# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sentinel Peak Holdings Ltd. v. The General Manager, Liquor Control and Licensing Branch,*** 2004 BCSC 885

Date: 20040630
Docket: L031999
Registry: Vancouver

**IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996 CHAPTER 241**

Between:

**SENTINEL PEAK HOLDINGS LTD. DBA NO. 5 ORANGE STREET HOTEL**

PETITIONER

And:

**THE GENERAL MANAGER, LIQUOR CONTROL AND LICENSING BRANCH**

RESPONDENT

The Honourable Madam Justice Morrison

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner | J. David Houston |
| Counsel for the Respondent | Heidi Hughes |
| Date and Place of Hearing: | May 10, 2004<br>Vancouver, B.C. |

[1] By way of petition, the petitioner seeks judicial review of a decision of the Enforcement Hearing Adjudicator, Edward Owsianski, of June 16, 2003 in which the adjudicator found the petitioner had contravened the ***Liquor Control and Licensing Act***. The petitioner operates a Class A pub license known as

No. 5 Orange in the City of Vancouver, which features exotic dancers. Following investigations by undercover police officers, the petitioner was charged with five contraventions of the ***Liquor Control and Licensing Act*** (***LCLA***).

[2] A contravention of an employee consuming liquor on the premises contrary to s. 10 of the Regulations of the ***LCLA*** was admitted and a fine of $1,000.00 was paid. Two other allegations of employees consuming liquor were dismissed by the adjudicator for lack of evidence. This judicial review concerns the remaining two allegations.

[3] The first notice of such allegations was issued to the petitioner by an ***LCLA*** notice document entitled “Police Licensed Premises Check” (LPC). Under “other alleged contraventions”, it stated: “Sec. 10(2) Regs, employee consuming liquor, employee selling pre-poured drinks, Prohibited Acts.” (emphasis added). These were alleged to have occurred May 25, 2002. We are concerned here only with the “Prohibited Acts”.

[4] On that same date, a second LPC set out this alleged contravention: “S. 50(2) employee permitting touching...” (emphasis added).

[5] The Police Licensed Premises Checks (LPC) were served on the petitioner on July 9, 2002. The police investigations had occurred on May 24, 25, 31, 2002, at the No. 5 Orange premises. The July 9 service of the LPCs by the police was the first notice that the petitioner had of the allegations.

[6] On October 16, 2002, an employee of the Liquor Control and Licensing Branch provided the petitioner with copies of Contravention Notices dealing with the allegations of May 25, 2002. That brief Contravention Notice set out information that on May 24, 2002, (or May 25, the date is difficult to read) at 21:45 hours, three contraventions were alleged. One was under “service” concerning a licensee or employee consuming liquor on the premises. The other two were under “entertainment” and the two categories indicated were, “dancer prohibited acts s. 50” and “other”. There were no other details in the Contravention Notice with regard to the alleged contraventions by the dancers.

[7] A compliance meeting occurred then between an inspector with the branch and the petitioner, where a contract was agreed to that the staff would not drink while working and dancers would not touch or allow others to touch them.

[8] On November 5, 2002 a Notice of Enforcement Action was served, and that was amended November 28, 2002. That notice to the petitioner stated that the purpose of the letter was to inform the petitioner that the general manager of the Liquor Control and Licensing Branch would be reviewing whether to take enforcement action for the alleged contraventions. The two contraventions in contention were set out as, “dancer prohibited acts – LCLA s. 50 – May 31, 2002, dancer prohibited acts – LCLA s. 50 – May 25, 2002”.

[9] In Appendix A to the Notice of Enforcement Action a summary of evidence was provided. Of the May 31, 2002 events, the summary of evidence stated: “There were two stage dancers that performed while the officers were inside

the premises. Both dancers allowed patrons to touch their breasts. One dancer allowed a male patron to suck her breasts and place a $10.00 bill into her nipple ring with his mouth." The summary revealed the officers were inside the premises between 00:14 to 01:08 hours.

[10] The summary of evidence for the May 25, 2002 violation stated:

> The officers were making their observations between 21:40 – 23:45 hours. The officers observed a dancer on stage taking various denominations of bills from customers sitting in the front row by pressing her breasts into their face and squeezing her breasts together grasping the money with her breasts. The customers would hold the bills in their mouths, therefore patron contact made with dancer's breasts.
>
> The officer's also observed two (2) dancers do an impromptu lesbian act where they kiss each other on the mouth and feel each others breasts on stage.

[11] Appendix A also listed the names of ten police officers involved in the investigations, including three Constables who were to give evidence on the two contraventions regarding the dancers.

[12] Disclosure, including the officers' notes, was not given to the petitioner until February 19, 2003. Although it would appear that in December the petitioner knew the stage names of the dancers who would have been present on the nights in question. It is difficult to say how many dancers were present, as the summary of evidence in the Notice of Enforcement refers to lap dancers, presumably in addition to those who were dancing on stage.

[13] By March 7, 2003 it is apparent that in answer to questions by counsel for the petitioner, the police were unable to give any descriptions of the dancers involved in the two alleged contraventions. Earlier, on December 6, 2002, there had been an email sent to counsel for the petitioner regarding the stage name identity of the dancers.

[14] The hearing took place before the adjudicator April 22 to 25, 2003 and on June 16, 2003 the adjudicator's decision was issued, finding the petitioner in violation of the two contraventions in question.

[15] Having found contraventions of both dancer prohibited acts, the adjudicator imposed a $5,000.00 fine for the May 25 infraction, and a four day suspension of the petitioner's liquor license for the May 31 infraction.

**Position of the Petitioner**

[16] The petitioner asks that the decision be quashed pursuant to s. 2 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241. Or, in the alternative, that the decision be remitted to the respondent for reconsideration pursuant to s. 5 of the ***Judicial Review Procedure Act***.

[17] Until 2002, under the ***Liquor Control and Licensing Act***, the licensee had the right of appeal from any decision of the General Manager made under

s. 20 of the Act to the Liquor Appeal Board. The Liquor Appeal Board was a statutory tribunal that specialized with appeals from the Act, and there was then an appeal from that tribunal to the B.C. Court of Appeal, provided leave was obtained from the Court of Appeal.

[18] The Liquor Appeal Board was abolished in 2002. That has left a licensee's appeal procedures limited to the ***Judicial Review Procedure Act***.

[19] Counsel for the petitioner contends that the appropriate standard of review on decisions made by the General Manager of the Act should be that of correctness, which, rather than a standard of patent unreasonableness or reasonableness *simplicitor*, accords the least amount of deference to the decision of the General Manager. This would apply in matters of law and statutory interpretation. On matters of fact or mixed fact and law, the appropriate standard of review should be reasonableness *simplicitor*. And the standard of reasonableness should be proportional to the degree of expertise of the tribunal.

[20] On the issue of standard of proof, counsel for the petitioner cited with approval two recent decisions of the Honourable Mr. Justice Pitfield in ***Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch,*** 2004 BCSC 248 and ***Urban Well v. General Manager of Liquor Control and Licensing Branch,*** 2004 BCSC 127.

[21] In those decisions, Mr. Justice Pitfield concluded that the General Manager must establish that the "*actus reus*" at the heart of the contravention must be proved beyond a reasonable doubt.

[22] In the ***Urban Well*** case, the General Manager had issued a 45 day suspension, where the contraventions included too many patrons, unauthorized entertainment, dancing, intoxicated persons on the premises, and not primarily engaged in food, as required.

[23] The proven allegations in ***Plaza Cabaret*** included too many patrons on the premises, alcohol outside the premises, sale of a drug or controlled substance, and a helpful bartender when there was a request for the drug ecstasy.

[24] In both those cases, the court felt that the approach had been appropriate, given the severity of the offences and the severity of the sanctions imposed.

[25] The petitioner suggests the same standard of proof should be applicable here, whereas the adjudicator, Mr. Owsianski, decided matters on a balance of probabilities.

[26] The petitioner further argues that it was not provided a fair hearing. There were delays that were prejudicial to the petitioner. The police observed the alleged violations May 25 and May 31, 2002 but the first notice that the petitioner had was on July 9, 2002 when served with the Licensed Premises Checks (LPC). The LPC gave no details. There was no Contravention Notice served until October 16, 2002. Then the Notice of Enforcement Action

was not served until November 5, with the amendment of November 28, 2002.

[27] By February 19, 2003 the petitioner still had no description of the dancers that were said to have engaged in the prohibited acts. In the email communication of December 6, 2002, the petitioner had been told that the two dancers on May 25 were known as Saisha who was dancing from 2200 to 2230 hours, a person unknown to the petitioner, and the second dancer was Kiana, at 2300 hours. For the May 31 contravention, there was no name of a dancer, nor any description, and the time of contravention was 0014 to 0100 hours. The officers were unable to provide any physical description of the dancers, including colour or length of hair, tattoos, body piercings or any other distinguishing characteristics.

[28] At the hearing, Kiana testified that she had never been touched by a patron in the five years that she had been performing at licensed establishments.

[29] Counsel for the petitioner argues that because of the lengthy delays, the petitioner has been unable to defend itself from obtaining the appropriate evidence on a timely basis. And that the only dancer identified, Kiana, was called on behalf of the petitioner. She gave evidence that it was physically impossible for her to have done what she is alleged to have done because of her small physical attributes.

[30] In his decision, the adjudicator suggests that the licensee has an obligation to maintain logs as to when a performer is on stage, and what that performer is doing on stage, and to have such a log available for review in such circumstances. The petitioner argues there is no such obligation on any licensee, and this would not exclude or excuse the obligation of timely disclosure.

[31] The petitioner argues that the decision of the adjudicator is “patently unreasonable” nor does it meet the standard of reasonableness *simplicitor*. This is not a specialized tribunal, and there should not be the deference usually accorded to the decision of an adjudicator of a specialized tribunal. There is no special expertise required within the statutory scheme of the ***LCLA***.

**Position of the Respondent**

[32] First, the General Manager applied the correct standard of proof, that of a balance of probabilities, rather than the criminal standard of beyond a reasonable doubt. Counsel for the respondent relies upon two recent decisions in our court, ***Zodiac Pub v. General Manager, Liquor Control and Licensing Branch***, 2004 BCSC 96, a decision of Mr. Justice Blair, and ***New World Entertainment Investments Ltd. dba Richard’s on Richards v. General Manager Liquor Control and Licensing Branch***, Kamloops Registry No. 34055, a decision of Madam Justice Gill. In both those cases, the court concluded that the appropriate standard of proof is that of a balance of probabilities.

[33] In the ***Zodiac*** case, the same adjudicator assessed a penalty of $5,000.00 plus a five day suspension for a licensee allowing an intoxicated

person to stay on the premises. This was the first case under the amended ***Liquor Control and Licensing Act***.

[34] Mr. Justice Blair set out the three standards of review: (1) Correctness, where a decision gets an exacting review. (2) Reasonableness *simplicitor,* where a decision gets a significant testing with regard to findings of fact to determine whether they were clearly wrong. (3) Patent unreasonableness, where considerable deference is accorded to the administrative tribunal.

[35] The court in ***Zodiac*** found that the second standard of review, that of reasonableness *simplicitor* is the appropriate standard of review. The court went on further to say that the appropriate burden of proof is that of a balance of probabilities. That there is "no basis to import into a s. 20 enforcement hearing... the criminal standard of proof of beyond a reasonable doubt."

[36] Mr. Justice Blair conceded that in child protection cases or disciplinary hearings with regard to professionals, the courts have alluded to the standard of proof requiring clear and cogent evidence to establish something more than a bare balance of probabilities. But he found that in the ***Zodiac*** case, the appropriate standard of proof was on a balance of probabilities and he declined to require a higher standard within that test.

[37] Secondly, the respondent argues the petitioner was not prejudiced by any delays between the contraventions and the notice of the contraventions. Nor was it prejudiced by failure to provide particulars of the dancers involved, including their names. The manager had rejected this evidence, finding that the licensee was provided with the date, time and location of the contraventions, and they would have been able to obtain further details through the agencies that provide exotic dancers to such licensed establishments.

[38] The issue as to whether the General Manager applied the correct test, whether delay caused the petitioner prejudice, is one of mixed fact and law, and the respondent submits that the General Manager's decision is entitled to deference. That the delay did not amount to any breach of the duty of fairness. The petitioner was unable to prove that the delay caused any significant prejudice, nor was there any abuse of process. The respondent suggests that the petitioner failed in its own recordkeeping, and this was a greater prejudice than any delay. Third, this court should not re-weigh the evidence before the General Manager. The adjudicator made an assessment of credibility, and was in the best position to do so. This court should not re-weigh such evidence. The findings were reasonable, and there was no overriding error, in view of the respondent. To find otherwise would go beyond this court's role in a judicial review. The respondent asks that the petition be dismissed.

**Standard of Review and Standard of Proof**

[39] Having reviewed the four recent cases dealing with the amended ***LCLA***, I

agree with the views stated by Mr. Justice Blair in the ***Zodiac*** case. Namely, that the standard of review is that of reasonableness *simplicitor*, and the appropriate standard of proof is on a balance of probabilities.

[40] Should there be a higher standard within that test? The decision of our Court of Appeal in ***Mohammed v. B.C. (Liquor Control and Licensing Branch)***, [1994] B.C.J. No. 2331 was cited by counsel. In that case the regal liquor Crown Royal had been stolen, and it was argued that the penalties were too severe. The court found that no error had been made with regard to two suspensions. In commenting on the proper burden of proof, Mr. Justice Lambert stated that in a case such as the one before them, "the requisite degree of proof should be higher than a simple balance of probabilities." While the court was unanimous in its decision with regard to disposition of the case, Mr. Justice Legg refrained from agreeing with that portion of Mr. Justice Lambert's decision, and Mr. Justice Wood suggested that they leave the question as to what might be the proper burden of proof to another day.

[41] In the ***Zodiac*** case, Mr. Justice Blair referred to child protection cases or where professionals face disciplinary hearings where there may be something more than a bare balance of probabilities required. There may well be some suggestion of degrees within the standard of proof of balance of probabilities in some more extreme instances. But it does not amount and should not amount to proof beyond a reasonable doubt, the criminal standard.

[42] The evidence before this adjudicator would not have passed the criminal test of beyond a reasonable doubt, in my view. However, based on the evidence before me, I cannot say that the decision is such that the findings of fact were clearly wrong. The adjudicator was in the best position to hear the evidence, and assess credibility. I agree with the petitioner that there is no responsibility on the part of a licensee to keep the logs as suggested by the adjudicator. But on the other hand, the licensee had the means to determine who was working on those two particular nights, and to call whatever evidence they deemed advisable. The adjudicator found the police officers who testified reliable and credible and rejected evidence for the petitioner. I cannot say his findings of fact or decision were clearly wrong.

[43] I agree with counsel for the petitioner that this is not a situation of patent unreasonableness, where considerable deference must be accorded to the administrative tribunal. The deference to be shown in this case to the decision is that it should not be interfered with, unless this court is satisfied that the petitioner has shown the decision to be unreasonable. And that is not the case.

[44] The petition is dismissed. Under the circumstances, given the uncertainty that followed the amendments to the ***LCLA***, it is appropriate under these circumstances that each party pay their own costs.

"N. Morrison, J."
Madam Justice N. Morrison