

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Roxy Cabaret Ltd v. British Columbia
(General Manager, Liquor Control &
Licensing Branch)***
2005 BCSC 459

Date: 20050330
Docket: L041836
Registry: Vancouver

Between:

**ROXY CABARET LTD., DOING BUSINESS AS
THE ROXY CABARET**

Petitioner

And:

**General Manager of the Liquor Control
and Licensing Branch**

Respondent

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (In Chambers)

Counsel for the Petitioner

J. B. Carter

Counsel for the Respondent

J.G. Penner

Date and Place of Hearing:

January 10, 2005

Vancouver, B.C.

[1] The Petitioner, Roxy Cabaret Ltd., doing business as The Roxy Cabaret (“Roxy”) seeks to quash the June 22, 2004 decision (“Decision”) of the Enforcement Hearing Adjudicator (“Adjudicator”) appointed as the delegate of the General Manager, Liquor Control and Licensing Branch (“General Manager”) (“Branch”) or, in the alternative, seeks an order that the Decision be remitted to the General Manager for reconsideration. The Petition is filed pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241. These matters are governed by the **Liquor Control Licensing Act**, R.S.B.C. 1996, c. 267 as amended from time to time (“**Act**”) and the **Liquor Control Licensing Regulation** B.C. Reg. 244/2002 as amended from time to time (“**Regulation**”).

BACKGROUND

[2] Roxy operates a nightclub in downtown Vancouver. Roxy was operating under a “C” Cabaret Liquor Licence. That licence issued pursuant to s.12 (1) of the **Act** permitted a maximum capacity of 275 patrons in the licensed area. The “maximum occupant load” as set by the Office of the Fire Chief of the City of Vancouver was 300 persons.

[3] The “Contravention Notice” received by Roxy stated that the “Contravention” was “Overcrowding”, the section of the **Act** relied upon was s. 12(2) and the section of the **Regulation** relied upon was s. 71(2)(b).

[4] A December 10, 2003 “Notice of Enforcement Action” set out the “alleged contravention” as being: “Overcrowding beyond patron capacity more than occupant load, s. 12(2), Reg. s. 71(2)(b)”, the “Date of alleged contravention” as being

September 13, 2003 and the “Recommended enforcement action” as being a five-day suspension.

[5] The General Manager appointed an Adjudicator to conduct a hearing regarding the Contravention Notice and the Notice of Enforcement Action. The evidence before the Adjudicator was that a Branch Inspector counted 386 persons, a person from the City of Vancouver Licence Department counted 395 persons, and a representative of the City of Vancouver Fire Services counted 358 persons as present early in the morning of September 13, 2003.

[6] In his Affidavit, counsel for Roxy states:

At the hearing I argued there could be no contravention as alleged by applying the definition of “occupant load” as found in Section 1 of the Regulations to those sections of the Regulations that deal with either contraventions of the Act or impositions of penalties.

At the hearing of this matter, I argued that the Branch had not produced a valid Building Occupancy Load Certificate. The Certificate produced did not correspond with any set of plans to identify what the Building Occupancy Load related to any area.

At the hearing of this matter, I argued that on a reading of the amendments to the regulations including the definition in Section 1 that there could no longer be a contravention for exceeding the “patron” capacity.

[7] A decision was rendered by the Adjudicator on June 22, 2004 resulting in a five-day suspension to start from the close of business on Friday, July 30, 2004. Pursuant to an agreement reached, the effects of the June 22, 2004 decision have been stayed pending a decision of this Court arising out of this Petition.

STATUTORY PROVISIONS

[8] In the “Definitions” set out in s.1(1) of the **Act**, “establishment” is defined to mean: “. . . a place or premises that may comply with the requirements of this Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served.”

[9] Sections 12(1) and (2) of the **Act** state:

(1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the Regulations, or

(b) that are in addition to those referred to in paragraph (a).

[10] Section 20(1) of the **Act** states:

In addition to any other powers the general manager has under this **Act**, the general manager may, on the general manager’s own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

(a) the licensee’s contravention of this Act or the regulations or the licensee’s failure to comply with a term or condition of the licence;

[11] Section 20(2) of the **Act** states:

If the general manager has the right under subsection (1) to take action against the licensee, the general manager may do any one or more of the following, with or without a hearing: ...

(c) imposing monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee’s licence in accordance with the prescribed schedule of licence suspensions;

(e) cancel all or any part of the licensee's licence; ...

[12] There is no definition of "Contraventions" under the **Act**. Rather, the term "contravention" is defined under the **Regulation**. Section 84 of the **Act** provides that the Lieutenant Governor in Council may make regulations and s. 84(2) allows the Lieutenant Governor in Council to make regulations relating to prescribing a schedule of monetary and license suspensions for the purposes of section 20(2)(d) of the **Act**.

REGULATIONS UNDER THE ACT

[13] Under s. 1(1) of the **Regulation**, a "contravention" is defined to mean: "... a matter referred to in the "Contravention" column of Schedule 4".

[14] The term "occupant load" is defined to mean: "... the least number of persons allowed in an establishment under (a) the Provincial Building Regulations, (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located".

[15] The term "patron capacity", is defined to mean: "... maximum number of patrons allowed by the general manager in the area of the establishment designated by the general manager under section 12(3)(b) of the *Act* as the area where liquor may be sold or served". The term "person capacity" is defined to mean: "... the maximum number of persons allowed by the general manager in the establishment".

[16] Section 6(1) of the **Regulation** provides that, before the General Manager approves the issuance of a licence, the General Manager must:

... set the person capacity of the establishment, having regard to the public interest and the views of the local government or first nation if provided under section 10 or 53 of this regulation.

[17] Sections 6(2)(3) and (4) of the **Regulation** provide:

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

[18] Section 61(1) of the **Regulation** states:

If, in relation to a contravention, the enforcement actions specified under section 64(2)(a) or referred to in section 65(1) include a suspension, the period of the suspension must, subject to the subsection (2) of this section, fall within the range established for the contravention under Schedule 4.

[19] Section 64 of the **Regulation** states:

64 (1) If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

(2) If, after considering the alleged contravention, the inspector proposes that enforcement actions should be taken against the licensee in response to that alleged contravention, the inspector must, after forming that opinion, provide written notice to the licensee

(a) specifying which enforcement actions the general manager proposes to take against the licensee should the licensee agree under subsection (3) that the licensee has committed the contravention, and

(b) notifying the licensee that, unless the licensee provides a notice of waiver in accordance with subsection (3),

(i) the general manager will determine whether the alleged contravention occurred and the enforcement actions, if any, that are to be taken in relation to that alleged contravention, and

(ii) an enforcement hearing may be scheduled for that purpose.

(3) The general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result, unless, within 14 days after the date of the notice referred to in subsection (2), or within such longer period as the general manager considers appropriate, the licensee provides to the general manager a notice of waiver, in form and content satisfactory to the general manager, by which the licensee expressly and irrevocably

(a) agrees that the licensee has committed the contravention,

(b) accepts the specified enforcement actions,

(c) waives the opportunity to have an enforcement hearing on the matter, and

(d) agrees that the finding of contravention and the specified enforcement actions will form part of the compliance history of the licensee.

[20] Section 71 of the **Regulation** deals with transition provisions. After December 2, 2002, Class C licenses were no longer issued and, in their place, a Liquor Primary Licence was issued. Pursuant to s. 71 of the **Regulation**, any Class C Cabaret licence became a Liquor Primary Licence and, pursuant to s. 71(2)(b) of the **Regulation**, the conditions imposed under the previous licence were applicable

to the converted licence after December 2, 2002. Accordingly, the “C” Cabaret Liquor Licence of Roxy was converted to a Liquor Primary Licence as at December 2, 2002 but with the maximum capacity of “patrons” remaining at 275.

[21] Schedule 4 of the **Regulation** is headed “Enforcement Actions”. There are various “contraventions” referred to in Schedule 4. Under the general heading “Overcrowding”, item 15 is stated to be:

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contra- vention	Second Contra- vention	Subsequent Contraventions	
Overcrowding					
15	Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load	4-7	10-14	18-20	\$5 000 - \$7 000

THE DECISION OF THE ADJUDICATOR

[22] The Adjudicator defined a number of “Issues”. For the purposes of this Petition, the following Issues as defined by the Adjudicator are pertinent:

- (a) whether the contravention contrary to section 12(2) of the **Act** and section 71(2)(b) of the **Regulation** as alleged, is valid in law?
- (b) whether the occupant load certificate is valid?

[23] Regarding the submission that the contravention as alleged did not exist, the Adjudicator described that submission as follows:

Counsel submitted that following the changes made to the Regulations on December 2, 2002, sections 12(2) of the Act and 71(2) of the Regulations do not give rise to a contravention as contended by the Branch in the NOEA [Notice of Enforcement Action]. The Regulations at section 6(4) provide a term and condition regarding the “person” capacity, but not for “patron” capacity as is alleged here where the contravention is for exceeding the “patron” capacity.

Further, the definition of “patron capacity” in the Regulations refers to the maximum number of patrons allowed in the licensed red-lined area of the “establishment”. The definition of “establishment” in the Act refers to the whole area of a place or premises, licensed and unlicensed, not just the licensed red-lined area. Thus, there is no contravention as alleged.

Additionally, Schedule 4(15) of the Regulations which outlines the penalties for contraventions refers to “occupant load” which by definition refers to the number of persons allowed in an “establishment” which is defined as the whole area of a place or premises, licensed and unlicensed, not just the licensed red-lined area. Thus, there are no penalty provisions which apply.

Counsel submitted that this is similar to the facts in the *Plaza [The Plaza v. General Manager, Liquor Control Licensing Branch 2004 B.C.S.C. 248]* where the alleged contravention did not exist. He submitted, that as in the *Plaza* [decision] it is not open to the general manager to try to fix the shortcomings in the Act and regulations thorough interpretations amounting to amendments. What is needed is changes to the Regulations to correct the problems. (at pp. 15-6)

[24] The Adjudicator described the third issue as being that: “... the maximum occupant load certificate ... is fatally flawed as it does not have a floor plan attached to it to identify the area it covers.”

[25] Regarding the first issue, the Adjudicator reached this conclusion:

Counsel has argued that there is no contravention for exceeding the “patron” capacity. I do not agree. For the following reasons I am satisfied that the patron capacity is a term and condition of the licence and that section 20 of the Act allows the general manager to take action against a licensee for the licensee’s contravention of the Act, Regulations or a term or condition of the licence.

Section 12(2) of the Act allows the general manager to impose the terms and conditions to the licence. Section 71 of the Regulations is a transitional section to give prospective effect to terms and conditions of a licence which existed prior to the enactment of the new Legislation on December 2, 2002. Section 6(1) of the Regulations requires the general manager to set the “person” capacity when issuing a licence after the Regulation came into effect on December 2002, whereas in the past, the general manager always set terms and conditions for “patron” capacity. Section 6(4) creates a term and condition of the licence for “person” capacity. Section 71(2)(b) is designed to act as the transitional piece while the old licences refer to “patron” capacity. The “Guide” (exhibit 1, table 7) at page one states:

It also imposes further terms and conditions in addition to those found in the Act and Regulations. Like the requirement contained in the Act and Regulations, these additional terms and conditions – and any further terms and conditions that might be printed on the face of your licence or contained in letters issued to you by the general manager of the LCLB – must be followed at all times.

I do not accept counsel’s argument that the definition of “establishment” in “patron capacity” nullified the contravention because it refers to the whole of the place or premises and not just the licensed area. One must look at the wording as a whole and not just focus on one word. The definition of patron capacity in the Regulations refers to the “area of the establishment designated by the general manager under section 12 (3)(b) of the Act as the area where liquor may be sold or served” . . . i.e. the licensed area and not all areas.

The same consideration should be applied to counsel’s argument regarding the use of “establishment” in the definition of “occupant load” when considering the provisions of Section 15 of Schedule 4 to the Regulations. The wording of section 15 refers to “more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is less than or equal to the occupant load”. . . . Licensed establishment refers to the licensed areas of an establishment not the whole of the establishment.

In the result I am satisfied that the NOEA [Notice of Enforcement Action] of December 10, 2003, sets out the alleged contravention, the recommended penalty, and the legislative provisions upon which they are founded. (at pp. 20-1)

[26] Regarding the third issue and whether the occupant load certificate was valid or not, the Adjudicator found that the certificate was valid:

Counsel has argued that the Maximum Load Certificate (exhibit 1, tab 9) is invalid because it is not attached to a floor plan outlining the area covered by the certificate. I cannot agree with counsel for several reasons.

Firstly, the certificate states on its face: "Maximum Occupant Load, premises located at 932 Granville St. known as The Roxy Cabaret, Licensed Beverage Establishment 300 persons". Secondly, the witness from the Vancouver Fire Department testified that the certificate referred to the area in exhibit 1, tab 8, and not to other areas of the cabaret. Finally, a close examination of the floor plan at exhibit 1, tab 8, reveals a stamp stating: "Maximum Occupant Load, Licensed Beverage Establishment 300 persons".

In the result I am satisfied that it is clear that the maximum occupant load of the area of the Roxy Cabaret as depicted in the floor plan found at exhibit 1, tab 8, is 300 persons. (at pp. 22-3)

STANDARD OF REVIEW.

[27] Because the interpretation of a statute is a purely legal question, the appropriate standard of review is that of correctness when dealing with the question of whether there was or was not a contravention. The expertise of the Court in matters of statutory interpretation is superior to that of the General Manager: **Barrie Public Utilities v. Canadian Cable Television Association**, [2003] 1 S.C.R. 476; and **Canada (Attorney General) v. Mossop**, [1993] 1 S.C.R. 553.

DISCUSSION AND CASE AUTHORITIES

[28] There are no definitions of "contravention" other than as set out in the **Regulation**. In this regard, a "contravention" is defined under s.1(1) of the **Regulation** to mean a matter referred to in the "Contravention" column of Schedule

4 and not to anything which may be set out in s.6 of the **Regulation**. Section 6(4) of the **Regulation** does not establish a contravention. Rather, that section merely establishes that it is a term and condition of the license that there not be at any one time more persons than the person capacity established under s.6(1) and (3) of the **Regulation**. I find that the Adjudicator was incorrect in assuming that whether a contravention had occurred or not was a question of whether there had been a contravention as was set out under s. 6(4) of the **Regulation**. While it may well be that it is a “term and condition” of a licence that there not be more persons than the “person capacity” as set out under s. 6(1) or s. 6(3) of the **Regulation**, contraventions are limited to what are defined as contraventions under s. 1(1) of the **Regulation**, being matters referred to in the “Contravention” column of Schedule 4 of the **Regulation**.

[29] Under Item 15 of Schedule 4, the General Manager must find that a licensee permitted more persons in the licensed establishment than the “patron or person capacity” set by the General Manager permitted and the number of people present was more than the “occupant load”. Each of the terms “occupant load”, “patron capacity”, and “person capacity” are defined in the **Regulation**. I take from the fact that those terms are defined in the **Regulation** that it was the intention of the Legislature to permit one or more of those terms to be included within the contraventions which are set out in the “Contraventions” column of Schedule 4 of the **Regulation** despite the fact that the General Manager must refuse to issue, amend or transfer a licence if the occupant load of the establishment is not equal to the

person capacity (s.6 (2) of the **Regulation**) or must reduce the person capacity to equal the occupant load (s. 6(3) of the **Regulation**).

[30] Accordingly, the phrase “Overcrowding beyond patron capacity more than occupant load” set out in the December 10, 2003 Notice of Enforcement Action contains words which are set out Item 15 in Schedule 4.

[31] Item 15 states the Contravention to be: “permitting more persons in the licensed establishment than the patron or person capacity set by the General Manger and the number of persons in the licensed establishment is more than the occupant load”. It is clear that the number of individuals at the Roxy on September 13, 2003 (between 358 and 395) was in excess of the “patron capacity” of 275 and of the “occupant load” of 300.

[32] Because those numbers were found as facts by the Adjudicator, the Adjudicator found that the contravention under Item 15 had been proven. To prove Item 15, it was necessary for findings of fact to be made that the following had been established:

- (a) the premises were a “licensed establishment”. That is clearly the case;
- (b) the “patron . . . capacity set by the General Manager” had been exceeded by permitting more persons in the licensed establishment than either the “patron or person capacity”;
- (c) in addition to permitting more persons than the patron or person capacity set by the General Manager, the number of patrons was “more than the occupant load”.

[33] I am satisfied that the Adjudicator was correct in coming to the conclusion that all of those things had been proven. While the “person” capacity refers to the total

number of persons including staff who are allowed in the “establishment” whereas the “patron” capacity refers to the number of persons who can be present in that part of the “. . . establishment designated by the General Manager under section 12 (3) (b) of the **Act** as the area where liquor may be sold or served”, I am satisfied that Item 15 establishes a “contravention” for permitting more individuals in the establishment than either the “patron or person capacity” providing that number is also “more than the occupant load”.

[34] The term “patron capacity” refers to the maximum number of people designated by the General Manager to be allowed in the area within the establishment where “liquor may be sold or served” while the term “person capacity” relates to the “maximum of persons” allowed by the General Manager in the establishment. The latter term includes staff as well as patrons and includes areas of the establishment whether or not these are areas where liquor may be sold or served.

[35] Under s. 6(1) of the **Regulation**, the General Manager must set the person capacity and, under s.6(2) and s. 6(3) of the **Regulation**, once the person capacity has been set by the General Manager the person capacity must be further reduced so that the person capacity is equal to the “occupant load”. However, this requirement imposed on the General Manager must only be undertaken if there is to be an issuance, an amendment, or a transfer of a licence. Until the General Manager issues, amends or transfers a licence, it may well be that the “person capacity” or the “patron capacity” may be in excess of the “occupant load”.

[36] In establishing the two criteria for the contravention set out in Item 15, the Legislature was providing for a contravention where either the patron or the person capacity are found to be greater than the occupant load. The contravention is then permitting more persons in the licensed establishment than the patron or person capacity and more persons in the licensed establishment than allowed by the occupant load which have been set.

[37] I find that the Adjudicator was correct in coming to the conclusion that the contravention set out under Item 15 in Schedule 4 had been made out and that the facts found by the Adjudicator justified the finding that the Branch had established that the contravention of permitting overcrowding (more persons) than the patron capacity set by the General Manager and that the number of persons there that night were in a number more than the occupant load. That being the case, the only question which arises is whether there was a valid Maximum Load Certificate before the Adjudicator upon which he could conclude that the “occupant load” had been exceeded on September 13, 2003.

[38] In this regard, what was in evidence before the Adjudicator was:

Exhibit 2 Occupant Load Drawings for the Roxy Cabaret,
”Based on VBBL [Vancouver Building By-law]
1999 & VFBL [Vancouver Fire By-law] 2000
(Current Calculations)”

Exhibit 3 Occupant Load Drawings for the Roxy Cabaret,
“Based on BCBC 1998 & BCFC 1998 (Outside
Vancouver)”

[39] The Occupancy Load Certificate was issued June 18, 1997 setting the maximum occupancy load at 300 persons.

[40] Roxy submits that, because the Occupancy Load Certificate makes reference to a set of plans, the Occupancy Load Certificate is “. . . meaningless without reference to the approved plans.” Roxy also submits that the function of the Office of the Fire Commissioner in determining the Occupant Load from a set of plans is different from the determination of the “red-lined area” determined by the General Manager when determining the “person capacity” or the “patron capacity”. What was in evidence were the plans utilized by the General Manager in determining the “red-lined area”. Roxy submits that this is insufficient evidence to establish the “occupant load”.

[41] Because there was no admission made before the Adjudicator regarding the Occupant Load Certificate, Roxy submits that the Adjudicator could not have reached the conclusion that there was “Overcrowding beyond patron capacity more than the occupant load”.

[42] The General Manager submits that the sufficiency of the evidence as to the occupant load must be reviewed by a standard of review of reasonableness simpliciter and that this standard requires the Court not to interfere with the finding of the Adjudicator unless Roxy can positively establish that the finding was unreasonable: ***Zodiac Pub Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)***, [2004] B.C.J. (Q.L.)No. 119 (B.C.S.C.). In this regard, the General Manager submits that the standard of proof that was to have been applied by the Adjudicator was that of proof on a balance of probabilities: ***Sentinel Peak Holdings Ltd. v. British Columbia (General Manager, Liquor***

Control & Licensing Branch, [2004] B.C.J. (Q.L.) No. 1352 (B.C.S.C.); and
Zodiac, *supra*.

[43] Roxy provided no evidence to the Adjudicator to suggest that the Occupant Load was anything other than 300. I am satisfied that the Adjudicator was entitled to rely on the Certificate and that, in the circumstances, the Adjudicator was entitled to conclude that the Occupant Load had been proven on a balance of probabilities to be 300. Roxy has not established and cannot establish that this conclusion was unreasonable. While the Occupant Load Certificate was not admitted, it was proven through the Captain of the City of Vancouver Fire Department who testified that he was responsible for reviewing building plans and maximum occupancy loads within the City of Vancouver. Reviewing the decision reached by the Adjudicator, I cannot conclude that it was unreasonable to find that the patron capacity and the occupant load capacity had been exceeded in that part of the establishment governed both by the Occupant Load Certificate and the “red-lined area” determined by the General Manager when determining the “person capacity” or the “patron capacity”.

DECISION

[44] The Petition of The Roxy Ltd. dba Roxy Cabaret is dismissed. The General Manager will be entitled to Party and Party (Scale 3) costs throughout.

“G.D Burnyeat J.”

The Honourable Mr. Justice Burnyeat