

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

OCT 07 2019

FORM 66 (RULES 16-1(2) AND 21-5(14))

S1911287



No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between

FETS FINE FOODS LTD. dba FETS WHISKY KITCHEN

Petitioner

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA (LIQUOR AND CANNABIS
REGULATION BRANCH)

Respondents

Re: Judicial review of a reconsideration decision pursuant to s.53.1 of the *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19

PETITION TO THE COURT

ON NOTICE TO:

Liquor and Cannabis Regulation Branch
PO Box 9292 Stn Provt Govt
Victoria, BC V8W 9J8

The Attorney General of British Columbia
c/o Deputy Attorney General
Ministry of Attorney General
PO Box 9290 Stn Prov Govt
Victoria BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by

- the person named as petitioner in the style of proceedings above
 Fets Fine Foods Ltd. dba Fets Whisky Kitchen (the petitioner)

If you intend to respond to this petition, you or your lawyer must

- a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

- b) serve on the petitioner
 - i) 2 copies of the filed response to petition, and
 - ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to the petition within the time for response.

Time for response to the petition

A response to petition must be filed and served on the petitioner(s),

- a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- c) if you were served with the petition anywhere else, within 49 days after that service, or
- d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: Vancouver Law Courts, 800 Smithe Street, Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: Owen Bird Law Corporation P.O. Box 49130 Three Bentall Centre 2900-595 Burrard Street Vancouver, BC V7X 1J5 (Attention: Daniel H. Coles) Fax number address for service (if any) of the petitioner: N/A E-mail address for service of the petitioner: dcoles@owenbird.com
(3)	The name and office address of the petitioner's lawyer is: Daniel H. Coles Owen Bird Law Corporation P.O. Box 49130

	Three Bentall Centre 2900-595 Burrard Street Vancouver, BC V7X 1J5
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Part 1: ORDERS SOUGHT

1. An order quashing and setting aside the decision of the General Manager’s Delegate Mr. Paul Devine made September 6, 2019, Case No. REH18-003, a reconsideration pursuant to section 53.1 of the *Liquor Control and Licensing Act* (the “**Reconsideration Decision**”), and entering a stay of proceedings in its place.
2. A declaration that the Liquor Control and Cannabis Regulation Branch breached the petitioner’s, and its principals, rights under the *Charter*.
3. A declaration that the Liquor Control and Cannabis Regulation Branch conducted the within enforcement hearing in a procedurally unfair manner.
4. An order that the Liquor Control and Cannabis Regulation Branch provide to counsel for the petitioner unredacted copies of all materials provided to the petitioner by way of its *Freedom of Information* request, and any other relevant documents in its possession or control not disclosed to date.
5. An order that the liquor seized by the Liquor Control and Cannabis Regulation Branch on January 18, 2018 be returned to the principals of the petitioner Mr. Eric and Allura Fergie.
6. Costs.
7. Such other and further relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

OVERVIEW

1. The petitioner, Fets Fine Foods Ltd. dba Fets Whisky Kitchen has been in continuous operation since 1986 (the “**Licensee**” or “**Fets**”).

2. Fets operates a restaurant located at 1230 Commercial Drive in Vancouver under food primary licence #169939.
3. The respondent, the Liquor and Cannabis Regulation Branch (the “**Branch**”) regulates British Columbia's liquor industries and private retail non-medical cannabis industries, including restaurants, bars and pubs serving liquor.
4. The Branch employees liquor inspectors, which as designated special provincial constables under the *Police Act*, are peace officers.
5. Prior to the subject matter of the within judicial review proceeding, the Licensee did not have any compliance history as the term is defined in s. 149 of the *Liquor Control and Licensing Regulation*.
6. On January 18, 2018 the Branch conducted a warrantless search of the Licensee's premises and seized (the “**Search & Seizure**”) 242 bottles of Scotch Malt Whisky Society single malt whisky (“**SMWS product**”).
7. The Search & Seizure, which the Branch codenamed “Operation Malt Barely” was conducted by three liquor inspectors with the assistance of members of the Vancouver Police Department. The liquor inspectors rented a Uhaul van, and loaded it with empty cardboard boxes and a hand truck, for the express purpose of facilitating the Search & Seizure.
8. On June 6, 2019, following a two day hearing, the Branch issued a decision ordering the Licensee pay a monetary penalty in the sum of \$3,000 along with the posting of signage showing that a monetary penalty had been imposed (the “**Decision**”).
9. Fets sought a reconsideration of the Decision.
10. On September 6, 2019, following the receipt of written submissions by Fets, the Branch issued the Reconsideration Decision, wherein the Branch declined to vary or set aside the Decision.
11. The Reconsideration Decision replaces the Decision.

12. For the reasons set out below, Fets says that it has been denied some of the most basic aspects of procedural fairness, and that the Reconsideration Decision is in error, unreasonable at law, and cannot be permitted to stand.
13. The Licensee requests that this court quash and set aside the Reconsideration Decision, inserting its own decision in its place, and issuing an order directing the Branch to return to the principals of the Licensee the unlawfully seized SMWS product.

FACTS

14. On or about December 7, 2017 the Branch received an anonymous tip that certain food primary and liquor primary licensees were selling SMWS product.
15. On receipt of this tip the Branch began an investigation into the Licensee's compliance with the *Liquor Control and Licencing Act*, the *Regulation* and its terms of licence (the "**Investigation**").
16. SMWS product is not available for purchase through the British Columbia Liquor Distribution Branch (the "**LDB**") stores or warehouses. It is only available for purchase in British Columbia through certain licensed retail stores.
17. Hospitality licensees in British Columbia, subject to certain exceptions that are not relevant to the within judicial review, are only permitted to buy alcohol from the LDB (e.g. government liquor stores), not directly from other licensees (e.g. private liquor stores).
18. So although SMWS product is lawfully imported into British Columbia, taxed, and sold to members of the public at certain private liquor stores, licensees are not permitted to purchase it for sale at their bars or restaurants.
19. On December 8, 2017, in furtherance of the Investigation, the Branch contacted an individual within the LDB who confirmed that it had no records of the Licensee ever purchasing SMWS product through its warehouse.

20. On December 22, 2017, in furtherance of its investigation, the Branch directed two liquor inspectors to conduct a covert inspection of the Licensee for the express purpose of determining whether or not it stocked for the purpose of sale SMWS product.
21. The liquor inspectors found SWMS product for sale at Fets and purchased an example of the same. The inspectors duly recorded the result of their covert inspection in their notes and reported to their superior. The liquor inspectors made no attempt to immediately seize the SWMS product.
22. By no later than December 22, 2017 the Branch knew that the Licensee was stocking for the purchase of sale SMWS product and that it could not produce receipts from the LDB indicating it had purchased the same lawfully.
23. Between January 12, 2018 and January 17, 2018 various levels of management within the Branch exchanged emails, at least one briefing note, and an “operational plan” with respect to the Investigation that was by this point labelled “OP Malt Barley.”
24. On January 18, 2018 the Search & Seizure began at approximately 10:00 am (one hour before the Licensee was permitted to sell alcohol). The Search & Seizure continued for approximately five hours until shortly before 3:00 pm.
25. The Search & Seizure involved:
 - a) liquor inspectors searching places not open to patrons (e.g. behind the service bar and climbing ladders) and doing the same during the “lunch rush”;
 - b) the conscription of evidence from Ms. Allura Fergie, one of the principals of Fets, about the substance and merits of the Investigation; and
 - c) the presence of police officers
26. The Search & Seizure did not involve:
 - a) the Branch obtaining a search warrant in accordance with the *Act*; or

- b) the Branch providing Ms. Allura Fergie or her staff with a *Charter* caution, or advising her that she was not required to speak with the liquor inspectors conducting the Search & Seizure.
27. Ultimately the liquor inspectors conducting the Search & Seizure found and seized 242 bottles of SMWS product. The Licensee paid approximately \$40,000 for the seized SMWS product.
28. Fets understands the seized product remains intact at a Branch or LDB warehouse.
29. On the day of the Search & Seizure the Branch conducted similar warrantless searches and seizures at other licensed establishments within the province that stocked and sold SMWS product.

POST SEARCH & SEIZURE CONDUCT

30. On January 23, 2018 and again on February 1, 2018 the Branch delivered to the Licensee contravention notices asserting the following contraventions:
- a) Unlawful purchase of liquor in contraction of (s.8(2)(e) of the *Act*;
 - b) Selling or serving unauthorized liquor in contravention of (s.8(3)) of the *Act*; and
 - c) Draw attention to a liquor inspector in contravention of the standard terms and conditions of Fets' licence.
- (collectively the "**Contravention Notice**")
31. On February 1, 2018 the Branch also delivered to Fets a Notice to Produce made pursuant to s.42 of the *Act* (the "**Notice to Produce**"). The Notice to Produce required that Fets produce to the Branch, *inter alia*, receipts from its purchase of the SMWS product, liquor register entries and prices lists.
32. On or about February 15, 2018, in response to the Notice to Produce, Fets produced to the Branch a copy of its liquor registry as well as receipts for purchase of SWMS product by its principal Mr. Eric Fergie

33. On July 2, 2018 the Branch issued a Notice of Enforcement Act indicating that the general manager of the Branch was pursuing enforcement action against Fets for allegedly purchasing liquor other than from the LDB or other designated outlet in contravention of the terms and conditions of its licence (the “**Notice of Enforcement**”).
34. On September 24, 2018 the Branch conducted the first pre-hearing conference conducted in the within enforcement proceeding. The Licensee’s principal Mr. Eric Fergie attended on behalf of Fets. On this date a February 6, 2019 enforcement hearing date was fixed.
35. On November 11, 2018 Mr. Fergie wrote to the Branch providing a particularized list of the documents Fets expected to receive in the Branch’s disclosure.
36. On November 16, 2018 the Branch provided to Fets its document disclosure.
37. On November 21, 2018 the Branch confirmed its position, which has since been confirmed by the Decision maker and the Reconsider Decision maker, that the November 11, 2018 disclosure is complete as it allowed the Licensee to “know and understand the allegation that Branch has made with respect to the alleged contravention.” The Branch Registrar recommended that Mr. Fergie pursue a *Freedom of Information* request if he required further document production.
38. On December 28, 2018 Fets advised the Branch Registrar that its *Freedom of Information* request had been delayed.
39. On January 17, 2019 the enforcement hearing was re-scheduled to May 3, 2019
40. On March 26, 2019 a second pre-hearing conference was conducted. At this hearing Fets was represented by counsel. Despite counsel for Fets expressly advising the Branch that it intended to pursue issues related to statutory authority and abuse of process at the hearing, the Branch refused to provide to Fets document disclosure on these important issues. The Branch Registrar confirmed that Fets was at liberty to pursue its document disclosure request for before the Decision maker.
41. The Branch conducted the enforcement hearing over two days: May 2 and 7, 2019 (the “**Enforcement Hearing**”).

42. The Branch rendered the Decision on June 6, 2019.
43. On July 4, 2019 Fets applied for a reconsideration of the Decision (the “**Reconsideration Hearing**”)
44. The Reconsideration Decision proceeded by way of written submissions only. Fets is unaware of what, if any, submissions the Branch made in this process.
45. The Reconsideration Decision was issued on September 6, 2019.

Part 3: LEGAL BASIS

OVERVIEW

46. This petition is brought pursuant to the *Judicial Review Procedure Act*.
47. The *Administrative Tribunals Act* does not apply to decisions of the general manager of the Liquor Control and Cannabis Regulation Branch.
48. The Reconsideration Decision was a review on the record. It was not a hearing *de novo*.
49. The Reconsideration Decision was the product of a series of errors, some substantive, some procedural, which deprived the petitioner of natural justice and rendered the Reconsideration Decision unreasonable at law.
50. Additionally, the Reconsideration Decision fails to meaningfully engage with and respond to written materials advanced by the Licensee in support of its application for reconsideration. The Reconsideration Decision does not provided intelligible reasons adequately supported by the Act or relevant authorities.
51. The Licensee’s *primary* grounds for judicial review can be summarized as follows:
 - a) The Licensee was, and continues to be, deprived of access to relevant documents necessary for it to fairly and fully put its case forward. As a result of the Licensee’s *Freedom of Information and Protection of Privacy Act* request, it was able to put before the Decision Maker a cache of heavily redacted documents that are clearly relevant to the key issues in dispute such as whether or not the liquor

inspectors attended its premises with an intention/direction to search for and seize SMWS product in pursuit of an investigation into an offence under the *Act*. The Reconsideration Decision maker was in error for failing to understand, analyze and correct this error of procedural fairness.

- b) The Decision Maker prejudged the entirety of the Licensee's case by deciding that the liquor inspectors had authority pursuant to s.45 of the *Liquor Control and Licensing Act*, SBC 2015, c 19 (the "*Act*") to seize the SMWS product, without hearing any evidence or submissions on the issue. The Decision Maker made this decision at the outset of the two day hearing, rendering the remainder of the hearing process a mere sham. The Decision Maker quite literally pre-judged the case. There can be no clearer deprivation of procedural fairness. The Reconsideration Decision maker failed to meaningfully engage with this issue or consider any of the relevant authorities on procedural fairness in the administrative law context.
- c) The Decision Maker failed to perform an intelligible interpretation of s.45 of the *Act*, and went on to interpret the word "immediately" in that section to mean at any time the General Manager "was confident that the seizure could be conducted efficiently and effectively." This is plainly an impermissible re-writing of the *Act*. Under no conceivable rubric for statutory interpretation can "immediately" be read to mean at any time. The Reconsideration Decision maker did not correct this impermissible re-writing of the *Act*.
- d) The Reconsideration Decision appears to confirm that the Decision maker was competent to apply the *Charter*, while simultaneously confirming that the Decision maker did not have authority to grant *Charter* remedies (e.g. the return of the SMWS product). This confused decision making and articulation of the authority of the Decision Maker requires correction and clarification on judicial review. The Licensee submits that the Decision Maker was competent to apply the *Charter*, including *Charter* remedies, which in this instance requires the return of unlawfully seized goods.

- e) The Reconsideration Decision confirms that the *Charter* did not apply to the Search & Seizure and that there was no obligation by the Branch to obtain a search warrant before conducting the Search & Seizure. These findings are unsupported errors of law and are unreasonable.
 - f) Taken as a whole, the investigation, planning and execution of the Search & Seizure was abusive and an attempt to circumvent the terms of the *Act*, the Branch's own practices and procedures, and judicial oversight.
52. The petitioner seeks the general remedy of *certiorari* in response to the abusive, high handed and coercive behaviour of the Branch that was sanctioned and reinforced by the Decision maker and Reconsideration Maker.

SPECIFIC GROUNDS FOR JUDICIAL REVIEW

Document Disclosure

53. The Licensee, throughout the enforcement process, repeatedly requested that the Branch make fair and fulsome disclosure of documents in its possession and control that are relevant to the issues at the very heart of the enforcement action: namely statutory authority and abuse of process.
54. Those requests were all denied, and the Branch Registrar invited Fets to make a request under the *Freedom of Information and Protection of Privacy Act* ("FOI") to obtain copies of the documents it requested. It is fortunate that Fets did so.
55. Fets' FOI yielded a series of heavily redacted documents that confirm the existence of an internal LDB briefing note and various emails setting out the particulars, approvals, and planning considered by the LDB in advance of the Search and Seizure (the "**FOI Documents**").
56. Fets drew the FOI Documents to the attention of the decision makers at each of the Enforcement Hearing and again during the Reconsideration Hearing, evidencing the existence of documents relevant to the very issues being decided. Each time the decision

maker declined to order the production of documents, or find that the Branch's refusal to do so was a breach of procedural fairness.

57. The significance of the breach of natural justice and procedural fairness complained of is confirmed in the Decision and the Reconsideration Decision where the respective decision makers each confirm at various intervals that there is "no evidence" that *Offence Act* charges were being considered by the Branch, or that the Branch attended Fets on the day of the Search & Seizure with the intention to seize the SWMS product.
58. No evidence of these intentions exists only because the Branch, the Decision maker and the Reconsiderer Decision maker have refused to provide it.
59. The circumstances of this matter require that the Branch proceed in a transparent and accountable manner which includes fulsome document disclosure. It is an absurdity that the Branch Registrar's recommendation that Fets pursue document production through a separate branch of government, rather than through first-party disclosure, was countenanced by the Decision maker and again in the Reconsideration Decision.
60. It is patently unfair to refuse to disclose relevant documents to a licensee, and then expressly rely on the lack of such documents as a basis to deny the licensee the relief it seeks.
61. The Branch's refusal to disclose relevant documents is in breach of the rules of natural justice and procedural fairness and its own hearing rules.

Pre-judgment of fundamental issue

62. The Licensee was entitled to a hearing before an impartial decision maker who approached the Enforcement Hearing with an open mind. Fets was further entitled to have the Reconsideration Hearing conducted by an impartial decision maker who had a mind open to varying or rescinding the Decision.
63. The Licensee was deprived of these fundamental pillars of natural justice, as more fully particularized below.

64. One of the focal points of the Licensee's submissions before the Decision maker was whether or not the liquor inspectors who searched for and seized 242 bottles of SWMS product were acting with lawful authority. More specifically, whether sections 42 and 45 of the *Act* provided the appropriate authority in the circumstances.

65. Unfortunately, at the very outset of the Enforcement Hearing, in response to Fets' limited request for an adjournment until sufficient document disclosure was made (as described above), the Decision maker in brief oral reasons decided that:

- a. there is authority to seize liquor under section 45 of the *Act*; and
- b. the case law on search and seizure and *Charter* remedies do not apply.

66. The Decision maker confirmed her pre-judgment of these issues as follows:

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.

And later

... The Licensee made no argument about section 45 in its written submission on its adjournment request and further document disclosure.

67. The Licensee did not make argument on the proper interpretation of that section of the *Act* because an adjournment request was not the appropriate juncture in the hearing to advance argument on this issue.

68. Neither the Licensee, nor the advocate for the Branch, requested that the Decision maker decide these fundamental issues at the outset of the hearing before evidence had been called or submissions made.

69. The Decision maker literally pre-judged the entirety of the Enforcement Hearing, rendering the two days of hearing time that would follow her decision a sham, and

depriving the Licensee of a fair hearing, on the merits, by an impartial and open-minded decision maker. The significant of this breach of natural justice cannot be overstated.

70. Later in the Decision the Decision maker described the onus she placed on the Licensee as being to “change [her] initial ruling.” This is not an evidentiary or legal standard known to administrative law. The Licensee at an enforcement hearing should not be placed in the position of having to change the mind of a decision maker, who prematurely decided the case against it.
71. The Decision is the product of a clear case of pre-judgment. The Decision maker decided the two issues at the very heart of the petitioner’s case, without hearing any submissions on them. These breaches of the most basic aspects of natural justice, to be heard and to have a case decided by a decision maker with an open mind, were denied.
72. The Reconsideration Decision fails to meaningful engage with this issue. It does not provide adequate reasons for dismissing this ground of reconsideration. It is unreasonable and compounds the procedural unfairness the Licensee experienced before the Decision maker rather than correcting it.

Interpretation of s.45 of the Act.

73. As mentioned above, the Licensee’s primary submission is that the Search & Seizure was conducted without statutory authority, making the liquor inspector’s conduct both unreasonable and unlawful.
74. Indeed, the Licensee asserts that the Branch deliberately attempted to circumvent the search warrant provisions of the *Act*, thereby avoiding judicial scrutiny of its actions and depriving Fets of the benefits of the safeguards provided by such a process.

75. The Decision maker held that s.45 of the *Act*, set out below, contained the necessary authority for the liquor inspectors to search for and seize the SWMS product.

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.

(emphasis added)

76. For a liquor inspector to rely on s.45 of the *Act* as authority to seize and remove liquor he or she must 1) “find” it and 2) “immediately” seize and remove it.
77. On the day of the Search & Seizure the liquor inspectors did not “find” the SMWS product, they were aware of its existence since no later than December 22, 2017.
78. *Black's Law Dictionary*, 9th Ed. Defines “immediately” as “occurring without delay; instant”.
79. It is plainly wrong to interpret the legislative requirement that liquor inspectors act “immediately” when they find liquor possessed or stored contrary to the *Act*, to mean at some other time (days and weeks later) when it would be efficient and effective to do so.
80. In this case the liquor inspectors knew by no later than December 22, 2017 (the date of the covert inspection) that SMWS product was being possessed or stored contrary to the *Act*, yet they did not seize the liquor until January 18, 2018 (26 days later).
81. “Immediately” cannot mean 26 days later. Such an interpretation is absurd and completely unreasonable.

82. The Reconsideration Decision, without directly commenting on the correctness of the interpretation and application of s.45 of the *Act* in the Decision, introduces a new line of reasoning in support of the Decision.
83. The Reconsideration Decision holds that because the liquor inspectors during the Search & Seizure provided the representative of Fets the opportunity to establish that it was in lawful possession of the SMWS product, and Fets was unable to do so, the Branch seized the SMWS product immediately after this brief interaction.
84. Respectfully, this analysis completely ignores the context of the Search & Seizure, the information the Branch had obtained about the SMWS product to date by way of the Investigation, and the enforcement scheme contemplated by the *Act*.
85. The Branch knew, from speaking with the LDB, that the Licensee would be unable to produce receipts showing that it had lawfully purchased the SMWS product. The mere fact that a liquor inspector asked this one question (knowing full well the answer) cannot cloak an unlawful and warrantless search with legitimacy. To do so would render the search warrant provision of the *Act* meaningless, and encourage similar actions by liquor inspectors.
86. The pained attempts by both the Decision maker, and the Reconsideration Decision maker to awkwardly shoehorn the Branch's conduct into s.45 of the *Act* only serves to highlight why in the circumstances a search warrant obtained pursuant to s.44 of the *Act* was the only lawful investigative step open to the Branch.
87. The Reconsideration Decision fails to perform a meaningful analysis of the *Act* and the Decision itself. It is unreasonable and must be set aside on that basis.

88. The legislature, in drafting the “new” *Liquor Control and Licensing Act*, determined that the contravention of certain sections of the *Act* were serious enough to be treated as offences, punishable under the *Offence Act* on summary conviction, to a term of imprisonment, a fine or both. There are 25 such sections, including s. 8, being a section identified on the Contravention Notice.
89. To assist liquor inspectors in seizing things that are themselves an offence under the *Act*, or may provide evidence of the commission of an offence, the *Act* contains a provision for liquor inspectors to obtain search warrants.
90. Read as a whole, the *Act* treats the investigation, prosecution, and penalizing of offences differently than other mere contraventions of the *Act*.
91. Having created a distinct regime for the investigation and prosecution of offences, the general manager’s delegates conducting enforcement hearings, or reconsideration hearings, must respect this legislative choice along with the related powers and responsibilities it bestows on liquor inspectors. The Licensee says the Reconsideration Decision maker failed to do so.
92. Although ultimately the Branch did not pursue the Licensee and its principals under the *Offence Act*, the Licensee says that is not relevant to determining the lawfulness of the Branch’s failure to provide Ms. Allura Fergie with a *Charter* caution when she was detained and interviewed by liquor inspectors during the Search & Seizure.
93. The Licensee says the Reconsideration Decision maker has fallen into error, like the Decision maker, by engaging in an *ex post facto* analysis of the jeopardy that the Licensee and its principals ultimately faced rather than the criminal jeopardy the Licensee and its principals were actually facing at the time of the Search & Seizure.

94. There is no evidence that the liquor inspectors advised Ms. Fergie that the Branch would not be laying an *Offence Act* information following the Search & Seizure. It is irrelevant to a *Charter* analysis that months later the branch indicated it wished to proceed by way of administrative enforcement action.
95. The Licensee submits that it cannot be correct that liquor inspectors are permitted to conscript evidence from licensees when they are being investigated for offences with complete disregard for the *Charter* - so long as the Branch at some later date decides not to proceed with an *Offence Act* prosecution.
96. The purpose of *Charter* rights, namely s. 8 rights to be free from unreasonable (warrantless) searches and seizure, and s. 10 rights to be informed promptly upon detention of the reason for the detention and to be informed of the right to retain and instruct counsel, is to prevent unjustified searches or other state instructions on liberty before they happen.
97. Section 10 rights permit an accused person to make an informed decision about their jeopardy and whether to contact a lawyer. When an individual is being investigated for an offence, and has been detained and questioned about that offence, they need to be provided with their rights so they understand 1) they do not need to speak with the inspectors 2) they are facing penal consequences 3) they can speak with counsel.
98. The Compliance and Enforcement Reference Manual (Last Update April 2014) at Section 8 "Gathering Evidence" confirms that liquor inspectors cannot compel an individual to answer questions when interviewing licensees, staff and witnesses.

99. The liquor inspectors conducting the Search & Seizure did not advise Ms. Allura Fergie that she did not have to speak with them. Had any one of the inspectors advised her of her s.10 *Charter* rights she would have known this.
100. The structure of the *Act*, and the evidence admitted at the Enforcement Hearing, is that at the time of the Search & Seizure, and at the time of making the written s.42 demand for document production, the Branch was investigating an offence under the *Act* for which the Fergies could be sent to jail.
101. Whether this offence is best characterized as “regulatory” or “quasi-criminal” is of limited utility when determining the application of *Charter* rights; the penal consequences were real, and at all material times available to the Branch to pursue. A person who is exposed to a restriction of their liberty by way of imprisonment is in no less jeopardy because he or she is being punished for the commission of a regulatory offence as opposed to a criminal or quasi-criminal offence.
102. Licensees in this province can and do contravene the *Act*, the *Regulation* and their respective terms of licence in a variety of ways. For most of these contraventions the Branch’s course of action is limited to the s.51 enforcement process and the fines and licence suspensions identified in the *Regulation*. However the investigation and subsequent prosecution of 25 contraventions of the *Act*, which are offences, must be handled differently and in accordance with the *Charter*. The Reconsideration Decision is in error for failing to rescind the Decision on this basis, and rebuke the liquor inspectors for failing to conduct themselves lawfully in accordance with the *Act* and the *Charter*.

BRANCH'S CONDUCT ABUSIVE

103. The Branch's conduct to date, taken as a whole, has been abusive. The Licensee submits that it would be appropriate for this court to rebuke and sanction the Branch to distance itself from the Branch's conduct to date.

104. The Licensee identifies the following conduct as abusive:

- a) The Branch, having completed its investigation into the Licensee by December, 2017, ought to have obtained a search warrant to conduct the Search & Seizure. It did not, for reasons unexplained. This court must not permit the Branch to circumvent the *Act* through *ex post facto* explanations of its conduct or other reasoning that places form over substance. It must require adherence to the *Act* and the safeguards to licensees contained therein.
- b) Through the FOI process the Licensee is aware of a trove of documents that will set out and explain the Branch's decision making, including "intention" which is a concept both the Decision maker and the Reconsideration Decision maker rely on heavily. In the circumstances the Reconsideration Decision, and the enforcement process itself, cannot be permitted to stand until the Branch discloses these documents;
- c) The Branch has abused its s.42 inspection powers. Having already completed an investigation in December, 2017, and the Search & Seizure on January 18, 2018, it was unlawful for the Branch to initiate a s.42 demand on February 1, 2018 to conscript document production. It is plain that by February, 2018 the Branch was not inspecting the Licensee for compliance with the *Act*, rather it was gathering evidence in support of a prosecution, administrative or otherwise. This, and other

steps taken by the Branch violate the “inspection” vs. “investigation” dichotomy confirmed by the Supreme Court of Canada in *R. v. Jarvis* and other cases.

PARTICULAR LEGAL DOCTRINES TO BE ADVANCED AT THE HEARING OF THE WITHIN JUDICIAL REVIEW

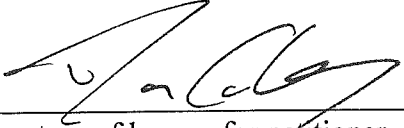
105. Natural justice and procedural fairness.
106. Law of Reasonableness.
107. Doctrine of reasonable expectations.
108. *Charter* jurisprudence.
109. Duties applicable to administrative decision makers with respect to impartiality, prejudice and open-mind of decision makers.
110. Sufficiency of administrative reasons.
111. Fettered decision making.
112. Such further and other doctrines, authorities and legal principles as the Licensee shall advised in advance of the hearing of the within petition.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of M. Yawney, made October 7, 2019 [“Record Affidavit”].

The petitioner estimates that the hearing of the petition will take two days.

Date: October 7, 2019



Signature of lawyer for petitioner
Daniel H. Coles

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this petition

with the following variations and additional terms:

Date: _____

Signature of Judge Master