of the relevant evidence so that it can make, and be seen to be making, a fair and informed adjudication.
- In the alternative, the licensee seeks a *voir dire* to be conducted at the outset of the hearing to determine:
  1. On what authority, if any, the search and seizure was conducted; and
  2. Assuming the General Manager's Delegate agrees that the search and seizure was conducted without lawful authority, what are the appropriate remedies
- With respect to document production, the adjournment is necessary to provide full disclosure of documents to ensure that the licensee has had a reasonable opportunity in all the circumstances to present proofs and arguments to the decision maker and to answer the opposing case. It is a fundamental principle of administrative law that the party that is the subject of state action be provided with adequate disclosure of the case it has to meet.
- The branch's position is that it is only required to disclose to the licensee those documents that it believes tend to prove the alleged contravention.
- The function of the general manager's delegate at this hearing is analogous to a court proceeding in the sense that it performs an adjudicative role in an adversarial proceeding and the licensee is subjected to penal consequences. In the circumstances, it is appropriate that the transparent and fulsome document disclosure obligations contemplated in *R. v. Stinchcombe* [1991] 3 S.C.R. 326 @ 333 be applied.
- The branch's refusal to make first party disclosure to the licensee to date has denied it the ability to effectively and adequately prepare its own case and answer the case that they have to meet. The duty of fairness places a positive obligation on the branch to conduct itself fairly and in a manner consistent with the high standards to which it holds licensees.
- A modest adjournment paired with a direction to the branch to produce to the licensee its entire file is appropriate.

## Branch Response to Adjournment Request and Document Disclosure

The branch submits as follows:

- No adjournment is necessary as the documents the licensee is seeking are not relevant to this hearing.
- The licensee is trying to show that the incident on January 18, 2018 that led to the contravention and this hearing was an investigation and not an inspection and that this distinction is relevant as to whether the seizure of the liquor was conducted with lawful authority.
- The hearing of the contravention is to determine whether the licensee was selling liquor that was not purchased from the LDB or a designated outlet. After the branch issued a notice to produce to the licensee on February 1, 2018, the licensee provided purchase records showing that the seized liquor was bought from Legacy Licensed Retail Store ("Legacy LRS"), not the LDB and not a designated outlet. Licensee witness 2 admitted on January 18, 2018 that they purchased the product labelled SMWS from Legacy LRS.
- With respect to the seizure of the 242 bottles on January 18, 2018, section 45 of the *Act* provides authority to the branch to seize liquor when they form the opinion that liquor is possessed or kept contrary to the *Act*.
- The *Act* provides a separate statutory remedy for a licensee to make a claim of its seized liquor. The licensee, through its legal counsel at the time, sent a letter dated February 14, 2018, making a claim under section 47 of the *Act*, for the seized liquor to be returned. (Exhibit 2). The branch responded to this claim in its letter of March 8, 2018. (Exhibit 3). The branch stated that "in respect of section 47(3) of the *Act*, the general manager is not satisfied of the claim. As a result, the liquor is, in accordance with section 47(5), forfeited to the government."
- Whether or not the January 18, 2018 inspection was an investigation or inspection is not relevant. All the licensee has to show is whether or not the licensee is in compliance with buying the liquor through LDB or a designated outlet,
- If the licensee is not satisfied with the statutory decision rendered on March 8, 2018, with respect to the forfeiture of liquor, the remedy is not through the contravention hearing, which is to determine whether the licensee is in compliance with the terms and conditions of the handbook that requires the

licensee to purchase liquor from the LDB or a designated outlet. The licensee's receipts demonstrate that the bottles were not purchased as required.

- The branch has consistently maintained throughout its correspondence that the requested documents have no relevance to the hearing on the contravention.
- Because the documents are not relevant, there should be no adjournment and no order to disclose.

### My Ruling on the Request for an Adjournment and Document Disclosure

After a brief adjournment of an hour to allow me time to review the materials and the arguments, I denied both the request for adjournment and an order for further disclosure of documents. I gave my ruling as follows:

I have heard from both the licensee and the branch on the preliminary issue as to whether or not there should be an adjournment and an order for further document disclosure from the branch.

I find there is authority to seize liquor under section 45 of the *Liquor Control and Licensing Act*, c. 19, [SBC 2015]. The authority to inspect is under section 42 while the authority to seize is found under section 45. This is noted in exhibit 3, the letter from Deputy General Manager, Compliance and Enforcement to licensee's then legal counsel, dated March 8, 2018. Further, section 44 does not apply here. Section 45 provides the full authority to inspectors to seize liquor.

Because there is statutory authority under this regulatory regime, the case law on search and seizure and Charter remedies do not apply here. A licensee does not have the same expectation of freedom from search and seizure as a private citizen in other contexts may have – because of the very nature of the liquor control and licensing regime.

With respect to the remedy for a licensee to dispute the lawful seizure and forfeiture of seized liquor, there is a remedy under section 47 of the Act for the licensee. The licensee did that and the response was provided in the letter from Deputy General Manager, Compliance and Enforcement to the licensee's then legal counsel. (exhibit 3)



Therefore, no adjournment is necessary as I find that there has been full document disclosure relating to the allegation of contravening a term or condition of the licence, i.e. purchasing liquor other than from the LDB or a designated outlet. The basis of the licensee's argument for further document disclosure is that the documents are required to support the argument that there was a warrantless search. As I have found that no warrant was required because of the statutory authority in section 45, the documents listed by the licensee in Mr. Coles' letter of Feb.26, 2019 are not relevant to this case.

The hearing will proceed and I will set out my ruling on this preliminary issue in the decision.

To be clear, because of this ruling, any further arguments relating to search and seizure and documents relating to the stage of the investigation and whether or not the liquor inspectors were sufficiently aware that there may be unlawful liquor on the premises are not part of this hearing. I have made my decision on this preliminary matter and the hearing will proceed on the facts relating to whether or not there was liquor on the premises that was not purchased through the LDB or a designated outlet.

Given my ruling above on the authority for the search and seizure, I declined to hold a *voir dire* and proceeded with the hearing of the contravention.

#### Request from Licensee for further argument on section 45

After I gave my ruling above, the licensee asked if I was foreclosing any further argument on section 45 of the *Act* and the question as to whether there was a warrantless search not authorized by the *Act*. The licensee submitted that I had made a ruling on section 45 without hearing fully from the licensee. The licensee made no argument about section 45 in its written submission on its adjournment request and further document disclosure. The licensee did not refer to section 45 in its written submission, merely stating at paragraph 2 of its written submission that "the search and seizure was conducted without statutory authority."

The branch advocate opposes the issue of search and seizure being raised at today's proceeding. The issue around seizure of liquor was done under section 47 and the licensee should have proceeded to a judicial review of that statutory decision and not raised it at this hearing.

In the interest of ensuring the licensee receives a full and fair hearing on the issues it raises, I allowed the licensee the opportunity to make further argument in its closing submissions about the authority of the liquor inspectors under section 45. This also ensured that I had the time needed to review the case law provided by the licensee on this issue and to respond fully to the licensee's submissions in this decision.

## **WITNESSES**

Two liquor inspectors testified for the branch:

- liquor inspector 1
- liquor inspector 2

The licensee called two witnesses:

- Licensee witness 2, a principal of Fets Fine Foods Ltd.
- Licensee witness 3 an owner of a licensed establishment in Victoria

## **EVIDENCE OF THE ALLEGED CONTRAVENTION**

### Evidence of Branch

There is little dispute between the branch and the licensee as to what occurred on January 18, 2018 and during the covert inspection on December 22, 2017. The branch and the licensee disagree on the relevance of certain facts prior to January 18, 2018. As the licensee has emphasized strongly that there is a distinction between what he calls the inspection stage and the investigation stage surrounding this incident, and that this is relevant to his defence, I am including the facts with respect to the earlier inspection in this narrative. I will deal with their relevance in my reasons and analysis.

Fets Fine Foods Ltd. has operated Fets Whisky Kitchen with a food primary licence since 2013. Prior to 2013, Fets Fine Foods Ltd. operated as Fets Pasta Bar & Grill (food primary licenses for 8 years at tab 9 of exhibit 4.) The two principals of Fets Fine Foods Ltd. are Licensee witness 1 and Licensee witness 2 (legal entity summary at tab 12 of exhibit 4)

On December 22, 2017, two liquor inspectors (liquor inspector 2 and liquor inspector 3) attended at the restaurant to conduct a covert inspection. Liquor inspector 2 testified about this inspection. The branch advocate called liquor inspector 2 at the request of the licensee's counsel so that counsel could cross-examine him. The branch advocate asked no questions of liquor inspector 2. Liquor inspector 3 was available to testify but licensee's counsel advised the branch advocate that he did not need to cross-examine liquor inspector 3.

The licensee asked why the liquor inspectors attended the restaurant on December 22, 2017. Liquor inspector 2 stated that he had been instructed to go to the restaurant and to order a SMWS product. He looked at the menu, found the product on what he described as the "whiskey bible" and ordered a shot of 41.54 called "takes the biscuit." It took a few minutes for the bartender to find the product. When he did, the server delivered the shot to their table. Liquor inspector 2 took only one sip of the whiskey and then the liquor inspectors asked for the bill and left the restaurant. (Receipt and photo of Whiskey Bible page showing "Takes the Biscuit" and a photo of the glass on the table with the shot of whiskey at tab 4 of exhibit 4)

Liquor inspector 2 agreed that liquor inspector 1 had instructed him to purchase this particular product because liquor inspector 1 believed it was an illicit product (i.e. not purchased from the LDB). The liquor inspectors did not issue a contravention notice at this time or later, with respect to this incident. They did not seize any illicit liquor. The liquor inspectors were there merely to ascertain that the SMWS product was being sold, and then to report back, which he did as noted in his email dated December 22, 2017 sent to liquor inspector 1. (Exhibit 4, tab 4)

On January 18, 2018, three liquor inspectors (liquor inspector 1, liquor inspector 3 and liquor inspector 4) attended the restaurant at approximately 10:00 a.m., prior to the opening time of 11:00 a.m. Liquor inspector 1 identified himself as a liquor inspector to

the staff, provided photo I.D., and requested to speak with the licensee. He then spoke by phone to Licensee witness 2 who identified herself as a representative of the licensee. On the phone, Licensee witness 2 told liquor inspector 1 not to touch the SMWS labelled product and that she would be coming to the restaurant. The liquor inspectors waited for the arrival of Licensee witness 2 before beginning their review of the product. When Licensee witness 2 arrived, the three liquor inspectors sat down with her and explained the situation. While they were talking, two police officers appeared at the door of the restaurant. Liquor inspector 1 had called the police to notify them of the inspection at the restaurant that morning. Liquor inspector 1 spoke with the police and told them there was no safety threat so they left.

The liquor inspectors requested to see receipts confirming where the SMWS product was purchased. Licensee witness 2 advised that the receipts were not available for inspection. During this conversation, she advised the liquor inspectors that the SMWS labelled product had been purchased from the Legacy LRS.

The three liquor inspectors began to process the SMWS bottles from the bar stock. They placed evidence tags on each bottle and entered every bottle on an exhibit receipt showing the SMWS liquor that was seized. They tagged, boxed and removed the SMWS liquor from the restaurant. They placed them in the Uhaul truck they had rented for this purpose. They accounted for all bottles in the exhibit log and provided Licensee witness 2 with a copy of the evidence exhibit log (exhibit 4, tab 7). Licensee witness 2 signed the log indicating she had received a copy of the log. The liquor inspectors were in the restaurant for about five hours. The branch seized 242 bottles of liquor. (photo of tagged and wrapped boxes at tab 6 of exhibit 4)

The liquor inspectors advised Licensee witness 2 that the licensee could apply within 30 days from the seizure to have the liquor returned if the licensee could provide receipts showing that the SMWS product had been purchased from the LDB or a designated outlet.

In cross-examination, liquor inspector 1 agreed that the branch received a complaint in early December that initiated the investigation of the sale of SMWS products. Liquor inspector 1 testified that, through the internet, the branch was able to identify the restaurant as one of the licensed premises that was selling the SMWS product. Liquor

inspector 1 then spoke with an individual at the LDB who confirmed that the restaurant was not purchasing the SMWS product from LDB. Shortly after this conversation, liquor inspector 1 instructed two liquor inspectors to attend the restaurant in a covert capacity and to attempt to buy the SMWS product, which was done on December 22, 2017. Liquor inspector 1 agreed that on that date, as a result of the report from liquor inspector 2, he was aware that the restaurant possessed at least one bottle of SMWS product and was selling shots to customers.

Liquor inspector 1 agreed there were four establishments that the branch was investigating for the sale of the SMWS product. The branch gave the investigation a code name: "Operation Malt Barley."

Liquor inspector 1 agreed that between December 7, 2017 and January 18, 2018, the branch took a series of investigative steps with respect to Operation Malt Barley that resulted in inspections. When pressed in cross-examination, liquor inspector 1 agreed that he was aware that there was unlawful liquor in the restaurant when he attended on January 18, 2018. He did not agree that he attended the restaurant with the intent to seize the unlawful liquor. He stated, that, if the licensee had been able to produce receipts to demonstrate the product was lawful, there would have been no seizure. He agreed that he had reason to believe that the licensee would be unable to produce such receipts.

At no time did the branch obtain or attempt to obtain a search warrant to seize the unlawful liquor at the restaurant.

On January 23, 2018, liquor inspector 1 issued a contravention notice, sent via registered mail, to the restaurant. The Contravention Notice (exhibit 4, tab 8) lists 3 contraventions: 1) unlawful purchase of liquor, section 8(2)(e) of the Act, 2) selling or serving unauthorized liquor, section 8(3) of the Act and 3) draw attention to a liquor inspector, terms and conditions guide. The details in the Contravention Notice state:

"LCLB investigation determined Fets Whisky Kitchen had unlawfully purchased and sold SMWS products. Inspectors' images on social media."

At the bottom of the Contravention Notice is the statement:

The general manager Liquor Control and Licensing Branch may proceed with enforcement action on the basis of this contravention notice.

The branch sent the NOEA to the licensee on or about July 2, 2018 (exhibit 4, tab 1). The licensee submitted an earlier draft of an undated Notice of Enforcement Action that the licensee obtained through its request under FOIPPA (exhibit 5, tab 21). This earlier draft listed the three contraventions as described above in the CN and recommended penalties of \$10,000 for each of the contraventions of section 8(2)(e) and section 8(3) and a penalty of \$5,000 of the contravention of drawing attention to a liquor inspector. Liquor inspector 1 testified that he submitted this earlier draft to his superiors as was the branch practice, for their review and edits. The NOEA issued on July 2, 2018 was the final result, with the changes suggested by his superiors. The contravention in the NOEA, as described above, is a contravention of a term or condition of the handbook and the branch recommended a penalty of \$3000. The branch dropped the alleged contravention of drawing attention to a liquor inspector.

Both the draft Notice of Enforcement Action and the July 2, 2018 NOEA refer to section 51 of the Act and that the general manager is pursuing enforcement action against the licensee.

### Evidence of Licensee

Licensee witness 2 testified that she is a principal of the corporate licensee and co-owns the restaurant with her husband Licensee witness 1. She is involved in the day to day management of the restaurant.

She stated that they have been operating a neighbourhood restaurant since December 1986 in the area. They changed location at one point and operated as Fets Pasta Bar and Grill and later rebranded to Fets Whisky Kitchen. She said they love what they do and are very passionate about their business. She noted they have a strong following of clientele, with good relationships in the community.

Their focus and passion in the restaurant is whisky and the restaurant carries a large and diverse assortment of whiskies.

Licensee witness 2 testified that the restaurant had never received a contravention notice nor had they had any difficulties with the branch. She stated they have received visits from a liquor inspector usually about twice a year. She said their relationship with past liquor inspectors has been amazing. The former liquor inspector was a genuinely nice person, who came in and checked things. She said this liquor inspector was probably the most positive one they had had. Most liquor inspectors would enter the restaurant, take a look around and then leave.

She stated that since 2013, the restaurant has openly stocked and displayed SMWS products. She said that the SMWS product is a big part of who they are. She said they openly advertised this product as it is all over their website. They are very open about this product and said they are not hiding it under the bar in brown bags.

Licensee witness 2 provided a written statement dated January 20, 2018, included in the licensee's book of documents (exhibit 5, tab 32). She stated these were her notes of the incident on January 18, 2018, written on January 20, 2018. This statement was an accurate account of her recollection of the events on January 18, 2018.

She recounted much of the written statement in her testimony, noting that at no time did the liquor inspectors produce identification, other than their business cards.

Licensee witness 2 stated that she and her husband live a few blocks away from the restaurant and was at home when she received a call from one of her servers who was very upset. The server told her that three people had come in and started asking for the liquor registry and talking to her about scotch whisky bottles. Licensee witness 2 talked to liquor inspector 1 on the phone. He just said that he was the liquor inspector and that they had reason to believe there was product on shelves that was not purchased from LDB. He told her that the restaurant must provide the receipts right away or they would have to take the bottles away.

She said she was in shock and asked him to give her a little time to get to the restaurant. She told the liquor inspector: "you and I both know they don't come from the LDB". She told him she would be there in two hours. Liquor inspector 1 first indicated that would be fine and then said that he had received word from above and that they would start taking bottles right away if no receipts.

She noted that her husband, Licensee witness 1, was away at the time.

She attended the restaurant about 11:00 a.m., introduced herself and sat down to talk to them. She said two cops came by at the front door and liquor inspector 1 spoke with them and dismissed them. When he came back, he said in these situations, they are never sure how it will go and liquor inspectors are not armed.

She asked if she could just remove the bottles from the shelves and was told they were seizing them as evidence of an ongoing investigation. The liquor inspectors told her they had the right to remove the bottles of SMWS product from the shelves. She said she felt she had to cooperate with the liquor inspectors.

When she sat down with liquor inspectors at the beginning of the incident and they told her they were taking the bottles, she asked if she could get a lawyer and if they could give her some time to get one. She was told she did not have time to get a lawyer.

At the very end of the events on January 18, 2018, the liquor inspectors suggested she speak with a legal counsel. They told her if she did not have receipts to show SMWS bottles were purchased from the LDB, the bottles were not supposed to be in the restaurant. The whole incident left her feeling very confused and intimidated. She said she felt like she was some kind of criminal. She thought she had done nothing wrong. She described the incident with the liquor inspectors in the restaurant for about five hours as a very unpleasant experience. Her customers were watching people removing bottles from the shelves, while trying to eat lunch. She said she explained to her customers what was going on. There were a lot of regulars who wanted to know.



When asked in cross-examination, she responded that she understood her responsibility as a licensee to be compliant with the Act and the regulations. When asked if she was aware of the buying provision in the handbook that all liquor for the restaurant must be bought from the LDB, she stated that she was under the impression that she could get the bottles from a licensed retail store like Legacy LRS. She said the government liquor stores cannot stock the SWMS product. She noted that the government still "gets their cut" as Legacy LRS buys the product from the LDB.

She agreed that the liquor inspectors, after they seized all the liquor, provided her with information as to how to make a claim for the seized liquor.

She did not agree with the branch's decision when they refused their claim for the SMWS bottles to be returned to them. She stated she felt they had done nothing wrong. She reiterated her statement about needing to find a place to purchase the SMWS product.

"Like I said, when the LDB does not have the products that we require to have a successful business, we need to go to the alternative store to find the products. We can't have a strong business with the monopoly. We buy so much from the LDB, you look at all the taxes and now we are being treated like criminals. So wrong."

When asked if she ever, at any time, confirmed with their liquor inspector about buying liquor from an LRS, she stated: "No, we didn't think it was a problem."

She stated that they are responsible licensees and are in control of what goes on. She said that buying SMWS product from Legacy LRS is not a public safety issue. She agreed that liquor inspector 1 identified himself to her on the morning of January 18, 2018. She also agreed that she knew liquor inspectors could conduct inspections and ask for records or documents.

She felt that the whole thing could have been avoided if a liquor inspector "had an adult conversation with us. They didn't have to go behind our back and conduct a full investigation."

The second witness for the licensee was Licensee witness 3 an owner of a licensed food primary establishment in Victoria who admitted his establishment had carried SMWS product. He believed it was a complaint about his establishment and SMWS product that initiated the investigation by the branch into the purchase and sale of this product. He stated liquor inspectors came to his restaurant on January 18, 2018, looking for SMWS product. Licensee witness 3 had removed most of it just prior to this inspection. Liquor inspectors wanted to know where it was and emphasized that it was unlawful to sell a product not bought from LDB.

He admitted the branch took enforcement action and he accepted the fine, rather than a one day suspension, and waived his right to a hearing.

### **FACTS RE. DOCUMENT DISCLOSURE**

As the licensee has maintained that the branch document disclosure for the purposes of this hearing has been inadequate, I am setting out the facts with respect to the branch's actions and the licensee's requests. The branch's letter of April 26, 2019 with its attachments provides the evidence for these facts (exhibit 1):

1. After the branch issued the NOEA, the branch registrar conducted a prehearing conference with the licensee on September 24, 2018. Licensee witness 1 attended as the licensee's representative. The licensee and the branch agreed on a hearing date of February 6, 2019, with a disclosure date for documents set for January 2, 2019.
2. On November 16, 2018, the branch advocate provided the licensee with disclosure of the branch documents.
3. On November 11, 2018, Licensee witness 1 wrote an email to the branch registrar requesting the following documents:
  - The origin of the complaint and the complaint itself;
  - Any and all information surrounding the complaint;
  - The name of the complainant;
  - The date of the complaint;

- All historical liquor inspection reports for Fets Fine Foods dba Fets Whisky Kitchen, to include all email texting or other electronic correspondence including fax transmissions [with, in capital letters – WE HAVE NOW RECEIVED THESE];
- Any and all written notes made by any inspectors during and after the investigation regarding any and all of the establishments being investigated;
- All email, texting or other electronic correspondence including fax transmissions between the inspectors investigating the complaint for all four establishments involved and the investigation at large. This request is to include any and all correspondence, pre, post and during the investigation as well as any enforcement communication;
- All email, texting or other electronic correspondence including fax transmissions between the inspectors and BCLCL management regarding all four establishments involved and the investigation at large. This request is to include any and all correspondence; pre, post and during the investigation as well as any enforcement communication;
- All email, texting or other electronic correspondence including fax transmissions between the BCLCL management regarding all four establishments involved and the investigation at large. This request is to include any and all correspondence, pre, post and during the investigation as well as any enforcement communication;
- All email, texting or other electronic correspondence including fax transmissions between BCLCL management, inspectors and both appointed and elected government officials and their offices regarding all four establishments involved and the investigation at large. This request is to include any and all correspondence, pre, post and during the investigation as well as any enforcement communication.

4. On November 21, 2018, the registrar responded to the above request stating that all of the relevant documents had been disclosed that will allow the licensee to know and understand the allegation that the branch has made with respect to the alleged contravention. In that letter, the registrar noted that the licensee has the option of making a request under Freedom of Information channels.
5. On December 28, 2018, the licensee wrote an email to the registrar advising that his FOI request had been delayed by 30 days and he would not be able to make the disclosure deadline of January 2, 2019. The registrar wrote back on the same date and asked if the licensee had availability in March should the hearing be adjourned.
6. On January 2, 2019, the registrar followed up with the licensee to see if he was seeking an adjournment and if he had availability in March or May. The licensee responded on the same date saying he was seeking an adjournment and that he would respond further re. dates.
7. On January 15, 2019, the licensee wrote to the registrar stating he was unavailable from March to April 17, 2019.
8. On January 17, the registrar adjourned the hearing to May 3, 2019, with a new document disclosure date of April 19, 2019. [hearing date changed later to May 2, 2019]
9. On February 26, 2019, the registrar received correspondence from Daniel H. Coles, advising that he was now representing the licensee and requesting a further prehearing conference.
10. On the same date, the registrar responded and stated a prehearing date would be set shortly. A further prehearing conference was scheduled for March 26, 2019. During that call, Mr. Coles reiterated his request for documents contained in his letter of February 26, 2019. The registrar reiterated his position that all relevant documents had been disclosed and

indicated to Mr. Coles that he could raise the same arguments in his letter regarding document disclosure with the hearing delegate.

11. The registrar further advised Mr. Coles that no warrant was requested or obtained by the branch.

In my reasons below, I comment further on the question of relevance of the additional documents requested by the licensee.

### **SUBMISSIONS – BRANCH**

On the question as to the statutory authority of the branch to enter and seize liquor products and to proceed to obtain further evidence of the alleged contravention, the branch submits that it has full authority to do so under section 42 and section 45. The branch did not require a search warrant under section 44. At all times the branch was proceeding under its inspection powers and taking enforcement actions as set out in the *Act*. There is no evidence to support the licensee's suggestion that the licensee was subject to penal consequences under the *Offence Act*. The branch issued a Contravention Notice initially indicating it was alleging a breach of sections 8(2) and 8(3) which would have permitted greater penalties under Schedule 2 of the Regulation. The NOEA set out the enforcement action that the branch was taking i.e. an allegation of a contravention of the terms and conditions of the handbook, which attracts a lesser penalty under the Schedule.

As to the licensee's request that I order the return of the seized liquor bottles, the branch submits that this issue is not before me and I do not have the jurisdiction to make such an order. The branch submitted a letter dated February 14, 2018, from licensee's former legal counsel, S. Coulson, (exhibit 2) addressed to the Deputy General Manager, Compliance and Enforcement. The licensee made a demand for return of approximately 242 bottles of liquor seized by the branch on January 18, 2018 (the "seizure") on the following grounds, as stated in the letter:

1. The Seizure failed to comply with the requirements of sections 44 and 45 of the Act; and

2. The Seizure and search that led to the Seizure were unlawful breaches of Fets' section 8 Charter right against unreasonable search and seizure

The Deputy General Manager, Compliance and Enforcement responded to this demand in a letter dated March 8, 2018 (exhibit 3) and referred to his previous letter of January 25, 2018. He stated that the branch relied on its authority under section 45 of the Act for the seizure of the bottles. He further noted that Mr. Coulson, other than making a demand for the return of the bottles, made no comment on the matter of whether the liquor seized was, or was not, possessed or kept contrary to the *Liquor Distribution Act*, or the *Act*, or the regulations under these statutes. He advised the licensee that, in respect of section 47(3), the general manager is not satisfied of the claim and that as a result, the liquor is, in accordance with section 47(5) forfeited to the government. He added that if the general manager chooses to take enforcement action under section 51(1) of the Act, notice will, in keeping with section 51(7) follow in due course and that the licensee should expect that such action will be taken. He reiterated that the liquor will not be destroyed prior to the resolution of the processes contemplated by section 51 of the *Act*. He further stated that section 44 of the *Act* was not engaged in the context of this regulatory inspection.

The branch submits that, if the licensee is not satisfied with the decision letter of March 8, 2018, this proceeding is not the place to seek a remedy. This hearing is to determine whether the licensee is in compliance with the requirement to buy its liquor from the LDB or a designated outlet.

With respect to the alleged contravention, the evidence of the liquor register shows that the licensee purchased SMWS product from a licensed retail store and not from the LDB or a designated outlet. This is contrary to the term and condition in the handbook with respect to the requirement for licensees to buy liquor from the LDB or a designated outlet. The LRS was not a designated outlet. Section 80(4) of the Regulation requires a licensee to keep a liquor register for a period of six years. The licensee's register and receipts show that the licensee was purchasing SMWS liquor products from the Legacy LRS for the past 5 years. The licensee has been contravening the buying liquor restriction in the handbook from 2013 to 2018.

The branch submits that the defence of due diligence is unavailable to the licensee as the evidence shows that the purchases were made with full knowledge of the principals of the licensee, i.e. the directing minds. All purchase receipts were in the name of Licensee witness 1. The branch points out that Licensee witness 2 admitted knowledge of these purchases to liquor inspector 1.

With respect to the licensee's submissions on the branch's authority to search and seize, the branch submits that the authority to search and seize in the present case is found in section 45 of the *Act* as a result of its exercise of its inspection powers under section 42.

The branch submitted three cases, *R. v. Mission Western Developments Ltd.* 2012 BCCA 167, *Goodwin v. B.C.(Superintendent of Motor Vehicles) and Attorney General of B.C.* [2015] 3 S.C.R.250, and *R. v. Dyer* 2017 BCPC 281, to support its submission that the *Act* provides full lawful authority for the search and seizure and that it was not contrary to section 8 of the Charter. The branch disputes the licensee's characterization of the jeopardy facing the licensee here. At all times, the branch was exercising its regulatory authority under the *Act* and pursuing administrative enforcement action. The licensee was not charged with an offence, as were the accused in most of the cases submitted by the licensee, nor was the licensee facing penal consequences.

The branch distinguishes the line of cases that follow *Jarvis*, pointing out that the mischief that the courts are condemning in these cases is the use by inspectors (whether fishing or tax inspectors) of their regulatory authority as a ruse for the police who then proceed with a criminal investigation using the evidence collected by the inspectors. In the present case, the inspectors had an ongoing regulatory purpose the whole time. The liquor inspectors attended the restaurant on December 22, 2017 and on January 18, 2018, with the purpose of monitoring compliance with the buying liquor term and condition of the licence and other relevant statutory and regulatory provisions.

The branch points out that the licensee is engaged in a business that is part of a highly regulated industry and is subject to the continuing regulatory authority of the branch. In exchange for the benefits of selling liquor, licensees have a lower expectation of privacy.

Finally, if I am satisfied that the search and seizure was taken with full legislative authority under the *Act*, and that no search warrant was required, the evidence demonstrates that the seized bottles were not purchased from the LDB or from a designated outlet. Thus, I should find a contravention and impose the recommended penalty.

The branch has recommended a penalty of \$3,000, which is the maximum penalty under the Schedule for a first contravention of this term and condition of the licence. The branch recommends the maximum as the licensee's liquor register shows that the licensee was purchasing liquor unlawfully since 2013. There was a significant volume of unlawfully purchased product. The branch's aim is to instill voluntary compliance and to encourage licensees to abide by the regulations and the requirements of the *Act*. Through this penalty, the branch hopes the licensee will review its business practices to ensure all aspects of its licence are being operated properly. The branch points out that it did not proceed with a contravention of section 8 of the *Act* which attracts much higher penalties.

As to the purpose of ensuring compliance with the buying liquor requirements, the branch emphasizes that these restrictions on the purchase of liquor help to ensure fair competition in the industry and to ensure that there is no monetary loss to the government, as well as to act as a deterrent to all licensees by sending the message that the branch takes these contraventions seriously.

## **SUBMISSIONS – LICENSEE**

I set out the licensee's written argument and verbal submissions in some detail here - to assure the licensee that I have fully considered each issue and the judicial authorities submitted by the licensee. I address the issues and respond to the licensee's argument in the Reasons section of this decision.

The licensee submits that I have the authority to find that the search and seizure were contrary to section 8 of the Charter and to provide the appropriate remedy under section 24(2) of the *Charter*. If I am satisfied that the branch acted without legal authority, I should either exclude all the evidence collected on January 18, 2018 and later, including the evidence of the seizure of the bottles and the evidence of the liquor



register and receipts. If I exclude this evidence, I have no evidence to find a contravention.

As lesser arguments, the licensee submits that, in addition to the breach of the licensee's section 8 Charter rights, the actions of the branch breached the licensee's rights by:

- a) Failing to present on request adequate and meaningful identification confirming themselves as liquor inspectors;
- b) Failing to provide the licensee with accurate and meaningful receipts for the alcohol seized;
- c) Issuing a "notice to produce" requesting documents from the licensee (an inspection power) when in the circumstances of the ongoing investigation a search warrant was the only available course of action;
- d) Failing to provide Licensee witness 2 with a Charter caution.

The licensee submitted a volume of case law to support its arguments with respect to the alleged Charter breaches and the relevance of the distinction between an inspection and an investigation.

The licensee relied on several cases which emphasize this distinction and its relevance as to whether or not a search warrant was required here. The licensee submitted that the *Act* provides for different statutory authority depending on how the actions of the liquor inspectors are characterized. The licensee submits that at the point that the actions of the liquor inspectors crystallized into an investigation and shifted from a mere inspection, the branch had lost its authority under sections 42 and 45. At that point, the liquor inspectors had to seek to obtain a search warrant under section 44; if not, the search and seizure were unlawful. The licensee relies on an income tax case, *R. v. Jarvis* 2002 SCC 73, to support this.

With respect to the branch's argument that this proceeding is an administrative enforcement hearing and not an offence with penal consequences, the licensee says that the monetary fines under the *Act* are penal. The licensee submits that on January 18, 2018, on the date of the seizure of 242 bottles of liquor, the licensee was in jeopardy of being charged with an offence under the *Offence Act* and the consequent penal consequences. The licensee says that, given the potential for a charge under the *Offence*

*Act* (my underlining), the licensee's Charter rights were engaged on that date and that it is immaterial or irrelevant that the branch chose to proceed with administrative enforcement action only.

The licensee points to the following facts, to demonstrate the possible dates on which I can conclude that the "inspection" ended and the "investigation" began. The licensee argues that some of these facts were obtained through FOI and thus these documents and possibly others are relevant to this proceeding:

- December 7, 2017 - when liquor inspector 1 received information that a LRS on Vancouver Island was selling SMWS product to Food Primary and Liquor Primary licensees. On or about that date, liquor inspector 1 determined that the restaurant was being held out as a "partner bar" where SMWS product was available for sale. The licensee points to the testimony of liquor inspector 1 who characterized that point as being the beginning of "an investigation".
- December 8, 2017 – liquor inspector 1 contacted someone at the LDB to request a search of LDB records to determine if the restaurant had purchased any SMWS product from LDB. Liquor inspector 1 received confirmation from this person at the LDB that the LDB had no record of the restaurant ever purchasing SMWS product from them.
- December 22, 2017 - under instructions from liquor inspector 1, liquor inspector 2 attended with a third liquor inspector to conduct a covert inspection at the restaurant. The evidence of liquor inspector 2 was that he found the SMWS product that liquor inspector 1 had instructed him to order. Liquor inspector 2 completed an inspection report of his observations at the restaurant on December 22, 2017 and sent it to liquor inspector 1. (exhibit 4, tab 4)
- January 11, 2018 - a branch liquor inspector received an email from the person at LDB who further confirmed that there was "no lawful way that Fets Whisky Kitchen could be in lawful possession of SMWS product."

- Between January 12, 2018 and January 18, 2018 - various levels of branch management exchanged emails and at least one briefing note and an "operational plan" with respect to the investigation that was by this point labelled "OP Malt Barley."
- January 17, 2018 - liquor inspector 1 received "final authorization" to conduct the search and seizure at the restaurant.

Given all of the above facts that are not in dispute, the licensee says that, in all the circumstances, it is obvious that the briefing note and the operational plan confirm the existence of an ongoing and resource intensive investigation into the restaurant. This investigation culminated in express authorization and direction for liquor inspectors to conduct a warrantless search and seizure at the licensee's restaurant.

The licensee points to liquor inspector 1's answers under cross-examination to illustrate that the branch was in full investigatory mode on January 18, 2018 and fully intended to seize unlawful liquor on that date:

- 1) Liquor inspector 1 admitted that he had "no reason to believe" the licensee could produce 'receipts' that would justify its possession of the SMWS product;
- 2) His own draft NOEA confirm that he "received final authorization to inspect and seize products. . . " (exhibit 5, tab 21)
- 3) He rented a Uhaul van and filled it with empty boxes.

The licensee says that the only inference available to me from all of the admissible evidence is that on January 18, 2018, the liquor inspectors conducting the search and seizure of the SMWS product did so with the intention and internal direction from management, to search for and seize the SMWS product. The licensee says it was at the point of the "final authorization" or perhaps just prior to this point, that the branch should have requested a search warrant under section 44 of the Act.

Further, the licensee submits that the fact that the liquor inspectors attended the restaurant outside of the opening hours (i.e. at 10:00 a.m.) indicates their intentions to seize product.

Licensee witness 2 testified about the events of January 18, 2018. She stated that she found the search and seizure to be “stressful, confusing and intimidating.” She stated it was “an embarrassment to her business” as the lunch crowd came in while the liquor inspectors were busy seizing and tagging the product. When she asked liquor inspector 1 if she had time to contact a lawyer, liquor inspector 1 advised her that she did not have time. At no time was Licensee witness 2 advised of her Charter rights.

The exhibit receipt provided by the branch to the restaurant on January 18, 2018 confirmed that the subject liquor was seized pursuant to sections 42 and 45 of the Act. (exhibit 4, tab 7). The exhibit receipt does not identify the seized alcohol by brand or label, does not indicate the volume of alcohol present in each bottle or whether the bottle had been previously opened. As a result, the licensee says it is impossible to know from the exhibit receipt what alcohol was seized.

The branch sent a Notice to Produce on February 1, 2018 (exhibit 6). The Notice to Produce states:

“Pursuant to section 42 of the Liquor Control and Licensing Act, you are required, upon receipt of this notice, to produce for inspection, the following listed record(s), liquor sample or other thing that is required by the general manager or is otherwise related to the inspection.”

The Notice to Produce lists records, receipts for Scotch Malt Whisky Society, liquor register entries and LDB data, price list for all SMWS liquor products, and a copy of any signed contracts or agreements between Fets Whisky Kitchen and Noseworthy Imports Ltd. dba The Scotch Malt Whisky Society Canada.

The Notice sets out the penalty for failure to provide all the items outlined, which is a 10 to 15 day suspension and/or a \$7500 to \$10,000 monetary penalty for the first contravention.

In response to the Notice to Produce, on February 15, 2018, the licensee sent a copy of its liquor registry as well as receipts for the purchase of SMWS product by its principal Licensee witness 1 (exhibit 4, tab 13).

The licensee submits that if I find that the search and seizure was unlawful i.e. conducted without a search warrant, all of the evidence gathered by the branch on January 18, 2018 (including conscripted statements) and later evidence gathered from the Notice to Produce is inadmissible.

The licensee describes this as a threshold issue that I must address before proceeding to determine if there was a contravention. The licensee frames the threshold issue in its written argument as: does the conduct of the branch render the evidence and admissions obtained during and after the search and seizure inadmissible or otherwise require that the general manager's delegate enter a stay of proceedings?

The licensee submits that it is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority. The onus is on the branch to articulate the source of its authority to conduct the search and seizure and satisfy this tribunal that its source of authority is appropriate in the circumstances.

The licensee acknowledges that, in the context of regulated industries, the law permits inspections of those persons and places involved or participating in a regulated industry, here the licensed sale of alcohol. (*R. v. Lowe* 2007 CanLii 69298 @ page 9 (Newfoundland Provincial Court))

However, the licensee says, once a regulator is in possession of evidence or reasonable belief of an offence and an investigation is underway, the public interest in state supervision of a regulated activity is no longer paramount. At that point the potential abuses and prejudice to the accused licensee become paramount and Charter rights come into play. (*R. v. Lowe, supra* @ page 22)

The licensee acknowledges that it participates in a heavily regulated industry and therefore has a reduced expectation of privacy over certain records and things, and that it is under a positive obligation to cooperate with inspections from time-to-time that would otherwise be in breach of the Charter. In its review of Part 6 of the *Act*, the licensee notes section 42 authorizes liquor inspectors to conduct inspections for the purpose of ensuring compliance with the *Act*, while section 44 of the *Act* is aimed at known or suspected breaches of the *Act* which are or have been committed. The licensee submits that Part 6 of the *Act*, read as a whole, clearly distinguishes between the power

of inspection, which is necessary in the public interest to ensure the persons operating or acting under its auspices are in compliance, and the power of search and seizure which arises when an investigation into that non-compliance has commenced.

The licensee relies on the distinction between inspection powers and investigation powers as set out in *R. v. Jarvis* 2002 SCC 73 @ 81 and cites the following:

The existence of a prior authorization procedure where the commission of an offence is suspected creates a strong inference that the separate statutory inspection and requirement powers are unavailable to further a prosecutorial investigation.

In *Jarvis*, the court explained that when the “predominant purpose” of a particular inquiry is penal liability, officials must relinquish their inspection power. (*Jarvis, supra.* @ 88)

The licensee applies this distinction to the liquor regulatory regime set out in the *Act* and says that once a liquor inspector has evidence, or otherwise forms reasonable grounds to believe that a licensee has contravened the *Act*, or is engaged in an ongoing contravention of the *Act*, they are no longer engaged in an inspection or entitled to conduct a further inspection. From that point onwards, the licensee says that the liquor inspector is engaged in an investigation of the suspected contravention, and the predominant purposes of continued action is obtaining further evidence in support of contravention action, not merely compliance.

The licensee reviews section 42 of the *Act* and says that it does not provide liquor inspectors with the authority to seize and remove quantities of liquor other than samples “for testing and analysis.” The licensee notes that section 42 is buttressed by section 43 which provides that licensees “must” cooperate with the general manager to facilitate an inspection.

Next, the licensee reviews section 44 of the *Act* which, it says, sets out the “search powers” of the branch. Section 44 provides for the issuance of search warrants in situations where a justice is satisfied by information on oath that there are reasonable grounds to believe that there is in a place, any thing which is an offence under the *Act* or may provide evidence of the commission of the offence. The licensee points to Schedule 3 of the Regulation which includes a form “Information to Obtain Search Warrant”

This form includes the following:

“I have reasonable grounds to believe that there are in . . . . . [identify the vehicle, place or premises] the following things: [describe the thing or things to be searched for]. . . . . on or in respect of which the following offence(s) under the *Liquor Control and Licensing Act* has been or is (are) suspected to have been committed or that there are reasonable grounds to believe may provide evidence of the commission of the offence(s): [describe the offence(s)]. . . . .

Section 57 allows for a contravention of section 8 (2) or (3) of the *Act*, i.e. to sell or serve liquor not purchased from the LDB, to be considered “an offence”.

The licensee notes that the branch admits that it did not obtain a search warrant. Therefore, the search on January 18, 2018 was not conducted pursuant to section 44 of the *Act*.

The licensee emphasizes that the liquor inspectors did not “find” the SMWS product on January 18, 2018. Liquor inspector 2 had previously “found” the product during his covert inspection on December 22, 2017.

The licensee says that the branch cannot rely on section 45 for the seizure on January 18, 2018. Section 45 provides for authority to “immediately” seize and remove liquor if an inspector or peace officer finds it and in his or her opinion determines that it is possessed or kept contrary to the *Act*. As the branch learned of the sale of the SMWS product through its covert inspection on December 22, 2017, the branch at that point determined that the licensee was possessing liquor in contravention of the *Act*. However, the branch did not immediately seize the unlawful liquor.

The licensee submits that the branch cannot rely on section 45 to circumvent the process for judicial authorization contemplated by section 44 of the Act.

Section 45 exists to provide authority for liquor inspectors and peace officers in bona fide circumstances when they encounter illicit liquor and wish to take immediate steps to seize and remove the same. In the present case, as of December 22, 2017, the general manager of the branch was of the opinion that the restaurant was selling liquor that was not bought through the LDB or a designated outlet. To accept that section 45 could be used as the authority for seizure of liquor, once the branch was fully aware and chose not to take immediate action, would not only do violence to the plain language of the section but would produce absurd consequences rendering section 44 of the Act meaningless.

The licensee submits that it would be an abuse of process for the branch to attempt to circumvent judicial oversight by going through the “back door” and relying on section 45 to justify its warrantless search. The licensee adds that conduct of this nature is deserving of rebuke and wider examination by the Attorney General.

The licensee addresses the impact of what it calls the Charter breach here. The licensee relies on *R. v. Conway* 2010 SCC 22 @ para.20 for the proposition that administrative tribunals must comply with the Charter. The licensee cites the authors of *Judicial Review of Administrative Action in Canada* for the proposition that administrative tribunals with the authority to apply the law have the jurisdiction to apply the Charter to the issues that arise in the proper exercise of their statutory functions. And that it is clear that the prohibition in section 8 [of the Charter] against unlawful search and seizure can be invoked in the context of administrative proceedings (at 13:3451 of *Judicial Review*).

The licensee reviews the common law protections with regard to governmental search and seizures and points out that the purpose of section 8 of the Charter is to prevent unjustified searches before they happen. The fact that the liquor inspectors could have obtained a search warrant, or that their warrantless search in fact yielded the evidence they were seeking, does not subsequently cloak their unlawful activities with legitimacy.



A warrantless search is presumptively unreasonable and contrary to section 8 of the Charter. In the absence of a warrant, the government agency must establish on a balance of probabilities that the search at issue was authorized by law, that the law itself is reasonable, and the manner in which the search was carried out was reasonable (*R. v. Nolet* 2010 SCC 24 @ para 21)

The licensee relies on a recent provincial court decision, *R. v. MV Marathassa* 2018 BCPC 125, that excluded evidence on the basis of a violation of section 8 of the Charter. The court found that the Transport Canada inspectors boarded the vessel to conduct an enforcement investigation, without a search warrant.

The licensee cites an Ontario Supreme Court decision, *R. v. Canada Brick Ltd.* 2005 CanLII 24925 at para 157, which provides a summary overview of relevant principles respecting section 8 Charter breaches. The licensee says that, applying these principles to the present case, the bright line between inspection and investigation is obvious.

The licensee points to the undated draft Notice of Enforcement Action (exhibit 5, tab 21) that indicates the branch was now into the investigation mode as a result of information obtained from the LDB about the licensee. At the very latest in the chain of events leading up to January 18, 2018, the licensee says that the December 22, 2017 report on the covert inspection shifted the branch from inspection to investigation mode.

The licensee says, if I find that the search was unreasonable and in breach of the licensee's Charter rights, I must enter a "stay of proceedings" or exclude the evidence and thus dismiss the contravention as there will then be no evidence before me.

The licensee relies on the remedy in section 24(2) of the Charter and says I must exclude the evidence gathered at the time of the seizure and the subsequent evidence of records produced by the branch's demand in the Notice to Produce. The licensee says that the branch's breach of its Charter rights, and its governing statute, were grave. The search and seizure was an elaborate, dramatic and resource intensive exercise in defeating and avoiding prior judicial authorization.

In conclusion, the licensee seeks:

1. an order that the contravention proceeding is stayed, or in the alternative dismissed, following the rejection of the branch's evidence;
2. a declaration that the search and seizure was conducted without lawful authority and in breach of the licensee's Charter rights;
3. a declaration that the branch's conduct with respect to document disclosure has been unreasonable and procedurally unfair;
4. a declaration that the branch is to return to the licensee the SMWS product illicitly seized.

In addition to its submission on unreasonable search and seizure, the licensee submits that the liquor inspectors breached Licensee witness 2's rights under sections 7 and 10 of the Charter. At the time the liquor inspectors were seeking admissions from Licensee witness 2, she was not advised of her Charter rights and she was being detained.

With respect to the licensee's compliance history, the licensee points out that it has operated a licensed establishment since 1986 and that the restaurant has no compliance history. Since 2001, the restaurant has been inspected no fewer than 44 times and, until the present case, has never been the subject of enforcement action. Since October 2013, the restaurant has stocked and sold SMWS products. Prior to the issuance of the contravention notice, at no time had the branch put the restaurant on notice that it had any complaints or concerns with its stock and sale of SMWS products.

## REASONS AND DECISION

### ISSUE 1

**As a delegate of the general manager hearing and deciding whether a contravention has been proven and the appropriate penalty, what is my authority to consider whether the seizure of the unlawful liquor was conducted with lawful authority?**

Pursuant to section 5 of the *Act*, the general manager has appointed me as a delegate to conduct this hearing under section 51 and to render a decision. As a delegate, I have the authority of the general manager under Division 3 of Part 6, Administrative Actions. Under this division, the general manager may take administrative enforcement action against a licensee. The general manager, if he/she chooses to take administrative action, is limited by the regulations with respect to the contraventions and the penalties that may be imposed. I have no authority under Division 4 of Part 6 which deals with offences.

In a section 51 hearing, if the branch provides evidence of a contravention, I must determine if I am satisfied that the contravention has been proven and whether or not the licensee has a defence to the contravention.

The licensee says that the issues it raises are not a defence to the contravention but rather threshold issues that I must determine before proceeding to determine if the contravention has been proven. I find that, in considering whether or not a contravention has been proven, I am required to consider and interpret various sections of the *Act*.

I have the authority to consider whether the actions of the liquor inspector and the branch, which led to the issuance of the NOEA, were lawful under the *Act*, its regulations and the handbook.

## ISSUE 2

### **If I determine I have the authority, was the search of the restaurant and subsequent seizure of SMWS product conducted with lawful authority?**

If I determine the branch had no lawful authority, the licensee says that I must exclude the evidence found as a result of the search and seizure. The licensee says this includes the evidence of the seized bottles and the records sent to the branch in response to the Notice to Produce. (exhibit 4, tab 13 and exhibit 6)

In my preliminary ruling on the adjournment request and further document disclosure, I found that the branch had full legal authority to conduct the seizure on January 18, 2018 and therefore the documents the licensee was seeking were not relevant. After a review of the licensee's closing submissions and the judicial authorities provided, I see no reason to change my initial ruling on this. My reasons follow.

The nature of the regulatory regime is the key to addressing the licensee's argument here. I find the words of Iacobucci and Major JJ. In *R. v. Jarvis, supra*, provide the starting point for my analysis.

Analysis must begin with the words of the Act, and the proper construction of [*Income Tax Act*] sections 231.1(1) and 231.2(1). The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.(para.77)

I follow this approach to statutory interpretation in my review of the liquor licensing scheme. I find that, in considering the actions of the liquor inspectors on January 18, 2018 and the reasonableness of the search and seizure, I may consider Charter values in the context of this regulatory regime. I address below my jurisdiction to provide the remedies sought by the licensee.

## **The Liquor Regulatory Regime**

### Powers of General Manager

The *Act*, its regulations and the handbook establish a detailed and comprehensive regulatory regime for the purchase and sale of liquor in this province. The general manager of the branch is charged with the responsibility of administering and enforcing the *Act*. Pursuant to section 3 of the *Act*, the general manager is responsible for issuing licences and permits, supervising licensees, permittees and the operation of establishments and events sites, and enforcing the Act and regulations.

Part 5 of the Act deals with licences, authorizations and permits for the sale of liquor. Pursuant to section 13, the general manager may determine if an applicant for a licence is “fit and proper.” The general manager has the power to issue certain classes of licences and may refuse to accept, in prescribed circumstances, an application for a licence or endorsement. Pursuant to section 15, the general manager may, in the public interest, impose terms and conditions on licences and may do so without prior notice.

The legislature has given the general manager extensive powers to impose terms and conditions respecting all matters related to the manufacture, purchase, sale, service and consumption of liquor under a licence or endorsement and the operation of establishments and service areas.

The general manager has broad powers to ensure licensees comply with the *Act*, regulations and terms and conditions on their licence. Part 6 of the *Act* sets out the compliance and enforcement regime. Division 1 of Part 6 deals with inspection, search and seizure powers. Liquor inspectors have the power to enter and inspect licensed premises, to make demands and remove certain records, and to seize and remove liquor – without a search warrant. Section 44 requires a search warrant from a justice only in certain situations. Division 2 of Part 6 deals with the forfeiture of liquor, and the licensee’s right to make a claim for seized liquor.

Division 3 of Part 6 sets out the administrative actions that the general manager may take against a licensee for non-compliance. Section 51 confers a wide discretion on the general manager. These administrative actions are separate from any actions that may result in a person being charged with an offence, pursuant to Division 4 of Part 6.

Pursuant to section 51(7) of the Act, if the general manager proposes to take action under subsection (1), the general manager must provide written notice to the licensee. In the present case, the NOEA was issued to the licensee on July 2, 2018.

Pursuant to section 51(8), a licensee may provide a signed waiver admitting to the allegations set out in the Notice of Enforcement Action and waiving the opportunity for a hearing.

## Responsibilities of Licensees

The handbook (exhibit 4, tab 11) outlines the requirements of the *Act*, regulations and terms and conditions that relate to owners of licensed restaurants.

The Introduction states:

It is your responsibility to be aware of and to operate in compliance with these rules. Licensees must follow B.C.'s liquor laws and these terms and conditions at all times (as well as any further terms and conditions that might be printed on your licence or in letters issued to you by the general manager of the Liquor Control and Licensing Branch.) [August 2017] (page 5)

Licensees must renew their licences every year and pay an annual fee. Licensees are responsible to ensure compliance and as such are subject to inspection and search and seizure powers in their place of business. The general manager has such powers to ensure that licensees are following the rules and to ensure the public interest is paramount. Licensees must advise the branch and obtain approval for any changes listed in the handbook.

The details of your liquor licence application were the basis for granting you the licence. You must advise the Branch of any changes that alter the original information you provided, or of a change in circumstance related to your licence. Some changes require the Branch's prior approval, while others require you to report the change within 10 days. This is important because failure to do so is a licensing contravention and subject to penalty. Below is a table of changes that require prior approval and those that require reporting. (page 10)

Licensees are required to maintain a detailed record of items listed in the handbook, which include liquor purchase records, liquor sales records, including quantity of liquor sold and prices charged, liquor disposal records, food sales records. Licensees must keep records for at least six years. When asked, licensees must be forthright in providing information to the branch.

In addition to the requirement to purchase liquor from a LDB liquor store or other outlet designated (in writing) by the general manager of the LDB (alleged contravention here), the handbook sets out further restrictions on unlawful liquor:

### Unlawful or Private Liquor

You cannot buy, keep, sell or give unlawful liquor to anyone. Please note, bottles of wine brought to your restaurant by customers under “Bring Your Own Wine” are not considered unlawful liquor. Unlawful liquor is defined as:

- Liquor obtained from an unauthorized source
- Liquor not purchased under your licence
- Stolen liquor or smuggled liquor
- Liquor intended for export
- Homemade or UBrew/UVin (Ferment-on-Premises) liquor (you may serve it at a residential event if you have a caterer endorsement)
- Liquor purchased as a medicinal, confectionery or culinary product that is being used as beverage alcohol
- Liquor that has been adulterated, unless otherwise permitted below
- Samples that may have been left by a manufacturer or agent

You are accountable for any unlawful liquor found anywhere on your premises. It is not acceptable to say that unlawful liquor made its way into your stock by accident, that it was a gift for personal use, or that an employee left it there. Liquor intended for your personal consumption cannot be kept or served at your restaurant. Take the following steps to prevent unlawful liquor on your premises:

- If you recently purchased your establishment, conduct a thorough audit of all liquor on the premises to ensure none is unlawful
- Put safeguards in place to make sure no one waters down or otherwise unlawfully adulterates your liquor supply (the extent of the safeguards required will vary depending on the circumstances)
- Keep cooking alcohol (and culinary products containing alcohol) in the kitchen and separate from liquor kept for sale

## Liquor Register

A liquor register is a record of all your purchases (i.e. receipts and invoices) for your liquor inventory, including any liquor transfers. You must keep a liquor register and it must be available for inspection at all times. Liquor registers may be hardcopy or digital.

A liquor inspector or police officer may look at your register and compare it to your stock to make sure you have purchased your liquor lawfully.

If an inspector is unable to verify that the liquor on your premises was purchased legitimately, the liquor may be seized. It is therefore in your best interest to ensure your records are kept in a legible, orderly fashion so that an inspector can easily match your stock to your records. (my underlining)

You must also be able to account for any liquor that was lost due to spoilage and breakage. This can be done by either keeping a written record in a log book or by making a notation on the original receipt or invoice.

Best practices for keeping a liquor register:

- Keep all your receipts and invoices for liquor purchases in chronological order and separate from receipts and invoices for non-liquor purchases.
- Photocopy or scan receipts printed on thermal paper to protect the record from fading over time.
- Maintain a separate log book to record any liquor lost due to spoilage and breakage.

(pages 14 and 15)



The branch relies on voluntary compliance and conducts inspections to monitor that compliance.

### Compliance and Enforcement

As a licensee, you are required to:

1. Follow all of the terms and conditions.
2. Always allow liquor inspectors and/or police officers to enter your establishment. Never impede their entry in any way.
3. Never draw attention to liquor inspectors inside your establishment. This can affect the inspectors' safety. (page 33)

The above review of the Act, regulations and handbook shows that this is a highly regulated industry with responsibilities placed on licensees to comply with the rules.

I have laid out the liquor licensing regime in some detail to demonstrate the intent of the legislature in creating a complex regime that provides licences only to certain individuals who meet the requirements, that imposes restrictions on those licences, that places the responsibility for complying with those restrictions clearly on the licensees, and that provides broad powers to liquor inspectors to ensure compliance.

### **Inspection v. Investigation - Relevance of this Distinction in the Liquor Regulatory Regime**

The licensee relies on several cases that describe the "bright line rule" for the division of inspection and investigatory functions. Although I have considered all the authorities provided by the licensee, I refer in these reasons only to those emphasized by the licensee in its submissions. The branch has provided me with several cases to support its submissions.

The licensee has submitted that the judicial authorities refer to this distinction as determining the point at which the regulating authority must comply with the Charter with respect to the reasonableness of the search and seizure under section 8 and section 10 rights.

The licensee attempts to make the same distinction in the liquor regulatory regime and thus, to argue, that it is at the point that the liquor inspectors switched to investigation mode that Charter rights came into play, a search warrant was required and a Charter caution should have been given to Licensee witness 2.

I rely on the B.C. Court of Appeal decision submitted by the branch, *R. v. Mission Western Developments Ltd. supra*, paras. 38 to 40, to dismiss this line of argument. Mme. Justice Bennett places the emphasis on the regulatory regime, not on a particular point in time. She cites Binnie J. in *R. n. Nolet* 2010 SCC 24 for the proper question for consideration: whether the officers' regulatory inspection powers were exercised reasonably in the totality of the circumstances.

The licensee's reliance on *R. v. Jarvis* is misplaced here. *Jarvis* involved a civil tax audit, in which the taxpayer was obliged to disclose financial information; the audit evolved into a criminal investigation for tax evasion. The Supreme Court of Canada (para.2) concluded that "compliance audits and tax evasion investigations must be treated differently." As noted by Mme. Justice Bennett, at para.40, in *Mission, supra*, "Both *Nolet* and the present case take place in a wholly different context." She notes that section 49(1) of the *Fisheries Act* grants powers of entrance and inspection "for the purpose of ensuring compliance with this Act and the regulations."

The licensee submits *R. v. Marathassa* 2018 BCPC 125 supports its argument that there is a point at which inspectors must obtain a search warrant. The defence asked for exclusion of evidence based on alleged Charter violations. I find that this case is easily distinguishable from the present circumstances, not only because it is a criminal prosecution but because of the different regulatory regimes at issue, as well as a higher expectation of privacy of vessel owners. Transport Canada officials entered a vessel to conduct a pollution inspection. The question was at what point did the inspection become an investigation and thus require a search warrant, as the legislation governing the actions of the officials has a clear delineation between an inspection (section 211 of the *Canada Shipping Act* 2001 (S.C. 2001, c. 26) and an investigation (section 219). The official testified that he was aware that during an investigation he required a search warrant or the consent of the Captain to search the vessel or to seize any items. The judge in *Marathassa* found that "the evidence overwhelmingly supports the conclusion that [the inspector] was conducting an enforcement investigation under s. 219 of the

Act, from the moment he boarded the Marathassa on April 9, 2015. Such an investigation was not authorized without a valid warrant or informed consent.” (para.44). The judge also referred to a higher expectation of privacy that vessel owners might have, even though they are working within a regulated industry.

Quoting Mme. Justice Bennett in *Mission, supra*, at para 37, I find that inspections and investigations under the *Act* are a “part of the continuing regulatory purpose on which to ground the exercise of the regulatory power.”

I find that the liquor inspectors were at all times exercising their regulatory power and that there was no “bright line” in which the inspectors crossed over to a criminal investigation, nor is such a line contemplated in this regulatory regime.

Given my finding on this issue, I reiterate my reasons for refusing further document disclosure in my preliminary ruling. The documents requested by the licensee in its letters of November 11, 2018 and February 26, 2019 (exhibit 1), are not relevant to the issue to be decided at this hearing. The licensee argued that the documents it was seeking will “confirm the existence of an ongoing and resource intensive investigation into Fets culminating in express authorization and direction for liquor inspectors to conduct a warrantless search and seizure at the licensee’s premises.”

There is no dispute that the branch was involved in investigating several licensed establishments for the contravention of buying unlawful liquor. There is also no dispute that this was an ongoing and resource intensive investigation, that resulted in a search and seizure at the restaurant. The branch admits this. The branch registrar stated in its letter of April 26, 2019, referring to previous correspondence, that “the branch did not seek or receive a warrant.” The licensee needed no further documents to prove this.

The documents sought would not have provided assistance to the licensee “to make full answer and defence to the allegations levelled against it”, as described in Mr. Coles’ letter of April 18, 2019, as the branch admitted to the facts leading to the inspection and seizure on January 18, 2019. I have found above that the judicial authorities support my finding that the investigation/inspection distinction is irrelevant to the contravention allegations before me, and that the search and seizure on January 18, 2018 were “part of

the continuing regulatory power” of liquor inspectors to ensure compliance with the rules.

I now consider whether the liquor inspectors’ powers “were exercised reasonably in the totality of the circumstances.”

### **Section 45 Powers – Search and Seizure**

The licensee places great emphasis on the word “immediately” in section 45 of the *Act*. The licensee argues that the inclusion of this word means that the moment a liquor inspector believes that there may be unlawful product, they must “immediately” seize that product. If they choose not to, they have lost the opportunity to use section 45 seizure powers at a later date and must then apply for a search warrant under section 44.

Section 45 states that the general manager or peace officer “may immediately seize and remove.” (my underlining) The general manager has a discretion to act immediately to seize and may decide not to for any number of reasons. In this case, I find that the general manager made the decision to act to seize the liquor bottles once the general manager was confident that the seizure could be conducted efficiently and effectively, and once the liquor inspectors had clearly established on January 18, 2018, that the licensee could not produce receipts to show the SMWS product had been purchased lawfully. There was a coordinated investigation/inspection being conducted with several licensed establishments on January 18, 2018, all believed to be selling unlawfully obtained SMWS product. (testimony of liquor inspector 1)

In *Nolet, supra*, Binnie J. refers to the commercial trucking industry and that “knowledge of transportation legislation is a requirement to be licensed as a driver.” Despite a greater expectation of privacy in a truck, as it may serve as temporary living accommodations for a trucker, (compared to the liquor regime here with a lower expectation of privacy in licensed establishments), Binnie J. found that the search was reasonable. He noted that the appellants’ reliance on the *Jarvis* case was misplaced. He stated that “we are not crossing the Rubicon from a civil dispute into penal remedies,” noting that the context was always penal. The issue in *Nolet* was whether

the police search of the duffle bag did “in the totality of the circumstances invade the reasonable privacy interest of the appellants.” He found it did not. (para 45)

If a licensee is unable to provide proof of the lawful purchase of liquor, liquor inspectors may seize any unlawful liquor. Liquor inspectors may continue to research, investigate, consult with others, as they did here, all in the interest of ensuring they are satisfied that the licensee has obtained unlawful product.

At all times in the present case, the liquor inspectors were exercising administrative compliance and enforcement powers, in conducting an inspection, and did not require a search warrant to seize the liquor on January 18, 2018. There was no “crossing the Rubicon” as suggested by the licensee.

The licensee submitted that the Charter search and seizure principles summarized in *R. v. Canada Brick Ltd.*, supra, para.157 support its argument. The licensee outlined a number of the principles in its written argument, omitting a few key ones. I cite the omissions here as they are supportive of my analysis on the question as to whether or not the search and seizure was reasonable.

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: *R. v. Collins* (1987) 33 C.C.C. (3d) 1 (S.C.C.), at page 14.

Section 8, “like other Charter rights, must be broadly and liberally construed to effect its purpose”: *R. v. Colarusso* (1994), 87 C.C.C. (3d) 193 (S.C.C.) at page 214. “What is reasonable, however, is context-specific”: *R. v. Jarvis*, at page 33.

The standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law “will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context”” *Thomson Newspapers Ltd. v. Canada* (1990), 54 C.C.C. (3d) 417 (S.C.C.) at pages 475-6; *R. v. Colarusso*, at page 204; *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.) at pages 511-2.

This “does not, however, mean that the contextual standard of reasonableness will necessarily be as strict in a matter involving the regulation of an industrial sector as it is in criminal matters”: *Comite Paritaire v. Potash*, supra, at page 441

With respect to the arguments of the licensee on section 8 of the Charter, I have found I may consider Charter values in determining whether the search and seizure by the liquor inspectors infringed the reasonable expectations of privacy of the licensee. (para.41 of *Nolet*, supra.)

I conclude that, in the context of the liquor licensing and enforcement regime, the branch’s search and seizure on January 18, 2018 was not an unreasonable search and seizure and that the regulatory inspection and seizure powers were exercised reasonably.

I find that the liquor inspectors here, at all times, were acting with full authority pursuant to sections 42 and 45 of the Act to inspect and seize unlawful product.

### **Offence v. Contravention**

The licensee submits that, at all times up to the issuance of the contravention notice, the licensee was subject to a summary conviction proceeding and the penalties that might arise from a conviction. The licensee says that, because of the potential that the branch could have proceeded using section 57, the branch should have provided full Charter rights to the licensee, including obtaining a search warrant. This line of argument disregards the nature of this industry and the responsibility of a licensee with the lowered expectation of privacy, especially on its licensed business premises, and the *R. v. Nolet* emphasis on context, when determining if a search warrant is necessary.

I have no evidence to suggest that at any time leading up to the January 18, 2018 inspection was the branch considering proceeding by way of section 57, which would lead to the laying of a charge under the *Offence Act*. Even if I were to accept the licensee’s arguments about the potential for greater liability on the licensee as a result of section 57, which I do not, I find that the licensee has a lower expectation of privacy and thus, in the circumstances of this case and the regulatory regime, the licensee’s Charter

rights were not breached. (*R. v. Mission Western Developments Ltd. supra, R. v. Dyer* 2017 BCPC 281, *R. v. Nolet, supra*)

Most of the cases provided by the licensee deal with summary conviction offences. Even if this were a summary conviction offence, which it is not, I am of the opinion that the result would be the same (see *Mission* and *Dyer, supra*). This highly regulated liquor industry draws a much lower level of expectation of privacy than the circumstances in the cases relied on by the licensee.

### **Penal liability**

The licensee submits that even in the context of the administrative enforcement regime, the licensee was at all times subject to “penal liability” and therefore liquor inspectors must provide a Charter caution before proceeding with a search or eliciting information.

I disagree with the characterization of the potential penalty that may be imposed on the licensee here.

I agree with the branch advocate that *R. v. Goodwin* [2015] 3 S.C.R. 250 provides authority for dismissing this line of argument. Although a different legislative regime and a different Charter section (s.11), the comments from the majority decision, as to what constitutes an “offence” apply equally here. After determining that the Automatic Roadside Prohibition scheme (ARP) did not create an “offence” within the meaning of section 11 the majority stated:

While administrative and criminal proceedings both have public purposes, they are fundamentally different. Administrative regimes “are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity (*R. v. Wigglesworth* [1987]2 S.C.R. 541, at p.560). Criminal matters on the other hand, are public in nature and aim to redress the wrong done to society by applying the principles of retribution and denunciation in an open courtroom. (para.41)

The court goes on to review the three factors set out in *Martineau v. M.N.R.* 2004 SCC 81 to consider when determining whether a proceeding is criminal in nature: 1) the objectives of the [legislation]; 2) the purpose of the sanction; and 3) the process leading to imposition of the sanction.

The court applied these factors to the ARP scheme and said:

The ARP scheme imposes a driving prohibition coupled with a monetary penalty. It is not concerned with addressing the harm done to society in a public forum; instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on Criminal Code seizure powers and is administered by police, the scheme is more accurately characterized as a proceeding of an administrative nature. (para 43)

This highly regulated liquor regime is administered by the general manager. Section 51 hearings are for the purpose of determining if a licensee has contravened the *Act*, Regulation or the terms and conditions of its licence, with the potential for the imposition of a monetary fine or a suspension of the liquor licence. The focus of the statutory scheme is on the regulation of licensees and licensing for the purchase and sale of liquor, to ensure public safety in this industry, with administrative penalties to enforce compliance. The consequences of a finding of a contravention are not “truly penal.” (para.45 of *Goodwin*)

### **Remedies sought**

I will now address the specific remedies sought by the licensee as set out in the licensee’s written submission.

1. an order that the contravention proceeding is stayed, or in the alternative dismissed, following the rejection of the branch’s evidence pursuant to section 24(2) of the Charter



The licensee submits *R. v. Conway* [2010] 1 S.C.R.765 establishes that I have the jurisdiction to grant a Charter remedy here. This case deals with the power of the Ontario Review Board and whether it has the authority to grant a remedy pursuant to section 24(1) of the Charter. The court found that it did, noting that “we do not have one Charter for the courts and another for administrative tribunals. . . . and that “administrative tribunals with the authority to apply the law have the jurisdiction to apply the Charter to the issues that arise in the proper exercise of their statutory functions.”

The licensee relied on this to argue I have the jurisdiction to grant a Charter remedy if I find a breach of the Charter. Given that I am a statutory decision maker acting as a delegate of the general manager, I am not persuaded I have this jurisdiction. Nevertheless, I agree that I need to consider Charter values when rendering the decision and have done so. If I had the jurisdiction to exclude evidence, and I do not believe I do in the context of my role as a delegate of the general manager, I would not do so on the basis of my findings on the lawful actions of the liquor inspectors.

I have no authority to “stay a proceeding”. I have the authority to dismiss after determining a contravention is not proven. I deal with the evidence of the contravention below.

2. a declaration that the search and seizure was conducted without lawful authority and in breach of the licensee’s Charter rights;

I heard no argument on my authority to make such a declaration. If I did have the authority, I would not make such a declaration as I have found that the search and seizure was conducted with lawful authority pursuant to sections 42 and 45 of the Act. In making this determination, I have considered the licensee’s rights in the context of Charter values as well as in the context of the regulatory regime under which the licensee operates. I have also considered the judicial authorities provided by the licensee, and have concluded that the *Act* sets out a clear framework to permit such search and seizure as occurred here.

3. a declaration that the branch's conduct with respect to document disclosure has been unreasonable and procedurally unfair;

I found, in my preliminary ruling at the hearing, that the branch's document disclosure was reasonable and fair. My findings on the irrelevance of the inspection/investigation distinction support my ruling that the further disclosure sought by the licensee was not necessary for the determination of this contravention under the *Act*.

4. a declaration that the branch is to return to the licensee the SMWS product illicitly seized

With respect to asking me to order a return of the seized liquor bottles, as noted, I am appointed as a delegate to conduct a hearing into the alleged contravention and as such, only have the powers conferred on the general manager under section 51. This does not include the power to order the return of any seized items. I do not have the authority to grant the remedy the licensee is seeking.

The licensee applied in its letter of February 14, 2018 (exhibit 2) for the return of the bottles. The licensee received a response from Deputy General Manager, Compliance and Enforcement, acting as the delegate of the general manager for the purposes of section 47, who stated:

"Consequently, I am advising you, on behalf of the general manager, that in respect of section 47(3) of the Act, the general manager is not satisfied of the claim. As a result, the liquor is, in accordance with section 47(5), forfeited to the government." (exhibit 3)

I have no knowledge as to whether or not the licensee applied for a judicial review of the above statutory decision.

As lesser arguments, the licensee submits that, in addition to the breach of the licensee's section 8 Charter rights, the actions of the branch breached the licensee's rights by:

- a) Failing to present on request adequate and meaningful identification confirming themselves as liquor inspectors;

I have no evidence before me that the licensee requested further identification from the liquor inspectors when they provided Licensee witness 2 with business cards. Section 42(3)(b) stipulates that liquor inspectors "must carry, and present on request, identification in a form the general manager establishes." (my underlining) I note that liquor inspector 1 presented photo identification to the staff member when he first entered the restaurant on January 18, 2018 (testimony of liquor inspector 1 in cross-examination).

I find that the liquor inspectors' presentation of their business cards was sufficient identification to confirm who they were, in the context of this regulatory regime. And I find that Licensee witness 2 did not request further identification from them.

- b) Failing to provide the licensee with accurate and meaningful receipts for the alcohol seized;

I find that the listing of the bottles on the exhibit receipt does not identify each bottle or its contents or indicate the name of the product seized. (exhibit 4, tab 7) The licensee did not dispute that these were SMWS products. The licensee had an opportunity in its section 47 letter to explain if these bottles were not SMWS products and improperly seized. The licensee did not do so. In my findings below on the contravention, I rely on the testimony of liquor inspector 1 and on the licensee's own admissions and records (exhibit 4, tab 13) as evidence of unlawful liquor. I agree that the exhibit log does not identify the product 'SMWS' but find that the other evidence of the product and testimony of liquor inspector 1 is sufficient to support my finding that this was a listing of all the unlawful product seized.

- c) Issuing a “notice to produce” requesting documents from the licensee (an inspection power) when in the circumstances of the ongoing investigation a search warrant was the only available course of action;

I have found that the liquor inspectors acted with full lawful authority pursuant to sections 42 and 45 of the Act. No search warrant was sought and no search warrant was required

- d) Failing to provide Licensee witness 2 with a Charter caution.

As noted above, in my response to the allegations of breaches of Charter rights, I have considered Charter values in the context of this regulatory regime. As the licensee notes, section 43 of the *Act* requires licensees to cooperate with liquor inspectors who are performing their duties.

A liquor licence is a privilege, not a right. A liquor licence places certain responsibilities upon a licensee, one of which is to fully cooperate with liquor inspectors. I find that liquor inspectors do not need to issue Charter cautions when dealing with a licensee or its staff, when they are exercising their inspection powers under section 42 of the Act.

In addition, the licensee suggested that the liquor inspectors did not comply with section 46 of the *Act* which states:

**No interference with seizure notice**

**46** Without the permission of the person who made the seizure, a person must not remove, alter, destroy or deface a notice posted for the purpose of notifying the public of a seizure under section 44 or 45.

The licensee interpreted this section to say that the liquor inspectors were required to post a seizure notice and did not do so. The licensee did not point to any other section of the Act requiring the posting of a notice. I read this section as a prohibition on anyone removing, altering, destroying or defacing a notice, not that a notice must be posted.

### ISSUE 3

#### **If I find the seizure was conducted lawfully, did the contravention occur?**

I have addressed the threshold issues raised by the license and turn now to the evidence of the contravention. I find the following:

- In early December of 2017, the branch received information that certain licensed establishments, including the restaurant, were purchasing a particular Scotch whisky, labelled SMWS from a licensed retail store;
- Liquor inspector 1 contacted the LDB to determine if the LDB had any record of the restaurant purchasing SMWS products from them – the LDB had no record of this; (testimony of liquor inspector 1)
- According to the terms and conditions of its licence, the restaurant is required to buy all liquor from the LDB or an outlet designated in writing. This has been a term and condition of the restaurant's licence since at least 2013;
- On January 18, 2018, liquor inspector 1 attended the restaurant to conduct an inspection with two other liquor inspectors. The inspection of the restaurant was part of a larger branch operation with code name "Operation Malt Barley," which involved the purchase of unlawful product by three other licensed establishments; (testimony of liquor inspector 1)
- On that date, liquor inspector 1 and the two other liquor inspectors identified SMWS product in the restaurant and requested the liquor register and the receipts for this product from Licensee witness 2 to show where the product was purchased. When Licensee witness 2 stated the receipts were not available for inspection nor did she produce the liquor register, the liquor inspectors seized 242 bottles of SMWS product;

- The 242 bottles of SMWS product were for sale in the service area of the restaurant. A significant number of the bottles were opened with varying levels of product remaining in the opened bottles; (NOEA and testimony of liquor inspector 1)
- The liquor inspectors placed evidence tags on each bottle seized, sealed the bottles, noted the numbers on the evidence exhibit receipt, boxed the marked bottles and removed them from the restaurant;
- The liquor inspectors provided Licensee witness 2 with a copy of the evidence exhibit receipt listing all the bottles seized (exhibit 4, tab 7);
- On January 18, 2018, Licensee witness 2 told the liquor inspectors that the SMWS product was purchased from the Legacy LRS. Licensee witness 2 admitted that the SMWS product was not from the LDB; (testimony of liquor inspector 1 and testimony of Licensee witness 2)
- The licensee provided the branch with receipts issued to Licensee witness 1, from 2013 to 2018, showing the purchase of SMWS product from Legacy LRS (exhibit 4, tab 13)
- The Legacy LRS was not “an outlet designated (in writing) by the general manager of the LDB.”

In my findings above, I have relied on the evidence of the alleged contravention, not on the additional documents sought and obtained by the licensee under the FOIPPA and included in exhibit 5, tabs 14 to 29. I have determined that the licensee contravened the *Act* and have made this decision based on the evidence from the witnesses and the documents disclosed by the branch in its book of documents (exhibit 4). Given my conclusions on the inspection/investigation distinction, which were based on judicial authorities and statute interpretation, not on any documents, I have found any further document disclosure relating to the stages of the investigation/inspection to be irrelevant to this determination.

I do not consider a draft Notice of Enforcement Action to be relevant to my determination. I consider only the final NOEA issued by the branch that sets out the allegations and recommended actions, as well of course, as the testimony of the branch's and licensee's witnesses at the hearing.

I find that the licensee or its principal, Licensee witness 1, purchased SMWS products from Legacy LRS from the years 2013 to 2018, with a total monetary value (sales value) of \$37,635.63. (testimony of liquor inspector 1 and licensee's records and registry provided to branch in response to Notice to Produce issued February 1, 2019, exhibit 4, tab 13).

I find further that the SMWS product seized from the restaurant and bought from Legacy LRS was being served and sold in the restaurant.

I find that the licensee has contravened the term and condition in the handbook, with respect to the requirement to buy liquor from the LDB or a designated outlet.

#### **ISSUE 4**

**If so, has the Licensee established a defence to the contravention?**

#### **Due Diligence**

The licensee did not make a due diligence defence. I agree with the branch's submission that the directing minds of the licensee, i.e. Licensee witness 2 and Licensee witness 1, were responsible and involved in the buying of the liquor from a source other than the LDB.

As noted in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, if the person contravening the Act is a directing mind, the defence of due diligence is not available and that is the end of any further inquiry.

I therefore find there is no defence to the contravention and that the licensee has contravened the term and condition of its licence, i.e. purchasing liquor other than from LDB or a designated outlet.

## ISSUE 5

### **If the contravention is proven, what penalty, if any, is appropriate?**

Pursuant to section 51(2)(b) of the Act, having found that the licensee has contravened the Act, the Regulations and/or the terms and conditions of the licence, I may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the NOEA. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 2 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the branch and/or the police; the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

The licensee emphasized that it has had no compliance history over its years of doing business in the industry. However, the licensee's own evidence shows that the licensee has been purchasing SMWS product since 2013, other than from the LDB.



The licensee submits that the fact that the restaurant had had a number of liquor inspections over the years and that the liquor inspector had never raised the issue of the SMWS products which were clearly visible in their menu and on their shelves, excuses the licensee's actions here. The liquor regulatory regime relies on voluntary compliance and expects liquor licensees to comply with the rules and regulations, regardless as to how they feel about them.

I find it disingenuous of the licensee to argue here that no liquor inspector ever brought the issue of SMWS product on the restaurant shelves to the licensee's attention. Licensee witness 2 admitted that she never brought the SMWS product to the attention of the liquor inspectors, deciding "it was not a problem". The licensee here made its own decision to ignore the rules, based on its belief that it needed this product to operate its business successfully. At no time did the licensee ask about the buying liquor restriction and whether or not the licensee was complying with the rules by buying the product from the LRS.

I repeat the sentence in the Introduction to the handbook: "It is your responsibility to be aware of and to operate in compliance with these rules." A licensee does not have the option of disregarding those rules it does not agree with. Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 2 and calculating a penalty. Item 54 in Schedule 2 provides a range of penalties for a first contravention of this type: a one to three day licence suspension and/or a \$1000 to \$3000 penalty. In the NOEA, the branch recommends a penalty of \$3000, i.e. the maximum for a first contravention. Liquor inspector 1 explained why the branch was recommending the maximum and referred also to the reasons set out in the NOEA, which are as follows:

- The egregiousness and duration of the contravention warrants a maximum penalty within the penalty range;

- The penalty will hopefully instill upon the licensee the seriousness of the contravention and the importance of maintaining voluntary compliance with the legislation, regulations and terms and conditions of its liquor licence;
- The branch expects the licensee will use this contravention as a means to review its business practices and ensure that all aspects of its licence are being operated lawfully;
- The enforcement action here should discourage similar incidents from occurring in the future.

I agree with the reasons set out above. I find the maximum for a first contravention is warranted in the circumstances of this contravention.

## ORDER

Pursuant to section 51(2)(b) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$3000 to the general manager of the Liquor and Cannabis Regulation Branch on or before July 8, 2019.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor and Cannabis Branch inspector or a police officer.

*Original signed by*

\_\_\_\_\_  
Nerys Poole  
General Manager's Delegate

Date: June 6, 2019

cc: Liquor and Cannabis Regulation Branch, Vancouver Office  
Attn: Maria Caduhada, Branch Advocate

## APPENDIX

### *Liquor Control and Licensing Act, S.B.C. 2015, c.19*

#### **Terms and conditions on licence**

15 (1) Subject to this Act and the regulations, the general manager may, in the public interest,

- (a) impose terms and conditions on a licence or endorsement that is being or has been issued,
- (b) without prior notice, impose terms and conditions on all licences in a class of licences established by the regulations and on all endorsements in a class of endorsements established by the regulations and may impose different terms and conditions for the different classes of licences or endorsements,
- (c) establish classes of establishments and without prior notice, impose terms and conditions on all licences issued in respect of a class of establishment and all endorsements on licences issued in respect of a class of establishment and may impose different terms and conditions for different licences or endorsements issued in respect of different classes of establishments,
- (d) without prior notice, impose terms and conditions on licences or endorsements of the same class that are issued at different times,
- (e) suspend, rescind or amend the terms and conditions referred to in paragraph (a), and
- (f) without prior notice, suspend, rescind or amend the terms and conditions referred to in paragraphs (b) to (d).

(2) Without limiting subsection (1), the general manager may impose terms and conditions respecting all matters related to the manufacture, purchase, sale, service and consumption of liquor under a licence or endorsement and the operation of establishments and service areas, including, without limitation, respecting one or more of the following:

- (a) the days and hours that a service area is allowed to be open for the sale, service or consumption of liquor;

- (b) minors entering and being in an establishment or a service area and the employment of minors in an establishment or a service area;
- (c) games and entertainment allowed in an establishment or a service area;
- (d) reporting and record-keeping requirements of a licensee;
- (e) advertising and signs used by a licensee in relation to an establishment;
- (f) posting of signs in an establishment;
- (g) reasonable measures to ensure that the operation of an establishment does not disturb persons in the vicinity of the establishment;
- (h) the safety of employees, patrons, employees of the licensee, and the public;
- (i) the type of liquor that may be offered for sale or service;
- (j) the minimum price of liquor offered for sale or service;
- (k) liquor serving sizes;
- (l) requirements for the service of food and non-alcoholic beverages in a service area;
- (m) liquor storage;
- (n) the area in an establishment where the manufacture of liquor is allowed;
- (o) equipment;
- (p) use of an establishment during a period when the sale or service of liquor is not allowed or liquor is not being sold or served.

(3) The general manager may

- (a) publish the terms and conditions referred to in subsection (1) (b) to (d), and other terms and conditions respecting a class of licences or endorsements, in whatever form the general manager believes will bring the terms and conditions to the attention of licensees, and
- (b) change a record published under paragraph (a) of this subsection to reflect suspended, rescinded or amended terms and conditions.

(4) If terms and conditions are imposed, suspended, rescinded or amended in respect of a class of licences or endorsements, those terms and conditions as imposed, suspended, rescinded or amended take effect, in relation to the licences or endorsements in that class of licences or endorsements, on their publication in accordance with subsection (3).

### **Action against licensee**

**51** (1) In addition to other powers the general manager has under this Act, the general manager may take action against a licensee for one or more of the following reasons:

- (a) the licensee's contravention of this Act;
- (b) the licensee's contravention of the regulations;
- (c) the licensee's failure to comply with a term or condition imposed by the general manager.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may take one or more of the following actions:

- (a) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions of the licence;
- (b) subject to subsection (4), impose a monetary penalty on the licensee in accordance with the prescribed schedule of monetary penalties;
- (c) subject to subsection (4), suspend all or part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
- (d) cancel all or part of the licensee's licence;
- (e) order a transfer of the licensee's licence, within the period the general manager specifies, to a person who is at arm's length from the licensee.

(3) The general manager must, in taking action against a licensee under subsection (2), take into account

- (a) the licensee's compliance history,
- (b) the matters prescribed by regulation, and
- (c) other matters that the general manager considers relevant.

- (4) The general manager may, if the general manager is satisfied that it is in the public interest to do so,
- (a) subject to subsection (5), impose a monetary penalty under subsection (2) (b) that is greater than the amount provided for in the prescribed schedule of monetary penalties, or
  - (b) suspend a licensee's licence under subsection (2) (c) for a period longer than that provided for in the prescribed schedule of licence suspensions.
- (5) The general manager may not impose a monetary penalty that is greater than the following amounts:
- (a) \$50 000 for a contravention of section 8 (2) (a), (b), (c) or (d) or (3);
  - (b) \$25 000 for another reason referred to in subsection (1) of this section for which the general manager may take action against the licensee.
- (6) If a corporation is liable to a monetary penalty imposed under this section in respect of a contravention of this Act or the regulations or a failure to comply with a term or condition the general manager imposes, an officer, director or agent of the corporation who authorizes, allows or acquiesces in the contravention is also liable to the penalty.
- (7) If the general manager proposes to take action under subsection (1), the general manager must provide written notice to the licensee
- (a) specifying the reason under subsection (1) for which the general manager proposes to take action,
  - (b) respecting the action the general manager proposes to take against the licensee, and
  - (c) notifying the licensee that the licensee may, in accordance with subsection (8), waive the opportunity for a hearing.
- (8) A licensee may provide to the general manager a signed waiver, in form and content satisfactory to the general manager and within such period as the general manager considers appropriate, in which the licensee expressly and irrevocably
- (a) admits to the allegation referred to in subsection (7) (a),
  - (b) accepts the action, specified in the waiver, to be taken by the general manager, which action may, but need not, be that proposed under subsection (7) (b),

(c) waives the opportunity for a hearing, and  
(d) agrees that the action of the general manager and the reasons for taking that action, set out in an order under subsection (9), will form part of the compliance history of the licensee.

(9) If the general manager makes a determination against a licensee, the general manager must, in an order given to the licensee,

(a) specify the action being taken under subsection (2), which action may, but need not, be that proposed under subsection (7) (b),

(b) set out the reasons for taking the action, and

(c) set out 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 licence suspension is imposed, the period of the suspension and the dates on which the suspension must be served.

#### **Division 4 – Offences**

##### **Section 5 of *Offence Act* does not apply**

56 Section 5 of the *Offence Act* does not apply to this Act or the regulations.

##### **Offences and penalties**

57 (1) A person commits an offence under this Act if the person

(a) contravenes section 7 (1) or (2), 8 (2) or (3), 10 (3) or (6), 44 (6), 46, 60 (1), (2) or (3), 61 (2) or (4), 64 (1), 73 (1), 74 (1), 75, 76 (2), 77 (1), 78 (1), (2) or (3) or 79 (1),

(b) contravenes section 62 (1) or (2) when not exempted under section 62 (3),

(c) provides false or misleading information in the following circumstances:

- (i) when making an application referred to in section 12;
  - (ii) when making a report or when required and as specified by the general manager under section 59, or
  - (d) contravenes a provision of the regulations, the contravention of which is prescribed to be an offence.
- (2) A person who commits an offence under this Act in respect of section 8 (2) (a), (b), (c) or (d) or (3) is liable,
- (a) in the case of a corporation, to a fine of not more than \$100 000,
  - (b) in the case of an individual who is a licensee, to a fine of not more than \$100 000 or to imprisonment for not more than 12 months, or to both, and
  - (c) in the case of an individual who is not a licensee, to a fine of not more than \$50 000 or to imprisonment for not more than 12 months, or to both.
- (3) A person who commits an offence under this Act, other than in respect of section 8 (2) (a), (b), (c) or (d) or (3), is liable,
- (a) in the case of a corporation, to a fine of not more than \$50 000,
  - (b) in the case of an individual who is a licensee, to a fine of not more than \$50 000 or to imprisonment for not more than 6 months, or to both, and
  - (c) in the case of an individual who is not a licensee, to a fine of not more than \$10 000 or to imprisonment for not more than 6 months, or to both.

### **Offence by officer, director or agent**

**58** If a corporation commits an offence under this Act, an officer, director or agent of the corporation who authorizes, allows or acquiesces in the commission of the offence also commits an offence, whether or not the corporation is prosecuted for the offence.