Case Comments and Notes

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Chronique de Jurisprudence et Notes

The Grand Manan Liquor Cases: Protection of the Public Interest or Legislative Tweedledum and Tweedledee?

The 1983 amendments to the *Liquor Control Act*[1] were introduced to correct a number of perceived deficiencies in the New Brunswick Government's liquor policy. Among these were the addition of new classes of licenses,[2] changes to the French version of the Act,[3] regulation-making provisions of a housekeeping nature,[4] the creation of a 'live entertainment' license,[5] and provision for the employment of minors in licensed premises.[6]

There were also four new provisions intrinsic to the decision-making process of the Liquor Licensing Board: 1) its procedure,[7] 2) considerations guiding its decisions,[8] 3) the form and contents of its decisions,[9] and 4) the judicial review of them.[10] These amendments are generally regarded as a legislative response to objections arising from eight unsuccessful

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[1]First passed S.N.B. 1961-62, c. 3; revised R.S.N.B. 1973, c. L-10; amended S.N.B. 1974, c. 26 (Supp.), amended S.N.B. 1983, c. 47. Note there are some errors in the section histories in the loose-leaf version of the Revised Statues of New Brunswick.

[2]S.N.B. 1983, c. 47, sections 1, 8, 13 and 14. These include a 'ferry boat licence'. The coincidental introduction of this provision prompted one Opposition Member to ask 'what about the ferry to Grand Manan?' (S.R.I.A.N.B., June 23, 1983, p. 2788).

[3]*Ibid.*, ss. 2 and 4(c).

[4]*Ibid.*, ss. 7 and 16. See also S.N.B. 1983, c. 8, s. 18.

[5]*Ibid.*, ss. 9, 10 and 12. These provisions were prompted by the judicial striking down of S.N.B. 1982, c. 37 (re immoral, indecent or obscene entertainment) in the case of *Rio Hotel* v. *Liquor Licensing Board and Attorney General of New Brunswick*, (1983) 45 N.B.R. (2d) 224; (1983) 47 N.B.R. (2d) 436. The journey of S.N.B. 1982, c. 37 and its replacement by ss. 9 and 10 of S.N.B. 1983, c. 47 merit separate attention.

[6]*Ibid.*, s. 15.

[7]*Ibid.*, sections 4 and 11.

[8]*Ibid.*, s. 3.

[9]*Ibid.*, s. 5.

[10]*Ibid.*, s. 6.

applications[11] for dining-room[12] and restaurant licenses[13] by three establishments[14] in the Village of North Head, Grand Manan Island.[15]

These complaints related to the exercise of the Board's jurisdiction through its interpretation of the concept 'public interest'.[16] They also related to procedures followed by the Board, including (a) the ascertainment of objections to an application prior to the date of the hearing; (b) the failure to give proper weight to evidence emanating from the municipality within which the premises are located; (c) the Board's refusal to allow the cross-examination of objectors; (d) the Board's alleged failure to give reasons for its decisions, and (e) the inability to challenge the Board's decisions in a Court.

The purpose of this note is to examine these objections in the context of the history of liquor licensing in New Brunswick and the legislative framework within which the provincial liquor policy is implemented, as well as the 1983 legislative response to them.

LEGISLATIVE HISTORY

The subject of liquor[17] has frequently preoccupied the legislative life of New Brunswick. The first colonial legislative sittings in Fredericton were reputed to have been held in a tavern and, through many of the Province's early years, alcohol formed an integral ingredient in the "triangular" Atlantic trade between Britain, the West Indies and British North America.[18] The widespread licensing of colonial establishments was carried out by magistrates of the Administrative Courts of General Sessions.[19] The negative social effects of liquor gradually gave rise to a powerful prohibitionist

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[11]The Marathon Hotel Ltd. (James Leslie) has made five applications, heard in March, 1978; November, 1978 (rehearing); February, 1980; June, 1981; and January, 1983. The Griff-Inn Ltd. (Robert Griffin) has made two applications, heard in February, 1981 and February, 1983. The Shorecrest Lodge (John Tover) has made one application, heard in May, 1983.

[12]*Liquor Control Act*, R.S.N.B. 1973, c. L-10, sections 88-89. This license enables the licensee to 'purchase . . . and to sell . . . liquor, together with meals . . . in any dining or reception area of the premises of the licensee' (s. 89(1)).

[13]*Ibid.*, sections 85-87. This license enables the proprietor or operator of a restaurant to 'sell . . . beer and wine . . . for consumption only in the restaurant, together with meals . . .'.

[14]S.R.I.A.N.B., June 23, 1983, pp. 2787-96. In presenting the legislation, the Minister of Finance demurred in this; however, the Opposition clearly perceived the origin of the legislation.

[15]The Parish of Grand Manan includes the inhabited islands of Grand Manan and White Head, as well as the unoccupied islands to the south and east of Grand Manan Island. (*Territorial Division Act*, R.S.N.B. 1973, c. T-3, s. 19(e)). There are three incorporated villages on the island—North Head (the location of the three establishments which have made applications)—Grand Harbour and Seal Cove, each with less than 1,000 population. (Report of Chief Electoral Officer, 30th General Election, October 12, 1982, Fredericton, Queen's Printer, 1982, p. 55.)

[16]S.N.B. 1974, c. 26 (Supp.), s. 2 (now s. 11(c)).

[17]*Ibid.*, s. 1.

[18]J.B. Brebner, *North Atlantic Triangle*, (Toronto: Ryerson, 1945).

[19]S.N.B. 1786, c. 36; S.N.B. 1831, c. 24; S.N.B. 1835, c. 3.

sentiment in New Brunswick, led by the Sons of Temperance organization and its leader, Samuel (later Sir Samuel) Leonard Tilley.[20] Through his leadership of the "Smasher" faction in the colonial Legislature, Tilley succeeded in obtaining the passage of prohibitionist legislation in 1852 and again in 1855. Both Acts presented difficulties of enforcement which led to their repeal less than one year after their respective proclamations. The prohibitory Act of 1852 was regarded judicially as one "conceived in tyranny and ended in fanaticism and violence";[21] while the repeal of the latter was viewed historically as a move to "rid the country of a measure that was alien and unpopular".[22]

The prohibitionist lobby remained intact following Confederation and, in 1878, its efforts resulted in Parliament's passage of the *Canada Temperance Act* of 1878, the first national venture in the regulation of the sale and consumption of spirits.[23] This legislation—commonly known as the "Scott Act"—provided for the adoption of prohibition by Canadian municipal governments on the referendum or "local option" of a majority of its residents.

By 1916, approximately two-thirds of the Province's municipalities (including counties and other municipal governments) had opted for the application of the so-called "Scott Act".[24] In that year, the Provincial Government, in response to continued pressure from the prohibitionist lobby, and a general sentiment to "bring the First World War home to Canadians," passed the *Prohibition Act*.[25] The Act was to apply to the entire Province where the "Scott Act" was not enforced. It prohibited the sale of liquor except for medicinal, scientific and sacramental reasons. The problem with this Act was that its application fell heaviest on anti-prohibitionist areas, particularly Saint John and the "North Shore" counties.

Although this legislation remained in force until 1925, its experience was not dissimilar to its nineteenth century predecessors. Liquor "prescriptions" were readily available through local druggists and doctors—and generally, "bootlegging flourished in every city, town and village;"[26] in addition, New Brunswick was a leading point of entry for liquor entering the prohibitionist United States from 1919 onwards. In 1927, the Baxter administration, following a last attempt to enforce the Act, replaced it with the *Intoxicating Liquor Act*, 1927.[27] This new legislation provided for the estab-

[20]W.S. MacNutt, *New Brunswick: A History: 1784-1867*, (Toronto: MacMillan, 1963); at 350; S.N.B. 1852, c. 51; S.N.B. 1855, c. 36.

[21]*Ibid.*, p. 351. (Quotation attributed to Mr. Justice Lemuel Allen Wilmot of the N.B. Supreme Court).

[22]*Ibid.*, p. 361 (See above pp. 357-62).

[23]S. C. 1878, c. 16.

[24]C. Ferris, "The New Brunswick Elections of 1917", U.N.B., unpublished thesis, 1974, p. 101.

[25]S.N.B. 1916, c. 20. Interestingly, L.P.D. Tilley, M.L.A., son of Sir Leonard, voted against the measure.

[26]A.T. Doyle, *Front Benches and Back Rooms*, (Toronto: Green Tree, 1976), p. 233.

[27]S.N.B. 1927, c. 3.

lishment of a New Brunswick Liquor Control Board, charged with the regulated sale of liquor by Government stores throughout the Province. However, it continued to outlaw the sale of liquor in public establishments and imposed strict regulations regarding store hours and operations, sales to minors and bootlegging.

The 1927 legislation presented a fundamental paradox. On the one hand, it permitted the sale of alcohol within the Province; however, it also purported to determine the social context in which it would be consumed. As a result, the difficulties which plagued the prohibitory legislation—particularly bootlegging and the sale of liquor in public places—continued for the New Brunswick Liquor Control Board. Particularly after World War II, the Act was enforced through a process of "enforcement in the breach", i.e., the Board and its parent political administration vigorously prosecuted violations of the law by third parties while initiating certain illegal procedures on their own accord. The most noteworthy of these latter exceptions was the issuance of letters of authorization to Legions and other clubs for the purchase of liquor, the dispensing of liquor at banquets and parties, at certain authorized hotels and in certain municipalities.[28]

These inconsistencies led the Robichaud administration to pass the *Liquor Inquiries Act* of 1961.[29] The Bridges Commission (established under this Act) was charged with completing a comprehensive review of provincial liquor legislation. The Commission considered, and expressly rejected, concerns that increased availability of liquor would result in increased alcoholism, more dangerous driving conditions and adverse effects on youth. It also rejected the concept of local option and recommended increased availability of liquor to the public through the issuance of licenses and permits to a number of public facilities. The *Liquor Control Act*,[30] "legislation based upon [the] findings and recommendations" of the Bridges Commission,[31] provided for the continued sale of alcohol in Government stores and, in addition, permitted the sale of liquor by the glass in a number of licensed premises including taverns, restaurants, dining rooms, lounges and clubs.[32] The New Brunswick Liquor Control Board was replaced by the New Brunswick Liquor Control Commission[33] and the Commission was charged with the overall supervision of Government stores,[34] as well as the licensing of establishments for the sale of liquor.[35]

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[28]Report of New Brunswick Liquor Inquiry Commission, Queen's Printers, Fredericton, July, 1961, pp. 11-12.

[29]S.N.B. 1960-61, c. 12.

[30]S.N.B. 1961-62, c. 3.

[31]S.R.L.A.N.B. 1961-62, Vol. I, November 14, 1961, p. 4.

[32]S.N.B. 1961-62, c. 3, s. 60.

[33]*Ibid.*, s. 2.

[34]*Ibid.*, s. 13.

[35]*Ibid.*, s. 28.

The task of hearing applications and making recommendations for license issuance was placed in the Licensing Board, consisting of a member of the Commission as full-time Chairman of the Board, together with two to six other persons as part-time members. The Board was required to consider every application for a liquor license and was cloaked with broad evidentiary and inquiry powers to do so. It had the power to recommend the granting or refusal of a license application, to grant rehearings after a license cancellation,[36] and to recommend the attachment of conditions to the issuance of a license.[37]

From 1961 to 1974, the New Brunswick Liquor Control Commission discharged the triple duties of the direct sale of bottled liquor, the licensing of premises for the sale of liquor by the glass and the enforcement of the quasi-criminal provisions of the legislation through its inspection system. It was perhaps inevitable that, given such diverse roles (and given the nature of appointments to the Commission and its subsidiary Licensing Board), conflict of interest charges would eventually be levelled against it.[38] For this reason and in order to more clearly delineate between the liquor sale and the liquor control aspects of government policy, the Hatfield Administration abolished the New Brunswick Liquor Control Commission in 1974 and replaced it with a new Liquor Licensing Board[39] and the New Brunswick Liquor Corporation.[40] The administration of the day literally ripped out sections of the *Liquor Control Act* relating to the sale of liquor in government stores, replacing them in the *New Brunswick Liquor Corporation Act*. The gaping remnants of the *Liquor Control Act* remained with a reconstituted liquor licensing and enforcement function.

In utilizing such blunt statutory tools, the Province was left with a lack of any clear legislative purpose with respect to liquor. The 'purposes' clause of the *Liquor Control Act* states that:

> 199(1) The purpose and intent of this Act are to *prohibit* transactions in liquor that take place wholly within the Province, except under control as specifically provided by this Act and every section and provision of this Act shall be construed accordingly.[41]

Section 199(2) went on to state that provisions dealing with the importation, sale and disposition of liquor in the Province by the New Brunswick Liquor Corporation "provided the means by which such control should be made effective."

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[36]*Ibid.*, ss. 25 and 26.

[37]*Ibid.*, ss. 28 and 29.

[38]Indeed, s. 65(3) of the *Liquor Control Act* contained a rather stringent conflict of interest provision with regard to the issuance of licenses.

[39]S.N.B. 1974, c. 26 (Supp.), s. 2.

[40]S.N.B. 1974, c. 26 (Supp.); S.N.B. 1974, c. N-6.1.

[41]R.S.N.B., 1973, c. L-10, s. 199(1). This section is paradoxically—yet characteristically—at the end rather than the beginning of the legislation.

Ranged against these restrictive provisions is the purposes clause of the *New Brunswick Liquor Corporation Act* which states that: "3. The purposes of the Corporation are to carry on the general business of manufacturing, buying, importing and selling liquor of every kind and description."[42] The wording and intent of this provision appears to be in direct contradiction to the restrictive provisions of the *Liquor Control Act*. This dichotomy presented an opportunity for the evolution of a liquor control policy akin to the straightforwardness of Alice in Wonderland's Tweedledum and Tweedledee. The ensuing issues presented to the Board were to bring this possibility into reality.

'Public Interest', Administrative Fairness and the Liquor Licensing Board

A discussion of the concept of 'public interest' in the *Liquor Control Act* must be viewed in the context of the Liquor Licensing Board's jurisdiction, its obligation to provide reasons for its decisions and the finality of such decisions.

The 1961 Act had established prerequisites to the issuance of a license, including the age, citizenship, residency, reputation, financial status and any criminal record of an applicant,[43] the adequacy of the physical premises with respect to which a license was sought,[44] and the right of persons,[45] and of the municipality in which the proposed licensed premises were located,[46] to object to the granting of a license.

The 1961 Act had also required an applicant to submit an affidavit in support of the application for a license and to publish a notice of the Board's hearing of his application, together with a notice of the right of persons to object to, or protest, the granting of the license.[47] Within 14 days of the last publication of the advertisement persons might file an 'objection or protest' against the issuing of the license with the Commission. The Commission was obliged to consider objections by fixing "a time and place for the Licensing Board to hear evidence from the applicant, any objectors, and the municipality within which the premises were situated. With regard to the hearing itself, the Licensing Board was required to "hear the evidence; and for that purpose (to) possess the same powers and authority of a County Court Judge" and to follow "the practice and procedure of the

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[42]R.S.N.B. 1973, c. L-6.1, s. 3.

[43]S.N.B. 1961-62, c. 3, ss. 61, 66(1) (now s. 64 and s. 69(11). See also Reg. 76-60 under the *Liquor Control Act*.

[44]*Ibid.*, ss. 66 and 67 (now s. 69 and s. 70).

[45]*Ibid.*, ss. 66(2), 68 (now s. 69(2) and s. 71).

[46]*Ibid.*

[47]*Ibid.*, s. 66(2), 66(4). The words 'or protest' were deleted in the 1974 amendment to the Act.

County Court in respect of hearing of the application, the subpoeaning, calling and paying of witnesses, maintenance of order, and other matters."[48]

The 1961 legislation provided a number of minimum fair procedural rules including the requirements of a public hearing, the right of the applicant, any objector, and a municipal representative to be present at a hearing, to be heard personally or by counsel or agent, and to produce witnesses and evidence.[49]

In conducting its hearing, the Licensing Board was required to ensure that all preliminary requirements had been met, whether or not an objection had been filed, and "to take evidence of witnesses on oath and respect thereof if it deems the evidence necessary or proper."[50] If the Licensing Board was satisfied that an applicant had met the requirements of the Act, the Commission might then issue an interim license or license to the applicant[51] (the former to expire not later than 60 days following its issuance; the latter to expire on March 31st of each year).

The 1974 version of the Liquor Licensing Board comprised a Provincial Court Judge as full-time Chairman, together with five part-time members[52]—a unique combination of full-time judicial and part-time lay membership.

The former Licensing Board's procedural powers remained intact. In addition, the former Board's power to recommend the issuance of licenses was replaced by the Liquor Licensing Board's power to do so.[53] Commensurate with this new power were requirements regarding considerations to be taken into account by the Board in reaching a decision, the provision of reasons for its decisions and for rehearings.

Section 11, which established the Board's considerations in granting a license, repeated the requirements of the former Board. It added the requirements that the Board must determine that the applicant would provide 'a proper service',[54] and also that, in issuing a license (or permit), 'the public

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[48]*Ibid.*, s. 68(1), (2); the reference to the County Court was changed to The Court of Queen's Bench of New Brunswick following the abolition of the County Court (S.N.B. 1979, c. 41, s. 75(1)). In addition, the Board had the same power and authority to summon and examine witnesses, take evidence and make inquiries as Commissioners appointed under the *Inquiries Act* (S.N.B. 1961-62, c. 3, s. 28(2)) however, this provision was repealed in 1974.

[49]*Ibid.*, s. 68(3), (4), (5), (6) (now s. 71 (3-6)).

[50]*Ibid.*, s. 69(2) (now s. 72(2)).

[51]*Ibid.*, s. 69(3), (4) (now s. 72(3), (4)).

[52]S.N.B. 1974, c. 26 (Supp.), s. 2; (R.S.N.B. 1973, c. L-10, s. 2(1)). In 1983, the *Provincial Court Act* (S.N.B. 1983, c. 69) was amended to provide for the assignment of judges to tribunals, at the discretion of the Lieutenant Governor in Council. The same Act abolished the requirement that the Chairman of the Liquor Licensing Board be a judge. The Act also prohibited new judges being appointed directly to tribunals, as was the case with the present Chairman, Judge William Cockburn.

[53]*Ibid.*, s. 2(s. 11(a)).

[54]*Ibid.*, s. 1 (s. 11(b)).

interest would be served'.[55] Having heard an application, the Board was required 'forthwith'[56] to notify all interested parties of its decision, and 'on request',[57] to forward reasons for its decision. For the purpose of this provision, 'any minute, record or any document in the form of a decision or order was deemed to be a decision.'[58] Finally, the Act's privative clause provided that 'every decision of the Board (was) final'.[59]

All eight Grand Manan applications have been refused on the basis of section 11(c), namely that the 'public interest' would not be 'served' by the issuance of a license.[60] This issue of 'public interest' has become the focal point of a concern that the Liquor Licensing Board is improperly exercising its jurisdiction under the *Liquor Control Act*. This, in turn, has resulted in considerable devotion of time and effort to establish the meaning of the phrase 'public interest will be served' in section 11(c).

It has been the view of the Board that the duty imposed upon it under section 11(c) is limited to the exercise of a discretionary power on proper grounds. It has believed that the manner in which such a discretion will be exercised is a function of the degree of sophistication of those charged with exercising the discretion as well as the 'public' which is interested in or affected by matters which come before the Board. It is difficult to ascertain the degree of sophistication expected of a tribunal whose Chairman and administrative head is a lawyer and senior Judge of the Provincial Court of New Brunswick, but whose five members meet no particular standards of expertise in the legal or technical aspects of liquor licensing. Similarly, the 'public' affected by a Board decision might range from a municipality[61] to the entire Province, depending on the area to which the legislation applied.

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[55]*Ibid.*, s. 2 (s. 11(c)).

[56]*Ibid.*, s. 2 (s. 15(1)).

[57]*Ibid.*, s. 2 (s. 15(2)).

[58]*Ibid.*, s. 2 (s. 15(3)). Note that s. 15(4) stated that these requirements were in addition to those under s. 24, a section dealing with cancellation and suspension.

[59]*Ibid.*, s. 2 (s. 16).

[60]The French version of 'public interest' in s. 11(c) was originally 'l'intérêt du public' (S.N.B. 1974, c. 26 (Supp.), s. 2). In 1983, this wording was amended to read 'l'intérêt public' (S.N.B. 1983, c. 47, s. 2).

[61]See footnote 7 supra. It is unclear whether the right afforded to a municipality to intervene in matters before the Board was to be limited to specific areas of municipal jurisdictions—zoning, public health, noise control—or whether it was to be broader interventionist one. Following the Marathon Hotel's first refusal, it requested the support of the Village of North Head. The Council resolved that it was 'unable to take a stand on such matters' (Minutes of Council—Village of North Head, May 3, 1978). However, on relaying this position to the Board, the Village's Mayor stated that 'the North Head Council did not support the liquor license application of the Marathon Hotel Ltd.' (Marie Thomas to Liquor Licensing Board, Sept. 29, 1978). This letter was considered by the Board prior to its November, 1978 refusal. Still later, when objections were made to the misleading nature of the Mayor's letter, the Council amended its 1978 Resolution to read that 'the North Head Village Council oppose granting of a license to anyone who should apply' (Minutes of Council—Village of North Head—February 14, 1979). Later still, the Council reverted to its original position, i.e., that it was unable to take a stand concerning such matters (Minutes of Council—Village of North Head, June 25, 1979).

Although neither physical concepts are mentioned in the Act, the Board has consistently interpreted 'public' to mean the year-round residents of Grand Manan Parish,[62] while the Marathon Hotel's counsel has argued that the 'public' is limited to the customers who frequent his client's establishment.[63] These various interpretations of the word 'public', and the dysfunctional degree of sophistication of the Board, lead one to conclude that arguments based on any precise interpretation are built on quicksand.

Certainly this would appear to be the view of those legal commentators who have concluded that the use of words like 'the public interest' are tantamount to the conferral of a 'very broad'[64] discretion. Having generalized the concept of 'public interest' to the broad exercise of discretion, the scrutiny of the tribunal focuses on the manner in which it exercises the powers conferred on it. This scrutiny may entail the application of particularist tests of relevancy (did the tribunal base its decision on extraneous considerations?) or legislative purpose (did the tribunal carry out an unauthorized purpose?) on a more general 'reasonableness' test. The cumulative effect of such tests forms a wide requirement that a discretionary power must be exercised reasonably, and that discretionary decisions which are reasonable (to a greater or lesser degree) will not be impugned by the courts as having been exercised outside an authority's jurisdiction.[65]

The first six Grand Manan refusals were decided simply by direct reference to section 11(c)1, i.e., the reason for the decision was stated that the 'public interest' would not be 'served' by the granting of a license. If one accepts the view that 'public interest' is no more than the conferral of a discretion on an authority, one must also conclude that decisions based solely on 'public interest' are decisions without *reasons*, and therefore, are a contravention of section 15(2) of the *Liquor Control Act*.

Following the third such decision, the Marathon Hotel Ltd. requested that The Court of Queen's Bench of New Brunswick issue a summons for a hearing to request an order for mandamus. The Court refused to issue a summons and the matter was referred to the Ombudsman and the Lieutenant-Governor in Council.[66] Meanwhile, a fourth Marathon Hotel Ltd.

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[62]Together with the occasional off-island clergymen or ex-resident whose prohibitionist views appear to carry some weight with the Board.

[63]The vast majority of whom are not residents of Grand Manan Parish. See Liquor Licensing Board proceedings of hearings mentioned in footnote 11 above.

[64]*Re: Simpson and City of Vancouver* (1975), 48 DLR (3d) 215 (B.C.C.A.).

[65]For an excellent summary of the 'reasonableness' and other tests applied to discretionary decisions, see J.M. Evans, H. Janisch, D.J. Mullan, R.C.B. Risk, *Administrative Law: Cases, Text and Materials*, (Toronto: Montgomery, 1980), pp. 698-701. These commentators point out that the more liberal the scrutiny of unreasonable decisions, the greater the opportunity for judicial intervention.

[66]Neither the Cabinet nor the Ombudsman have the power to order the Board to issue a license. The Cabinet eventually reconsidered the impugned provisions of the *Liquor Control Act*.

and the first Griff-Inn Ltd.[67] applications were refused on the grounds of 'public interest'.

The investigation by the Ombudsman sought to determine the reasons for the Board's refusals in the absence of any stated reasons by it. This investigation consisted of a detailed analysis of the number and kind of objections made to the two most recent applications from Grand Manan establishments. The purpose of this task was to determine if there existed a factual basis for the Board's refusals, and if so, whether these reasons were consistent with the legislative intent of the *Liquor Control Act*. The Ombudsman concluded that the Board had not scrutinized the objections presented to it, as evidenced by the large number of duplicate objections which it apparently overlooked, and by the Board's failure to categorize and weigh carefully the types of objections received by it. The Ombudsman's own analysis revealed that most of the objectors who provided reasons for their objections did so on bases which had been considered and rejected by the Bridges Commission.

In a recommendation issued to the Board on March 30, 1982, the Office concluded that the bases on which the applications had been refused may have been contrary to the *Liquor Control Act*, being beyond its legislative intent, and recommended that the Board reconsider its decision on the basis of more relevant criteria.[68] In addition, the Ombudsman recommended to the Government that 'a more precise definition . . . be placed on the concept of 'public interest'.[69] The Board refused to reconsider its decision; however, in its subsequent refusal of applications by the Marathon Hotel and Griff-Inn early in 1983, it did provide 'reasons' for its refusal.[70]

These 'reasons' (which are lengthy and vague) appeared to amount to a conclusion that the significant number and force of objections was a reasonable basis on which to refuse an application.[71]

The Legislature responded to the Ombudsman's concern regarding 'public interest' by the passage, in its 1983 amendments to the *Liquor Control*

[67]Judge Lloyd Smith retired early in 1981, and was not replaced by another Judge until early 1983. Although the decisions sent to the applicants referred only to section 11(c), the transcript of the decision in the June, 1981, Marathon Hotel application elicited comment that 'the public being the people of Grand Manan . . . don't wish to have the license, and I don't feel it should be imposed on them'. The comments were never articulated as 'formal reasons'. Note also that, on this application, and on an application for a rehearing by the Griff-Inn, a seasonal license was requested.

[68]The full text of the Ombudsman's Report and Recommendation is set out in the Sixteenth Report of the Ombudsman (1982), pp. 16-17.

[69]The full text of this Recommendation is set out in the Fifteenth Report of the Ombudsman, (1981), pp. 1-2.

[70]These included: (a) the number and force of objections; (b) substantial public interest of those living in proximity to the applicant premises, especially in a small, isolated community; (c) the power to make a decision which 'reflects' the overall public good of a particular community or area and (d) the need to respond positively to the 'sincere' concern and apprehensions of the objectors.

[71]Curiously, the February 9, 1983, letter signed by Mr. Morin (the acting Chairman) was apparently dictated by one J.L.C.—possibly an employee of the Board. The reasons given to the Griff-Inn were a precis of the February 9 letter. (Fredericton Daily Gleaner, February 10, 1983).

Act, of six detailed considerations to be borne in mind by the Board in determining whether, 'under section 11 . . . the public interest will be served'.[72] These included considerations intrinsic to the applicant[73] and zoning considerations. It also required that the Board consider 'the effect the proposed service may have on any surrounding neighbourhood or community'[74] and 'any other circumstances that the Board considers appropriate'.[75] The generality of these considerations lays open the possibility that the Board may continue to refuse license applications on the basis of the number and force of objections only, as opposed to the merits of such objections or their relative number and force. There is also the possibility that the Board may now substitute as reasons one or more of the paragraphs of section 11.1 in place of, or in addition to, its former reference to section 11(c)1.

The Government was apparently cognizant of such a possibility when it decided to continue the efficacy of local community factors as a basis for the Board decisions. It did so in three ways: (a) by providing that an applicant would have access to any objections prior to the date of a hearing, to enable a full knowledge of the 'case' against the application and to enable a proper case presentation on the hearing of the application;[76] (b) by requiring that 'the findings of fact upon which the Board bases its decisions' as well as the reasons for the decision be provided by the Board on request;[77] and, (c) by amending the Act's privative clause by the provision of a right of judicial review on a matter of law or jurisdiction.[78]

The effect of the 1983 amendments appears to have been a specific response to allegations of shortcomings by a particular Board. Up to the present, the Liquor Licensing Board has been capable of making virtually unchallengeable decisions based on a kind of instinctive reaction to the 'mood' or some other factor present at a hearing in circumstances where an applicant presented a case in considerable ignorance of the evidence to be met by him. As a result of the amendments, the Board now has a clear authority to consider local factors in determining whether it is in the public interest to grant a license. However, in making its decision, it will now be required to provide applicants with all details of objections, and to give reasons for its decisions based on factual considerations, and also, will be

[72]S.N.B. 1983, c. 47, s. 3 (R.S.N.B. 1973, c. L-10, s. 11.1).

[73]*Ibid.*, s. 3 (s. 11.1(a),(c), and (d)).

[74]*Ibid.*, s. 3 (s. 11.1(b)).

[75]*Ibid.*, s. 3 (s. 11.1(f)).

[76]*Ibid.*, s. 11 (s. 71(2),(4); s. 11.1(e)).

[77]*Ibid.*, s. 5 (s. 15(2)). The applicants and the Ombudsman have argued that the latter factors must be addressed.

[78]*Ibid.*, s. 6 (s. 16.1). The Legislature did not give effect to a request made by an applicant 'that they have an automatic right of cross-examination of witnesses' (s. 71(8)). Although the Board has made no by-laws under the *Liquor Control Act*, it has established 'Rules' of procedure. S. 7(i) of the Rules prohibits any cross-examination. Quaere whether this interdiction is in contravention of rights to 'fundamental justice' under the Canadian Charter of Rights and Freedoms, s. 6?

subject to judicial review if it does not.[79] While it is speculative to presume that the Board's decisions may soon be subjected to judicial review, it is also safe to say that, should such a review take place, it may well be of an interventionist nature, through an application of a broad test of 'reasonableness' to scrutinize theBoard's decision, rather than narrower tests which require that a disciplinary power be manifestly unreasonable, 'arbitrary and capricious' or based on 'extreme facts'[80] before a judicial intervention takes place. Indeed, in introducing this amendment, the Minister of Finance—a former Minister of Justice and son of the Premier who abolished prohibition in 1927—indicated that, if the Board were to refuse a decision 'because 300 petitioners have asked that it not be granted', it 'would be in severe risk of being overturned by the Appeal Court'.[81]

As an aside, one must be cognizant of the possible overlay of Charter provisions guaranteeing freedom of religion. Will objections raised after the coming into force of section 15 of the Charter be viewed as religious arguments and be struck down as violating the applicant's right to 'equal protection' and 'equal benefit' 'of the law without discrimination . . . based on . . . religion'?

CONCLUSIONS

Historically, liquor licensing legislation in New Brunswick has evolved into one underlaid with opposing philosophies of 'control' and 'mass marketing', both of which are expounded by the Provincial Government. The Liquor Licensing Board has also evolved a kind of dichotomous policy, granting licenses in every part of the Province except Grand Manan Parish.

The basis for this dichotomy has been questioned because the administrative procedures followed by the Board lacked fairness in a number of areas, and because of the large sales of liquor by the New Brunswick Liquor Corporation store in Grand Manan. The legislative response contained in S.N.B. 1983 should meet 'administrative fairness' concerns directed at the Board. However, such a result will remain problematic until the Province's liquor policy, as enunciated in the *Liquor Control Act* and the *New Brunswick Liquor Corporation Act*, has been rationalized. If such a rationalization is undertaken, it should be done in the context of a completely revised legislative framework. Similarly, although the 1983 amendments should help to ensure that the Liquor Licensing Board will henceforth be subject to adequate standards of administrative fairness, there remains a need for the generalization of such a standard to all provincial administrative tri-

[79]The appeal provision was not proclaimed until November 3, 1983, almost *two months* after most other parts of the Act.

[80]*Associated Picture Houses* v. *Wednesday Corporation*, [1948], KB 223. See footnote 65 above regarding Canadian jurisprudence on administrative discretion. For an excellent review of the British and U.S. Standards of judicial review of discretion, see B. Schwartz and H.W.R. Wade, *Legal Control of Government*, (Oxford: Clarendon, 1972), pp. 252-95 and 315-16.

[81]S.R.I.A.N.B., June 23, 1983, p. 2791.

bunals. This could be done most effectively through the legislative establishment of universal fair procedural rules and a uniform appeal mechanism with respect to the judicial review of administrative tribunals.[82]

Finaliy, there is in these cases, a kind of public morality issue quite separate from that argued by the objectors to the Grand Manan applicants. The New Brunswick Liquor Corporation store in Castalia sold $621,118 worth of liquor in fiscal year 1982-83. Grand Manan's Government liquor store reports average per capita (adult) sales of $345—the provincial average of all New Brunswick Liquor Corporation stores being $346 per capita. These per capita sales are higher than either of New Brunswick's two largest cities—Moncton and Saint John—where there are a combined total of 188 establishments.[83] Within that figure, sales of spirits ('hard' liquor) average $180 per capital on Grand Manan versus a provincial average of only $130 per capita.[84]

It is almost trite to say that government must avoid the enforcement of laws in such a manner that the process is seen as hypocritical and engenders a feeling of cynicism among its citizenry. Nevertheless, the denial of a liquor license by one arm of the Government—in the public interest—where there is very clear statistical proof of a high level of alcohol consumption through distribution by another arm of the Government—also in the public interest—cannot help but give rise to such an opinion. This is, perhaps, the underlying challenge to be met in this drama, and it remains to be seen whether the 1983 amendments will meet it.

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Editors Note: Following a hearing on March 8, 1984, The Liquor Licencing Board granted a Dining Room License (seasonal) to The Marathon Hotel Ltd. At the date of publication, the objectors were considering an application for judicial review of the Board's decision.)

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[82]This has been recommended by the Ombudsman. See Third Report of the Ombudsman, Fredericton, 1969, pp. 30-31; Sixteenth Report of the Ombudsman, 1982, p. 1. The legislative response to date has been the promulgation of minimum fair procedural rules under the *Inquiries Act*, R.S.N.B. 1973, c. I-11 (O.C. 83-914, October 27, 1983).

[83]1982 Annual Report of the Liquor Licensing Board, Fredericton, Queen's Printer, 1982, p. 8.

[84]Population/Sales Density Study, New Brunswick Liquor Corporation, Fredericton, June, 1983.

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