COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R.G..Facilities (Victoria) Ltd. v. British Columbia (Liquor and Licensing Branch),* 2010 BCCA 537

Date: 20101124
Docket: CA037162

Between:

**R.G. Facilities (Victoria) Ltd. dba
Save-On-Foods Memorial Arena**

Appellant
(Petitioner)

And

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

Respondent
(Respondent)

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Low
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, May 8, 2009
(*R.G. Facilities (Victoria) Ltd. v. Liquor Control and Licensing Branch*,
2009 BCSC 630, Victoria Docket No. 08-3824)

Oral Reasons for Judgment

Counsel for the Appellant: M. T. Mulligan

Counsel for the Respondent: T. A. Mason

Place and Date of Hearing: Vancouver, British Columbia
November 24, 2010

Place and Date of Judgment: Vancouver, British Columbia
November 24, 2010

[1] **PROWSE J.A.:** The appellant, R. G. Facilities (Victoria) Ltd. dba Save-On-Foods Memorial Arena, received a ten-day suspension of its liquor license pursuant to s. 20(2) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, flowing from its conviction for a breach of s. 33(1)(c) of the *Act* by permitting a minor to consume liquor in premises under its control. The adjudicator stipulated the manner in which the penalty was to be served pursuant to s. 67(1) of the Liquor Control and Licensing Regulations (the "Regulations").

[2] The appellant applied for judicial review of the adjudicator's decision, both with respect to the finding of contravention and with respect to the penalty. In the result, the chambers judge who heard the judicial review ordered a new hearing limited to the question of whether the appellant could establish a defence of due diligence, and providing directions as to the conduct of the hearing. The order went on to give the appellant the option of pursuing a new hearing, which option was to be exercised within 14 days of the decision on judicial review. In that respect, the order provided as follows:

> ... If the petitioner does not confirm within 14 days from the date of this order that it wishes to exercise its rehearing rights granted by this order, the adjudicator's decision stands. If the petitioner confirms its desire for a further hearing, the adjudicator's finding of a contravention under s. 33(1)(c) is quashed, to be replaced with the new adjudicator's decision.

[3] The order did not set aside the penalty, but went on to stipulate that if the appellant were again found to have contravened s. 33(1)(c), then some aspects of the penalty would survive, subject to qualifications which I do not propose to detail here. Counsel attended before the chamber's judge to settle the order. This resulted in a memorandum being sent to counsel containing some qualifications with respect to the form of order. The order was entered thereafter.

[4] The court was advised at the outset of the appeal that the appellant had elected within the 14 day period stipulated in the order to pursue a new hearing. The result is that, in accordance with the terms of the order, the contravention has been quashed.

[5] The appellant's appeal is from the penalty imposed by the adjudicator and upheld by the chamber's judge. It wishes to argue that the adjudicator had no jurisdiction to impose the penalty under s. 67(1) in the manner in which he did as a matter of statutory interpretation. If it succeeds in its argument in this regard, then it appears that the appellant may well have served the penalty imposed.

[6] The problem with the appellant's position in wishing to pursue the appeal at this time is that there is now no penalty in effect. The contravention has been quashed; without a contravention there can be no penalty. It may be that the appellant will succeed in establishing its due diligence defence, in which case there will never be a penalty. In short, there is simply not a penalty in existence at the moment upon which to found the appeal. Nor, in my view, is this a case in which the Court should embark on the appeal because it may be of utility to the appellant if it is ultimately found to have contravened the *Act* on the rehearing.

[7] Counsel agreed that the order in this case was "unusual" such that it is unlikely that it will spark similar orders in the future. While the issue of statutory interpretation may arise in the future, and perhaps even in this case after the rehearing, the issue can be dealt with at that time.

[8] I note that the respondent is also of the view that the appeal is premature and should not proceed at this time.

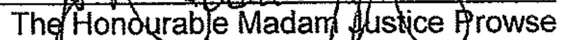
[9] In the result, I would adjourn the appeal pending the outcome of the rehearing. If the appellant is found to have contravened the *Act* at that hearing, it is open to it to bring the appeal on for hearing at a later date. Given the unusual nature of the order, and the nature of the contravention involved, including the provisions in the order with respect to the powers of the adjudicator in relation to penalty on the rehearing, it is conceivable that a second judicial review could result. On the other hand, the respondent may determine that it is appropriate in these unusual circumstances to simply terminate the proceedings without the necessity of incurring further public and private expense.

[10] I would adjourn the appeal.

[11] **LOW J.A.:** I agree.

[12] **GARSON J.A.:** I agree.

[13] **PROWSE J.A.:** The appeal is adjourned.



The Honourable Madam Justice Prowse