

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cactus Cafe Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch)*,
2010 BCSC 1691

Date: 20101201
Docket: S100196
Registry: Vancouver

Between:

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

Petitioner

And

General Manager of the Liquor Control and Licensing Branch

Respondent

In the Matter of the Decision of the General Manager - Liquor Control and Licensing Branch (case number EH 09-004) dated December 3, 2009)

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the Petitioner:

W.C. Kaplan, Q.C.
V.A. Allard

Counsel for the Respondent:

R.C. Mullett

Place and Date of Hearing:

Vancouver, B.C.
August 12, 2010

Place and Date of Judgment:

Vancouver, B.C.
December 1, 2010

The Action

[1] The Petitioner, Cactus Café Turner Road Ltd. dba Cactus Club Café (Nanaimo) (“Cactus”), seeks a judicial review of a decision of an Enforcement Hearing Adjudicator (the “Adjudicator”) as delegate of the General Manager, Liquor Control and Licensing Branch (the “General Manager”) dated December 3, 2009 (the “Decision”). The Decision was rendered after an enforcement hearing under s. 20 of the *Liquor Control and Licensing Act* (the “Act”) was heard.

[2] The following relief is sought by the Petitioner:

- an Order that the Decision be set aside;
- alternatively, an Order that the matter be remitted to the General Manager for a full rehearing by an adjudicator other than the Adjudicator; or
- in the further alternative, an Order that the matter be remitted to the Adjudicator for reconsideration in accordance with the reasons for judgment of this Court.

The Parties

(1) The Petitioner

[3] Cactus operates a casual fine dining restaurant in Nanaimo (the “Restaurant”) pursuant to Food Primary Licence No. 171335 issued by the General Manager. The licensed person capacity of the Restaurant is 219 persons consisting of 127 persons in the main dining area, 32 persons in the lounge, and 60 persons in the patio. The official floor plan bears a stamp by the Building Inspection Division of the City of Nanaimo that shows an occupant load of 159 patrons for the inside areas of the Restaurant. There is no designated occupant load for the patio area.

(2) The Respondent

[4] The General Manager is authorized to administer the Act pursuant to s. 3 of the Act. The General Manager is entitled to delegate authority to conduct investigations to officers including liquor inspectors (s. 84 of the Act and s. 3 of the *Liquor Control and Licensing Regulation* (the “Regulation”). Liquor inspectors have delegated authority to investigate contraventions of the Act, its Regulations, or the

terms and conditions of a licence. The General Manager is authorized to conduct enforcement hearings and may delegate this authority to enforcement hearing adjudicators (s. 84 of the Act and s. 3 of the Regulation).

The Facts

[5] As discussed below, the Respondent submits that the affidavit of Randy Olafson, Cactus' liquor consultant, should not be admitted to this Court because it was not part of the record before the Adjudicator. However, the majority of the facts below were referenced in the Decision of the Adjudicator through the evidence/testimony of various parties at the Hearing. Therefore, the majority of the facts below do not rely solely on the affidavit of Mr. Olafson, and I do not consider the additional evidence he submitted to be necessary to a determination of this petition.

[6] Cactus held a New Years Eve party on December 31, 2008 complete with music and dancing (the "Event"). Cactus had never hosted such an event before and on the advice of its liquor consultant, Mr. Olafson, obtained a Temporary Patron Participation Endorsement (the "Temporary Endorsement") from the General Manager. The Temporary Endorsement provided a one day amendment to the Food Primary Licence to allow the Restaurant to operate akin to a cabaret until 12:00 a.m. on the night of the Event.

[7] 220 tickets were printed for the Event. People who attended the Event were given wrist bands in exchange for their tickets. Once the ticket was exchanged, it was shredded in order to prevent ticket reuse. A manager was situated at the door during the Event to take tickets and to control the flow of patrons. In addition, four external security personnel were retained to oversee activities. The Restaurant's General Manager, Mr. Flengeris, also used a mechanical counter to conduct counts of the number of persons in the Restaurant throughout the evening.

[8] Between 9:30 and 10:30 p.m. on the evening of the Event, a count was conducted by Mr. Flengeris that indicated that there were more than 250 persons in the Restaurant with more ticket-holders lined up at the door. It was suspected that

some of the tickets had been illegally copied and used to gain entry into the Restaurant. Mr. Flengeris telephoned Mr. Olafson who advised Mr. Flengeris to refuse admission to further persons, to provide refunds to people at the door for their tickets, and to ask patrons already inside the Restaurant to leave. According to Cactus, approximately 60 tickets were refunded.

[9] At around 11:00 p.m., police attended the Restaurant on a routine “walk through”. Mr. Flengeris advised the police of the suspected ticket fraud and according to the corporal in charge, asked the police for their assistance (Mr. Flengeris denies that he asked for assistance and instead testified that the police did not appear concerned). Mr. Flengeris suggested shutting down the Event but the police advised against this since doing so would likely create a volatile situation of upset patrons. Instead at 11:55 p.m., Cactus announced last call for liquor service and turned on the lights at 12:10 a.m. Between 1:00 and 1:30 a.m., all persons had left the Restaurant. Cactus cooperated fully with the police to safely remove patrons from the Restaurant.

[10] Mr. Flengeris received a call from the Fire Chief who had been advised by the RCMP of the Restaurant’s overcrowding issue. According to Cactus, the Fire Chief advised Mr. Olafson that the RCMP had told him that there were between 280-290 persons in the Restaurant.

[11] The RCMP testified that some of the patrons expressed relief to see the police arrive given the Restaurant’s crowdedness. Estimates of the numbers of persons present in the Restaurant between 11:00 p.m. and 12:00 a.m. ranged from 295 to 436. Cactus does not dispute that the number of persons was greater than 219 but it was conceded by the RCMP that an accurate count was impossible.

[12] At approximately 1:20 a.m., the police issued Cactus a Police Licensed Premise Check (“LPC”) alleging a contravention of s. 6(4) of the Regulation due to overcrowding beyond licence capacity and occupant load. The LPC indicated a licence capacity of 250 persons and a count of 436 persons excluding staff. A copy

of the LPC was forwarded to the local liquor inspector, Brad McRobert (the “Liquor Inspector”).

[13] Mr. Olafson spoke with the Liquor Inspector on January 2, 2009. Mr. Olafson advised the Liquor Inspector that Cactus would cooperate fully with the investigation and would not host a similar event. The Liquor Inspector confirmed that he would not grant any further Temporary Endorsements to Cactus.

[14] Mr. Flengeris met with the Liquor Inspector on or about January 5, 2009. At the meeting, Mr. Flengeris was given a Contravention Notice. The Contravention Notice alleged a contravention of s. 6(4) of the Regulation and specified that the licence capacity and occupant load had both been set at 219. It stated that the RCMP conducted a capacity count of approximately 436 persons.

[15] On January 20, 2009, a compliance meeting took place between representatives of Cactus and the Liquor Inspector (the “Meeting”). At the Meeting, the Liquor Inspector indicated that he had decided to recommend enforcement action and was preparing a Notice of Enforcement Action. According to Cactus, the Liquor Inspector stated that he would recommend a seven-day licence suspension (the maximum suspension for a first time overcrowding contravention under the Regulation) unless Cactus agreed not to contest the enforcement, in which case a five-day suspension would be issued.

[16] On or about April 3, 2009, Cactus received a Notice of Enforcement Action (the “NOEA”). The NOEA alleged a contravention of s. 6(4) of the Regulation and stated that the licensed person capacity and occupant load of the Restaurant 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.

[17] The Adjudicator conducted an enforcement hearing on October 1, 2, 28 and November 20, 2009 (the “Hearing”). The Adjudicator determined that the licensed person capacity for the dining area and lounge could be combined to allow for 159

persons generally within those two areas; however, the Adjudicator concluded that the capacity for the patio (60 persons) could not be combined with either of the inside areas. The Adjudicator also found the occupant load for the inside areas of the Restaurant to be 159 patrons.

[18] The Adjudicator concluded that the number of persons present at the Event exceeded both the licensed person capacity and the occupant load for the Restaurant. He concluded that there were no fewer than 350 persons in the Restaurant at the time of the alleged contravention on a balance of probabilities. He also concluded that Cactus had failed to make out a defence of due diligence and accepted the Liquor Inspector's recommendation as to penalty in imposing the seven-day licence suspension commencing January 19, 2010. The suspension was subsequently stayed pending this judicial review.

Preliminary Issues

(1) Statutory Framework of the Act

[19] Both parties agree that the General Manager has authority to take action against a licensee if the licensee is in contravention of the Act or the Regulation, or if the licensee has failed to comply with a term or condition of the licence (s. 20(1)(a) of the Act). It is a term and condition of a licence that the number of persons in the licensed establishment not exceed the person capacity at any one time (s. 6(4) of the Regulation). The "person capacity" is the maximum number of persons (patron and staff) allowed by the General Manager in the licensed establishment, whereas the "occupant load" refers to the number of persons allowed in an establishment as determined by other provincial or municipal authority (s. 1 of the Regulation). The General Manager has discretion to determine whether to take any enforcement action at all and if an action is pursued, to determine the appropriate penalty in the circumstances.

(a) The Petitioner

[20] The Petitioner adds that it is not a contravention of the Act, the Regulation or a licence to exceed the occupant load, which is not set by the General Manager.

However, for penalty purposes, the Regulation distinguishes between a contravention that involves exceeding only the licensed person capacity and a contravention that involves exceeding both the licensed person capacity and the occupant load. Schedule 4 imposes a greater penalty for the latter contravention.

(b) The Respondent

[21] The Respondent submits that the public safety purpose of the Act is paramount to any other purpose, including any economic interest of a licensee. It adds that if the General Manager concludes that the contravention warrants enforcement action, it may suspend all or any part of the licensee's licence in accordance with the prescribed schedule (s. 20(2)(d) of the Act). The period of suspension for the contravention set out in the NOEA is 4-7 days (Item 15, Schedule 4 of the Regulation). The General Manager may not impose a suspension less than the minimum duration prescribed but may impose a longer suspension if the circumstances warrant doing so (ss. 65 and 66 of Regulation).

(2) Role of the Court and Standard of Review

(a) The Petitioner

[22] The standard of review applicable to a decision of the General Manager as regards to questions of law, jurisdiction and procedural fairness is correctness. The standard of review applicable to remaining issues, including the exercise of the Adjudicator's discretion as to penalty, is reasonableness.

(b) The Respondent

[23] The Respondent relies on *Miller's Landing Pub Ltd. v. Liquor Control Licensing Branch (General Manager)*, 2009 BCSC 1352 [*"Miller's Landing Pub"*], to address the issue of standard of review. It submits that "reasonableness" applies to questions of fact, discretion and policy, or to questions of mixed fact and law. Further, it states that "correctness" applies to questions of law such as constitutional or jurisdictional issues.

[24] It submits that when reasonableness applies, it requires deference. The job of the Court is to determine whether the outcome falls within a range of possible acceptable outcomes given the facts and the law involved (*Khosa*, 2009 SCC 12, at para. 59 citing *Dunsmuir*, 2008 SCC 9, at para. 47). The respondent states that it is not the job of the Court to reweigh or reassess the evidence.

[25] The Respondent submits that the role of the Court in a judicial review is limited. The role of the Court is to review the record and the tribunal's decision and to ensure that the tribunal: (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) that it did not lose jurisdiction by failing to provide a fair hearing, or (3) by rendering a decision outside the degree of deference owed by the reviewing Court. The Court cannot consider evidence that did not form part of the record before the tribunal nor consider as a ground of review an issue that was not raised before the tribunal, including procedural fairness issues.

[26] The Respondent claims that the Petitioner's material suggests an intention to depart from these principles since: (1) the affidavit of Mr. Olafson was not before the Adjudicator during the hearing (note, however, that all of the exhibits attached to Mr. Olafson's affidavit are included in Elizabeth Barker's affidavit; thus these exhibits were part of the record before the Adjudicator); and (2) the Petitioner did not raise issues with respect to the NOEA or the fairness of the investigation process to the Adjudicator but wishes to do so now as grounds for review.

Summary of the parties' positions

(1) The Petitioner

[27] The Petitioner raised nine grounds of review in its petition to the Court for judicial review. In its submissions, the Petitioner appears to have grouped these into four grounds of review, as discussed below.

(a) The Adjudicator erred in law and exceeded his jurisdiction in proceeding with the Hearing in the face of a defective NOEA ("Defective NOEA")

[28] Section 64(2) of the Regulation states:

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.

[29] Section 20(4) of the Act states that:

On taking action against a licensee under subsection (2), the general manager must

- (a) provide the licensee with written notice of the action in accordance with the regulations,
- (b) set out in the notice the reasons for taking the action,
- (c) set out in the notice the details of the action including
 - (i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and
 - (ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served

[30] The Petitioner submits that the “written notice” referred to in s. 64(2) of the Regulation and s. 20(4) of the Act is the NOEA. The Petitioner submits that the requirement that written notice be provided to a licensee is a condition precedent to the exercise of jurisdiction.

[31] The Petitioner submits that the General Manager did not comply with this requirement because the NOEA did not specify the dates on which the suspension must be served. Because of this failure, the Petitioner submits that the Adjudicator lacked jurisdiction to enter upon the hearing and to make the Decision. As a result, it submits that the Decision must be quashed.

[32] The NOEA specified the licensed person capacity and the occupant load of the Restaurant as 219 persons. The Petitioner submits that the Adjudicator erred at the hearing in proceeding on the basis that the licensed person capacity and the occupant load were set at 159. In the result, the Petitioner alleges that it was not given proper notice of the case that it had to meet at the Hearing and was thus denied procedural fairness. The Petitioner submits that the decision cannot stand due to breach of procedural fairness.

(b) The Liquor Inspector failed to fairly investigate the circumstances surrounding the Event

[33] The Petitioner submits that the Liquor Inspector owed a duty of fairness to Cactus given its investigatory and advisory role vis-a-vis the General Manager. This duty of fairness includes an obligation to be thorough, neutral and open minded in the course of the investigation. The Petitioner claims that an inspector must, at a minimum, notify the licensee of the alleged contravention and solicit a response from the licensee.

[34] The Petitioner states that the Liquor Inspector breached its duty of fairness by arriving at the Meeting with its mind already made up regarding the existence of the contravention and the nature of the enforcement action that would be recommended to the General Manager. It submits that the Liquor Inspector did not seek any information from Cactus regarding the steps it had taken to ensure voluntary compliance.

[35] The Petitioner states that the Liquor Inspector's investigation was incomplete as of the date of the Meeting since he did not have a complete record from the RCMP regarding their observations on the night of the Event. Further, it alleges a breach of the duty on the basis that the Liquor Inspector failed to conduct an investigation into the possibility of a due diligence defence.

[36] The Petitioner submits that it raised these concerns to the Adjudicator at the Hearing. However, the Adjudicator accepted the recommendation of the Liquor

Inspector as to penalty without reservation. The Petitioner submits that the Decision must be quashed because it is tainted by an apprehension of bias.

(c) The Adjudicator erred in law and the Decision was unreasonable in rejecting Cactus' defence of due diligence

[37] The Petitioner submits that a due diligence defence applies to proceedings under s. 20 of the Act. The Petitioner submits that the Adjudicator erred by adopting the wrong test for due diligence and by basing his conclusion on irrelevant considerations. It submits that the due diligence test in *Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 [*"Plaza Cabaret"*], is not applicable to this case since neither s. 20(1)(a) of the Act nor s. 6(4) of the Regulation purport to impose liability upon a licensee for the act of an employee in "permitting" a contravention (see s. 36(2)(b) of the Act, which was the contravention at issue in *Plaza Cabaret*).

[38] It submits that the Adjudicator should have asked whether Cactus, as a larger entity through its directing minds, took all reasonable measures to prevent the contravention. The Petitioner submits that the Adjudicator erred in concluding that Mr. Flengeris was the directing mind of Cactus since he was neither responsible for developing Cactus' liquor policy nor its procedures to prevent overcrowding. The Petitioner states that the Adjudicator further erred by focusing on the acts and omissions of Mr. Flengeris alone, rather than asking whether Cactus put in place sufficient measures. The Petitioner's position is that Cactus was diligent in implementing safeguards to control attendance at the Event and adduced extensive *viva voce* evidence of its due diligence.

[39] The Petitioner submits that it was wrongly determined that the licensed person capacity and occupant load during the Event was 159 persons and patrons, respectively, and that this error led the Adjudicator to err in his analysis and conclusions on the due diligence defence. In considering the question of due diligence, the Adjudicator erred in focusing on the fact that Mr. Flengeris issued tickets for the Event in a number that was significantly higher than 159.

[40] The Petitioner submits that the Adjudicator erred in concluding that the licensed capacities of the three areas of the Restaurant could not be combined to determine the Restaurant's licensed capacity. It states that all three areas were licensed and in operation during the Event and that the Temporary Endorsement was issued with respect to the entire Restaurant (not just the dining and lounge areas). It submits that the Adjudicator erred in concluding that Mr. Flengeris ought to have known that the licensed capacity and occupant load was 159 when the General Manger herself believed them to be 219 as stated in the NOEA.

[41] The Adjudicator emphasized that Mr. Flengeris did not know the occupant load and had failed to take measures to ensure that the occupant load was not exceeded. However, it is not a contravention of the Act or the Regulation to exceed the occupant load (this is relevant only to penalty). The Petitioner submits that the occupant load was an irrelevant consideration to the due diligence defence. It claims that the Adjudicator's rejection of Cactus' due diligence was unreasonable and tainted by errors of law.

(d) The Adjudicator erred in law and the Decision was unreasonable in imposing a penalty on Cactus, or alternatively in imposing the maximum penalty of a seven day suspension of its licence

[42] The Adjudicator found that the occupancy load was 159 and relied upon this finding in exercising his discretion to impose a penalty on the Petitioner. The Petitioner submits that having provided written notice specifying an alleged contravention based on a different occupant load than that alleged at the hearing, the General Manager lacked jurisdiction to impose a penalty.

[43] The Petitioner submits that this is its first alleged contravention of the Act and Regulation and states that the penalty proposed is unwarranted since it has been and will continue to be in voluntary compliance with its Food Primary Licence No. 171335. The Petitioner submits that a corporate decision was made by Cactus to never allow these kinds of special events in the future, and this intention was communicated to the Liquor Inspector at or before the Meeting on January 20, 2009.

[44] The Petitioner submits that the proposed penalty is punitive and not preventative given its compliance history and its good faith attempts to deal with the situation. The Petitioner states that the primary goal in bringing an enforcement action and imposing penalties is to achieve voluntary compliance. As stated by the Adjudicator in his decision, factors that should be considered by the General Manager in exercising his discretion to determine the appropriate penalty include: (a) past history of warnings by the General Manager and/or the police; (b) seriousness of the contraventions; (c) threat to public safety; and (d) well-being of the community.

[45] The Petitioner claims that the Adjudicator erred by failing to consider these factors and by exercising his discretion on facts not supported by evidence. It submits that there was no basis in the evidence for the Adjudicator's conclusion that a penalty was justified as "necessary to ensure future voluntary compliance" especially in light of Cactus' commitment to never hold such an event again.

[46] The Petitioner relies on *Urban Well v. B.C. (Liquor Control and Licensing Branch, General Manager)*, 2005 BCCA 416, and submits that the Adjudicator erred in adopting a "default" position in favour of imposing a suspension without considering the individual circumstances of the case. It claims that the Adjudicator erred by identifying factors in support of a 7-day suspension that did not pertain to the individual circumstances of the case but rather were factors common to all such contraventions. In support of this argument, the Petitioner submits that every contravention under s. 6(4) of the Regulation necessarily involves exceeding person capacity, and a discussion of its associated dangers, and an allegation of negligence on the part of the licensee.

(2) The Respondent

[47] The Respondent responds to the Petitioner's nine grounds of review by grouping them as they appear to fit the arguments set out in the Petitioner's outline. In summary, it submits that it acted within its jurisdiction, provided the Petitioner with a fair hearing, and rendered a reasonable decision given the evidence before the Adjudicator.

(a) Defective NOEA

[48] The Respondent submits that the issue of an alleged defective NOEA was not raised before the Adjudicator. It claims that the Adjudicator was never asked to address any perceived shortcomings in the NOEA and accordingly, it is impossible to know if he would have taken jurisdiction or if he did take jurisdiction, his reasons for doing so. Therefore, the Respondent submits that this ground of review cannot be considered by the Court.

(b) Investigation Process

[49] The Respondent claims that 5 of the 9 grounds of review raised by the Petitioner relate to the alleged bias of the Liquor Inspector. The Respondent submits that none of these grounds were articulated as issues before the Adjudicator and thus cannot be grounds of review before this Court. It further denies that the evidence supports any allegation of bias by the Liquor Inspector.

[50] The Respondent states that the Courts have long accepted that administrative tribunals may exercise different functions at different times and that mistakes made at an investigative stage can be remedied at an adjudicative hearing. It submits that any possible breach of natural justice on the part of the Liquor Inspector, which it denies, was cured by the Hearing. Further, the Respondent submits that there is no specific allegation against the Adjudicator.

(c) Due Diligence

[51] The Petitioner submits that the General Manager erred by finding that the occupant load was 159 patrons and by finding that the Petitioner could not succeed on the defence of due diligence. The Respondent argues that these grounds of review turn on findings of fact, or mixed law and fact. Therefore, it must be assessed on a reasonableness standard, with the highest degree of deference afforded to the Adjudicator's determinations.

[52] The Respondent submits that the Liquor Control and Licensing Branch Plan, which is attached to the Petitioner's licence, states that the occupant load is 159

patrons. Therefore, the decision of the Adjudicator in this regard cannot be considered unreasonable. With regards to due diligence, the Respondent submits that the test in *Plaza Cabaret* is appropriate in the context of a liquor control and licensing case. It relies on *Miller's Landing Pub* and states that it is not enough to have a policy or practice in place to prevent the occurrence of unlawful conduct. It submits that the licensee must demonstrate that the policies were being implemented at the time of the contravention. Further, the Petitioner cannot rely on what it does after the contravention to meet the test for due diligence.

[53] The Respondent submits that the Adjudicator's conclusion with respect to the due diligence defence is reasonable and falls within a range of acceptable and defensible outcomes. It would be difficult to argue with the logic that where a licensee prints as many tickets as allowed by the most generous capacity figure (219), absent evidence that the licensee does not intend to issue all of the tickets, the licensee intends to permit a contravention.

(d) Penalty

[54] The Respondent submits that the determination of penalty is at the absolute discretion of the General Manager. The Respondent submits that there is nothing in the Decision to suggest that the Adjudicator adopted a "default" position. It states that the Adjudicator was justified in describing the contravention as "serious" and a threat to public safety. This is supported by the fact that the Petitioner was 116 persons over its person capacity of 159, that some patrons had described the Event as "out of control", and that a patron was punching holes in the walls of the Restaurant's washroom. The Respondent submits that it cannot be said that the decision to impose the 7-day suspension was unreasonable given these facts.

Available Remedy

[55] The Respondent submits that the remedy on judicial review is discretionary and is to be exercised only where the Court concludes an error by the tribunal resulted in some miscarriage of justice. The Court may acknowledge an error and yet decline to grant a remedy if it is satisfied that the error did not affect the outcome

of the hearing. If a remedy is granted, it must be aimed at assisting the tribunal to change its process in a fashion that will correct the error. The Respondent states that the Court cannot make the decision which, in its view, should have been made by the tribunal.

[56] If the Court concludes that the Adjudicator lost jurisdiction in a fashion which affected the outcome of the hearing, and therefore exercises its discretion to grant relief, the Respondent submits that the remedy available would be an order in the nature of certiorari to quash the Adjudicator's decision and a direction that the matter be remitted for a rehearing. The Respondent submits that the Court cannot order a "full rehearing by an adjudicator other than the Adjudicator", as sought by the Petitioner, since the General Manager is responsible for delegating authority to decide these issues and the court should not interfere with its jurisdiction to do so. Further, the Respondent submits that there is no basis for an award of costs since there is no evidence of misconduct or perversity by the tribunal.

(a) Did the Adjudicator Err in Law and Exceed his Jurisdiction in Proceeding with the Hearing in the Face of a Defective NOEA?

[57] In *New Brunswick (Board of Management) v. Dunsmuir*, 2008 S.C.C. 9 (SCC) the court established at common law there are two standards of review, correctness and reasonableness. In *Victoria Social Club Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* 2009 BCSC 270, Bracken J. summarized the nature and scope of the correctness standard as follows in paras. 17 and 18:

Correctness is a non-deferential standard applied when the question is one of general law where, because of the importance of such issues to the administration of such issues as a whole, courts do not defer to the decisions of the tribunal appealed from. This is because such questions require uniform and consistent answers on areas such as jurisdiction and the principles of natural justice (*Dunsmuir, supra*, para. 60, 61 and 90).

Dunsmuir also adopted the comments of Le Dain J. in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), where it was stated:

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority

making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ...

[58] Thus, I conclude that the issues raised by the petitioner as to the defectiveness of the notice run to issues of procedural fairness and natural justice which are governed by a correctness standard of review.

[59] I am not satisfied that the NOEA was defective in its failure to provide notice of the period of the suspension and the dates on which the suspension must be served.

[60] The petitioner relies on s. 20(4) of the Act as providing as a condition precedent to a hearing, a requirement that the general manager provide the licensee with “written notice” of an action setting out “the details of the action including ... if a suspension is imposed the period of the suspension and the dates on which the suspension must be served”.

[61] The petitioner says the failure of the NOEA to specify the dates on which the proposed suspension must be served vitiates the notice and robs the adjudicator of jurisdiction to proceed with the hearing. While in my view there is a live issue whether s. 20(4) of the Act has any application to a notice of enforcement action under s. 64(2) of the *Regulations*, I am satisfied that the petitioner’s failure to raise this issue with the adjudicator at the time of the hearing is fatal to its application on this ground before me in any event.

[62] The petitioner’s second submission respecting the defectiveness of the NOEA is 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.

[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.

[71] The adjudicator dealt with the person capacity and building occupancy load issue thus in his reasons:

The liquor license capacity for the establishment.

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.

My finding as noted above is that the number of persons within the inside licensed areas far exceeded the licensed capacity. I pause to note that even were we to take the best case scenario favouring the licensee that there were only 295 persons in the licensed areas of whom twenty were on the patio, i.e. 275 persons within the inside licensed areas. That is still far in excess of the licensed capacity.

The building occupancy load.

The official floor plan at exhibit 1, tab 5, bears a stamp by the City of Nanaimo, Building Inspection Division, dated March 17, 2004 which shows an occupant load of 159 patrons. The supervisor of building inspections for the city of Nanaimo testified that in Nanaimo the Building Department does the calculations for the occupant load. The current approved occupancy load for the inside area of the Cactus Club is as noted on the plans. He testified that occupant load calculations could be based on square foot area or on seating. He recently recalculated the occupant load on the basis of square footage for the inside area as being 198 persons not including staff, i.e. 198 patrons. The owner of the premises could make an application to have the occupant load increased. The Cactus Club has not made an application to increase the occupancy load, the building occupancy load remains at 159 patrons for the inside areas.

[72] The Adjudicator then went on to deal with the petitioner's defence of due diligence in light of the findings he made with respect to the capacity and building occupancy load, and after determining that the general manager of the licensee was its directing mind at the material time, he found as follows:

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 numbing 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.

[73] The Adjudicator's imposition of penalty was of course predicated on his determination that the operative person capacity and occupant load was 159, and not 219.

[74] In my view, in making the findings which he did, which conditioned both his view whether the petitioner had acted with due diligence and his view of the appropriate penalty, the Adjudicator committed a jurisdictional error. The effect of his findings with respect to the person capacity and the occupant load was to create a moving target for the petitioner which had been confronted with a series of notices asserting a person capacity at issue of (at least) 219, and a total occupant load of 219. While there is no doubt that in the result the licensee admitted significantly more patrons than its permitted person capacity, the Adjudicator's analysis of the defence of due diligence and the penalty which he imposed rested on a determination that the applicable person capacity was 159 and that the petitioner should have acted on that understanding consistently, both in planning the event and in defending the enforcement action. That finding is at odds with each notice the petitioner received as to the foundation of the contravention.

[75] The police license check issued on January 1, 2009 asserted a capacity of 250; the contravention notice issued by the liquor inspector on January 5, 2009 asserted an applicable person capacity of 219, and the NOEA issued on April 3, 2009 similarly alleged the operative capacity as 219. In addition, as earlier noted, there is nothing in the patron participation endorsement that altered the license capacity conferred on the petitioner's establishment from a total of 219.

[76] None of the notices give any indication that the licensee's liability (or penalty) would be predicated on anything other than a person capacity of 219, or that the terms and conditions of the license precluded the petitioner from having any more than 159 persons in the establishment at any given time.

[77] Moreover, nothing in the notices gave any indication that the penalty to be imposed would be predicated on anything other than an occupancy load of 219 and a person capacity of 219.

[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.

[79] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the court observed in part, at para. 77 and 79 as follows:

Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that may have been breached. It is also a concern with general principals involving the right to make full answer and defence where one's rights are affected.

...

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 principal 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" (citations omitted).

[80] Here, as I see it, the petitioner's right to advance its defence of due diligence was compromised by the Adjudicator's determination, contrary to the notice the petitioner was entitled to rely on, that the only applicable person capacity on the night in question was 159. If that were the position taken by the general manager, it should have been set forth in the notice. If that was not the position of the general

manager, then the Adjudicator made a determination in the circumstances that inhibited the petitioner from making full answer and defence.

[81] Based on that finding, I would quash the decision with respect to liability and penalty and remit this 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.

[82] In light of that determination I do not consider it necessary or desirable to address the issues raised by the petitioner as to the reasonableness of the Adjudicator's determinations as to the petitioner's defence of due diligence or as to the penalty imposed.

[83] I am not satisfied that the petitioner has established that the hearing before the Adjudicator was tainted by unfairness and/or bias or a reasonable apprehension of bias by the testimony and participation of the liquor inspector or otherwise by the NOEA issued by him. I accept that mistakes or unfair conduct at the investigative stage can engage the right to judicial review. See: *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473, aff'd (2007) BCCA 562, leave to appeal to SCC dismissed 2008 SCCA No. 18; *Taser International Inc. v. British Columbia (Commissioner)* 2010 B.C.J. No. 802.

[84] It is clear however that any procedural unfairness or breach of the rule of natural justice committed at the investigatory stage of a process can be remedied at an adjudicative hearing. See: *Histed v. Law Society (Manitoba)* 2006 Carswell Man. 287 at para. 48 - 61 (CA) citing *Ocean Port Hotel v. British Columbia General Manager Liquor Control and Licensing Branch* 2001 2 S.C.R. 781. In *Histed*, the court held as follows at paras. 48 and 49:

48. As noted at the outset of my reasons, I have concluded that any reasonable apprehension of bias that may have existed at the time of the CIC decided to issue the citation was cured by the discipline hearing at which the appellant was given full opportunity to answer the charges against him. While the appellant has many objections about the rulings and decisions made by the panel, he makes no complaint as to the constitution of the panel or the fairness of the discipline hearing. As will be seen, fundamental to my

conclusion is my determination that the CIC's function was investigative in nature, and not adjudicative, as argued by the appellant. A reasonable apprehension of bias at an early investigative stage of proceedings can be cured by a subsequent hearing that adheres to the principles of natural justice.

49. The principle that a tribunal can cure its procedural defects was recognized in *King v. University of Saskatchewan*, [1969] S.C.R. 678 (S.C.C.). In *King*, the university had refused to grant the applicant a law degree. The applicant's appeal was considered by several committees, but he and his counsel were only allowed to be present at the final hearing before a committee of the senate of the university. Spence J. noted that breaches of natural justice had occurred in the earlier hearings, but he found that the final hearing before the senate committee was sufficient to rectify the defects: "If there were any absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee".

[85] In the case at bar, the petitioner had a full hearing before the Adjudicator and, apart from the procedural unfairness occasioned by the discrepancy between the person capacity threshold alleged in the various notices and the petitioner's licence, and the Adjudicator's contrary finding, had every opportunity to contest the case against it and advance its defence of due diligence and its submissions on the appropriate penalty. That the Adjudicator's findings did not favour the petitioner's position does not establish a reasonable apprehension of bias. What I have found in the case at bar is a procedural unfairness stemming from a finding of the Adjudicator at odds with the formal allegations made against the petitioner and which it was entitled to rely on in assessing and advancing its position. I do not, however, find, in making that determination, any evidence supportive of a reasonable apprehension of bias. The petitioner's submissions in that regard are speculative and based on its own view of the circumstances which it will have an opportunity to advance in a rehearing conducted on the footing established by the formal allegations set out in the NOEA and the petitioner's license. I would not accordingly give effect to the petitioner's application to have a rehearing conducted by another adjudicator or for costs of this petition.

[86] In the result, the decision of the Adjudicator is quashed and the matter is remitted for a rehearing on the basis that the person capacity of the petitioner's

establishment at the material time was 219 as was formally alleged, and that the occupant load was similarly 219.

“A.F. Cullen J.”

The Honourable Mr. Justice A.F. Cullen