COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cactus Cafe Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch),* 2011 BCCA 414

Date: 20111025
Docket: CA038691

Between:

Cactus Cafe Turner Road Ltd. dba Cactus Club Cafe (Nanaimo)

Respondent
(Petitioner)

And

General Manager of the Liquor Control and Licensing Branch

Appellant
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low
The Honourable Mr. Justice Hinkson

On appeal from the Supreme Court of British Columbia, December 1, 2010, (*Cactus Cafe Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2010 BCSC 1691, Vancouver Registry No. S100196)

Counsel for the Appellant: R. Mullett

Counsel for the Respondent: W.C. Kaplan Q.C., V.A. Allard

Place and Date of Hearing: Vancouver, British Columbia
October 4, 2011

Place and Date of Judgment: Vancouver, British Columbia
October 25, 2011

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] On December 3, 2009, following an oral hearing pursuant to s. 20 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 241 [*Act*], a delegate of the appellant ("Adjudicator") found that on December 31, 2008, the respondent had contravened s. 6(4) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 [*Regulations*]. That section creates an offence for permitting more persons into an establishment than the person capacity set for that establishment. His decision is indexed as EH09-004 Cactus Club Cafe (Nanaimo) December 3, 2009.

[2] On December 1, 2010, a Supreme Court Justice, sitting in Chambers conducted a judicial review of the Adjudicator's decision and quashed that decision and remitted the matter for rehearing on the basis that the correct person capacity and the occupant load for the respondent's establishment were both 219 persons. His reasons for judgment are indexed as 2010 BCSC 1691.

[3] The appellant appeals the decision of the Chambers Judge.

Background

[4] The appellant is authorized to administer the *Act* pursuant to s. 3 of that *Act*. She is entitled to delegate authority to conduct investigations to officers, including liquor inspectors. Liquor inspectors use this delegated authority to investigate contraventions of the *Act*, its *Regulations*, or the terms and conditions of a licence. The appellant is authorized to conduct enforcement hearings and may delegate this authority to enforcement hearing adjudicators pursuant to s. 84 of the *Act* and s. 3 of the *Regulations*.

[5] The respondent operates an establishment in Nanaimo pursuant to Food Primary Licence No. 171335 issued by the appellant. Under that license, the licensed person capacity of the establishment consists of 127 persons in the main dining area, 32 persons in the lounge, and 60 persons on the patio.

[6] On December 31, 2008, the respondent held a New Years Eve party. In preparation for that party, the respondent obtained a Temporary Patron Participation Endorsement (the "Temporary Endorsement") from the appellant. The Temporary Endorsement provided a one-day amendment to the Food Primary Licence to allow the establishment to operate akin to a nightclub until 12:00 a.m. on the night of the Event.

[7] On or about April 3, 2009, the respondent received a Notice of Enforcement Action ("NOEA") that alleged a contravention of s. 6(4) of the *Regulations*. The Summary of Evidence attached as Schedule 1 to the NOEA stated that the licensed person capacity and occupant load of the establishment had both been set at 219 persons. The penalty proposed in the NOEA was a seven-day licence suspension. The NOEA cited the importance of public safety and future voluntary compliance in support of its seven-day suspension.

[8] The hearing of the matter took place before the Adjudicator who found that at 11:45 p.m. on December 31, 2008, there were no fewer than 350 persons in the respondent's establishment, and that there was a strong likelihood that the number was closer to 400 persons.

[9] The Adjudicator also found:

> The liquor license capacity is not in doubt. It is clearly shown on the liquor license (exhibit 4) and the floor plans (exhibit 5). The inside capacity consists of the main dining area of 127 persons and the lounge area of 32 persons. The patio is a separate area with a capacity of 60 persons. That does not mean that the capacities of the three areas could be combined to allow for 219 persons in any one area. For our purposes here I accept that the capacities of the inside areas could be combined to allow for 159 persons generally within those two areas. That is not the case for the patio. It is a separate and distinct area for 60 persons and the capacity may not be combined with either of the inside areas.

[10] The respondent did not dispute that its person capacity had been exceeded on the night in question. Instead, it relied upon the defence of due diligence.

[11] The Adjudicator rejected the defence of due diligence and concluded:

> Here, I find that the directing mind of the licensee at the time of the contravention was the general manager (witness J). He was the senior manager for the Nanaimo location and was responsible for its operation. He was on site and in charge at the time of the alleged contravention. He knew or ought to have known the licensed capacities for the licensed areas and the building occupancy load. He authorized the printing of 220 tickets to allow that number of patrons into the establishment. He knew or ought to have known that to allow that number of patrons together with the number of staff on duty in the inside licensed areas with a combined licensed capacity of 159 persons would exceed the licensed capacity. He knew or ought to have known that to allow that number of patrons together with the number of staff on duty in the inside licensed areas with a building occupancy load of 159 patrons would exceed building occupancy load. There is no evidence that he intended that 60 of the patrons to whom tickets were sold be restricted to the patio area so as not to overcrowd the inside areas. The evidence is to the contrary, few persons used the patio other than for a smoking area on a temporary basis. Further he did not take reasonable measures such as numbering or placing other security measures on the tickets to prevent the tickets from being illegally duplicated. He did not take reasonable measures to ensure that tickets being presented at the door were authentic.

[12] The respondent argued before the Chambers Judge that the NOEA was defective in a number of ways. One of those alleged defects was that it was misleading in identifying the operative person's capacity and occupancy load at 219 when the adjudicator based his determination on finding a person capacity of 159 and an occupant load of 159. The Chambers Judge saw the issue as to this alleged defect in the notice as one of procedural fairness and natural justice which he concluded were governed by a correctness standard of review.

[13] At paras. 63-70 of his reasons for judgment the Chambers Judge found:

> [63] In my view, there is a clear discrepancy between the assertion in the NOEA and the finding of the adjudicator. In the summary of evidence attached as Schedule 1 to the NOEA, the following is alleged:
>
> > Cactus Club Café is located at 8 - 5800 Turner Road, Nanaimo BC, holding a Food Primary Licence #171335 which states a combined licence person capacity of 219 persons in the restaurant, restaurant lounge and patio areas. This person capacity is also stated on the approved floor plans from the City of Nanaimo. The occupant load for the establishment has also been set at 219 persons. The liquor license does not have a patron participation endorsement, but the licensee did receive a temporary patron participation to take place on December 31, 2008 until midnight.

[64] In the Regulations, "occupant load" and "person capacity" are defined as follows in s. 1:

> "occupant load" means 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;
>
> ...
>
> "person capacity", in relation to an establishment means the maximum number of persons allowed by the general manager in the establishment.

[65] In distinction to person capacity, the patron capacity of an establishment is defined as follows:

> "patron capacity", in relation to an establishment, means the 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.

[66] Section 12(3)(b) provides for areas of a restaurant where liquor may be sold and served to which the patron capacity applies. It reads as follows:

> 12(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
>
> ...
>
> (b) Designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served.

[67] Establishment is defined in the *Act* as follows:

> "establishment" means 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.

[68] The petitioner's license refers only to "capacity" and identifies "lounge interior" 32, "patio 1" 60, and "person 01" 127. Person 01 refers to the main dining area. According to the plans filed with the City of Nanaimo, the two interior areas had an occupancy load of 159. There was no occupancy load

> designated for the patio area. As noted, there is no contravention of the terms of the license to exceed the occupancy load (although the occupancy load determines the maximum person capacity).
>
> [69] As I see it, the petitioner's complaint about the NOEA being defective for a failure to accurately identify the person capacity at issue, is in substance a complaint about procedural fairness involving the petitioner's right to make full answer and defence in a proceeding where its rights are affected.
>
> [70] It is clear that the person capacity of the petitioner's establishment as a whole was set at 219 by the primary license, and it was not modified in any way by the patron participation endorsement.

[14] The Chambers Judge then concluded at para. 78:

> [78] I thus conclude that the Adjudicator fell into jurisdictional error by failing to confine his determination of the applicable person capacity to that set out in the various notices given to the petitioner. To have found that the licensee was limited from the outset to a person capacity less than that set forth in its licence, and less than that alleged as applicable in the contravention notice and the NOEA, in my view, implicates the petitioner's right to make full answer and defence. In this case, the petitioner was entitled to rely on the foundation established by the notices that the person capacity at issue was 219 and the occupant load was 219, and to have advanced its defence of due diligence and, if required, its submissions on penalty on that foundation.

Issues on Appeal

[15] The appellant raises two grounds of appeal; that the Chambers Judge erred in law in finding that the process that led to the adverse finding against the respondent was unfair, and that he erred in law in remitting the matter for rehearing on the basis that the respondent’s occupant load was 219, or at all.

Discussion

a) The Person Capacity

[16] The respondent was charged with breaching s. 6(4) of the *Regulations*. That section states:

> 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).
>
> [Emphasis added.]

[17] While it did not contest that it permitted more patrons into its establishment than its license permitted on December 31, 2008, the respondent raised a defence of due diligence to the charge under that section. The Adjudicator properly described that defence in his decision as follows:

> The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.
>
> The leading case is: *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299. At p. [1331], Dickson J sets out the test of due diligence:
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>> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of [*respondeat superior*] has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

[18] The Adjudicator determined that the person capacities of the restaurant and lounge areas could be combined, but because the patio was separate from the restaurant and lounge areas, its person capacity could not be combined with those of the restaurant and lounge areas. He therefore concluded that the person capacity of the respondent’s establishment was only 159 persons.

[19] On December 31, 2008, the respondent was licensed to operate, in effect, as a nightclub. As such, its patrons could be expected to move about the entirety of the

respondent's establishment. The patio portion of the establishment was open for use, and had an operating fireplace and heat lamps in use that night. At least some of the respondent's patrons were moving from the restaurant and lounge areas back and forth to the patio area.

[20] While I agree with the analysis of the Chambers Judge at paras. 63-70 of his reasons for judgment, and with his finding that on the evidence before the Adjudicator the person capacity of the petitioner's establishment as a whole was set at 219, I find that he erred in law by resolving the judicial review on the basis that the Adjudicator had committed an error of jurisdiction affecting the process employed by the appellant.

[21] At para. 77 of his reasons, the Chambers Judge referred to paras. 77 and 79 of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Para. 79 in *Dunsmuir* contains the observation by Justices Bastarache and LeBel that:

> [79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[22] The appellant contends that there was no defect in the NOEA as it was clear from that document that the respondent was charged with allowing more persons than its person capacity into its establishment on the night in question, and that the Summary of Evidence attached as Schedule 1 to the NOEA correctly stated the person capacity as 219 persons. The appellant contends that while the occupant load is incorrectly stated to be 219 persons, that figure is irrelevant insofar as the alleged breach of s. 6(4) of the *Regulations* is concerned.

[23] In my view, the appellant's contention with respect to the NOEA and the attached Summary of Evidence is correct, and I have concluded that the Chambers Judge thus erred in law in concluding that the Adjudicator fell into jurisdictional error by failing to confine his determination of the applicable person capacity to that set out in the various notices given to the respondent.

[24] The conclusion of the Chambers Judge to quash the Adjudicator's decision is, however, sustainable on another basis.

[25] As the Chambers Judge observed, the definition of "establishment" in the *Act* "includes within such a place or premises any area where liquor is manufactured, stored or served" (emphasis added). In my view, the evidence before the Adjudicator demonstrated that the respondent's "person capacity" for its establishment is 219 and the finding that it is only 159 is unsupported by any evidence and is thus an error in law.

[26] The respondent's defence of due diligence was rejected by the Adjudicator on the basis that it sold 220 tickets for the evening in question when the person capacity was only 159. As the Adjudicator based his rejection of the respondent's defence of due diligence on an incorrect "person capacity" under the respondent's license, he erred in law by failing to assess that defence on the correct capacity basis.

[27] In the result, I would uphold the decision of the Chambers Judge to quash the decision of the Adjudicator on the basis that the adjudicator erred in law in his determination of the applicable "person capacity" under the respondent's license.

b) Remitting the Matter for Rehearing

[28] In addition to quashing the decision of the Adjudicator, the Chambers Judge remitted the matter to the Adjudicator for a re-hearing on the foundation that the licensee's establishment had a person capacity at the relevant time of 219, and, in relation to penalty, if applicable, on the basis of an occupant load of 219.

[29] In *Dunsmuir* at para. 27, Justices Bastarache and LeBel, commented in part:

> [27] ... Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[30] Sections 5-7 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 provide:

> 5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.
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> (2) In giving a direction under subsection (1), the court must
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> (a) advise the tribunal of its reasons, and
>
> (b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
>
> 6 In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.
>
> 7 If an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration.

[31] In *Testa v. British Columbia (Workers' Compensation Board)* (1989), 58 D.L.R. (4th) 676, 36 B.L.C.R. (2d) 129, the Court's power to remit a matter under sections 5-7 of the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209 was stated by Mr. Justice MacFarlane, for the Court, in the following terms (at 689-90):

> The power is to set aside a decision and to direct a reconsideration of it.
>
> It is contended on behalf of the claimant that the power to give directions embraces a power to direct the result of the reconsideration. I do not agree. The power of the court is to direct the tribunal to reconsider its decision, not to decide the issues arising under the *Act* - see *Evans v. Workers Compensation Board* (1982), 38 B.C.L.R. 86. The directions may determine the extent of the reconsideration, and the court's reasons may assist the tribunal in undertaking a valid reconsideration.

> For instance, in this case, the reconsideration is limited to questions A. and B. (*supra*). In respect to each question, the WCB is free to make its own findings of fact, and to apply its special expertise in determining questions of law and of policy, but it must apply and not ignore the provisions of s. 33(1), and other provisions of its constituent statute.

[32] The wording of ss. 5-7 of the 1996 *Judicial Review Procedure Act* is the same as the wording of those sections in the 1979 iteration, but for the substitution of the word "If" for the word "Where" in s. 7. That change does not detract from the analysis of MacFarlane J.A. above.

[33] As I agree that the decision of the Adjudicator was correctly quashed by the Chambers Judge, there is no outstanding decision with respect to a contravention of the *Regulations* by the respondent, and the matter is remitted to the Appellant to be dealt with in accordance with the *Act* and the *Regulations*.

Conclusion

[34] Accordingly I would allow the appeal but only to the limited extent of setting aside the directions of the judge, leaving untouched his order quashing the decision.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Low"