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From: Daniel H. Coles

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July 4, 2019

VIA FACSIMILE

Liquor and Cannabis Regulation Branch
400 – 645 Tye Road
Victoria, BC V8W 9J8

Dear Sirs/Mesdames:

**Re: Application for Reconsideration Form
Case No. EH18-003**

We are counsel for the licensee Fets Fine Foods Ltd. dba Fets Whisky Kitchen (“FETS”) who was the licensee in case EH18-003 dated June 6, 2019. Enclosed is Liquor and Cannabis Regulation Form LCRB126 – *Application for Reconsideration Form*, duly signed by Mr. Eric Fergie a director and officer of FETS. The credit card information of the writer’s law firm appears at the base of the enclosed form as indicated under Part 5.

According to Mr. Raymond Tetzl’s penalty letter dated June 13, 2019, the monetary penalty at issue in the Section 51 Order under reconsideration is payable by July 8, 2019. In the circumstances we would appreciate your office promptly confirming pursuant to Section 53.1(7) of the *Act* that the general manager has accepted the enclosed application for reconsideration and that the action specified in the order, namely the payment of a monetary penalty and the posting of signs, are stayed until the general manager makes a reconsideration order.

Should you have any questions or concerns with respect to the forgoing or the enclosed, please contact the writer directly. We look forward to hearing from you.

Yours truly,

OWEN BIRD LAW CORPORATION


Daniel H. Coles

DHC/km
Encl.
cc. Clients

{01325302;1}



Liquor and Cannabis Regulation Branch
 400-645 Tyee Road, Victoria, BC V9A 6X5
 Mail: PO Box 9292 Stn Provincial Govt, Victoria, BC V8W 9J8
 Phone: 1 866 209-2111 Fax: 250-952-7066

APPLICATION FOR RECONSIDERATION FORM

Liquor and Cannabis Regulation Form LCRB126

INSTRUCTIONS:

Complete all applicable fields then submit with payment as outlined in Part 7 of this application form. You may complete this form online, then print. If you have any questions about this application, call the Liquor and Cannabis Regulation Branch (LCRB) toll-free at: 1 866 209-2111.

Part 1: Applicant Information

Applicant for reconsideration:

Applicant can be a licensee, deemed licensee, former licensee, permittee, deemed permittee, or former permittee

Full legal name of individual, corporation or other entity against whom the order was made

Licence Number:

Address for Service:

Street

City

Province

Postal Code

E-mail: Tel:

Order (Under Section 51(9) of the Act) for which reconsideration is sought:

Case No. (see order):

The applicant must submit their reconsideration application 30 days after the applicant received the order for which reconsideration is sought (see section 199 of the Liquor Control and Licensing Regulation (LCLR) for rules regarding how to determine when an order was received).

Part 2: Request for Extension of Time

To be completed only if more than 30 days have passed since the applicant received the order for which reconsideration is sought. Identify below the special circumstance that prevented the applicant from meeting the deadline.

Note: The general manager has the authority to deny the extension of time request.

Part 3: Prescribed Grounds for Reconsideration

As specified in section 152 of the LCLR, there are three prescribed grounds for reconsideration of an order made under section 51(9) of the Act:

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

Note: Reconsideration is not an opportunity to re-argue the case. These are the only reasons that a decision may be reconsidered.

Part 4: Applicant's Submission

Please provide a detailed written submission which clearly indicates the way in which one or more of the prescribed grounds is/are applicable. If there is not enough room in the space provided below you may attach the written submission to your application.

Note: Be thorough in your argument as reconsideration of the order is generally based on your written submission and supporting evidence only. The general manager (or his or her delegate) may, at his or her discretion, hold an oral hearing; however, you should not anticipate that an oral hearing will be held.

SEE ATTACHED "SCHEDULE A"

Part 5: Fee Payment

The reconsideration application fee is \$500.00 and is refundable only if the enforcement order is rescinded.


In accordance with Payment Card Industry Standards, the branch is no longer able to accept credit card information via email.

Payment is by (check (X) one):

- Cheque, payable to Minister of Finance (if cheque is returned as non-sufficient funds (NSF), a \$30 fee will be charged. If your cheque is NSF and the application fee is not paid in full before the 30 day deadline, your application may be terminated)
- Money order, payable to Minister of Finance
- Credit card: VISA MasterCard AMEX
 - I am submitting my application by email and I will call with my credit card information. I will call Victoria Head Office at 250-952-5787 or 1-866-209-2111 and understand that no action can proceed with my application until the application fee is paid in full.
 - I am submitting my application by fax or mail and have given my credit information in the space provided at the bottom of the page.

Part 6: Signature

Section 57(1)(c) of the *Liquor Control and Licensing Act* states: "A person commits an offence if the person (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". As the licensee or authorized signatory of the licensee, I understand and affirm that all of the information provided is true and complete.

Signature:  _____
Authorized signatory of the licensee

Name: Position: Date:

(last / first / middle) (if not an individual) (Day/Month/Year)

Note: An agent, lawyer or third party operator may not sign the declaration on behalf of the licensee.

This form should be signed by an individual with the authority to bind the applicant. The Branch relies on the licensee to ensure that the individual who signs this form is authorized to do so. Typically, an appropriate individual will be as follows:

- If the licensee is an individual or sole proprietor, the individual himself/herself
- If the licensee is a corporation, a duly authorized signatory who will usually be an officer or, in some cases, a director
- If the licensee is a general partnership, one of the partners
- If the licensee is a limited partnership, the general partner of the partnership
- If the licensee is a society, then a director or a senior manager (as defined in the *Societies Act*)

If an authorized signatory has completed the *Add, Change or Remove Licensee Representative* form (LCLB101) and they have specifically permitted a licensee representative to sign this form on the licensee's behalf, the branch will accept the licensee representative's signature.

Part 7: What Happens Next

1. Application reviewed for completeness/timeliness (applicant form, fee, date received).
2. The general manager (or his or her delegate) may issue stay of penalty, if required to provide time to adequately make a decision on rejection or acceptance of an application.
3. The general manager (or his or her delegate) will determine whether the application satisfied the requirements of section 53.1 (5) of the LCLA. If it does not, the application cannot be accepted.
4. The applicant will received written notice of whether the application was accepted or rejected.

If the application is accepted, then the following will happen:

5. If the general manager (or his or her delegate) determines that an oral hearing is required, the applicant will be notified of the hearing date, time and location.
6. The general manager (or his or her delegate) will, in accordance with section 53.1(9) of the LCLA, confirm, vary or rescind the order, and will prepare a reconsideration order that meets the requirements of section 53.1(11) of the LCLA.
7. The applicant will receive a copy of the reconsideration order.

Note: The applicant's complete application package must contain this application form with responses in all the applicable fields, all the required documentation and the full fee.


The information requested on this form is collected by the Liquor and Cannabis Regulation Branch under Section 26 (a), (b), and (c) of the *Freedom of Information and Protection of Privacy Act* and will be used for the purpose of liquor licensing and compliance and enforcement matters in accordance with the *Liquor Control and Licensing Act*. Should you have any questions about the collection, use, or disclosure of personal information, please contact the Freedom of Information Officer at PO Box 9292 STN PROV GVT, Victoria, BC, V8W 9J8 or by phone toll free at 1-866-209-2111.

Credit Card Information (To be submitted by fax or mail only)

Name of cardholder (as it appears on card):

Credit card number: Expiry date: /

(Month) (Year)

Signature:  _____

“SCHEDULE A”

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

Case: EH18-003

Date of Decision, June 6, 2019

**Fets Fine Foods Ltd. dba Fets Whisky Kitchen (“Fets” or the “Licensee”)
Application for Reconsideration**

OVERVIEW

1. The decision of the General Manager’s Delegate, Ms. Nerys Poole, (the “**Decision Maker**”) dated June 6, 2019 (the “**Decision**”), must be varied substantively to reflect the errors in law and procedure identified in these reconsideration submissions. In the alternative the Licensee says the Decision must be rescinded in its entirety.
2. The Decision was the product of a series of errors of law, and the process followed by the Branch and the Decision Maker in arriving at the Decision was procedurally unfair. The Licensee was deprived of many of the most basic principles of procedural fairness and natural justice.
3. The Licensee’s primary grounds for consideration 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 the Licensee's premises with an intention/direction to search for and seize SMWS product in pursuit of an investigation into an offence under the *Act*;

- 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;
- 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;
- d. The Decision Maker, without reference to statutory or case law authorities, determined that she had no authority to grant the Licensee *Charter* remedies. This aspect of the Decision is contrary to binding Supreme Court of Canada authority that was put before the Decision Maker;

- e. The Decision Maker, having misdirected herself into determining that the *Charter* did not apply, compounded her error by refusing to recognize the significance of the jeopardy the principals of the Licensee were facing when being investigated for offences that carry a penalty of imprisonment. In doing so she erred in finding that Ms. Fergie was not entitled to a *Charter* caution, that the Licensee was not entitled to *any* expectation of privacy in its premises, and that the liquor inspectors were entitled to perform a warrantless search of the Licensee's premises.
4. Taken as a whole the Decision was not only unreasonable, but the product of a substantially unfair process that if not substantially varied or rescinded will bring the proper administration of British Columbia's Liquor and Cannabis Regulation Branch into disrepute.
5. The Licensee says that reconsideration process is an opportunity for the General Manager to correct the grave procedural and substantive errors set out in the Decision, and ensure that the liquor inspectors in this province are held to the high standards of conduct and process that British Columbians expect of them.
6. Should the General Manager reject the Licensee's submissions, and confirm the Decision, the Licensee requests that it provide fulsome reasons in declining to correct the errors identified by the Licensee so that a justice of the Supreme Court of British Columbia reviewing the reconsideration order can fully appreciate the General Manager's decision making process and reasoning.
7. Attached to these submissions, for ease of reference, are the written submissions of the Licensee provided to the Decision Maker at the Hearing.

ISSUES FOR RECONSIDERATION

8. As set out above, the Licensee says that Decision as a whole was unreasonable and the product of a procedurally unfair process. This makes isolating specific errors in the Decision, for the purpose of assigning them to the prescribed grounds for reconsideration, difficult. For example, the Branch advocate's decision (which was subsequently confirmed by Branch Registrar Mior, and the Decision maker) to refuse to disclose to the Licensee relevant documents permeates various categories; the Branch's decision/practice was procedurally unfair, it induced the Decision Maker to commit various errors of law, and if reversed on reconsideration will lead to the production of "substantial and material evidence that was not available at the time of the original hearing".
9. The Decision was not issued with numbered paragraphs, making pinpoint citations to the Decision Maker's reasons difficult. Where possible the Licensee will identify with footnotes the relevant passages in the Decision.

Procedural Fairness

Issue #1 – Document Disclosure

10. The Licensee's requests for fair and fulsome document disclosure in this enforcement proceeding are well documented.¹
11. The Licensee provided both the Branch and Registrar Mior with a fully articulated basis for its requests. For example, in the Licensee's February 26, 2019 letter to Registrar Mior² the Licensee explained its concerns with respect to the inspection/investigation issue that looms large in this proceeding, and confirmed it required document production on that issue.

¹ Decision, pages 18-21.

² Exhibit 5, Tab 35.

12. Registrar Mior's letter of March 26, 2019³ sets out the Branch's position with respect to its obligation to produce documents as follows: it only need produce documents that will allow the licensee to know and understand the allegations made against it. Put another way, the Branch only needs to disclose documents necessary for it to prove its case, and not produce any documents that will assist the Licensee in defending the enforcement action.
13. With respect, in the modern era of procedural fairness it difficult to believe the Branch would take such a position, and that the Registrar and subsequently the Decision Maker would endorse it. The practice of state actors withholding exculpatory evidence from accused persons has long been criticized as at best a violation of natural justice, and at worst as conduct amounting to bad faith.
14. Exacerbating matters, Registrar Mior took the position that the Licensee's only recourse to the documents it was seeking was through the *Freedom of Information* process.
15. Such an approach to document disclosure is also entirely inconsistent with the purpose of the *Liquor & Cannabis Regulation Branch Enforcement Hearing Rules* which includes ensuring the "fair and efficient" adjudication of alleged contraventions.⁴ There is nothing "fair" to the Licensee, or the General Manager's Delegate tasked with making findings of fact, when relevant documents are hidden from production.
16. In the seminal decision of *R v. Stinchcombe*, Justice Sopinka noted that "the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the

³ Exhibit 5, Tab 36.

⁴ Liquor & Cannabis Regulation Branch Enforcement Hearing Rules s.1 "Purpose"

Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.”⁵

17. In *Stinchcombe* the court was clear that the Crown must disclose not only documents it intends to introduce into evidence, but also those which it does not, and that no distinction should be made between inculpatory and exculpatory evidence.
18. The Licensee says that the same analytical framework must apply to hearings before the General Manager’s Delegate. The General Manager, by virtue of s.42 of the *Act* and other investigatory powers and government resources, has tremendous information and document gathering abilities. In stark contrast, a licensee subjected to enforcement proceedings has none.
19. In the circumstances it is appropriate that the transparent and fulsome document disclosure obligations contemplated in *Stinchcombe* be applied in this proceeding⁶, and that the forthcoming reconsideration decision be written in a manner that provides guidance to the Branch with respect to how first-party disclosure can be made in a manner that is both “fair” and “efficient”.

Documents Obtained through FOI

20. Though absurd that the Licensee was required, and indeed advised by Registrar Mior, to pursue document production through a separate branch of government, in the circumstances it was fortunate that it did.

⁵ *R v. Stinchcombe*, [1991] 3 S.C.R. 326 at pg. 333

⁶ Brown and Evans, at 9-51 – 9-54

21. The Licensee's *FOI* request revealed the existence of a "briefing note" dated January 12, 2019 where the issue was identified as "Significant Unlawful Liquor Purchases and Sales by Multiple Licensees contrary to section 8, Liquor Control and Licensing Act."⁷
22. Various other emails produced indicate that the January 18, 2018 search and seizure at the Licensee's premises was given a code name ("OP Malt Barely"), an operation plan was devised and circulated for its execution, and the plan was given a "green light" from "all levels."⁸
23. Regrettably, these documents were provided by the *FOI* office to the Licensee, heavily redacted, and without attachments.
24. Even with the redactions, it is apparent that the contents of the documents that if and when they are produced to the Licensee in unredacted form they will contain the following:
 - a. Proof that the Branch was engaged in an investigation of an offence, with criminal consequences (e.g. imprisonment);
 - b. Proof that the Branch was fully aware that the SWMS product was in the Licensee's premises, and that it did not "find" it on the day of the search and seizure ("finding" liquor being a statutory prerequisite to the use of s.45 of the *Act* seizure powers);
 - c. Proof that the liquor inspectors rented a van, and filled it with empty boxes, for the express and approved purpose of seizing alcohol, as evidence of an ongoing investigation into the committal of an offence under the *Act*, and did so without applying for a search warrant.

⁷ Exhibit 5, Tab 14. It is significant that the briefing note identifies the "issue" as being a contravention of s.8 of the Act. A contravention of that section is an offence, punishable by imprisonment.

⁸ Exhibit 5, Tabs 16-18.

25. Each of the above categories of evidence go to the very heart of the issue before the Decision Maker: did the liquor inspectors act with lawful authority when they searched for and seized alcohol at the Licensee's premises?
26. There is no legitimate basis for the Licensee to have been deprived access to these documents. Equally troubling is that the Decision Maker, after the existence of these and other documents having been drawn to her attention, refused to order their production – or even order that she be provided with copies of the same to review for the purpose of determining relevance. It is apparent she had closed her mind to this issue.
27. The General Manager, the Licensee, British Columbia's hospitality industry, and more generally the public cannot be satisfied that justice has been done until the Branch is required to produce the documents it has to date so jealously guarded. The question looms large: what is the Branch hiding in the internal briefing note and operation plan?

Issue #2 – Pre-judgment of fundamental issue

28. The fundamental issue 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.
29. It is a trite principle of public law that all governmental action must be supported by a grant of legal authority.⁹ The actions and decisions of public officials and institutions that affect the rights of individuals have no legal force or effect unless authorized by grant of statutory

⁹ *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para. 24.

authority.¹⁰ When a public official is challenged on the legal source of its authority, it must be able to identify supporting legal authorization.¹¹

30. The Licensee's position is that it is apparent from a plain reading of sections 42 and 45 of the *Act* that in the circumstances those sections provided no authority to the liquor inspectors to conduct the search and seizure. This makes both their actions on the day of the warrantless raid of the Licensee's premises unlawful, as well as the Branch's continued possession of the SWMS product.

31. At the outset of the hearing, the Licensee requested an adjournment (on terms) so that the document issue set out above could be addressed. Brief written submissions were provided to the Decision Maker in support of the application. The Branch opposed the Licensee's request.

32. The Decision Maker refused the adjournment request.¹²

33. Rather than limiting her decision to the application before her, being a request for an adjournment paired with a request for document production, the Decision Maker elected to decide 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.

34. The Decision Maker concluded her ruling on the adjournment request 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

¹⁰ *Judicial Review of Administrative Action in Canada* at 13:1100

¹¹ *Guérin v. Canada (Attorney General)*, 2018 FC 94 at 40

¹² Decision, pages 4-10.

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.

35. Respectfully, the Licensee says that it was entirely inappropriate for the Decision Maker to decide these fundamental issues at the very outset of the proceeding, without hearing *any* evidence or *any* submissions on the issues.
36. It is unprecedented for substantive matters of law to be decided during an adjournment or document production application.
37. The Decision Maker literally pre-judged the entirety of the proceeding, rendering the two days of hearing time that would follow her decision a sham.
38. Though the Decision Maker, after being challenged by counsel for the Licensee on the patent unfairness of her conduct, acquiesced to permit further submissions on these issues, the damages to procedural fairness and impartiality had already been done: the Decision Maker had already decided the merits of the proceeding to the shock and surprise of the Licensee and the members of the public present for the hearing.
39. Later in the Decision the Decision Maker described the onus she placed on the Licensee as being to “change [her] initial ruling.”¹³ 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.
40. The Decision is the product of a clear case of pre-judgment. The Decision Maker was unequivocal in deciding issues of fundamental importance before the Licensee was permitted

¹³ Decision at page 36.

to make submissions on them.¹⁴ The entirety of the Decision has been tainted by the bias of the Decision Maker.

41. This grave error itself requires the General Manager to rescind the Decision. The General Manager cannot be seen to condone its delegates adjudicating hearings in this manner.

Errors of Law, or Mixed Fact and Law

Issue #3 – Interpretation of s.45 of the Act.

42. As set out above, the Licensee's primary submission is that the search and seizure of its premises was conducted without statutory authority, making the liquor inspector's conduct unlawful. These submissions necessarily involved an interpretation and applications of sections 42-47 of the *Act*.

43. 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)

44. 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.

¹⁴ The Decision Maker acknowledged that she decided the s.45 issue without the Licensee having made any submissions on that point, see page 9 of the Decision.

45. The Decision Maker, citing *R. v. Jarvis*, accepted that the starting point for analysis to statutory interpretation is as follows¹⁵:

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.

46. Despite citing the proper approach to statutory construction, the Decision Maker went on to ignore these principles and interpret s.45 of the *Act* in a way that completely ignores context and the grammatical and ordinary meaning of the word “immediately.” The Decision Maker also failed to address the Licensee’s submission that liquor inspectors did not “find” the liquor they seized on the day of the raid; they were fully aware of its presence before attending the premises.

47. The Decision is 64 pages in length, but only a scant two paragraphs are devoted to the central issue before the Decision maker: did the liquor inspectors have authority pursuant to s.45 of the *Act* to seize the liquor?

48. The Decision Maker resolves this issue, and provides her interpretation of s.45 of the *Act* as follows:

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

¹⁵ Decision at 36.

establishments on January 18, 2018, all believed to be selling unlawfully obtained SMWS product. (testimony of liquor inspector 1)

(emphasis added)

49. Respectfully, the Licensee says that Decision Maker's interpretation of s.45 of the *Act* is unintelligible, and contrary to the very principles of statutory interpretation the Decision Maker directed herself to earlier in the Decision.
50. *Black's Law Dictionary*, 9th Ed. Defines "immediately" as "occurring without delay; instant".¹⁶
51. 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.
52. In this case the liquor inspectors knew 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).
53. "Immediately" cannot mean 26 days later. Such an interpretation is absurd and completely unreasonable.

¹⁶ See also *R. v. Lamb*, 2010 SKQB 50 (a case decided under the Saskatchewan *Wildlife Act*) where the court interpreted the requirement that a hunter "immediately" tag a deer to mean "if something comes between the taking or killing and the tagging of the deer, then the deer cannot be said to be tagged "immediately" as Regulation 45 requires" at para 33; In *Mainil Enterprises Ltd. v. Freitag Farmcare Ltd.*, 2001 SKQB 351 (a case decided under the Saskatchewan *Consumer Protection Act*) the court adopted the following definitions of the word "immediately" :

The Shorter Oxford Dictionary on Historical Principles, 3rd ed. (Oxford: Clarendon Press, 1973) defines "immediately" as meaning, inter alia, "without any delay, instantly". Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979) defines immediately in these terms:

Without interval of time, without delay, straightway, or without any delay or lapse of time. . . .The words "immediately" and "forthwith" have generally the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action without any delay. [Cites omitted] at para. 30.

54. In effect the Decision Maker elected to re-write the section by introducing the concepts of “efficient” and “effective” seizure – concepts that are not present in s.45 of the *Act*.
55. The Decision also fails to address and resolve the Licensee’s submissions that the liquor inspectors did not “find” liquor on the day of the search and seizure – they fully knew of its existence, and came prepared to seize it.
56. The very factors that Decision Maker identified in the Decision, effectiveness, efficiency, further investigation – all indicate that the Branch *should have* obtained a search warrant as required by s.44 of the *Act*.
57. The Decision Maker’s awkward attempt to 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.
58. The facts and surrounding circumstances, taken as a whole, suggest that the Branch attempted to circumvent the judicial oversight contemplated in the *Act* by way of the search warrant application process by treating OP Malt Barely as a mere inspection.
59. The Licensee requests that on reconsideration, the General Manager disavow the liquor inspectors’ conduct and state unequivocally that attempts to circumvent the search warrant provision of the *Act* will not be tolerated.

Issue #4 – Decision Maker lacked jurisdiction to apply Charter

60. The Decision Maker decided that she, as delegate of the General Manager, did not have jurisdiction to apply the *Charter* on the basis that

...I am a statutory decision maker acting as a delegate of the general manager, I am not persuaded I have this jurisdiction.¹⁷

61. The Decision Maker decided this point of law without reference to authority, statutory or otherwise.
62. Although the Decision Maker makes other references to her refusal to apply the *Charter*, or provide *Charter* remedies to the Licensee throughout the Decision, the Decision Maker's reasons for declining jurisdiction, or at the very least improperly fettering her discretion to "*Charter* values" is confined to the passage above. It offers little by way of reasoning or explanation.
63. The Supreme Court of Canada's 2010 decision in *R. v. Conway* is binding on this tribunal. The Decision Maker did not distinguish the within tribunal from the factors set out on *Conway*.
64. The within tribunal is both an expert tribunal, and a tribunal with authority to apply the law. *Conway* directs that this tribunal "play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction."
65. The Decision Maker's only discernible basis for declining to apply the *Charter* was because she was a "statutory decision maker" acting on delegated authority. Administrative tribunals by their very nature are statutory decision making bodies, often applying delegated authority. This cannot be a basis for declining jurisdiction to apply the *Charter*.
66. With respect, the Decision on the issue of whether or not the Decision Maker has jurisdiction to grant a *Charter* remedy is clearly wrong. Moreover, the Decision Maker's reasons for declining *Charter* jurisdiction are inadequate and nonsensical.

¹⁷ Decision, page 49.

67. As further evidence of the Decision Maker's error, the *Administrative Tribunals Act* at s.45 contains a provision that confirms that a tribunal (that expressly adopts s. 45) does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.¹⁸

68. The drafters of the *Act* are presumed to be aware of the *Administrative Tribunals Act*, and would have incorporated s.45 or the *Administrative Tribunals Act* by reference into the *Act*, had the legislature wished to exclude from the jurisdiction of this tribunal the *Charter*. They did not do so.

69. With respect, it was not open for the Decision Maker to make this choice for the legislature. It was not open to her to "write in" section 45 of the *Administrative Tribunals Act* to the *Liquor Control and Licensing Act*.

Issue #5 – Provincial Offences, Investigations, and Charter Rights

Context

70. 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.¹⁹

71. In drafting the "new" *Act* in this manner, the legislature created a regime where certain contraventions are considerably more serious than others.

¹⁸ The provisions of the *Administrative Tribunals Act* do not operate, except as made applicable to a tribunal or other body by enactment. No such enactment has been made in the *Liquor Control and Licensing Act* or the *Regulation*.

¹⁹ Section 57 of the *Act*.

72. 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.²⁰
73. Read as a whole, the *Act* treats the investigation, prosecution, and penalizing of offences differently than other contraventions of the *Act*.
74. Having created a distinct regime for the investigation and prosecution of offences, the General Manager's Delegate must respect this legislative choice along with the related powers and responsibilities it bestows on liquor inspectors. The Licensee says the Decision Maker failed to do so.
75. 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 on the day of the search and seizure.
76. The Licensee says the Decision Maker fell into error by engaging in an *ex post facto* analysis by evaluating not the jeopardy the Licensee and its principals were facing at the time of search and seizure, but rather by considering how the Branch ultimately chose to proceed with enforcement action months later. This was an error in law.
77. 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 does not proceed with an *Offence Act* prosecution.

²⁰ Section 44 of the *Act*.

78. Throughout the Decision the Decision Maker referenced her acceptance that the Branch's investigation of the Licensee was in pursuit of a regulatory purpose, and indicated that there was no evidence to the contrary.²¹ Naturally this was the case, as the Decision Maker denied the Licensee's request for disclosure of evidence on this vary issue.

79. What is established in the evidentiary record, and in the *Act* itself, is as follows:

- a. At all times the Branch was investigating contraventions of s.8 of the *Act*²²;
- b. A person who contravenes sections 8(2) or (3) of the *Act* commits an offence under the *Act*,²³
- c. Eric and Allura Fergie, as the officers, directors and agents of the Licensee, were liable upon conviction for said offences to a fine of not more than \$50 000 or to imprisonment for not more than 12 months, or to both; and
- d. The fact that the Branch issued to the Licensee a contravention notice, followed by a notice of enforcement action, was no bar to the Branch laying an information under the *Offence Act* and proceeding against the Fergie's by way of summary conviction. The Fergie's exposure to a prosecution for an offence for contravention of s.8 of the *Act*, and the corresponding penalty of imprisonment for a period of not more than 12 months ended very recently on June 6, 2019 when the Decision was released. The *Act* expressly reserved to the Branch the right to pursue the Fergies under the *Offence Act*

²¹ Decision at page 46.

²² See Briefing Note (Exhibit 5, Tab 14), Contravention Notice (Exhibit 5, Tab 8).

²³ See s. 57 of the *Act*.

until that time.²⁴ For approximately 1.5 years the Fergies have lived under the threat of an *Offence Act* prosecution.

80. The authorities the Licensee put before the Decision Maker clearly establish that special constables and other peace officers, such as Fisheries Officers or Transport Canada officers, must provide accused persons with *Charter* cautions when investigating them for offences under their respective *Acts*. There is no principled basis to interpret the *Act* differently.
81. The fact that the Branch, subsequent to the search and seizure and the s.42 notice to produce²⁵, elected not to pursue an *Offence Act* prosecution against the Licensee and its principals, but rather proceed only by way of administrative enforcement action, does not retroactively cure the breaches of the liquor inspectors.
82. 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.
83. 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.
84. 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

²⁴ See section 55 of the *Act*.

²⁵ Exhibit 6

questions when interviewing licensees, staff and witnesses.²⁶ Inspector Cridland and the other liquor inspectors did not advise 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.

85. The evidence before the Decision Maker was that the liquor inspectors at the time of the search and seizure, and at the time of making the written s.42 demand for document production, were investigating an offence under the *Act* for which the Fergies could be sent to jail.
86. 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.
87. 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*.

Dual Purpose/Predominant Purpose Investigation

²⁶ See section 8.5.1.

88. Allura Fergie was detained by the liquor inspectors. That cannot seriously be doubted: pursuant to s.42 of the *Act* she had an obligation to cooperate with an inspection. While such compulsion is acceptable in instances of *bona fide* inspections, it is not acceptable when liquor inspectors have previously determined that they are investigating an offence and this is the purpose for which they are relying on inspection powers. This is exactly the mischief that *Jarvis* determined was unacceptable.
89. A contravention of s.8 of the *Act*, or the other contraventions of the *Act* that are also offences by virtue of s.57, will always also be breaches of a licensee's terms and conditions (which require that they follow B.C.'s liquor laws at all times). Accordingly investigations into offences into the *Act* will always be dual purpose: the fruits of the investigation may lead to an *Offence Act* information being laid, or it may lead to administrative enforcement proceedings.
90. If the Decision Maker's analysis is permitted to stand, liquor inspectors and police officers investigating offences under the *Act* will never be required to provide Charter cautions to licensees. Liquor inspectors must not be permitted to rely on the lesser and included contravention of failure to comply with a term or condition as a ruse to avoid *Charter* compliance.
91. The subjective intent of a liquor inspector, such as Inspector Cridland, at the investigative stage is of little relevance in determining *Charter* compliance. It will always be the determination of the General Manager, or potentially a Regional Manager, following his or her review of the evidence, as to how to proceed against a licensee and its principals, whether by enforcement action, offence act information, or no further action.

Decision Maker's reliance on Nolet was in error

92. The Decision Maker placed considerable emphasis on the Supreme Court of Canada's 2010 decision in *R. v. Nolet* and described the Licensee's reliance on the earlier 2002 decision of the Supreme Court of Canada in *R. v. Jarvis* as "misplaced."²⁷
93. In *Mission Western Developments Ltd.*, a 2012 decision of the British Columbia Court of Appeal, a decision relied on by both the Branch Advocate and the Decision Maker, the court of appeal expressly confirmed that that *R. v. Nolet* did not overturn *R. v. Jarvis* – the context of the two cases was simply distinguishable.²⁸
94. *R. v. Nolet* concerned a random road stop that began as a *bona fide* inspection, and evolved into an investigation. Importantly, the court in *Nolet* observed that "the context was always penal". That is to say, the police at first were exercising inspection powers with respect to *Highway Traffic Act* offences (provincial offences) and later investigating criminal offences. Significantly, the court held that "the *Charter* applies to provincial offences as well as to criminal offences." A binding statement of law overlooked by the Decision Maker.²⁹
95. The opposite of those facts exist in the present case, and for that reason the fact pattern at issue in this proceeding is more akin to the facts in *Jarvis*. The Branch's interest in the Licensee in December, 2017 was the result of a "tip." Liquor Inspector Cridland, on receipt of the "tip" began what in his words were an investigation, progressing from "open source" (e.g. Internet) research, to internal investigations through the BC LDB, culminating in a covert inspection of the Licensee's premise. The purpose of the December 22, 2017 inspection was plainly to determine the Licensee's compliance with the *Act*.

²⁷ Decision at page 42.

²⁸ 20120 BCCA 167 at para 40.

²⁹ *Nolet* at 45.

96. The Branch, having completed its inspection of the Licensee's premises, and determined that an offence under the *Act* had occurred, shifted its predominant purpose from inspecting for regulatory compliance to a full blown investigation into an offence. To use the language from *Jarvis*, on December 22, 2017 the Branch "crossed the Rubicon" and could no longer rely on s.42 inspection powers to conscript evidence the from the Licensee.

REMEDY

97. Section 53.1(9) of the *Act* permits the General Manager, in a reconsideration order, to confirm, vary, or rescind the s.51 order.

98. The Licensee submits that an order varying the Decision is appropriate, and that the new Reconsideration Decision confirm:

- a. The Licensee was deprived of relevant document production;
- b. The Decision Maker pre-judged the Decision, and in doing so disqualified herself;
- c. General Manager's delegates have the jurisdiction, and must apply the *Charter* in their s.51 decisions, as appropriate; and
- d. The liquor inspectors acted in breach of the of the *Act* and the *Charter* rights of the Licensee and its principals;
- e. The liquor inspectors seized the SMWS product unlawfully, without statutory authority and in breach of the Licensee's *Charter* rights, and the same must be returned to the principals of the Licensee.

99. In the alternative, the Licensee says the Decision must be rescinded in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of July, 2019.

Date: July 4, 2019

A handwritten signature in black ink, appearing to read 'D. Coles', written over a horizontal line.

Signature of lawyer for Fets Whisky Kitchen
Daniel H. Coles

File: EH18-003
Job: 000770699-033

RE: Licence Number: 169939
Licence Type: Food Primary
Establishment: Fets Whisky Kitchen
Licensee: Fets Fine Foods Ltd. (“Fets”)

WRITTEN SUBMISSIONS OF FETS WHISKY KITCHEN

OVERVIEW

1. On May 2, 2019 the parties appeared before the General Manager’s Delegate to lead evidence and make submissions with respect to the hearing of this matter.
2. At the outset of the hearing the Licensee made an application for an adjournment and an order that the Branch make further document production. The written submissions in support of that application are attached to these submissions as “**Schedule A**”.
3. The General Manager’s Delegate denied the application in its entirety.
4. The Branch called one witness in support of its case, Inspector Cridland. The Branch also produced Inspector Bonneville to be cross-examined on his notes.
5. The Licensee called two witnesses: Ms. Allura Fergie and Mr. Bruce Gillespie.
6. The hearing was adjourned following the evidence of Mr. Gillespie, and the hearing was scheduled to resume on May 7, 2019 for closing submissions.

FACTS

7. Fets has been in operation since 1986.

Evidence of Allura Fergie

8. Fets does not have any compliance history, as the term is defined in s. 149 of the *Liquor Control and Licensing Regulation*.

Evidence of Allura Fergie, and admitted by the Branch
(see Proposed/Responding Statement of Facts at Tabs 9 & 10, Key Book of Documents)

9. Since 2001 Fets has been inspected no fewer than 44 times and until the subject matter of this hearing, had never been the subject of enforcement action.

Admitted by the Branch (see Proposed/Responding
Statement of Facts at tabs 9 & 10, Key Book of Documents)

10. Since October 2013, Fets has stocked and sold Scotch Malt Whisky Society (“SMWS”) products.

Evidence of Allura Fergie, and admitted by the Branch
(see Proposed/Responding Statement of Facts at Tabs 9 & 10, Key Book of Documents)

11. Prior to the issuance of Contravention Notice No. B021867 (the “**Contravention Notice**”), at no time had the Branch put Fets on notice that it had any complaints or concerns with its stock and sale of SMWS products.

Evidence of Allura Fergie, and admitted by the Branch
(see Proposed/Responding Statement of Facts at Tabs 9 & 10, Key Book of Documents)

12. On or about December 7, 2017 Inspector Ron Cridland “received information” that a LRS on Vancouver Island was selling SMWS products to FP and LP licensees (the “**Anonymous Complaint**”) On or about that date, Inspector Cridland determined that Fets held itself out as a “partner bar” where SMWS product was available for sale. On or about this date Inspector Cridland began what was in his words an “investigation”.

Evidence of Inspector Cridland
Licensee’s Book of Documents, Tab 21 (“Draft NOEA”) at page 2.

13. On December 8, 2017 Inspector Cridland contacted Peter Wu of the BC Liquor Distribution Branch (BCLDB) and requested that he search the BCLDB records to determine if Fets had purchased any SMWS product from it.

Evidence of Inspector Cridland
Licensee’s Book of Documents, Tab 21 (“Draft NOEA”) at page 3.

14. On December 8, 2017 Mr. Wu confirmed to Inspector Cridland that the BCLDB had no records of Fets ever purchasing SWMS through it.

Evidence of Inspector Cridland
Licensee’s Book of Documents, Tab 21 (“Draft NOEA”) at page 3.

15. Sometime after December 8, 2017, and in furtherance of his ongoing investigation into the Licensee, Inspector Cridland directed that Inspectors Bonneville and Castle conduct a covert inspection of Fets for the express purpose of confirming the presence of SMWS product at Fets.

Evidence of Inspector Cridland

16. On December 22, 2017 Inspectors Bonneville and Castle conducted a covert inspection of Fets. Inspector Bonneville’s evidence was clear: he was instructed to attend Fets to look for SMWS product. His evidence was that he “found it” (the “**December, 2017 Inspection**”).

Evidence of Inspector Bonneville

See also Tab 4 (“Bonneville Inspection Notes”) and Tabs 30 and 31 (“POSSE Entries”)

17. On December 22, 2017 Inspector Bonneville completed an inspection report on POSSE of his observations made during the December, 2017 Inspection. He also emailed Inspector Cridland a copy of his POSSE report.
18. Significantly, Inspector Bonneville testified that he was not sure if it was a contravention for Fets to have stocked or sold to him the SWMS product. Further he confirmed he made no attempt to seize any SWMS products or samples, and he duly record the “outcome” of the inspection on POSSE as “no contravention”.
19. As at December 22, 2017, or shortly thereafter, the Branch was fixed with knowledge that Fets stocked and sold SMWS product.

Evidence of Inspector Cridland and admitted by the Branch
(see Proposed/Responding Statement of Facts at Tabs 9 & 10, Key Book of Documents)

20. On January 11, 2018 Inspector Scott received an email from Mr. Wu that further confirmed that there was “no lawful way that Fets Whisky Kitchen could be in lawful possession” of SWMS product.

Evidence of Inspector Cridland
Licensee’s Book of Documents, Tab 21 (“Draft NOEA”) at page 4.

21. Between January 12, 2018 and January 17, 2018 various levels of management within the Branch 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.”

Licensee’s Book of Documents, Tabs 14-19

22. The Branch has refused to disclose the contents of the OP Malt Barley briefing note or operational plan. The General Manager’s Delegate has refused to order production of the same.

Licensee’s Book of Documents, Tab 37
 (“Registrar Mior’s summary of document disclosure requests”)

23. 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 Fets culminating in express authorization and direction for liquor inspectors to conduct a warrantless search and seizure and the Licensee’s premises.

24. Inspector Cridland, under cross-examination, denied that he and the team of liquor inspectors that conducted the Search and Seizure arrived at the Licensee’s premises with any intention of seizing alcohol. With respect, that evidence is untenable:

- a) Inspector Cridland admitted that he had “no reason to believe” the Licensee could produce “receipts” that would justify its possession of the SMWS product;
- b) His own draft NOEA confirms that he “received final authorization to inspect and seize products...”;

- c) He rented a Uhaul van and filled it with empty boxes.

Evidence of Inspector Cridland

Licensee's Book of Documents, Tab 21 ("Draft NOEA") at page 4

- 25. The Licensee says that the only inference available to the General Manager's Delegate from all of the admissible evidence is that on January 18, 2019 the liquor inspectors conducting the Search and Seizure did so with the intention and internal direction, to search for and seize SMWS product.

- 26. At no time did the Branch apply for or obtain a search warrant under the *Act* with respect to its attendance at Fets on the Investigation Date.

- 27. On January 17, 2018 Inspector Cridland received "final authorization" to conduct the Search and Seizure.

Licensee's Book of Documents, Tab 18

- 28. On the day of the Search and Seizure at 10:00 am three liquor inspectors attended Fets to investigate the presence of SMWS product. Fets is not licensed to sell alcohol until 11:00 a.m.

Evidence of Inspector Cridland

Licensee's Book of Documents, Tab 1

- 29. During the Search and Seizure the following occurred:

- a) The liquor inspectors advised Allura Fergie that they had reason to believe SMWS bottles had been purchased illegally and that they would remove them if Fets could not produce receipts;

Evidence of Inspector Cridland and Allura Fergie

- b) The liquor inspectors expressly advised Allura Fergie that they were "seizing bottles as evidence of an ongoing investigation";

Evidence of Allura Fergie, and Key Book of Documents Tab 13
("Allura Fergie inspection notes")

- c) The liquor inspectors attended Fets with a rented U-Haul truck, hand cart and empty liquor boxes;

Evidence of Inspector Cridland and Allura Fergie, and
Key Book of Documents Tab 13 ("Allura Fergie inspection notes")

- d) Members of the Vancouver Police Department attended Fets;

Evidence of Inspector Cridland and Allura Fergie, and
Key Book of Documents Tab 13 ("Allura Fergie inspection notes")

- e) The liquor inspectors did not provide the licensee's representative Allura Fergie with official forms of identification identifying themselves as liquor inspectors, despite demand. Instead they produced business cards; and

Evidence of Inspector Cridland and Allura Fergie, and
Key Book of Documents Tab 13 ("Allura Fergie inspection notes")

- f) The liquor inspectors did not provide the licensee with receipts that accurately described the products seized, whether or not the bottles were opened or closed, or the volume of each bottle.

Evidence of Inspector Cridland and Allura Fergie, and
Key Book of Documents Tab 13 ("Allura Fergie inspection notes")

- 30. On the day of the Search and Seizure the Branch conducted similar warrantless search and seizures at other licensed establishments within the province that stocked and sold SMWS product.

Evidence of Little Jumbo owner Bruce Gillespie

- 31. Allura Fergie's evidence was that she found the Search and Seizure to be stressful, confusing and intimidating. She felt the Search and Seizure to be an embarrassment to her business. When she asked if she had time to contact a lawyer before the Search and Seizure would be conducted she was expressly advised by Inspector Cridland that she did not have time.

Evidence of Allura Fergie

- 32. At no time did Inspector Cridland advise Ms. Fergie of her *Charter* rights.

Evidence of Inspector Cridland and Allura Fergie

- 33. The Exhibit Receipt provided by the Branch to Fets on January 18, 2018 confirmed that the subject liquor was seized pursuant to sections 42 and 45 of the *Act*.

Evidence of Inspector Cridland, and Key Book of Documents at Tab 11

- 34. The Exhibit Receipt does not identify the seized alcohol by brand or label, does not indicated the volume of alcohol present in each bottle or whether the bottle had previously been opened.

Evidence of Inspector Cridland, and Key Book of Documents at Tab 11

- 35. Looking at the Exhibit Receipt it is impossible to know what alcohol was seized.

Evidence of Inspector Cridland, and Key Book of Documents at Tab 11

- 36. Ray Tetzl, Deputy General Manager, Compliance and Enforcement Division and Stephen Hitchcock, Regional Manager Vancouver Island/Interior Division directly instructed and authorized the Investigation.

Evidence of Inspector Cridland

37. Inspector Cridland in the Contravention Notice makes reference to the outcome of an “investigation”.

Licensee’s Book of Documents, Tab 1

38. The Notice to Produce, also issued by the Branch on February 1, 2018 purports to rely on s.42 of the *Act* “inspection” powers.

Licensee’s Book of Documents, Tab 2

39. On February 15, 2018, in response to the Notice to Produce, the Branch received from the Licensee a copy of its liquor registry as well as receipts for purchase of SWMS product by its principal Mr. Eric Fergie

Evidence of Inspector Cridland and Licensee’s Book of Documents, Tab 13

RELEVANT FACTS AND ELEMENTS OF CONTRAVENTION

40. The NOEA frames what is relevant to this proceeding, and the evidence that the Branch relies on to support the alleged contravention.

41. The Branch has put the following facts at issue:

- a) The Anonymous Complaint;
- b) The Search and Seizure;
- c) The Licensee’s response to the Notice to Produce.

42. Significantly, the Branch did not lead as evidence in support of the alleged contravention the evidence of Inspector Bonneville, the BC LDB records prepared by Mr. Wu, or any of Inspector Cridland’s “open source” investigations.

43. While the Anonymous Complaint was apparently the impetus for the Branch’s investigation, it is itself not evidence of anything. Accordingly, the Branch’s alleged contravention is only proved if the evidence obtained by way of the Search and Seizure is admitted into evidence, and the subsequent compelled document production.

44. If the General Manager’s Delegate finds that the Search and Seizure was unlawful, all of the evidence gathered by the Branch on January 18, 2018 (including conscripted statements) is not admissible.

45. If the General Manager’s Delegate finds that as at February 1, 2018 the Branch was involved in an “investigation” of Fets, it was not lawful for the Branch to continue to rely on its “inspection” powers and compel the Licensee to provide documents. Accordingly the Licensee’s liquor registry and SMWS product receipts are not admissible.

46. The Licensee is confident that when the General Manager’s Delegate considers the Branch’s conduct as against the inspection and investigation powers provided by the *Act*, it will find that the Branch acted without authority, that the contravention action must be

dismissed, and that the unlawfully seized SMWS product must be returned to its owner Mr. Eric Fergie.

VOIR DIRE ANALYSIS REQUIRED

47. As outlined above, the Branch's conduct raises a threshold issue: does its conduct 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?
48. The typical decision of a General Manager's Delegate, following the usual averments of alleged penalty and relevant statutory provisions, embarks on a three-part analysis:
 - a) Did the contravention of the *Act* occur as alleged?
 - b) If so, has the licensee established a defence to the contravention?
 - c) If the contravention is proven, what penalty, if any, is appropriate?
49. This analysis *presumes* that the Branch's evidence is admissible.
50. To be certain, the Branch's conduct is not a defence to the contravention. If the Branch has acted without lawful authority, or in breach of the *Charter*, it comes before this tribunal without admissible evidence and exposes itself to censure.

LIQUOR INSPECTORS ACTED WITHOUT LAWFUL AUTHORITY

51. It is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority.¹
52. The actions and decisions of public officials and institutions that affect the rights of individuals have no legal force or effect unless authorized by grant of statutory authority.²
53. When a public official is challenged on the legal source of its authority, it must be able to identify supporting legal authorization.³
54. 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.

¹ 2011 FCA 299 at para. 24

² *Judicial Review of Administrative Action in Canada* at 13:1100

³ 2018 FC 94 at para. 40 and 2017 NSSC 1 at para. 26

INSPECTION, SEARCH AND SEIZURE

Overview: distinction between Inspections and Investigations

55. In the context of regulated industries, a proper balance must be achieved between the rights of individuals and the interest of society.
56. The law recognizes the necessity of government agents being able to ensure compliance with regulations. To permit such agents to carry out their duties, the law permits inspections of those persons and places involved or participating in a regulated industry. In this case that is the licensed sale of alcohol.⁴
57. However, 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 becomes paramount and *Charter* rights come into play.⁵
58. 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*. That is not in dispute at this hearing.
59. Part 6, Division 1 of the *Act* provides for compliance to be tested and enforced through the use of inspections and search warrants.
60. Section 42 of the *Act* authorizes liquor inspectors to conduct inspections for the purpose of ensuring compliance with the *Act*.
61. On the other hand s. 44 of the *Act* is aimed at known or suspected breaches of the *Act* which are or have been committed.
62. 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.
63. The Supreme Court of Canada has explained that where an *Act* contains both inspection powers and investigation powers available only after obtaining judicial authorization, the existence of the latter informs the limited use of the former. In *R. v. Jarvis* the court explained the distinction this way:

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.⁶

⁴ *R. v. Lowe*, 2007 CanLII 69298 at page 9.

⁵ *R. v. Lowe*, 2007 CanLII 69298 (NL PC) at page 22.

⁶ *R. v. Jarvis* at 81.

64. The Court went on to explain that when the “predominant purpose” of a particular inquiry is penal liability, officials must relinquish their inspection powers.⁷
65. When 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 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.

Inspections

66. Section 42 of the *Act* contains the Branch’s inspection powers. Broadly speaking, inspections consist of:
- a) Requiring a licensee to produce records or other information;
 - b) The inspection of an establishment; and
 - c) Taking samples of liquor (or other things associated with the operation of the establishment) for the purpose of testing or analysis.
67. Inspections may be done with the assistance of a peace officer, the liquor inspectors must carry and present on request identification, and if the inspectors remove any records or take any samples they must give a receipt for the records or samples taken and return the same within a reasonable period of time.
68. Section 42 of the *Act* does not provide liquor inspectors with the authority to seize and remove from a licensed establishment quantities of liquor other than samples “for testing and analysis”.
69. Importantly, s. 42 is buttressed by s.43 of the *Act* which provides that licensees “must” cooperate with the general manager to facilitate an inspection.⁸

Searches

70. Section 44 of the *Act* sets out the Branch’s “search powers”.
71. Section 44 of the *Act* 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.

⁷ R. v. Jarivs at 88.

⁸ A Licensee’s failure to cooperate with an inspection is a contravention of the Act. Failure to produce records calls for a minimum fine of \$7,500 and failure to facilitate an inspection calls for a minimum 15 day licence suspension. See Schedule 2 of the Regulation at 29 and 53.

72. Section 57 of the *Act* provides that it is an offence to sell or serve liquor not purchased from the Liquor Distribution Branch.
73. Section 44 of the *Act*, and the search warrant in the prescribed form, expressly authorize liquor inspectors to seize things. This language can be readily contrasted with the language in section 42 of the *Act*, which does not provide for seizure powers.
74. Sections 46 and 47 of the *Act* confirm that liquor may only be seized pursuant to section 44 and 45 of the *Act*. Liquor may not be seized pursuant to section 42 *Act*.
75. The Branch admits that it did not obtain a search warrant with respect to the Search and Seizure. Accordingly the Search and Seizure was not conducted pursuant to s.44 of the *Act*.
76. As set out above, s. 42 of the *Act* does not provide authority for the seizure of alcohol other than samples.
77. The SMWS product seized during the Search and Seizure were not samples.
78. As a matter of fact, the liquor inspectors conducting the Search and Seizure did not “find” the SMWS product on January 18, 2018. Inspector Bonneville had previously “found it” during the December, 2017 Inspection.
79. Section 45 of the *Act* provides for authority to “immediately” seize and remove liquor if an inspector or peace officer finds it and in his or her opinion determined that it is possessed or kept contrary to the *Act*.
80. Section 45 has no application to the within proceedings. The Branch learned and determined in December 2017 that the Licensee was possessing liquor contrary to the *Act* but did not *immediately*⁹ seize or remove the same. Instead, in contravention of the *Act*, it returned some weeks later to effect a warrantless seizure.
81. Section 45 of the *Act* cannot be relied on by the Branch to circumvent the process for prior judicial authorization contemplated by section 44 of the *Act*.
82. Section 45 of the *Act* 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 circumstances like the present case, when the General Manager is of the opinion that liquor is possessed or kept contrary for the *Act*, the only course of action open to it is to obtain a search warrant pursuant to section 44 of the *Act*.
83. An interpretation of s.45 of the *Act* that permits liquor inspectors to seize liquor at “any time” rather than “immediately” would not only do violence to the plain language of the section, but would produce absurd consequences rendering s.44 of the *Act* meaningless.¹⁰

⁹ *Black's Law Dictionary*, 9th Ed. Defines “immediately” as “occurring without delay; instant”

¹⁰ In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, Justice Iacobucci explained “absurdity” this was:

84. 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 s.45 for the *Act* to justify its warrantless search.
85. Conduct of this nature is deserving of rebuke and wider examination by the Attorney General.

THIS TRIBUNAL IS REQUIRED TO CONSIDER THE IMPACT OF THE BRANCH'S CHARTER BREACH

86. In Canada there is not one *Charter* for the courts and another for administrative tribunals.¹¹
87. The Supreme Court of Canada has confirmed that the principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. With rare exceptions, 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.
88. The learned authors of *Judicial Review of Administrative Action in Canada* have confirmed the same, writing 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.”¹²
89. Not only should expert tribunals such as this one play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising that statutory discretion they must comply with the *Charter*.¹³

Purpose of Search Warrants

90. Historically, the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were linked to the law of trespass.¹⁴

It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to *Côté, supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile...

¹¹ R. v. Conway, 2010 SCC 22 at para. 20.

¹² *Judicial Review of Administrative Action in Canada* at 13:3451

¹³ R. v. Conway, 2010 SCC 22 at para. 21.

¹⁴ *Southam* at page 157.

91. Centuries later the right to be free from unreasonable searches and seizures was enshrined in Section 8 of the *Canadian Charter of Rights and Freedoms*.¹⁵
92. The purpose of section 8 is to prevent unjustified searches before they happen, not simply to assess after the fact whether they ought to have occurred in the first place. Such a *post facto* analysis would be at odds with the purpose of the section. Accordingly the *Charter* requires that searches be conducted with prior authorization, not subsequent validation.¹⁶
93. The fact that liquor inspectors could have obtained a search warrant, or that their warrantless search of the Licensee's premises in fact yielded the evidence they were seeking, does not subsequently cloak their unlawful activities with legitimacy.
94. A warrantless search is *presumptively unreasonable* and contrary to s. 8 of the *Charter*, which guarantees to everyone "the right to be secure against unreasonable search or seizure".
95. 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 that the manner in which the search was carried out was reasonable.¹⁷

Charter Caution

96. The Branch refused or neglected to provide Ms. Allura Fergie a Charter caution when the liquor inspectors spoke with her during the Search and Seizure. From the moment the liquor inspectors engaged with her, she was detained for the purpose of s. 10 of the *Charter*.
97. The liquor inspectors knew, or ought to have known, that by virtue of sections 57 and 58 of the *Act* Ms. Fergie was during the Search and Seizure being actively investigated for an offence punishable on conviction of not more than \$100,000 and imprisonment for not more than 12 months, or both.
98. When an individual, such as Ms. Fergie, is engaged with government inspectors who are actively investigating an offence for which she personally faces penal jeopardy, she is entitled to a *Charter* caution, namely a warning that she is under no obligation to cooperate (right to be free from self-incrimination) and a right to counsel.
99. Regrettably, rather than providing Ms. Fergie with a Charter warning, the liquor inspectors conscripted evidence from her in breach of her s.7 and s. 10 *Charter* rights.¹⁸

¹⁵ Section 8 of the *Charter* applies to natural persons as well as corporations. "The use of the phrase "reasonable expectation of privacy" is an invocation of section 8 of the *Charter of Rights and Freedoms*, which protects individuals and corporations from "unreasonable" searches and seizures conducted by agents of the state or pursuant to statutory authority" *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196

¹⁶ *Southam* at 160.

¹⁷ *R. v. Nolet*, 2010 SCC 24 at para. 21.

¹⁸ See *Martin's Criminal Code* s.10 Annotation.

100. Inspector Cridland's evidence, informed with the benefit of the passage of time, that the Branch did not ultimately pursue penalties for offences committed under the *Act* is irrelevant.
101. At the time the liquor inspectors were seeking admissions from Ms. Fergie she was not advised of her *Charter* rights. The Branch's subsequent conduct cannot retroactively cure its Charter breaching activity.¹⁹

Recent Authorities

102. A recent decision out of the Provincial Court of British Columbia is instructive on the issue of inspectors in a regulated industry abusing or exceeding their statutory authority.²⁰
103. In *R. v. MV Marathassa*, at issue was the conduct of Transport Canada inspectors' investigation an oil spill in English Bay.
104. The *Canada Shipping Act*, under which Transport Canada inspectors find their authority, contains provisions similar to that of the *Liquor Control and Licensing Act*, in that it provides for "inspection" powers and also "investigations".
105. The *MV Marathassa* successfully asserted that Transport Canada inspectors boarded the vessel to conduct an enforcement investigation, without a search warrant, in breach of its s.8 *Charter* right to be free from unreasonable search and seizure, resulting in a significant exclusion of evidence.

R. v. Canada Brick Ltd.

106. In *R. v. Canada Brick Ltd.* Justice Hill provided a useful summary of the law with respect to s.8 *Charter* breaches in the regulatory context as follows (some citations omitted)²¹:
- a) For the application of s.8 of the *Charter*, "there must first be a search or seizure": *R. v. Jarvis*. In broadly defining a search or seizure for constitutional purposes, section 8 of the *Charter* protects not privacy but a reasonable expectation of privacy assessed on the totality of the circumstances with "particular emphasis on (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation": *R. v. Tessling*.
 - b) Commercial activities highly regulated by government in pursuit of public welfare and protection are a feature of modern society. The centrepiece of regulatory

¹⁹ Section 2 of the *Offence Act*, RSBC 1996, c 338 makes an offence created under an enacted punishable on summary conviction. Section 11 provides that proceedings are commenced by the laying of an information or by means of a violation ticket.

²⁰ See also *R. v. Lowe*, 2007 CanLii 69298 (NL PC)

²¹ 2005 CanLII 24925 (ON SC) at para. 157.

regimes for enforcement and ensuring compliance with established standards is generally a statutorily conferred warrantless power of entry and audit or inspection together with various ancillary powers. The need for this type of monitoring, in the absence of reasonable grounds for believing any infraction exists, is necessary to maintain compliance including through the deterrence of random and unannounced attendances by government officials: *R. v. McKinlay Transport Ltd.* “While regulatory statutes incidentally provide for offences, they are primarily concerned to encourage compliance”: *Comité Paritaire v. Potash.*

- c) A search, in the sense of government discovery of things including observations and information, without consent, may occur in a variety of contexts. And a seizure is “the taking hold by a public authority of a thing belonging to a person against that person’s will”: *R. v. McKinlay Transport Ltd.*
- d) As a general rule, in highly regulated sectors of society, there is a diminished expectation of privacy in commercial premises and in respect of records and documents produced in the ordinary course of business: *R. v. Jarvis, Thomson Newspapers Ltd. v. Canada, Comité Paritaire v. Potash.* That said, there is a reasonable expectation of privacy more or less, in business premises: *R. v. McKinlay Transport Ltd., R. v. Grant.*
- e) Because statutory powers in the regulatory sphere, such as an administrative inspection, amount to an unwarranted intrusion by government, such an authority is properly described as a “search” for the purposes of section 8 of the *Charter*: *Comité Paritaire v. Potash.*
- f) The conferral of a warrantless inspection authority is a “powerful...tool” in the hands of government: *R. v. Jarvis.* Accordingly, the exercise of such a power must be circumscribed in a manner consistent with the purpose of the power within the appropriate contextual balance of regulatory enforcement and individual privacy interests. To this end, a line of separation must be drawn between the exercise of legitimate regulatory inspection and ancillary powers on the one hand and, on the other, the employ of such powers to further investigation of statutory infractions and offences.
- g) However, the government “must be careful...not to use the [inspection] power...to gather further evidence for an investigation after it has commenced”: *R. v. Ling.* The investigative function is properly subject to the prior authorization model usually a warrant to search, as described in *Hunter v. Southam Inc.* The continued use of administrative warrantless authority to further investigative interests, as described in *R. v. Colarusso*, amounts to “a too convenient way of getting around the requirements set forth in *Hunter*”, a subterfuge giving an “easy passage around the constitutional requirements for searches for purposes of...investigation”, and, an improper “‘back door’ without complying with the requirements of prior authorization”.

- h) The bright line rule for the division of inspection and investigatory functions, in terms of the scope of s.8 *Charter* protection, occurs when “an adversarial relationship crystallizes” between the subject of government scrutiny and the government official(s). Although the government and the company under inspection may, during an inspection, be in “opposing positions”, when the government “exercises its investigative function [it is]...in a more traditional adversarial relationship” attracting the more robust protection of section 8 of the *Charter: R. v. Jarvis*. Accordingly, in the circumstances of any particular case, the adversarial relationship crystallizes “when the predominant purpose of an official’s inquiry is the determination of penal liability” where “a liberty interest is at stake”: *R. v. Jarvis*.
- i) The application of the “predominant purpose” test involves a case-by-case examination of the conduct of the government official(s) in the totality of the circumstances – “There is no clear formula” otherwise: *R. v. Jarvis*. All factors that bear upon the nature of the government inquiry must be considered. While the existence of reasonable grounds to believe an offence may have occurred is not in and of itself a sufficient indicator that the state is conducting a de facto investigation, “In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered”: *R. v. Jarvis*. Although it cannot be said that “from the moment such suspicion is formed, an investigation has begun” (*R. v. Jarvis*) there may, in a given case, come a point where continuation of warrantless inquiry becomes constitutionally unreasonable – in effect, “the same conduct motivated by a different purpose may interfere with reasonable expectations of privacy”: *R. v. D’Amour*.
- j) The reason regulatory inspectors have been granted powers of inspection is to determine whether an offence has been committed requiring an immediate or near-immediate response in furtherance of public safety – “the very nature of an administrative inspection in a regulated industry [is] that it takes place when there are no reasonable grounds to believe that a particular offence has been committed” (emphasis of original): *Comité Paritaire v. Potash*. “There is an important distinction between having reasonable and probable grounds to believe that an offence was committed and simply having information”: *Comité Paritaire v. Potash*. On occasion, during an inspection, government discovery of non-compliance with regulatory standards warrants an instant remedial response under government direction or order. Prolonged attendance, inquiries, inspections, questioning and even seizures by government officials may prove necessary to effect abatement and timely compliance in the interests of public welfare and protection. In these circumstances, the exercise of warrantless powers does not offend our constitutional notion of reasonableness. What is offensive, however, is overholding in the use of such powers into a disguised investigation or “Quite conceivably, situations may arise in which charges are delayed” improperly in order to compel the target to provide evidence against itself: *R. v. Jarvis, R. v. Chusid*.

CHARTER REMEDY

107. The Licensee submits that the Search and Seizure, as a warrantless search, is *prima facie* unreasonable and in breach of its *Charter* rights, and the Branch cannot point to any other legal basis to justify its conduct.
108. A stay of this proceeding, or a total exclusion of the evidence a dismissal on that basis, are the only remedies available to this tribunal.²²
109. The words of s. 24(2) of the *Charter* capture its purpose: to maintain the good repute of the administration of justice. The term “administration of justice” is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.²³
110. The phrase “bring the administration of justice into disrepute” must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.²⁴
111. When considering whether an exclusion of evidence, or a stay of proceedings, is warranted, this must tribunal must consider the following:
- a) The seriousness of the *Charter* infringing state conduct;
 - b) The impact on the *Charter*-protect rights of the accused; and
 - c) Society’s interest in the adjudication of the case on its merits.
112. The Licensee submits 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. There is no excuse for a sophisticated organization such as the Branch to conduct itself in this manner.

²² R. v Rigo, 2018 BCSC 2015 at para. 10.

²³ R. v. Grant, [2009] 2 SCR 353, 2009 SCC 32 (CanLII) at para. 67.

²⁴ Grant at 68

113. Even if the Branch can satisfy this tribunal that its breaches were the result of ignorance and not malice, ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith.²⁵

114. The Charter rights of the accused, to be free from unreasonable search and seizure, are significant. The Search and Seizure occurred over a serious of hours while the Licensee was open for business. The search was intrusive and involved state actors manoeuvring throw the restaurant and examining the Licensee's property. The Branch acted coercively, its inspectors making statements to Ms. Fergie that were not true, conscripting evidence from her.²⁶

115. The public has little interest in seeing this matter adjudicated on the merits. The alleged contravention has not resulted in any meaningful public harm. To the contrary the Search and Seizure and the within hearing are perceived by the public as vindictive, a poor use of taxpayer dollars, and bureaucracy run amok.

SUMMARY OF BREACHES

116. In addition to executing a warrantless search and seizure at the licensed premises, the liquor inspectors further contravened the *Act* 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 Ms. Allura Fergie with a Charter caution.

REMEDIES

117. The Licensee seeks an order that the contravention proceeding is stayed, or in the alternative dismissed following the rejection of the Branch's evidence.

118. A declaration that the Search and Seizure was conducted without lawful authority and in breach of the Licensee's Charter Rights.

119. A declaration that the Branch's conduct with respect to document disclosure has been unreasonable and procedurally unfair.

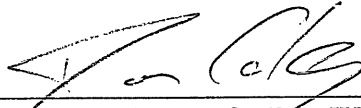
²⁵ Grant at 75.

²⁶ Grant at 92.

120. A declaration that the Branch is to return to Mr. and Ms. Fergie the SMWS product illicitly seized.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2019.

Date: May 2, 2019



Signature of lawyer for Pets Whisky Kitchen
Daniel H. Coles

SCHEDULE "A"

File: EH18-003
Job: 000770699-033

RE: Licence Number: 169939
Licence Type: Food Primary
Establishment: Fets Whisky Kitchen
Licensee: Fets Fine Foods Ltd. ("Fets")

WRITTEN SUBMISSIONS OF FETS WHISKY KITCHEN

OVERVIEW

1. On January 18, 2018 the Liquor Control and Licensing Branch (the "**Branch**") conducted a warrantless search and seizure of alcohol at the Licensee's establishment Fet's on Commercial Drive in Vancouver (the "**Search and Seizure**"). The Search and Seizure resulted in the Branch confiscating 242 bottles of alcohol with a value of approximately \$40,000.
2. The Search and Seizure was conducted without statutory authority.
3. To date the Branch has maintained that the Search and Seizure was in fact, and in law, an "inspection" authorized by s.42 of the *Liquor Control and Licensing Act* (the "**Act**")¹.
4. A plain reading of section 42 of the *Act* confirms that it does not confer on liquor inspectors search and seizure powers. Those powers are only available under s.44 of the *Act* – by way of prior judicial authorization in the form of a search warrant. Incredibly, despite the resources and personnel the Branch devoted to the Search and Seizure – it neglected to obtain a search warrant.
5. The power of liquor inspectors in this province, although considerable, is not absolute. The General Manager's Delegate at enforcement hearings must be vigilante against abuse.
6. At all times liquor inspectors, and the Branch generally, must conduct themselves in good faith and in accordance with the statute under which they derive their authority. When liquor inspectors act without authority they undermine the integrity of the Branch's enforcement process, and evidence obtained by them unlawfully is not admissible. They also expose the Branch to civil liability for damages.²
7. Prior to this hearing the Licensee has requested, in writing and at various intervals, that the Branch provide to it meaningful and fulsome document production so that it can

¹ *Liquor Control and Licensing Act*, SBC 2015, c 19

² *Paradis Honey Ltd. v. Canada*, [2016] 1 FCR 446, 2015 FCA 89

understand the source of the legal authority for the Search and Seizure and make informed and meaningful decisions with respect to the same.

8. Regrettably, to date the Branch has refused to do so.
9. Exacerbating the Branch's cavalier attitude towards procedural fairness, both the Branch and the Registrar have advised the Licensee that its only recourse to obtaining the documents needed to make full answer and defence to the allegations made against it this through Information Access Operations and the *Freedom of Information and Protection of Privacy Act*.
10. On April 18, 2019, after months of delay, Information Access Operations provided the Licensee with 192 pages of heavily redacted documents in partial response to the Licensees' requests (the "FOI Documents").
11. As set out in greater detail below, 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, the chain of events that lead to the Search and Seizure, and the merits of the allegations made against the Licensee.
12. The FOI Documents also make reference to relevant reports and emails in the Branch's possession that have not been disclosed.
13. The Branch's approach to document disclosure betrays a misunderstanding of the principles of administrative fairness. The Branch's conduct, supported by the Registrar, evidences that its intention today is to secure a finding of a contravention of the *Act*, with little regard to the public interest or principles of fair play.
14. The Licensee requests an order that the within hearing be adjourned, and that the Branch be ordered to provide the Licensee with the full and fair document disclosure to which it is entitled.
15. The Licensee further submits that it in the General Manager's 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.
16. In the alternative, if the General Manager's Delegate is prepared to condone the Branch's approach to document disclosure the Licensee requests that a *voir dire* be conducted at the outset of the hearing to determine:
 - a) On what authority, if any, the Search and Seizure was conducted; and
 - b) Assuming the General Manager's Delegate agrees that the Search and Seizure was conducted without lawful authority, what are the appropriate remedies?

HEARING MUST BE ADJOURNED SO PROPER DOCUMENT PRODUCTION CAN OCCUR

17. As set out above, for reasons unknown to the Licensee, the Branch has refused its reasonable requests to fully understand the case it has to meet.
18. Generally speaking, administrative tribunals control their own procedures, which includes whether to adjourn a proceeding either at the request of a party or on its own motion. The power to adjourn need not be conferred expressly by statute, as it will usually be implied as part of the tribunal's jurisdiction to hold a fair, expeditious and effective hearing.³
19. In this case, the General Manager's Delegate has the express authority to adjourn a hearing pursuant to the *Liquor & Cannabis Regulation Branch Enforcement Hearing Rules*⁴
20. The basic question with respect to whether an adjournment ought to be granted is whether or not it is required to ensure that the individual concerned has had a reasonable opportunity in all the circumstances to present proofs and arguments to the decision maker and to answer the opposing case.⁵
21. 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.
22. In the seminal decision of *R v. Stinchcombe*, Justice Sopinka noted that "the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."⁶
23. In this hearing the Branch has taken the position that it is only required to disclose to the licensee documents that it believes tend to prove the alleged contravention.
24. The Branch has taken the position that neither the Branch's own rules of procedure, nor the laws of administrative fairness, require that it make fulsome disclosure of documents adverse to its case but relevant to the fundamental issue in this hearing.
25. In *Stinchcombe* the court was clear that the Crown must disclose not only documents it intends to introduce into evidence, but also those which it does not, and that no distinction should be made between inculpatory and exculpatory evidence.
26. This tribunal's function 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

³ *Brown and Evans* at 9.89

⁴ *Liquor & Cannabis Regulation Branch Enforcement Hearing Rules* 12(2)(i)

⁵ *Brown and Evans* at 9.95

⁶ *R v. Stinchcombe*, [1991] 3 S.C.R. 326 at pg. 333

consequences. In the circumstances it is appropriate that the transparent and fulsome document disclosure obligations contemplated in *Stinchcombe* be applied.⁷

27. 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.
28. The Branch's conduct to date has fallen well below those standards.
29. The Licensee submits that a modest adjournment paired with a direction to the Branch to produce to the Licensee its entire file is appropriate.

⁷ Brown and Evans, at 9-51 – 9-54