



**DECISION OF THE
GENERAL MANAGER**

LIQUOR AND CANNABIS REGULATION BRANCH

IN THE MATTER OF AN APPLICATION FOR RECONSIDERATION

A reconsideration pursuant to Section 53.1 of

The Liquor Control and Licensing Act, S.B.C. 2015, c. 19 ("Act")

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

Case #: REH18-003

For the Licensee: Daniel Coles

For the Branch: Maria Caduhada

General Manager's Delegate: Paul Devine

Date of Decision: September 6, 2019

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

The licensee Fets Fine Foods Ltd. ("Licensee") operates a restaurant known as Fets Whisky Kitchen under Food Primary Licence #169939 ("Licence"). The restaurant is located at 1230 Commercial Drive in Vancouver. The licence, as with all primary food licences in B.C., is expressly subject to the terms and conditions contained in the publication "Food Primary Terms and Conditions" ("Handbook").

It is not disputed that the provisions of the Handbook are applicable to the operation of the business of the Licensee. One of these provisions found at page 14 stipulates as follows:

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.

The Liquor Control and Licensing Branch (now Liquor & Cannabis Regulation Branch) (the "Branch") issued a proposed Notice of Enforcement Action on July 2, 2018 (the "NOEA"). The Branch set out allegations relating to the discovery of 242 bottles of liquor described as Scotch Malt Whisky Society ("SMWS"). The Branch alleged that the Licensee had not produced receipts or other evidence to show that the SMWS had been purchased from the Liquor Distribution Branch ("LDB") or a designated outlet as required by the terms of its Licence.

The Branch proposed a sanction consisting of a \$3000 monetary penalty. This fell within the penalty range as set out in item 54 in Schedule 2 of the Liquor Control and Licensing Regulation ("Regulation"). The Licensee disputed the alleged contravention and a Delegate of the General Manager was appointed under section 51 of the *Act* to consider the proposed enforcement action as set out in the NOEA. A two-day hearing was held and on June 6, 2019, the Hearing Delegate confirmed the proposed monetary penalty ("Decision"). The Licensee seeks reconsideration of the Decision. I was appointed under section 53.1 of the *Act* to conduct this reconsideration.

RECONSIDERATION

53.1 (1) In this section:

"**applicant**" means a person who applies under subsection (2) for a reconsideration of a section 51 order;

"**reconsideration order**" means an order of the general manager under subsection (9);

"**section 51 order**" means an order of the general manager under section 51 (9) other than an order based on a signed waiver referred to in section 51 (8).

(2) The following persons who receive a section 51 order may apply to the general manager for a reconsideration of the order:

- (a) a licensee referred to in section 51;
- (b) a former licensee or deemed licensee referred to in section 52;
- (c) a permittee or former permittee referred to in section 53.

(3) A reconsideration is, subject to subsection (4), a review on the record and may be based on only one or more of the prescribed grounds.

(4) The general manager may, in a reconsideration of a section 51 order, consider new evidence only if the general manager is satisfied that the new evidence

- (a) is substantial and material to the reconsideration, and
- (b) did not exist when the section 51 order was given or did exist at that time but was not discovered and could not, through the exercise of reasonable diligence, have been discovered.

(5) The general manager must not accept an application for a reconsideration of a section 51 order unless the following requirements are met:

- (a) the application is in the form the general manager establishes;
- (b) the application identifies one or more of the prescribed grounds on which the application is based;
- (c) the application includes a submission setting out the applicant's argument with respect to the prescribed grounds identified under paragraph (b);
- (d) subject to subsection (6), the general manager receives the application within 30 days after the date on which the applicant receives the section 51 order.

- (6) The general manager may extend the deadline in subsection (5) (d) if the general manager is satisfied that
- (a) special circumstances existed that prevented the applicant from meeting the deadline, and
 - (b) an injustice would result if no extension were granted.
- (7) Despite section 51, if the general manager accepts an application for a reconsideration of a section 51 order, the actions specified in the order are stayed until the general manager makes a reconsideration order with respect to the section 51 order.
- (8) The general manager must give written notice to the applicant that the application has been accepted or rejected.
- (9) The general manager may, in a reconsideration order, confirm, vary or rescind the section 51 order that is the subject of the reconsideration, and a reconsideration order that confirms or varies a section 51 order replaces the section 51 order.
- (10) Section 51 (1) to (6) applies to a reconsideration of a section 51 order.
- (11) The general manager must, in a reconsideration order given to the applicant,
- (a) set out the reasons for making the order, and
 - (b) when the order confirms or varies the actions of the section 51 order that is the subject of the reconsideration, set out the details of the action under the reconsideration order, 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.
- (12) A monetary penalty confirmed, varied or imposed by a reconsideration order must be paid within 30 days after the date on which the applicant receives the order or within a longer period that the general manager specifies in the order.
- (13) If the requirement to pay a monetary penalty under a section 51 order is rescinded by a reconsideration order and the monetary penalty under the section 51 order has been paid, the penalty must be refunded.

(14) If the amount of a monetary penalty imposed under a section 51 order is reduced by a reconsideration order and the monetary penalty under the section 51 order has been paid, the amount of the reduction must be refunded.

LIQUOR CONTROL AND LICENSING REGULATION B.C. REG. 241/2016

Prescribed grounds relating to reconsideration orders

152(1) In this section, "section 51 **order**" has the same meaning as in section 53.1 (1) of the Act.

(2) For the purposes of section 53.1 (3) of the Act, an application for a reconsideration of a section 51 order may be based on the following:

- (a) a failure to observe the rules of procedural fairness;
- (b) an error of law;
- (c) subject to section 53.1 (4) of the Act, new evidence.

The Licensee seeks Reconsideration on grounds of a failure to observe the rules of procedural fairness and error of law. These are both "prescribed grounds" within the meaning of section 53.1 of the *Act* and section 152(2) of the Regulation.

RELEVANT STATUTORY PROVISIONS – SEE APPENDIX

SUMMARY OF THE HEARING DELEGATE DECISION AND ORDER

In the Narrative of Events contained in the NOEA of July 2, 2018, the Liquor Inspector stated that the Branch received information in December 2017 that certain licensed establishments including the Licensee were purchasing a particular Scotch from a licensed retail store (LRS) contrary to the terms of the Licence pertaining to the purchase of liquor. Further, on January 18, 2018 a team of three inspectors attended the premises of the Licensee to conduct an inspection. They met with a representative of the Licensee and asked to see receipts confirming where the SMWS was purchased. They were informed by the representative that no receipts were available. The Inspectors then began to seize the bottles of SMWS which was tagged and removed. The bottles were accounted for in an Evidence Exhibit Log. Later, in response to a Notice to Produce, the Licensee provided records of having made purchases of the SMWS product between 2013 and 2018 from the same LRS.

The Liquor Inspector concluded the Licensee had contravened a term or condition of its Licence because it purchased liquor other than from the LDB or a designated outlet. As of January 18, 2018, there were 242 bottles of SMWS labelled liquor in the service area for sale. This was a significant volume of product purchased contrary to the terms and conditions of the Licence and enforcement action was recommended to address the non-compliance.

The Licensee sought review of the recommended enforcement action under section 51 of the *Act*. In its extensive reasons, the Hearing Delegate addressed several issues. The first issue was whether she had authority to consider whether the seizure of unlawful liquor was conducted with lawful authority. She concluded that she had no authority under Division 4 of Part 6 of the *Act* which deals with offences. She concluded, however, that she had 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* in order to determine whether a contravention had occurred. The Licensee does not dispute the conclusion that the Hearing Delegate could exercise this authority.

Following from this, the second issue considered by the Hearing Delegate was whether the search of the restaurant and subsequent seizure of the SMWS product was made with lawful authority. The Licensee argued that the evidence found as a result of the search and seizure must be excluded including the evidence of the seized bottles and the records sent to the branch in response to the Notice to Produce.

The Hearing Delegate provided reasons for her preliminary ruling that the Branch had full legal authority to conduct the seizure of SMWS product that took place on January 18, 2018. The Decision contains a detailed recitation of certain obligations of Licensees in the liquor licensing regime in this province. Included in this is the obligation to maintain a Liquor Register.

The Hearing Delegate had concluded in a preliminary ruling that the Branch had full legal authority to conduct a seizure on January 18, 2018 and so the documents the Licensee was seeking were not relevant. In respect of the arguments of the Licensee that the Branch as the regulating authority had moved from inspection into investigation and so was obliged to comply with the Canadian Charter of Rights and Freedoms ("*Charter*"), the Hearing Delegate concluded that the inspections and

investigations under the *Act* were, at all times, the exercise of a regulatory power. As such, there was no point in which the liquor inspectors crossed over into the conduct of a criminal investigation. The search and seizure by the liquor inspectors was conducted as part of a regulatory power and to ensure compliance with the rules governing the activities of the Licensee. It did not stray into the area of investigation so that *Charter* rights came into play requiring a search warrant and a *Charter* caution.

With respect to the reasonableness of the exercise of the liquor inspectors' powers, the Hearing Delegate finds the inclusion of the word "may" in section 45 of the *Act* meant that the general manager has a discretion as to when to seize liquor. In this case, the seizure occurred after the liquor inspectors were satisfied it could be conducted efficiently and effectively, and after the Licensee could not produce receipts to show that the product had been purchased lawfully. If a licensee is unable to provide proof of the lawful purchase of the liquor, the liquor inspectors may seize it. This was an exercise of administrative compliance and enforcement powers and did not require a search warrant. In respect of the *Charter*, the Hearing Delegate considered "charter values" and decided that the search and seizure did not infringe upon the reasonable expectation of privacy of the Licensee. Further, the fact that the Branch could have proceeded under section 57 of the *Act* to lay a charge under the *Offence Act* was not relevant. There was no evidence the Branch intended to proceed in this manner and the Licensee had a lower expectation of privacy under the liquor licensing regime.

The Hearing Delegate concluded that in the context of the administrative enforcement regime, the Licensee was not subject to "penal liability" such that a *Charter* caution was required prior to a search or seizure. Section 51 proceedings were designed to determine if a licensee had contravened the *Act*, the Regulation or the terms and conditions of its licence. The focus of this statutory scheme was the regulation of licensees and licensing with administrative penalties to enforce compliance. The finding of the contravention in this context was not "penal".

In respect of the remedies sought, the Hearing Delegate rejected the argument that she had jurisdiction to grant a *Charter* remedy on finding a breach of the Charter. Instead, she considered "Charter values" but would not exclude evidence in any event because of her finding that the actions of the liquor inspectors were lawful. Similarly, she would not make a declaration that the search and seizure were conducted without lawful

authority and in breach of the Licensee's *Charter* rights even if she was able to do so. As well, the further disclosure sought by the Licensee was not necessary in order to determine whether there was a contravention under the *Act* because of the finding that the search and seizure were conducted with lawful authority.

The Licensee also sought a declaration requiring the Branch to return the SMWS product on the basis that it was illicitly seized. The Hearing Delegate concluded she had no such authority. In summary, Licensee was found to have contravened the Act by purchasing product for several years outside of the terms of its Licence. The SMWS product which was seized had been served and sold in the restaurant. The Licensee did not advance a due diligence defence and the proposed penalty was appropriate given the magnitude of the contravention. The Hearing Delegate ordered the Licensee to pay a monetary penalty of \$3000 to the general manager and to post signs showing that a monetary penalty had been imposed.

SUBMISSIONS OF THE LICENSEE

The Licensee begins by submitting that the Decision of the Hearing Delegate was unreasonable and the product of a procedurally unfair process. Its request for document production prior to the hearing was unreasonably restricted. The position of the Branch Registrar that it only needed to produce documents sufficient to allow the Licensee to know and understand the allegations made against it, was at least a denial of natural justice. No distinction can be made between inculpatory and exculpatory evidence.

Instead, the Licensee was obliged to make a Freedom of Information (FOI) request, the result of which was heavily redacted. The FOI documents nevertheless showed that the Branch was engaged in an investigation of an offence with criminal consequences, was fully aware that the SWMS product was in the Licensee's premises, had rented a van filled with empty boxes for the express purpose of seizing alcohol as evidence of an ongoing investigation into the committal of an offence under the *Act*, and did so without a search warrant.

Next, the Hearing Delegate prejudged a fundamental issue being whether the liquor inspectors who searched and seized 242 bottles of SWMS product were acting with lawful authority. Neither section 42 or section 45 of the *Act* provided the liquor inspectors with authority to conduct a search and seizure. It was inappropriate of the Hearing Delegate to decide this fundamental issue at the outset of the proceedings without any evidence or submissions, which turned the subsequent hearing and the decision into a sham.

The third issue raised by the Licensee was the interpretation of section 45 of the *Act* made by the Hearing Delegate. The Licensee submits that seizure is only authorized first, if a liquor inspector finds liquor is possessed or kept contrary to the *Act* and second, immediately seizes it. Section 45 provides in part “the general manager or peace officer may immediately seize and remove” liquor found contrary to the *Act*. The evidence showed that the liquor inspectors knew SWMS product was being kept on the premises of the Licensee when a covert inspection was conducted on December 22, 2017, yet the product was not removed until 26 days later. In its ordinary and grammatical sense, “immediately” must mean occurring without delay. The Hearing Delegate decided that the words “may immediately seize” gave the liquor inspectors a discretion to act immediately or not and that they did so properly at a time which was efficient and effective for them and after it was established that the Licensee could not produce receipts to show the product had been purchased lawfully. This was plainly a wrong interpretation of the legislative requirement that the liquor inspectors act immediately when they find liquor possessed or stored contrary to the *Act*. As well, the inspectors did not “find” liquor on the day of the search and seizure as they knew of its existence and came prepared to seize it. In the circumstances, a search warrant pursuant to section 44 of the *Act* was required.

Next, the Licensee takes issue with the statement of the Hearing Delegate regarding the application of the *Charter* to the matter at hand. The Hearing Delegate stated, “I am a statutory decision-maker acting as a delegate of the general manager, I am not persuaded I have this jurisdiction.” Relying upon *R. v. Conway*, 2010 SCC 22, the Licensee submits that the Hearing Delegate was clearly wrong. Further, section 45 of the *BC Administrative Tribunals Act* addresses the issue of a statutory tribunal dealing with constitutional questions. Since this legislation was not incorporated into the *Act*, there is no express limitation on the powers of the Hearing Delegate to apply *Charter* principles.

Finally, the Licensee submits the contravention of several sections of the *Act* are serious enough to be treated as offences which may be punishable under the *Offence Act* on summary conviction with imprisonment, a fine or both. While the Branch ultimately did not pursue the Licensee or its principals under the *Offence Act*, it could have done so. Therefore, a search warrant and a *Charter* caution were required before interviewing one of the principals of the Licensee. The Licensee submits that the evidence establishes the Branch was investigating contraventions of section 8 of the *Act*. The fact that the Branch chose to proceed by way of a Contravention Notice was no bar to it proceeding by way of summary conviction as well. One of the principals was detained by the liquor inspectors. While such compulsion was acceptable in the case of a *bona fide* inspection, it was not expectable when the liquor inspectors had previously determined they were investigating an offence and for this purpose were relying on their inspection powers. The Licensee submits that the subjective intent of Inspector C was of little relevance because it was always the determination of the general manager or a regional manager as to whether to proceed by way of enforcement action, *Offence Act* information, or to take no further action.

By way of remedy, the Licensee seeks a variance of the order made under section 51 of the *Act* to confirm that it was deprived of relevant document production, that the Hearing Delegate pre-judged its decision and so was disqualified, that the Hearing Delegate had jurisdiction to and must apply the *Charter* as appropriate, that the liquor inspectors seize the SMWS product unlawfully and must return the same or in the alternative, the decision of the Hearing Delegate must be rescinded in its entirety.

ANALYSIS AND DECISION

I begin by addressing the question of whether the Hearing Delegate was empowered to apply the provisions of the *Charter*. I agree with the Licensee that the Hearing Delegate was competent to do so. As the Licensee argued, the Supreme Court of Canada decided this issue in *R. v. Conway, supra*. The Supreme Court in this decision noted that administrative tribunals are competent to apply provisions of the *Charter* unless their power is limited by statute. Section 45 of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45, provides that tribunals to which the legislation applies do not have jurisdiction over constitutional questions relating to the *Charter*. Section 1.1, however, provides that the *Administrative Tribunals Act* does not apply unless it is made applicable to a tribunal

or another body. This legislation has not been made applicable to proceedings under the *Act*. While the Hearing Delegate was a statutory decision-maker acting as a delegate of the general manager, there may be instances in this context that give rise to *Charter* issues.

This does not necessarily mean there were a *Charter* issues on the facts of this case. In *R. v. Conway, supra* Abella, J. noted that an administrative board might well be able to resolve the issues before it by the application of its statutory mandate. As well, the Hearing Delegate stated she was applying *Charter* values to the matter before her. While the Licensee questioned what was meant by this, the term was further articulated in *R. v. Conway, supra* at paragraph 46. Here Abella, J. referred to cases where it was concluded that “statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.” I will address the issue of whether the *Charter* had specific application on the facts of this case in due course.

One of the remedies sought by the Licensee is the return of SMWS product seized by the liquor Inspector. I agree with the Hearing Delegate that she did not have this authority. Her authority was to review the administrative actions taken by the general manager under Division 3 of Part 6 of the *Act*. The evidence surrounding the inspections taken by the liquor inspectors was for the purpose of determining whether they acted lawfully. If the Hearing Delegate was satisfied that they did not, the remedy was to vacate the proposed monetary penalty. The Licensee has provided no persuasive legal argument otherwise. I confirm this aspect of the decision of the Hearing Delegate.

The Licensee submits that the Branch improperly refused to provide further document disclosure before the hearing on May 2. As well, the Hearing Delegate prejudged fundamental issues about the authority of the liquor inspectors under section 45 of the *Act* and the case law on search and seizure and the application of the *Charter* before hearing evidence and argument on these issues. All of this resulted in procedural unfairness.

At the outset of the hearing, the Licensee presented argument in support of an adjournment application and an order for further document disclosure. The Licensee argued that section 42 of the *Act* did not provide search and seizure powers and these could only be obtained through a search warrant under section 44 of the *Act*. The Branch took the position that it had disclosed relevant Branch documents in respect of the allegations contained in the NOEA.

After deliberation, the Hearing Delegate denied the request for an adjournment on the basis that sections 42 and 45 of the *Act* provided authority to seize the liquor in question. As a result, case law on search and seizure and *Charter* remedies did not apply. A dispute over the lawful seizure and forfeiture of the liquor had to be taken under section 47 of the *Act* which was a different proceeding. The Hearing Delegate allowed the Licensee to make further argument about the authority of liquor inspectors under section 45 of the *Act* although that provision had not been referred to specifically in opening submissions.

In respect of the document disclosure issue, the Hearing Delegate set out in detail the history of requests by the Licensee and responses by the Branch leading up to the hearing. Included in this was a postponement of the hearing scheduled for February 6, 2019 so that the Licensee could complete a Freedom of Information (“FOI”) request.

The hearing proceeded on May 2, 2019 and two liquor inspectors were called to testify. The Branch was prepared to call the third liquor Inspector involved in the events in issue, but it appears the Licensee decided that this was unnecessary. One of the liquor inspectors testified about the events leading to the seizure of the liquor in question. The Licensee introduced a draft NOEA which proposed proceeding with contraventions under section 8 of the *Act*. Ultimately, the Branch decided to pursue enforcement action against the licensee for a breach of a term or condition of its Licence by purchasing liquor other than from the LDB or an authorized source.

As recorded by the Hearing Delegate, the Licensee made extensive argument about whether the search and seizure of liquor should have fallen under section 44 of the *Act* such that a search warrant was required prior to seizing the liquor in question. The Hearing Delegate noted that her powers of review arose under Part 3 of the *Act* dealing with administrative action by the branch and not under Part 4 dealing with offences.

It appears from the foregoing that the Licensee was given the relevant documents in his possession pertaining to the administrative action that was proposed in the NOEA. While the Licensee argued that further document disclosure would establish there was an ongoing and resource intensive investigation that led to express authorization and direction for the liquor inspectors to conduct a search and seizure without a warrant, the Hearing Delegate noted these facts were not in dispute. In view of this, it appears that the Licensee was in possession of the documents it needed to make its arguments about the application of section 44 of the *Act*. The Licensee also had an opportunity by way of its application for an adjournment and its final argument to fully explain the basis for its position that the Branch was obliged to proceed under section 44 of the *Act* instead of section 45. I do not find that the Hearing Delegate prejudged any of the material issues before her or denied the Licensee a fair hearing by refusing its adjournment request. I therefore dismiss this ground for reconsideration.

One of the main arguments of the Licensee concerning the exercise of seizure power under section 45 of the *Act* was that the inspectors did not “immediately” take custody of the product in question. Section 45 provides in part “If the general manager or a peace officer finds liquor that, in his or her opinion, is possessed or kept contrary to this *Act*... the general manager or peace officer may immediately seize and remove” the liquor (emphasis added.) The Licensee submits the finding by the Hearing Delegate that the liquor inspector had a discretion under section 45 of the *Act* to seize liquor immediately or later did not accord with normal rules of statutory interpretation. Instead, the Licensee submits the language requires the power to be exercised “without any delay, instantly” or not at all. Section 45 also requires that the liquor inspector “finds” the liquor prior to the seizure. In this case, the liquor inspector already knew of its existence and was prepared to haul it away in a rented trailer. The liquor inspector was first served in a glass of the SMWS product in December 2017, so the seizure should have taken place well before January 18, 2018 when it actually took place in order to comply with section 45 of the *Act*.

On the evidence as set out in the Decision of the Hearing Delegate, it appears that the seizure took place after the Licensee was given an opportunity to establish that it was in lawful possession of the liquor in question. While one of the inspectors agreed in cross-examination that he did not believe the Licensee would be able to establish legal possession to the SMWS product, an opportunity was given for it to do so prior to the

seizure taking place. This is in conformity with the Terms and Conditions contained in the Handbook. At page 14 the Handbook provides “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.” This provision of the Handbook is in keeping with the powers of the general manager set out in section 15 of the *Act*.

In my view, the possession of liquor contrary to the *Act* and contrary to the terms and conditions for the Licence which were contained in the Handbook was found at the point when the Licensee was unable to establish that the liquor was purchased lawfully. The seizure of the SMWS product took place immediately afterwards, and so there was no issue of timing in respect of section 45 of the *Act*. I find there was no error in the interpretation of this section of the *Act* and so I also dismiss this ground for reconsideration.

The Licensee submits the evidence shows the liquor inspectors had “crossed the Rubicon” from acting in an inspection capacity into acting as investigators for the purpose of laying charges under the *Offence Act*. This language is referred to in *R. v. Jarvis* [2002] 3 S.C.R. 757, where a taxpayer’s response in a mandatory tax audit was then used for purposes of pursuing a tax evasion charge against a taxpayer. The Court held that when the predominant purpose of the investigation turned penal, the taxpayer was entitled to *Charter* protection. The Licensee asserts that at all times the Branch was investigating *Offence Act* contraventions as those are set out under the *Act*. The fact that a contravention notice and a NOEA seeking an administrative penalty were later issued did not prevent the general manager from taking proceeding under the *Offence Act*. The two individuals who are officers, directors and agents of the Licensee were therefore exposed to individually been charged and prosecuted under section 8 of the *Act*.

The Licensee's argument in essence provides that whenever the general manager might proceed against a party by way of an offence as set out in section 57 of the *Act*, a search warrant and a *Charter* warning are always required. It is true that the general manager might proceed under the provisions of section 57 of the *Act* that reference the *Offence Act* based upon facts obtained in an inspection. While not referenced in argument by the Licensee, section 58 of the *Act* provides that an offence committed by a corporate licensee is also committed by an officer, director or agent of the corporation who authorizes, allows or acquiesces in the commission of the offence. There is, however, no evidence that the liquor inspectors "crossed the Rubicon" in order to investigate any of the corporate officers individually on the basis of their authorizing the actions of the Licensee. As noted by the Hearing Delegate, there was no evidence that charges were considered at any point against the Licensee or any of its officers under the *Offence Act* during the inspections conducted by the Branch. In the language of *Jarvis, supra* the predominant purpose of the investigation was always directed towards administrative breaches of the *Act* and against the Terms and Conditions applicable to the licensee as set out in the Handbook.

This is clearly demonstrated by the fact that only administrative penalty action was proposed by the branch. Even the draft NOEA referenced in the documents of the licensee proposed to apply only the administrative penalties which are set out in Schedule 2 of the Regulation. The draft NOEA proposed administrative penalty action under sections 8(2)(e) and 8(3) of the *Act* for both buying and selling unauthorized liquor. As well, the draft NOEA proposed an administrative sanction against the Licensee for drawing attention to a liquor inspector. This was related to actions taken by a representative of the Licensee during the seizure. Apparently, pictures were taken and posted on social media and the CBC attended and took video pictures of the inspectors. Page 33 of the Handbook provides, under Compliance and Enforcement, the term that the licensee must "Never draw attention to liquor inspectors inside your establishment. This can affect the inspectors' safety." While breaches of sections 8(2) and 8(3) are referenced as possible offences in section 57 of the *Act*, breaches of these sections of the *Act* are also subject to the administrative penalties set out in Schedule 2 of the Regulation. It was the Schedule 2 administrative penalties that the liquor inspector referenced in the draft NOEA.

The Licensee submits, however, that because the general manager has the discretion to proceed against individuals under the *Offence Act*, a *Charter* warning and search warrant are always required. Requiring a search warrant and a *Charter* warning because of a theoretical possibility of *Offence Act* proceedings in these circumstances would render sections 42 and 45 of the *Act* virtually meaningless. These arguments might have had some force in the event *Offence Act* proceedings had been taken against individual owners but not in the event of the administrative action that was taken here.

The Licensee acknowledges that it is in a highly-regulated industry and it has a reduced expectation of privacy in order to comply with the terms of its liquor licence. The general manager is authorized under section 15 of the *Act* to establish terms and conditions applicable to a licensee. The applicable terms and conditions are set out in detail in the Handbook. The general manager can and did proceed against the Licensee by way of administrative action pursuant to section 51(1) of the *Act* for a breach of the terms and conditions of Licence as set out in the Handbook. This is what was proposed in the NOEA dated July 2, 2018. As the Hearing Delegate noted, this was the relevant document for the purposes of the proceedings taken by the general manager. It did not propose any liability against the individual owners of the Licence, and they were not named personally in either the draft or the final NOEA. The Licensee in its capacity as Licensee was the only party in the proposed administrative action. There was no obligation on the Branch in these circumstances to provide a *Charter* caution or warning or to obtain a search warrant in its dealings with the Licensee.

I agree with the Hearing Delegate that the focus of the statutory scheme is regulatory, and the consequences of finding a breach of the *Act* are not “truly penal” as discussed in *R. v. Goodwin* [2015] 3 S.C.R. 250 at para. 45. This is reflected in the evidence as set out in the Decision of the Hearing Delegate which supports the finding that the proposed action against the Licensee was administrative and not penal. I therefore dismiss this ground for reconsideration.

DECISION

I find there is no basis to reconsider the substantive conclusion of the Hearing Delegate that the Licensee contravened a term and condition contained in the Handbook requiring it to buy liquor from the LDB or from a designated outlet. No defence of due diligence was offered. Therefore, under section 53.1(11) of the *Act*, I direct the Licensee to pay a monetary penalty of \$3000.00 to the general manager of the Liquor and Cannabis Regulation Branch on or before October 15, 2019 and to post signs satisfactory to the general manager showing that a monetary penalty has been imposed in a prominent location in the establishment of the Licensee as established by a Liquor and Cannabis Regulation Branch inspector or a police officer.

Original signed by

A. Paul Devine
General Manager's Delegate

Date: September 6, 2019

cc: Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Peter Mior, Regional Manager

APPENDIX

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

Unlawful sale and purchase of liquor

8 (1) In subsection (2), "**liquor**" includes ethyl alcohol.

(2) Except as provided under this Act or the Liquor Distribution Act, a person must not, personally or otherwise,

- (a) keep liquor for sale or sell liquor,
- (b) solicit, receive or take orders for the sale or purchase of liquor, or act as agent for its sale or purchase,
- (c) manufacture liquor,
- (d) operate a facility that provides goods or services to a person manufacturing wine or beer in the facility for consumption by the person or for consumption at no charge by other persons, or
- (e) purchase or, in consideration of the sale or transfer of property or for other consideration, take liquor from another person.

(3) A licensee or permittee must not sell or serve liquor except

- (a) liquor purchased by the licensee or permittee from the Liquor Distribution Branch,
- (b) liquor purchased or acquired by the licensee or permittee in prescribed circumstances or on prescribed conditions, or
- (c) liquor purchased by the licensee or permittee as authorized by the terms and conditions of the licensee's licence or of the permittee's permit.

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).

Inspections

42 (1) For the purposes of the administration or enforcement of this Act or the regulations, the general manager may

(a) require a licensee or permittee to produce records that are required under this Act or by the terms and conditions of a licence or permit to be kept by the licensee or permittee,

(b) require a person to produce records that may contain information relating to goods or liquor transported or received for transport in British Columbia,

(c) inspect one or more of the following:

(i) records referred to in paragraphs (a) and (b);

(ii) an establishment or event site and the operations carried on there;

(iii) a person's premises that are used for the storage of liquor or ethyl alcohol and the operations carried on there;

(iv) records found in an establishment, at an event site or on the premises referred to in subparagraph (iii), which records are associated with the operation of the establishment, event site or premises or are otherwise related to the inspection,

(d) require a licensee or permittee to provide information relating to the inspection, and

(e) require an employee or patron of, or a person retained by, a licensee or permittee to produce identification.

(2) The general manager may remove the records referred to in subsection (1) for the purposes of inspection or making copies or extracts.

(3) In conducting an inspection under subsection (1), the general manager

(a) may

(i) take samples of liquor for testing or analysis, or

(ii) inspect and remove for inspection, or for the purposes of testing and analysis, other things found in an establishment, at an event site or on the premises referred to in subsection

- (1) (c) (iii), which other things are associated with the operation of the establishment, event site or premises or are otherwise related to the inspection,
 - (b) must carry, and present on request, identification in a form the general manager establishes, and
 - (c) may request and receive the assistance of a peace officer.
- (4) If the general manager retains records, removes records or things or takes a liquor sample, the general manager must
- (a) give a receipt for the records or things removed or the liquor samples taken, and
 - (b) return the records or things removed within a reasonable time.

Licensee or permittee must cooperate

- 43 For the purposes of section 42, a licensee or permittee
- (a) must cooperate with the general manager by
 - (i) allowing the general manager to immediately enter and inspect an establishment or event site,
 - (ii) facilitating the inspection of a premises referred to in section 42 (1) (c) (iii), and
 - (iii) promptly producing and allowing inspection and removal of the records, liquor samples and things the general manager is entitled to inspect or remove under section 42, and
 - (b) must not obstruct the general manager or withhold, destroy, conceal or refuse to provide information or produce a record, liquor sample or other thing that is required by the general manager or is otherwise related to the inspection.

Search

44 (1) In this section, "justice" has the same meaning as in the Offence Act.

(2) A justice who is satisfied by information on oath in the prescribed form that there are reasonable grounds to believe that there is in a vehicle, a place or premises, including premises or a part of premises occupied solely as a private dwelling,

(a) any thing on or in respect of which an offence under this Act has been or is suspected to have been committed, or

(b) any thing that there is reasonable grounds to believe may provide evidence of the commission of the offence

may issue a warrant authorizing a person named in the warrant or a peace officer to search the vehicle, place or premises for that thing, and to seize and remove that thing.

(3) A search warrant issued under subsection (2) may be in the prescribed form.

(4) If a licensee, permittee or person referred to in section 42 refuses to produce a record referred to in that section, a justice, on being satisfied that an inspection of the record is necessary for the administration or enforcement of this Act or the regulations, may issue a warrant authorizing a person named in the warrant or a peace officer to enter the premises specified in the warrant and to seize the record.

(5) Despite subsection (2), if the conditions for obtaining a warrant exist and a peace officer has a reasonable belief that the delay necessary to obtain the warrant would result in the loss or destruction of evidence, the peace officer may, without a warrant,

(a) enter and search a vehicle, place or premises, other than a private dwelling, and

(b) seize and remove any thing that the peace officer has reasonable grounds to believe may provide evidence of the commission of an offence under this Act.

(6) A person must not

(a) obstruct or attempt to obstruct an entry or search by a peace officer under subsection (5), or

(b) refuse or fail to admit immediately a peace officer demanding entry under subsection (5).

Liquor kept contrary to Act

45 If the general manager or a peace officer finds liquor that, in his or her opinion, is possessed or kept contrary to this Act, the Liquor Distribution Act or the regulations under either of those Acts, the general manager or peace officer may immediately seize and remove

- (a) the liquor and the packages containing it, and
- (b) records related to the liquor.

Division 3 – Administrative Actions - 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.
- (10) A monetary penalty imposed by an order under subsection (9) must be paid within 30 days after the date on which the licensee receives the order or within a longer period that the general manager specifies in the order.

Division 4 – Offences

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.

Liquor Control and Licensing Regulation

Monetary penalties

150 The prescribed schedule of monetary penalties for the purposes of section 51 (2) (b) of the Act is set out in Schedule 2.

Suspensions

151(1) The prescribed schedule of licence suspensions for the purposes of section 51(2)(c) of the Act is set out in Schedule 2.

(2) If a licence is subject to more than one suspension, the suspensions apply consecutively.

Table

Item	Contravention	Monetary Penalty	Period of Suspension (Days)		
			First Contravention	Second Contravention	Subsequent Contraventions
18	Contravention of section 8(2)(e) of the Act [<i>unlawful purchase of liquor</i>]	\$7 500-\$10 000	10-15	20-30	30-60
19	Contravention of section 8 (3) of the Act [<i>selling or serving unauthorized liquor</i>]	\$7 500-\$10 000	10-15	20-30	30-60
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	\$1000-\$3000	1-3	3 - 6	6 - 9