Liquor Control and Licensing Branch

Fairness In Decision Making

Public Report No. 6

June 1987

Legislative Assembly
Province of British Columbia

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June 11, 1987

The Honourable Lyall Hanson
Minister of Labour & Consumer Services
Parliament Buildings
Victoria, B.C.
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Dear Mr. Hanson:

Re: Ombudsman Public Report No. 6

Attached hereto is Ombudsman Public Report No. 6 regarding the review of current liquor policy by the Liquor Policy Review Committee. My office appreciates having been invited to address this important issue.

The Report draws on the experience of the Ombudsman's office in dealing with public concerns regarding liquor licensing over the years, and applies the office's special expertise in matters of administrative fairness. It does not address the issue of legislative policy itself, but rather identifies the general principles applicable to the fair administration of whatever policy is established.

I trust that the involvement of this office is helpful to the process.

Yours sincerely,

Stephen Owen

Stephen Owen
Ombudsman

c.c. Liquor Policy Review Committee

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I INTRODUCTION

The Liquor Control and Licensing Branch (LCLB) is established by section 2(1) of the Liquor Control and Licensing Act.[1] The Branch is authorized to grant licences and permits to purchase liquor from it for resale. The General Manager of the Branch is required to administer the Act and supervise all licensed establishments. His decision to approve or decline an application for a liquor licence can have a significant impact both financially and socially on the individual applicant, his competitors, and his community.

The Ombudsman's office has been established to investigate complaints of unfairness and to recommend change when unfairness is substantiated. Section 22 of the Ombudsman Act[2] sets out a statutory code of conduct against which administrative acts and decisions of provincial government authorities can be measured. This code requires more of government authorities than strict legal compliance: it demands that government be fair in its dealings with citizens. The determination of unfairness may involve a consideration of the merits of an administrative or quasi-judicial decision as well as the process by which it was reached.

The Ombudsman's office is neither a critic of the government nor an apologist for it; rather, it is an independent advocate for fairness. The office does not profess to be expert in all areas of government activity. Its expertise is in issues of administrative fairness and its mandate is to bring these principles to bear on the specialized work of government authorities.

The Ombudsman is empowered to commence an investigation on the receipt of a complaint or on his own initiative. Over time, complaints received concerning a particular government authority may reveal the existence of common traits to seemingly disparate concerns and also areas of recurring difficulties. Once identified, the expertise of the office in administrative fairness can be drawn upon to address these systemic problems by assisting the government authority to implement change in its public administration. Such assistance can relate to structuring the exercise of discretion and ensuring due process internally in the consideration of applications and externally in any appeal mechanisms.

The Liquor Policy Review Committee has recently toured the province and received submissions from countless individuals and diverse groups. This canvassing of public opinion is part of the democratic political process and is a prerequisite to the identification and clarification of the broad social purpose of liquor legislation. The development of social policy is not the arena for the Ombudsman's office. However, once the objectives of the legislation have been determined, the office can play a role in ensuring that the administrative process fairly achieves the legislated purpose. The Minister of Labour and Consumer Services has requested the written views of this office on current liquor policy, legislation and the administration of the Branch (see Appendix). The Ombudsman's office welcomes this opportunity to make its resources and expertise in administrative fairness available in this constructive manner.

This report is experience-based and draws upon the complaints which the office has investigated over the past eight years. It is recognized that the LCLB effectively administers thousands of applications and licences every year and that the number of complaints represents only a very small fraction of these. It is also possible that there may be specific problems which have not yet come to the attention of this office.

This report does not purport to be an all-encompassing study of the LCLB's mandate and the relevant legislation. There are many sections of the Liquor Control and Licensing Act (e.g. those concerning enforcement) about which the Ombudsman's office has never received a complaint. Examples of complaints are included to illustrate the types and complexity of problems that can arise. These are followed by a discussion of the principles and mechanisms required to ensure a fair process both at the level of the General Manager and the appellate level. Specific recommendations regarding the exercise of discretion and the appeal process are set out.

II History of Complaints

Complaints concerning the Liquor Control and Licensing Branch have been received since the advent of the Ombudsman's office to British Columbia in 1979. Below are brief summaries of ten representative complaints. The dispositions (i.e. the reasons for closing) are not included as the purpose is not to allocate fault but rather to illustrate the range and variety of concerns.

1. A complainant objected to a policy of the General Manager set out in Circular 210, January 28, 1980. This circular was directed to all licensed dining establishments and stated that "It is the policy of this Branch that all licensees carry a selection of British Columbia wines. As a minimum, licensees should carry at least one product in each category: white, red and rose".

The LCLB relied on the following two sections of the Liquor Control and Licensing Act for the statutory authority for this policy:

> 3(2) The general manager shall administer this Act and supervise all licenced establishments and manufacturees of liquor, subject to the order, directions and supervision of the minister.
>
> 11(2) The general manager may restrict the scope and effect of a licence or issue it on terms and subject to the conditions he may specify, and may limit the type of liquor to be offered for sale under a licence.

The complainant's position was that neither of these sections was sufficient to give the General Manager the authority to require licensed dining establishments to carry B.C. wines. As the purpose of the Act is to control the sale and the consumption

of liquor, and the Minister's directions and supervision can apply only within the framework of the Act, the complainant maintained that section 3(2) does not empower the General Manager to require dining establishments to stock B.C. wines. This requirement is not a term or condition imposed on an individual licence, it is not a restriction of the scope of a licence and it is not a limitation on the type of liquor which could be sold. Therefore, the complainant argued that there was no statutory provision which authorized the General Manager to issue this policy.

2. An individual's application for pre-clearance for a neighbourhood pub site was refused by the General Manager in 1981 for the following reasons:

(a) In close proximity to skating rink and public library.
(b) The proposed site is within 3 blocks of an "A" licensed hotel.
(c) The area is adequately served with licensed establishments at this time.
(d) Close proximity to a highway and a heavily-travelled road.
(e) The site is in a shopping centre.
(f) The police are opposed to further drinking establishments in this area.

The first four reasons can be related to various regulations (5(4)(b); 17(4)(f); 5(4)(c); 17(4)(g) respectively); the fifth reason is based on Branch policy; and the last reason does not appear to be based on either regulation or policy.

As he is entitled to do under section 32(2) of the Act, the complainant appealed the General Manager's decision to the Minister. His appeal was dismissed without reasons by the Deputy Minister. Subsequent interministerial correspondence revealed that the Deputy Minister's reason for refusal was that the site under consideration was located in a self-contained shopping centre, and that it had been the consistent policy of the Branch for some time to refuse such sites. Nevertheless, in a letter to the Ombudsman's office one month later, the Deputy Minister acknowledged that a small local shopping center may be an appropriate site and that some applications for neighbourhood pubs had been approved in such shopping centers in the past.

Over the next several years, the complainant periodically contacted the LCLB and was consistently told that the policy of the Branch had not changed: a neighbourhood pub site in a shopping centre would not be approved. He again contacted our office when he discovered approval had been given for a neighbourhood pub to another applicant in the exact location for which he had applied.

Our inquiries revealed that the General Manager had disallowed this subsequent application for the following 3 reasons:

(a) A licensed hotel and another neighbourhood pub located within one mile of the site.
(b) The site was in close proximity to a highway and to a public skating rink and library.
(c) The site was located within a shopping centre.

The applicant appealed to the Minister. The appeal was heard and allowed by the Assistant Deputy Minister because of the rapidly expanding residential population.

3. An individual who owned a 23-seat restaurant contacted our office when his application for a liquor license for that establishment was denied.

Regulation 17(2)(c) required that seating be provided for 40 persons. The complainant felt that it was unfair that the General Manager did not have the discretion to make an exception based on the particular circumstances and merits of an application.

4. An individual applied to the LCLB for pre-clearance for a cabaret license. His application was denied by the Deputy General Manager. Section 32(2) of the Liquor Control and Licensing Act allows an appeal to the Minister of a refusal by the General Manager and requires notice to be sent to the Minister within 30 days of the General Manager's refusal. However, the letter sent to the complainant informing him of the General Manager's refusal contained no information concerning either the right to appeal or the deadline. Two months after the General Manager's refusal, the complainant contacted the Deputy Minister but was informed that it was too late to hear his appeal.

5. A licensed hotel in a small community burned down. The community was large enough for only one licensed establishment. Shortly thereafter, a competitor

applied to the LCLB for pre-clearance of a neighbourhood pub. Three months later the owner of the hotel also applied for pre-clearance for a neighbourhood pub. When the competitor's application was approved, the hotel owner contacted our office.

He felt that the LCLB had acted unfairly by approving his competitor's application, thereby assisting him to take advantage of the complainant's vulnerability.

6. An organization contacted our office with a complaint about the application process for a special occasion licence (SOL). Section 6 of the Act and section 1 of the regulations deal with the issuance of SOL's. Section 6 describes the process: the store manager or an officer authorized by the general manager issues a licence; a licence shall not be issued if it is for the prime purpose of making a profit unless the general manager is satisfied that the profits will be used for a bona fide charitable purpose, and the general manager can delegate this decision to a store manager or other employee; if, in the opinion of the general manager, there is a breach of any statutory provision relative to liquor, he may cancel

a licence which has been issued; and, once the licence is issued, the store manager shall send a copy of it to the local police.

However, according to the complainant, the process adopted by the Branch is quite different. Application forms for SOL's are available at liquor stores. The applicant must obtain police approval before a licence will be issued. The complainant thought that is was incorrect that the police, rather than the individuals referred to in the statute, were making the licensing decision.

The complainant also argued that there was no authority in the Act for regulation 1(5) which states that "...the local police authority or a person designated by the general manager shall approve any application for a special occasion permit prior to issuance". The complainant maintained that this regulation abrogated the statutory responsibility of the store manager (or officer authorized by the general manager) under section 6 of the Act.

7. The owner of a licenced restaurant contacted our office with a complaint concerning a Branch policy set out in Circular No. 275, August 12, 1981. The circular concerned games in licensed restaurants, and stated that:

> ...the Liquor Control and Licensing Act Regulations, section 17(2)(k) is interpreted by this Branch as stating no games are permitted, including video games, in "B" Licensed Premises or Holding Areas.
>
> In addition, the General Manager is not considering any approvals for games in restaurants.

The relevant regulations were sections 14 and 17(2)(k). Section 14(1) states that "a licensee may provide entertainment, including but not limited to, music, radio, television and dancing". Subsection (3) reads: "If games of skill are approved for use in a licensed establishment by the general manager, not more than 20% of the floor area of a licensed establishment may be used for the games of skill."

Regulation 17(2)(k) reads: "Notwithstanding section 14, no games are permitted and no entertainment is permitted on Sunday, unless approved by the general manager."

The complainant contended that the Branch's circular misinterpreted the legislation. While the Branch's interpretation was that regulation 17(2)(k) prohibited games unless approved by the general manager, the complainant thought the regulation prohibited games on Sunday (unless approved by the general manager). Furthermore, the complainant argued that the Branch's policy (i.e. the General Manager is not considering any approvals for games in restaurants) was improper because it fettered the discretion which the legislation gave him.

8. An individual applied to the LCLB for preclearance for a neignborhood pub site. His application was refused by the General Manager for the following two reasons:

    (a) The location is within a proposed shopping center - Policy.

    (b) The site is adjacent to the Trans-Canada Highway - Regulation 17(4)(g).

The applicant then appealed the decision and his appeal was disallowed by the Deputy Minister. It appears from the Deputy Minister's written reasons that the sole reason for disallowance was the fact that the site was within 1/2 mile of a main highway.

Regulation 17(4)(g) reads as follows:

> No licensed Neighbourhood Public House shall be located within 1/2 mile of a main or secondary highway, except as approved by the general manager. (our emphasis)

There is no absolute prohibition against a site within 1/2 mile of a highway as the general manager has the discretion to approve such a site. The complainant maintained that this discretion should have been exercised in his case as the site was 100 yds. from the highway, would not be visible from the highway, and could not be entered from the highway. In support of his position, the complainant had compiled a series of photographs showing pubs previously approved which were located either on or much closer to highways. The complainant wanted to know why discretion had been exercised in favour of these sites and not in favour of his.

9. A certain cabaret site in Vancouver changed hands many times over the course of a few years. In August of 1984, the LCLB wrote the landlord that a cabaret licence would not be reissued unless the present

lessee and licence holder was able to operate the business successfully for 3 years. The licence holder failed to do so. In May of 1985, an individual (who later contacted our office with a complaint against the Branch) who held a first debenture from the lessee and holder of the liquor licence, applied to have the licence transferred to a company which he owned in an attempt to save his investment. Citing the position taken by the Branch in August 1984, the General Manager refused this individual's application. In October of 1985, in response to subsequent application from another individual for the same premises, the General Manager reversed his position and approved the application. He wrote in his decision that he:

> ...was influenced by the information put before me to the effect that the value of this building is substantially less if it cannnot be used for a cabaret. I was mindful of the severe financial hardship that this would represent to...[the applicant]. Accordingly, it is my decision that the licence can be re-issued.

The complainant maintained that either his application was unfairly refused or the subsequent applicant's was unfairly approved.

10. An individual held a "B Dining Room (Sandwich Shop)" Licence which allowed him to serve alcoholic beverages only until 4:00 p.m. He subsequently applied to the General Manager for an extension of his hours of sale until midnight; the Deputy General Manager declined to extend the hours of sale. However, as a result of further discussion, the licence was amended (without any reasons given) to a "B Dining Room" licence with hours of sale to terminate at 9:00 p.m. The licensee appealed the refusal of the General Manager to extend his hours of sale until midnight to the Commercial Appeals Commission.

The Commercial Appeals Commission disallowed the licensee's appeal. The licensee was dissatisfied with the process (which he felt was too formal) and with the decision (which he thought too legalistic). More specifically, he had the following complaints:

(a) Under section 18(1) of the Commercial Appeals Commission Act, "...the commission has the same powers of decision as the officer and the

commission may confirm, vary, or reverse the order under appeal with or without conditions or may refer the matter back to the officer with or without directions."

Before the hearing commenced, the Commission stated that it was proceeding by way of trial de novo. Yet in its decision, the Commission deferred to the General Manager's decision (i.e. refusal to extend hours to midnight). The complainant maintained that a trial de novo was a new trial in which the whole case is retried as if no trial whatever had been had in the first instance. Therefore, he argued, the Commission ought to have made its own determination and not deferred to the discretion of the General Manager as it did.

(b) Testimony at the complainant's appeal revealed that the criteria taken into account by the LCLB when considering an initial application for a "B Dining Room" licence are "equipment, menu and decor". The testimony also made clear that these same criteria were considered when the

licensee applied for an extension of his hours of sale. The complainant argued that this was incorrect as section 13 of the Act enumerates a different test with regard to an application to extend hours, viz. "the public need and convenience".

The licensee was suffering considerable financial hardship because his hours of sale ended at 9:00 p.m.; there were many licensed establishments near him which were licensed until midnight. Several months passed during which the complainant had no contact whatsoever with the Branch. He was therefore very surprised when he received a letter from the Branch informing him that his hours had been extended until midnight or later. However, due to his financial difficulties, he had committed himself to signing a lease the next day with another individual who was going to take over the restaurant premises and operate them under a new theme.

> The Deputy General Manager explained that as a result of his review of the complainant's operations, he had decided to extend the hours of sale. However, the licensee's accounts had not been reviewed, nor had there been any inspections of the establishment in over four months. The complainant felt that, at best, the extension was arbitrary; at worst, an intentional abuse of discretionary authority.

The above are examples of the variety and complexity of complaints received by the Ombudsman's office. Many require analysis by Ombudsman legal staff. Despite the diversity of the subject matter of the complaints, close examination reveals some common features, e.g. concerns about the exercise of statutory discretion by administrators during the application process, and the disparity between the two appeal routes (the informal appeal to the minister with no record kept and often no reasons given, and the formal appeal to the Commercial Appeals Commission with examination and cross-examination of witnesses, full transcript kept by a court reporter, and the rendering of a legalistic decision).

Identification of issues of administrative fairness in these common features caused us to focus this report on the exercise of discretion in the licensing process and the appeal mechanisms.

III Administrative Fairness in the Licensing Process

A. Discretion

1. Background

The Liquor Control and Licensing Act gives the General Manager of the LCLB a great deal of discretion. By that Act, he is empowered to grant, transfer, suspend, or cancel licences (section 5(a)); to supervise the conduct and operation of a licensed establishment (section 5(c)); to restrict the scope and effect of a licence or issue it on the terms and subject to conditions he may specify and to limit the type of liquor which may be sold (section 11(2)); to restrict the number of licences that may be issued in an area of the province (section 11(6)); to specify on the licence the days and hours the establishment

may remain open for the sale of liquor and, on application by the licensee, to change those hours (section 13); to endorse a licence to allow off-premises sale of liquor (section 14); and to refuse to issue, renew or transfer a licence where, in his opinion, it would be contrary to the public interest (section 16(2)).

Many regulations also vest discretionary authority in the general manager. Some of these are written in prohibitive terms but give the General Manager the discretion to approve exceptions, for example:

> ...no games are permitted and no entertainment is permitted on Sunday, unless approved by the general manager.
>
> (Regulation 17(2)(k))

> no minors other than entertainers shall be permitted on the premises unless otherwise approved by the general manager...
>
> (Regulation 17(3)(d))

> no licensed Neighbourhood Public House shall be located within 1 mile of another licensed Neighbourhood Public House or licensed hotel, except as approved by the general manager.
>
> (Regulation 17(4)(f))

> no licensed Neighbourhood Public House shall be located within 1/2 mile of a main or secondary highway, except as approved by the general manager.
>
> (Regulation 17(4)(g)

Numerous other regulations appear mandatory but similarly give the General Manager the discretion to allow exemptions, for example:

> Unless otherwise authorized by the general manager, all liquor served in licensed establishments shall be dispensed from the original container in which the liquor is purchased from the Liquor Distribution Branch.
>
> (Regulation 7(1))

> Unless otherwise authorized by the general manager, all licensed establishments shall be cleared of patrons within 1/2 hour after the establishment is closed.
>
> (Regulation 8(1))

> Unless exempted by the general manager, hot foods, wrapped sandwiches, snacks, hot beverages, soft drinks, fruit and vegetable juices shall be available at reasonable prices to the customers.
>
> (Regulation 17(1)(g))

> Seating at tables in the dining area shall be provided for a minimum of 40 persons unless otherwise authorized by the general manager.
>
> (Regulation 17(2)(h))

> Unless exempted by the general manager, appropriate marine facilities shall be available at reasonable prices to customers as follows:...
>
> (Regulation 17(6)(g))

Despite the extent of the General Manager's discretionary authority, virtually no criteria have been developed in either policy or regulations to structure the manner in which his discretion will be exercised. Over the years innumerable circulars have

been written by the Branch. The primary function of these is to communicate with the inspectors throughout the province; these circulars are no substitute for the comprehensive, methodical development of the criteria which should be taken into account every time the General Manager exercises his discretionary authority. No less than this is required.

2. Discussion and Recommendations

In recognition of the fact that rules without discretion cannot take into account the need for suiting results to the unique facts and circumstances of individual cases, the Legislature has provided the vehicle through which particular decisions are to be made by its delegates. That vehicle is the delegation of discretionary power. This statutory granting of discretionary authority is a necessary component of fair public administration for a variety of reasons, for example:

- the difficulty of providing a rule which is applicable to all cases;

- the difficulty of identifying all the factors to be applied to a particular case;
- the difficulty of weighing those factors; and
- the need to provide a vehicle for adapting the considerations to be applied over time.

Discretion exists whenever the limits on the power of a public administrator leave him or her free to make a choice among possible courses of action or inaction. This freedom, however, only exists within certain boundaries. Even the most broadly phrased grant of discretion does not confer an unlimited discretion. In Roncarelli v. Duplessis, Rand, J.'s famous judgment contained a classic, often repeated statement:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is, that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[3]

The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide

range of abuses, including:

- the exercise of discretion in bad faith, or for an unauthorized purpose;
- the exercise of discretion based on the consideration of irrelevant factors or the refusal to consider relevant factors;
- the exercise of discretion beyond the limit conferred by statute; and
- the refusal of a delegate to exercise his discretion by adopting a policy which fetters his discretion.

The essence of discretionary authority is that it can be, and should be, exercised differently in different cases. Therefore, the challenge is to develop an administrative system in which discretion, while tailored to suit individual circumstances, is exercised and is perceived to be exercised fairly and consistently. This can be accomplished by structuring discretion.

(a) Structuring Discretion

Sometimes the discretion granted by the Legislature to an administrative agency is

overly broad. This may be due to concern for individualization in decision-making, or the lack of familiarity of the Legislature with the type of issues which the agency will be dealing with.

When a legislative body delegates discretionary authority without enumerating any standards which should be taken into account in the exercise of that discretion, it is desirable for administrators to develop standards and principles to structure and regularize the exercise of their discretionary power so that their decisions affecting individuals will achieve a high degree of fairness. Standards and principles may be contained in plans, policy statements, rules or regulations.

Before an administrative agency can begin to develop standards, it must have a clear understanding of its statutory mandate and the objectives of the legislation. Confusion about agency objectives can cause operational problems as well as make it difficult for the Legislature,

the executive and interested others to evaluate how effectively the agency operates.

Recommendation 1:

That the broad objectives of the LCLB be stated clearly in the legislation.

A new administrative agency may have no defined policy in mind when it decides the first few cases in a specific area. Structuring begins as discretionary choices are made in the light of the agency's objectives. Typically, standards and criteria emerge in the process of adjudicating individual cases. Over time, the formulation of policy can become a more reasoned and inductive process.

Policy elaboration involves the translation of general policy criteria as set forth in the statute and regulations into rules and guidelines. The policy is then applied at the decision-making level. The purpose of policy formulation is to develop a framework for principled decision-making in light of the

statutory objectives of the program. In the absence of stated criteria which he or she proposes to apply in a decision, an administrator will be faced with the necessity of adjudicating indefinitely on a day-to-day basis without any guidelines. The inevitable result of such ad hoc decision-making is an inconsistent and often contradictory history of decisions.

The development of policy is an evolutionary process. In the infancy of an adminstrative agency, policy statements provide a degree of flexibility which may be desirable. The agency may wish to test a policy and feel its way while it gains experience. However, as the agency develops expertise and as a body of policy emerges, it is desirable that the standards and criteria be codified in regulations. Subordinate legislation can foster equality of treatment in similar circumstances and can inform interested persons what criteria the decision-maker will be taking into account. The Law Reform Commission of Canada, in its 1985 report on Independent Administrative Agencies, concluded that "subordinate legislation can help

promote such values as accountability, comprehensibility and fairness"[4] and that it is a useful means of structuring and communicating the policy of an agency. With the experience which the LCLB has gained to date, it is now at the stage where standards can be codified in the regulations.

Recommendation 2:

That, in those areas where the LCLB has had sufficient experience to develop standards, those standards be codified in the regulations.

There may be some instances where the Branch's experience has caused it to conclude that a certain discretion ought never to be exercised. To illustrate: Regulation 17(2)(i) requires that "seating at tables in the dining room shall be provided for a minimum of 40 persons unless otherwise authorized by the general manager". The regulations should include the criteria which the general manager will take into account when considering an application from a restaurant with less than 40 seats. What are the important factors?: the menu, the decor,

the total number of licensed seats in a certain area, the location, etc. In circular no. 377, dated March 19, 1984, the general manager wrote that "under no circumstances will I consider a restaurant with less than 25 seats". By refusing to consider an application with less than 25 seats, the General Manager has fettered his discretion. This situation can be rectified in either of two ways: the General Manager can evaluate each application on its merits considering the criteria (regardless of the number of seats) or the regulation can be amended to require seating for a minimum of 25 seats (thereby eliminating the General Manager's discretion below that figure).

Recommendation 3:

That, where the experience of the LCLB has been to refuse consistently to exercise certain statutory grants of discretion, those discretionary grants be deleted from the legislation.

However, the codification of standards and policy in regulations does not obviate the need for the formulation of policy. The provision of

the agency's formal mandate, whether in statute or regulation, cannot be so precise that the agency will not need to interpret it. Agencies are not generally constrained from such interpretation of the meaning of legislative provisions. Development of policy statements demands a willingness on the part of administrators to address situations before they must be dealt with as concrete cases. This process requires foresight and the ability to generalize. However, there are numerous advantages to the development of policy statements about how discretion will be exercised or legislation interpreted before the agency is required to do so in a specific case.

Policy statements can act as a complement to the inclusion of criteria in the regulations; furthermore, they can facilitate voluntary compliance, ensure greater consistency and encourage accountability.

Recommendation 4:

That the LCLB compile a comprehensive policy manual.

Policy statements (no less so than subordinate legislation) must fall within the mandate granted by the constituent act. Determination of that ambit requires a clear understanding of both the particular statutory provisions and the entire legislative scheme.

Recommendation 5:

That each policy statement make reference to the statutory or regulatory provision from which it flows.

Such reference provides an opportunity for careful consideration of the provision by the administrator formulating the policy, the individual affected by the policy, and any independent body which might be reviewing the policy.

"Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice".[5] Regulations are, of course, available to the public.

Recommendation 6:

That all policy statements developed by the Branch be made available to applicants or other interested persons.

Such openness will ensure that applicants are aware of the criteria which the Branch will take into account when considering their applications. The goal should be for an administrator and his staff to close the gap between what they know about the Branch's law and policy and what an applicant knows. When policies are kept secret, a private citizen is prevented from checking an unintended or an arbitrary departure from them. Hidden rules are inconsistent with a democratic system of government.

b. Fettering Discretion

As long as an administrator is the recipient of a statutory grant of discretionary authority, he must exercise it; he must not fetter it through the adoption of a rigid policy. How, then, can an administrator develop standards to structure his or her exercise of discretion while avoiding the abuse of fettering discretion? Lord Justice

Bankes defined the fine line an administrator must walk:

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.[6]

The courts have been concerned to ensure that the discretion granted by the Legislature is fully exercised and that individuals are not deprived of the benefit of a discretion by administratively created limitations that were not contained in the statute. However, the courts also recognize the extent of potential for unequal treatment when no structuring of broad discretionary powers is developed.

In the 1971 case of Lloyd v. Superintendent of Motor Vehicles [7], the British Columbia Court

of Appeal struck down the superintendent's invariable policy of suspending the licence of every driver convicted of driving while impaired. The statute empowered the superintendent to suspend a licence where in his opinion the licensee was unfit to drive. Bull, J.A. dealt with the legal issues as follows:

> In my view it is crystal clear that the respondent Superintendent did not enter into any inquiry at all as to whether or not the appellant was or was not, by virtue of any reason, unfit to drive a motor vehicle. He formed no opinion of the appellant's fitness at any time, and never at any time put his mind to that question. A pre-existing policy decision formed at some unknown earlier time would unquestionably have bearing upon the formation of his opinion, had he put his mind to the appellant's fitness or otherwise, but that policy decision is not what the section required the Superintendent to make or to apply. He was required to form an opinion of fitness or unfitness as at the time of the formation of the opinion. Put simply, there never was any inquiry or consideration given to the situation of the person aggrieved by the official charged by the Legislature with judicial or quasi-judicial duties. I fail to see on what valid grounds it can be said that the respondent Superintendent judicially formed an opinion of the appellant's unfitness to drive at the time of the opinion and which unfitness had been satisfactorily proved to him, when he did nothing more than give directions at some unknown earlier date to his staff to send out suspension notices to all persons who had been convicted of a violation of s. 222 of the Criminal Code and to place his stamped name thereon.[8]

While this judgment illustrates the danger of adopting too rigid a policy, it should not be taken to prohibit the adoption of standards.

In 1978, the Supreme Court of Canada endorsed the use of policy guidelines in the case of Capital Cities Communications Inc. v. Canadian Radio-Television Commission.[9] It was argued that the Commission had fettered its discretion by applying a policy statement as a guideline rather than considering a licence amendment on a purely individual basis. Chief Justice Laskin and a majority of the court not only rejected this argument but also endorsed the use of guidelines as a desirable regulatory technique. However, the endorsement was predicated on an opportunity being given to the affected party to argue against the policy and its applicability to his particular case. In other words, a policy statement cannot become a rigid rule. An administrator may suggest to an applicant what the agency's policy is and that, after consideration, his application will be denied in

accordance with that policy unless there is something exceptional in his case; he may not, however, refuse outright to consider certain applications.

Recommendation 7:

That care be taken to ensure that policy statements are not so rigid as to constitute a fettering of discretion.

B. Hearings and Appeals

1. Background

Currently, under the Liquor Control and Licensing Act, there are two different appeal routes. Section 31(2) provides for an appeal of an action, order or decision of the General Manager or any of his officers or employees to the Commercial Appeals Commission. Section 32(2) removes from those who may appeal to the Commission "a person aggrieved by the general manager's refusal to issue a prescribed licence or to give an approval necessary in the licensing process." Such a person "may appeal to the minister by notice in writing sent by registered mail within 30 days after the date of the refusal."

Generally speaking, the Branch's letters of denial have been very terse, for example:

> Your application for a neighbourhood pub has been refused for the following reasons:
>
> 1) Site located within shopping center. Policy.
>
> 2) Site located within 1/2 mile of Trans Canada Highway. Regulation 17(4)(g).

It has not consistently been the practice of the LCLB to inform applicants of their right to appeal a decision or the statutory time limitation for an appeal.

In February of 1984, the Branch sent a circular to all inspectors describing a new procedure for hearings before the General Manager. If the Deputy General Manager, Licensing, proposed to reject an application, he would so inform the applicant who would then have 30 days to request a full hearing before the General Manager. If the General Manager supported the proposed refusal, the applicant could then appeal the refusal to the Minister under section 32(2) of the Act. If the applicant did nothing, the proposed refusal would automatically be made definite after the expiry of 30 days. The last sentence of

this circular states that "an appeal [to the Minister] will not be heard unless a full hearing before the general manager has taken place previously." Recently, the Branch discontinued this procedure as it was felt that it promoted an image of discordance within the Branch.

2. Discussion and Recommendations

(a) Hearings

The quality and thoroughness of the first level decision-making in an agency has a direct bearing on the number of appeals and the impact of appeal decisions on the agency. When an administrator informs the affected party of his proposed decision, and affords that party the opportunity to present his case before a final decision is reached, the affected party will more likely feel that his particular situation has been thoroughly considered. Consequently, he will be less inclined to appeal. If he does appeal, it is less likely that the appellate body will allow the appeal if the decision being

appealed was reached only after thorough consideration of the relevant factors and full opportunity to the affected party to make his case known.

Recommendation 8:

That the General Manager, before making a decision, give notice of his proposed decision to the affected party who would then have the option of requesting a full hearing before the General Manager.

If the party did not wish to pursue this option, the decision of the General Manager would become final. The party could then choose to pursue his statutory right to appeal. As a result of improving the quality of the first level decision-making, the credibility and the stature of the LCLB process will be augmented because fewer decisions will be appealed and fewer of the appeals will succeeed.

The fundamental tenent of administrative fairness can be summarized by the phrase audi alteram partem (listen to the other side). The content of this principle will vary according to particular circumstances and the interests at stake.

Recommendation 9:

That notice of the General Manager's proposed decision at a minimum include the following: the consequences to the affected party of a negative decision; the procedure to be followed at the hearing; explanation of the relevant legislation and policy; and the proposed reasons with a discussion of the important facts.

Recommendation 10:

That, if the proposed decision is confirmed after the hearing, full written reasons be provided the affected party.

Recommendation 11:

That, if the proposed decision is confirmed, information concerning statutory appeal provisions should be given to the affected party.

(b) Appeals to the Minister

A statutory right to appeal to a Minister may be perceived as being susceptible to extraneous influences. "To reverse an agency decision for what might be seen as partisan political purposes detracts from the integrity and credibility of the administrative process"[10]; moreover, "it can be demoralizing for the agency and the parties to have worked diligently through a file only to be reversed on what may

be perceived to be extraneous factors".[11] While this would not necessarily be the case, there is a risk that ministerial appeals may yield such results.

Ministerial decisions in LCLB appeals are generally unaccompanied by reasons. Therefore, they offer no guidance to the administrators when faced with similar situations in the future; in fact, they may foster a sense of uncertainty in the affected parties, the administrators, and the public in general.

True rights of appeal for participants in the administrative process should be established within an adjudicative framework involving an independent administrative review agency. Such an appeal process would segregate the policy setting function of the Legislature and the LCLB from the independent adjudicative function of ensuring compliance with the legislation and the policy. Decisions of an independent body will foster greater public confidence in both those decisions and the system as a whole.

Recommendation 12:

That the legislation be amended to provide that all appeals be heard by the Commercial Appeals Commission or a similar independent appellate body.

Subsequent discussion and recommendations refer to the CAC but are equally applicable to another independent appellate body.

(c) Appeals to the Commercial Appeals Commission (CAC)

Generally speaking, an administrative appeal (such as is provided to the CAC by section 31(2) of the Liquor Control and Licensing Act) is broader than judicial review because the latter generally does not consider the merits of a delegate's decision but only its legality. Section 18(1) of the Commercial Appeals Commission Act[12] reads as follows:

> 18(1) In an appeal the commission has the same powers of decision as the officer and the commission may confirm, vary or reverse the order under appeal with or without conditions or may refer the matter back to the officer with or without directions.

This is an example of a very broad statutory appeal provision. Section 18(1) confers on the appeal body the power to substitute its decision on the merits for that of the original decision-maker. This type of appeal is usually held by way of hearing de novo: the appellate body is required to make its own determination of fact on the basis of the evidence and arguments submitted to it; it is not bound by the original decision. Indeed, a hearing de novo proceeds as though no hearing whatever had been had in the first instance. The Commission must put itself in the shoes of the General Manager and take into consideration the criteria contained in the regulations and policy.

Recommendation 13:

That the Commission exercise its jurisdiction to hold a hearing de novo and consider the issue at hand independent of the original decision.

Section 3(1) of the Commercial Appeals Commission Act provides that the Lieutenant Governor in Council may appoint to the Commission as many members as considered appropriate. Section 4(1) allows the Chairman

to establish a panel of the Commission. Given the nature of LCLB issues, it is desirable that Commission members have specialized knowledge. Caution must be exercised to ensure that the Commission members are impartial and are perceived to be impartial.

Recommendation 14:

That the Chairman establish a special panel of the Commission to hear all liquor-related appeals.

Recommendation 15:

That general guidelines be drawn up to indicate the desired background or qualities of the panel members.

The appeal process must guarantee that the requirements of procedural fairness are met.

Recommendation 16:

That adequate notice of the appeal proceedings be given the appellant.

Recommendation 17:

That the appellant be given access to all information that is relevant to the decision unless there is a compelling reason for confidentiality.

A statutory requirement or a practice that requires reasons to be given only upon request can encourage post hoc rationalizing in place of due consideration of the issues. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought through. Section 18(3) of the Commercial Appeals Commission Act does not require the Commission to give written reasons for its decision "except where a party to the hearing requests them within 90 days from the expiry of time limited for appeal to the Court of Appeal".

Recommendation 18:

That the legislation be amended to require the Commission to give written reasons for its decisions.

While a rigid application of precedent is not desirable, fear of excessive rigidity can result

in inconsistent decisions. There is a range in the possible uses of precedent: the issue is the extent to which an agency seeks to reconcile its later decisions with those which have preceded them. Common sense dictates that a previous decision has some bearing if the circumstances are similar and fairness demands consistency in the disposition of appeals.

An open record of decisions enables the affected party and other interested persons to review a decision in the light of the legislation, the policy, and previous decisions. Exposure of the Commission's reasoning to public scrutiny and criticism is healthy and may lead to a reduction in appeals concerning previously considered issues.

Recommendation 19:

That the Commission maintain a public record of its decisions.

IV Summary of Recommendations

The following recommendations encompass general principles of administrative fairness which are intended to be of assistance to the Liquor Policy Review Committee in its deliberations:

1. That the broad objectives of the LCLB be stated clearly in the legislation.

2. That, in those areas where the LCLB has had sufficient experience to develop standards, those standards be codified in the regulations.

3. That, where the experience of the LCLB has been to refuse consistently to exercise certain statutory grants of discretion, those discretionary grants be deleted from the legislation.

4. That the LCLB compile a comprehensive policy manual.

5. That each policy statement make reference to the statutory or regulatory provision from which it flows.

6. That all policy statements developed by the Branch be made available to applicants or other interested persons.

7. That care be taken to ensure that policy statements are not so rigid as to constitute a fettering of discretion.

8. That the General Manager, before making a decision, give notice of his proposed decision to the affected party who would then have the option of requesting a full hearing before the General Manager.

9. That notice of the General Manager's proposed decision at a minimum include the following: the consequences to the affected party of a negative decision; and the procedure to be followed at the hearing; explanation of the relevant legislation and policy; the proposed reasons with a discussion of the important facts.

10. That, if the proposed decision is confirmed after the hearing, full written reasons be provided the affected party.

11. That, if the proposed decision is confirmed, information concerning statutory appeal provisions should be given to the affected party.

12. That the legislation be amended to provide that all appeals be heard by the Commercial Appeals Commission or similar independent appellate body.

13. That the Commission exercise its jurisdiction to hold a hearing de novo and consider the issue at hand independent of the original decision.

14. That the Chairman establish a special panel of the Commission to hear all liquor-related appeals.

15. That general guidelines be drawn up to indicate the desired background or qualities of the panel members.

16. That adequate notice of the appeal proceedings be given the appellant.

17. That the appellant be given access to all information that is relevant to the decision unless there is a compelling reason for confidentiality.

18. That the legislation be amended to require the Commission to give written reasons for its decisions.

19. That the Commission maintain a public record of its decisions.

Footnotes

1. Liquor Control and Licensing Act, R.S.B.C. 1979, c.237, as amended.

2. Ombudsman Act, R.S.B.C. 1979, c.306.

3. Roncarelli v. Duplessis [1959] S.C.R. 121.

4. Report on Independent Administrative Agencies: A Framework for Decision Making, Law Reform Commission of Canada, 1985.

5. Evans et al, Administrative Law: Cases, Texts and Materials (Canada: Carswell, 1985), 740.

6. R. v. Port of London Authority ex p. Kynoch Ltd., [1919] 1 K.B. 176, at 184 (C.A.).

7. (1971) 20 D.L.R. (3d) 181 (B.C.C.A.).

8. Ibid., at 188-89.

9. [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609.

10. Supra, note 4, at 36.

11. Ibid.

12. Commercial Appeals Commission Act, S.B.C., 1982, c.68.

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5. Molot, H. The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion (1972) 18 McGill L.J. 310.

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B. Cases

1. Capital Cities Communications Inc. v. Canadian Radio-Television Commission [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609.

2. Gray Line of Victoria v. Chabot (... v. McClelland) [1981] 2 W.W.R. 636 (B.C.S.C.).

3. Lloyd v. Superintendent of M.V. (1971) 20 D.L.R. (3d) 181 (B.C.C.A.).

4. Manon v. Air New Zealand Ltd. and Others [1984] 3 All E.R. 201 (P.C.).

5. 033200 N.B. Ltd. v. Liquor Licensing Board (1986) 22 Admin. L.R. 309 (Q.B.).

6. Osmond v. Public Service Board of New South Wales and Another [1985] L.R.C. (Const) 1041 (N.S.W.S.C.).

7. R. v Port of London Authority ex p. Kynocn Ltd. [1919] 1 K.B. 176.

8. Roncarelli v. Duplessis [1959] S.C.R. 121.

9. R.V.P. Enterprises Ltd. v. Minister of Consumer and Corporate Affairs (1987 unreported) Vancouver Registry No. A860801.

C. Legislation

1. Commercial Appeals Commission Act, S.B.C. 1982, c. 68.

2. Liquor Control and Licensing Act, R.S.B.C. 1979, c. 237, as amended.

3. Ombudsman Act, R.S.B.C. 1979, c. 306.

A P P E N D I X

Province of
British Columbia

OFFICE OF THE MINISTER

Ministry of
Labour and
Consumer Services

Parliament Buildings
Victoria
British Columbia
V8V 1X4

March 2, 1987

Mr. Stephen Owen
Ombudsman
8 Bastion Square
Victoria, B.C.
V8W 1H9

Dear Mr. Owen:

Last fall the Premier stated that the Government would be initiating a comprehensive review of the Liquor Policy and Legislation of the province. I would like to take this opportunity to invite the Ombudsman's office to participate in the review. I would welcome receiving your written views and thoughts on the current liquor policy, legislation, regulations and the administration of the branch. Once you have completed your comments it may be worthwhile for you to meet with the panel, chaired by M.L.A. John Jansen, and present your recommendations.

I understand that Bert Hick, the new General Manager, has met with two members of your staff to discuss specific concerns and issues. I would fully support the continuation of this dialogue and would welcome any assistance and advice they could offer to the branch to improve the administration of the Act and Regulations, particularly as the policy team works through the policy review.

Yours sincerely,

Lyall Hanson
Minister

cc: Mr. Bert Hick

Legislative Assembly
Province of British Columbia

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March 9, 1987

The Honourable Lyle Hanson
Minister
Ministry of Labour and Consumer Services
Parliament Buildings
Victoria, B.C.
V8V 2X4

Dear Mr. Hanson:

Many thanks for your letter of March 2, 1987 inviting the participation of the Ombudsman's office in the review of the Liquor Policy and Legislation of the province. I would be pleased to initiate an investigation along the lines that you suggest and resulting in a formal statement of recommendations.

It is my opinion that this office should make its resources and specific expertise in administrative fairness available as a resource to the public service in this constructive and preventative way in addition to merely acting as a critic after the investigation of a specific complaint. I welcome your approach to us and appreciate the openess and cooperation that this office has received from Bert Hick.

Best wishes.

Yours sincerely,

Stephen Owen

Stephen Owen
Ombudsman

c.c. Bert Hick
Liquor Control and Licencing Branch