Case Name:

A.M.P.M. Holdings Ltd. (c.o.b. Oasis Hotel) v. British Columbia (Liquor Control and Licensing Branch, General Manager)

IN THE MATTER OF the Liquor Control and Licensing Act
R.S.B.C. 1996, c. 267
Between
A.M.P.M. Holdings Ltd. & Saylor Enterprises, doing business as Oasis Hotel, appellant, and
General Manager, Liquor Control and Licensing Branch, respondent

[2003] B.C.L.I. No. 1

Appeal No. LAB-0119

British Columbia Liquor Appeal Board

Vancouver, B.C.
J.B. Hall, Designated Chair; M.D.(D.) Condie-Smallman and N. Kinao, Members

Heard: June 18, 2003.
Decision: June 18, 2003.

(52 paras.)

Appearances:

Joseph M. Doyle, for the appellant.
Robert G. Payne, for the respondent.

HEARING

The reasons and decision of the Panel were delivered by

THE DESIGNATED CHAIR:--

INTRODUCTION

1 The appellant, A.M.P.M. Holdings Ltd. and Saylor Enterprises, doing business as the **Oasis Hotel,** operates licensed premises in Surrey known as the "Sahara Club". It holds four liquor licenses, including a Class A Pub licence.

2 An enforcement hearing took place before Adjudicator Suzanne Beattie on November 1, 2001. The hearing concerned infractions in respect of the pub license alleged to have occurred on April 28, 2001. The Liquor Distribution and Licensing Branch asserted the appellant had permitted an intoxicated minor to remain on its premises contrary to Sections 35 and 43(2)(b) of the Liquor Control and Licensing Act. The Branch recommended that the appellant's license be suspended for six days.

3 The Adjudicator issued her decision on March 5, 2002. She found the appellant had violated the Act as alleged. She imposed a two-day suspension for the violation of Section 35, and exercised her discretion by not imposing a penalty for the second violation.

GROUNDS OF APPEAL

4 This appeal was brought under Section 31 of the Act (since repealed). Section 31(6)(a) established that such appeals are not in the nature of a new hearing; instead, they are appeals on the record. Further, by reason of Section 31(6)(b), an appeal must be on grounds that the general manager (in this case, the Adjudicator) erred in law alone or failed to observe the principles of procedural fairness.

5 The specific grounds advanced by the appellant are as follows:

1. That the Adjudicator erred in law by making a decision against the weight of the evidence i.e. preferring the oral evidence of police Constables Johnston and Chartier over that of the Oasis staff.
2. That the Adjudicator erred in law by failing to properly take into account and apply the defence of due diligence.
3. That the Adjudicator erred in law by [not] following the definition of "permit", as endorsed by the Liquor Appeal Board in Ed Bulley Ventures Ltd. (COB Planet Sports Lounge) v. British Columbia (Liquor Control and Licensing Branch, General Manager) June 28, 2001, LAB L-9905 at para 61.
4. That the Adjudicator failed to observe the principles of procedural fairness in ordering a two-day suspension for contravention of section 35, rather than imposing the minimum one-day suspension as recommended by schedule 4 of the Act.

6 The main issue raised by the appeal relates to the first ground. The appellant and the respondent general manager agree that it concerns a question of pure fact; namely, whether the Adjudicator erred in finding on the balance of probabilities that the minor had been on the premises. The second and third issues flow from this finding. They are whether the Adjudicator misapplied the defence of due diligence in concluding the appellant had permitted the minor to be on the premises, and whether she erred in concluding the appellant had permitted the intoxicated minor to remain on the premises. The final issue concerns the appropriateness of the two-day suspension imposed by the Adjudicator.

BACKGROUND

7 April 28, 2001 was a Saturday. The events considered by the Adjudicator began late in the evening and continued into early Sunday morning. The minor in question was a 16 year old female. She was and appeared to be a "minor" as defined in the Act. She was not carrying any identification, but was identified by the police through a computer search. The minor was on court-imposed conditions of bail which, among other things, required her to obey an 11:00 pm to 6:00 am curfew on Saturday nights and to not consume alcohol.

8 The Adjudicator heard testimony from five witnesses: Constables N. Menard, L. Johnston and C. Chartier of the Surrey RCMP detachment were called by the branch; a bartender at the **Oasis Hotel,** Tod Belknap, and the manager, Gordon Trca, were called by the appellant.

9 There were numerous discrepancies in the testimony of the witnesses. This point was noted by the Adjudicator when she began to summarize the evidence and her findings of fact. The evidentiary conflicts are confirmed by the submissions on appeal. Not only were there discrepancies between the witnesses called by each side, there were conflicts between the testimony of the three Constables; further, the evidence of one Constable was internally inconsistent.

10 There are additional difficulties with the record. For instance, the parties disagree over whether the premises could by accessed by what is described as "Door 1". The decision records that this entrance was "Locked with chains and 'panic' hardware", and further records that Door 2 was "Locked with chains and 'panic' hardware - doorperson (Dave Stewart's) station" (p. 4). The appellant argues Doors 1 and 2 were locked at all material times. The respondent points to the testimony of Constables Johnston and Chartier who said they saw the minor exiting Door 1. We also note the manager's evidence that Door 2 had a doorman (i.e. was not locked), and that he observed the minor trying to access the premises at that entrance.

11 Fortunately, we are not required to resolve these and other conflicts found in the record. The parties disagree over the appropriate standard of review, but both acknowledge it is not our role to re-evaluate the evidence and substitute our views for findings made by the Adjudicator. We have highlighted the difficulties with the record at this juncture for two reasons: first, it illustrates the challenges faced by the Adjudicator in the first instance; and second, it underscores the need for deference by an appeal body that did not hear the witnesses.

GROUNDS OF APPEAL

12 We will address the appellant's grounds for review in the order advanced. The relevant evidence and argument will be set out separately in relation to each ground.

Ground No. 1

13 The issue raised by the first ground is whether the Adjudicator committed an error of law in finding that the minor was on the premises of the **Oasis Hotel** pub. The appellant does not argue it was denied procedural fairness due to the brevity of the Adjudicator's reasoning on this point: c.f. Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

14 The parties agreed during the oral hearing that the Adjudicator's finding regarding the minor having been on the premises was reviewable only if we concluded there had been a "palpable and overriding error": see Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802. However, the appellant equated this test to the standard of reasonableness simpliciter, citing Canada (Director Of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748. The respondent argued the Adjudicator's finding should be accorded greater deference, and submitted Housen v. Nikolaisen, [2002] S.C.J. No. 31, supported application of the patently unreasonable standard.

15 Shortly after the hearing, the Supreme Court of Canada released its judgments in Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19, and Law Society of New Brunswick v. Ryan, 2003 SCC 20. We gave the parties an opportunity to file written submissions regarding the appropriate standard of review in light of these more recent missing authorities. The appellant submits they confirm that the applicable standard is reasonableness simpliciter, while the respondent maintains they support its position that the more deferential standard of patent unreasonableness should apply.

16 We begin by noting that in Dr. Q the Supreme Court seems to have confined the "palpable and overriding error" test to appellate review of judicial decisions in the first instance. The Court continued by stating that the conceptual foundation for judicial review of administrative decisions is fundamentally different (para. 33). That conceptual framework is, of course, the "pragmatic and functional approach" established in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048. The parties' written submissions implicitly assume that the same framework applies in the present case. However, there are some potentially important differences. Among other things, this is not a review but an appeal (albeit under narrow grounds), and we are not a judicial body but a statutory tribunal. The recent decisions may apply by analogy, but they are not a direct fit.

17 We have ultimately concluded that the proper test to be applied by the Board when reviewing findings of fact need not be determined in this proceeding. For present purposes, we have accepted the appellant's assertion that the standard is reasonableness simpliciter.

18 The finding impugned by the appellant is found at pages 7-8 of the decision. It comes at the

end of the part headed "Evidence and Findings of Fact". Over the preceding pages, the Adjudicator sets out portions of the evidence and makes various findings relevant to her analysis. She ultimately accepts the testimony of Constables Johnston and Chartier that they found the minor on the premises just inside Door 6:

> Implicit in the licensee's explanation is the suggestion that Constable Johnston and Constable Chartier did not find the underage female inside the premises. I am not prepared to accept that suggestion. Rather, I prefer the evidence of Constable Menard, Constable Johnston, and Constable Chartier and find, on a balance of probabilities, that the female minor was found, in an intoxicated state, inside the licensee's premise. I am not persuaded by the manager that, having received a License Premise Check that referred to an intoxicated minor, he did not talk to any of his staff. The licensee did not produce the managers' logbook that would record the manager's notations of the event.
>
> On balance, after considering the totality of the evidence, I find that the female minor was on the premises of the **Oasis Hotel** Sahara Pub on the evening of Saturday, April 28, 2001 in an intoxicated state. (pp. 7-8)

19 The appellant attacks this finding as being unreasonable, unsupportable by the evidence, and clearly wrong at law, referring to Southam Inc., supra. It additionally argues the Adjudicator erred in law by failing to provide any or sufficient reasons for preferring the evidence of the police officers: see Hilo v. Canada (Minister of Employment and Immigration), [1991] F.C.J. No. 228 (C.A.). The appellant's arguments under this first ground are principally founded on what it describes as the "many discrepancies and other frailties apparent from the evidence of the three police officers". It submits the Adjudicator appears to have preferred their evidence merely because of their status as police officers.

20 We have examined the various discrepancies identified by the appellant (especially those found at paragraphs 64 and 65 of its Statement of Points) and admit to having serious reservations about some of the Adjudicator's findings. However, that is of limited consequence, as we cannot re-evaluate the evidence or even posit alternate interpretations. More importantly, the alleged discrepancies are mostly unrelated to the central question of whether the minor was found by the Constables on the premises just inside Door 6.

21 To elaborate, Constables Johnston and Chartier each gave direct evidence that they saw the minor when they entered the Sahara Club through Door 6. They also testified that Constable Johnston removed her from the premises. They then spoke with Constable Menard and informed him they had found the minor on the premises. Constable Menard was in his police car outside the Oasis writing a License Premise Check resulting from an inspection he had just completed. Based on the advice from the other officers, he wrote in part "one under age found inside, removed and

lobby locked".

22 The appellant did not lead any direct evidence before the Adjudicator to contradict this testimony by Constables Johnston and Chartier. The respondent points out that the appellant had staff working in the vicinity of Door 6 at the time of the incident who were not called as witnesses. Thus, the Adjudicator was left with the uncontradicted evidence of the officers on this central point.

23 We accept the appellant's submissions that the branch was obliged to prove the alleged violations, and that it was entitled to argue the officers' testimony should not be accepted. But rejecting their evidence would more than test the bounds of "reliability"; it would effectively constitute a finding that the two officers had deliberately fabricated the incident. Moreover, as the respondent points out, one would need to find that the deceit began no later than the point at which they spoke to Constable Menard. And if the story was concocted, they ran the risk of several persons (i.e. the pub staff and the minor herself) coming forward and offering a different version. The respondent additionally points out that no motivation for such a deceit has been attributed to the officers, so the Adjudicator had no reason to doubt them on the critical point of where they took the minor into custody.

24 We digress somewhat to address one of the evidentiary discrepancies identified by the appellant. Constables Johnston and Chartier differed over precisely where they saw the minor when they entered the premises. Constable Johnston said she was directly in front of the beer tub (to the right of Door 6), while Constable Chartier said she was standing next to a booth (to the left of Door 6). We do not believe this difference is sufficient to reject their testimony entirely. If anything, it suggests the events they portrayed to the Adjudicator were not fabricated or rehearsed.

25 The above explanation for the Adjudicator's finding arises mainly from the respondent's responses to the appellant's arguments based on the record. Applying the reasonableness standard, we must determine whether her finding was unreasonable, in the sense of not being supported by any reasons that can bear a somewhat probing examination (see Dr. Q, supra, at para. 39; and Ryan, supra, at paras. 55-56). We repeat for convenient reference the main paragraph criticized by the appellant:

> Implicit in the licensee's explanation is the suggestion that Constable Johnston and Constable Chartier did not find the underage female inside the premises. I am not prepared to accept that suggestion. Rather, I prefer the evidence of Constable Menard, Constable Johnston, and Constable Chartier and find, on a balance of probabilities, that the female minor was found, in an intoxicated state, inside the licensee's premise. I am not persuaded by the manager that, having received a License Premise Check that referred to an intoxicated minor, he did not talk to any of his staff. The licensee did not produce the managers' logbook that would record the manager's notations of the event. (p. 7)

26 This passage could have been written in a more satisfactory fashion, especially given the

importance of the finding to the entire proceeding. However, there is a line of analysis which could reasonably lead the Adjudicator to the conclusion found in the decision. She rejects the implicit suggestion that the officers did not find the minor on the premises (i.e. that they did not give credible evidence) for two stated reasons: she was not persuaded that the manager did not talk to his staff after receiving the LPC, and the manager's log book was not produced. When one subjects the Adjudicator's analysis to a "somewhat probing examination" based on the entire record, the reasonableness of her finding on this point is strengthened.

27 This brings us to the appellant's reliance on Hilo, supra, where the Immigration Board had made the following comments about the testimony of a person seeking refugee status:

> The claimant's testimony lacked detail and was sometimes inconsistent. He was often unable to answer questions and sometimes appeared uninterested in doing so. While this may be partly due to the claimant's young age, the panel was not fully satisfied of his credibility as a witness.

28 The Federal Court of Appeal found this passage "troublesome because of its ambiguity". The claimant had been the only witness before the Board and his evidence was uncontradicted. The Court found the comments cast a nebulous cloud over the reliability of the evidence. It held the Board was under a duty to give reasons for casting doubt on the claimant's credibility in clear and unmistakable terms. It characterized the Board's credibility assessment as defective because it was couched in "vague and general terms" (QL p. 4), and held the Board should have given particulars to support its criticisms of the claimant's testimony.

29 It is not immediately apparent whether this finding was sufficient to set aside the Immigration Board's decision. The Court proceeded to find on other grounds that the Board had erred in law, and issued the decision that it held the Board should have given. Nonetheless, the portion of Hilo relied on by the appellant is readily distinguished. The Adjudicator did not comment adversely on the uncontradicted testimony of a single witness. Rather, on the critical point in dispute, she accepted the direct evidence of two witnesses in preference to the appellant's submissions that their testimony was unreliable and the branch had not proven its case. More extensive analysis would have been desirable. But what the Adjudicator wrote was not ambiguous and it was supported by (albeit limited) reasons.

30 In summary, we find that the appellant's first ground of appeal must be dismissed. We have reached this determination based on the assumption that the applicable standard of review is reasonableness simpliciter. If the patently unreasonable standard applies, then greater deference must be afforded and the outcome would be the same.

Ground No. 2

31 The issue under this ground is whether the Adjudicator erred in law by failing to properly apply the defence of due diligence to the evidence. The defence arises by virtue of the express

language in Section 35(b) of the Act:

> 35. A person who holds a licence under this Act or who sells liquor under the Liquor Distribution Act, or the person's employee, must not authorize or permit a minor to enter on or be on premises where liquor is sold or kept for sale except ...
>
> (b) with lawful excuse, ...

32 The Adjudicator quoted a passage from Twilight Zone Cabaret v. British Columbia (Liquor Control and Licensing Branch), [1995] B.C.J. No. 596, where this language was considered. The passage is not helpful as it dealt with the specific question of whether an identification system put in place by the licensee satisfied the due diligence standard. We prefer to adopt the words of Dickson J. in R. v. City of Sault St. Marie, [1978] 2 S.C.R. 1299, which were quoted recently by our Court of Appeal in Whistler Mountain Ski Corporation v. British Columbia (General Manager Liquor Control and Licensing Branch), 2002 BCCA 426. Speaking for the Court, Dickson J. wrote that an accused may avoid liability "by proving that he took all reasonable care" (p. 1325). This involves considering what a reasonable person would have done in the circumstances; for instance, whether the person took all reasonable steps to avoid the particular event.

33 The appellant argued before the Adjudicator that it had demonstrated due diligence given the procedures it has put in place to ensure minors do not gain entry to its premises. There was also evidence that the minor in question had been refused entry at Door 2 earlier in the evening. The appellant argued in the alternative that, if the minor was later found on the premises by Constables Johnston and Chartier, then the Adjudicator had to consider how the minor had gained access, what she did while inside, and what steps were taken to remove her from the premises. The appellant additionally argued there was no evidence that it had "permitted" the minor to be on the premises.

34 The Adjudicator rejected these arguments:

> I find on the evidence before me that the licensee has not met the test of due diligence. I accept the evidence of Constable Menard that Door 4, the entrance from the Cornet Lounge and the Lobby was unlocked and unmanned. I find that on this evening, the **Oasis Hotel** Sahara Pub was free and accessible to a minor. The defence of due diligence would require the licensee to take measures to ensure that entrance doors are staffed and that a minor could not enter the premises. I find the licensee contravened section 35 of the Liquor Control and Licensing Act. (p. 9)

35 The evidence of Constable Menard referred to by the Adjudicator in the above paragraph concerned an observation earlier in the evening. As recorded in the decision, Constable Menard saw that Door 4 was unlocked and unmanned during a "walk by"; he also saw that persons entering the

pub through this door were not being checked for identification. Constable Menard believed a License Premise Check was warranted because of a similar incident about a month earlier. He spoke with the manager. While speaking with Mr. Trca, Constable Menard learned that only three doorpersons were working and expressed his view that this was not adequate for a Saturday evening. Constable Menard then ensured Door 4 was locked and returned to his patrol car to write up the License Premise Check.

36 Thus, Door 4 had been locked by the time the minor was apprehended by Constables Johnston and Chartier. More generally, the issue to be decided by the Adjudicator was not whether "... on this evening, the [pub] was free and accessible to a minor". The Adjudicator was required to determine whether the appellant had violated Section 35 of the Act by "permitting" the minor apprehended by Constables Johnston and Chartier to be on its premises. This gives rise to questions such as those posed by the appellant and left unanswered by the Adjudicator.

37 The Adjudicator was also required to consider whether the appellant had a lawful excuse for the minor being on premises; i.e. whether it had exercised due diligence. In considering this defence, the Adjudicator held it would require the appellant " ... to take measures to ensure that entrance doors are staffed and a minor could not enter the premises". This overstates the test. The proper standard is whether the appellant had taken all reasonable measures. The Adjudicator does not appear to have given any consideration to the procedures put in place by the appellant. Nor does she appear to have considered the evidence indicating the minor had in fact been refused entry earlier in the evening. Aside from failing to address the right question, the Adjudicator's reasoning virtually turns the strict liability offence in Section 35 into one of absolute liability.

38 The respondent attempts to salvage the Adjudicator's conclusion by noting Constable Menard's concern that the premises were understaffed for a Saturday evening. It also advances alternate theories about how the minor might have entered the pub in order to show the appellant was not taking adequate steps to control traffic through its doors. The respondent suggests it is unlikely that the Adjudicator's decision would have been different had she expressly noted the minor could not have re-entered through Door 4, and submits it would not be worthwhile to remit the matter for reconsideration.

39 The difficulty with the alternate explanations posed by the respondent is that they are not the reason given by the Adjudicator for finding the appellant violated Section 35 of the Act. We are not prepared to speculate on how she might view the evidence if required to answer the correct question. And as we have explained above, the Adjudicator did not properly or adequately address the defence of due diligence. This aspect of her decision must be set aside.

Ground No. 3

40 Section 43(2)(b) of the Act provides that a licensee or a licensee's employee must not permit an intoxicated person to remain in that part of a licensed establishment where liquor is sold. The Adjudicator found the appellant had contravened this provision by permitting the intoxicated minor

to remain on the premises. She ultimately imposed no penalty for this contravention because it was "inextricably linked" with the Section 35 violation and the minor was on the premises "for only a temporary moment" (p. 11).

41 The appellant argues under this ground that the Adjudicator misapplied the interpretation of "permit" found in Ed Bulley Ventures Ltd., supra. It submits she essentially created an absolute liability offence given her finding about the short duration of the minor's presence. The definition of "permit" adopted by this Board in Ed Bulley Ventures follows an interpretation approved by the B.C. Court of Appeal:

> ... a licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offence is committed or not. (para. 61)

42 The Board went on to hold that the Act requires licensees to be informed about the state of sobriety of their patrons, and to take proactive measures to ensure unruly conduct does not occur. However, there is nothing to suggest licensees will be held to a standard of absolute liability.

43 The Adjudicator rejected the appellant's arguments that it had not permitted the minor to be on the premises:

> I accept the evidence of Constable Chartier and Constable Johnson that the intoxicated female minor was 6 to 10 feet from the doorperson at Door 1 (the main door). As well, there was a coat check person and a female staff member selling beer from the beer tub in close proximity to the female minor. There was no evidence of any measures taken to remove the intoxicated female minor. Nor was the incident log provided by the licensee with respect to this incident. On the evidence, I find the licensee contravened section 43(2)(b) of the Liquor Control and Licensing Act. (p. 9)

44 The brief period of time that the minor was on the premises is indeed problematic. It was likely in the order of 30 seconds based on Constable Chartier's testimony. If the appellant's staff had removed the minor at that point (or perhaps after a slightly longer period), we do not see how one could find a contravention of the Act.

45 But the minor was not removed by the appellant or its staff; she was removed by the police. Her presence was temporary in nature only because Constables Johnson and Chartier intervened. The period was admittedly short, but three of the appellant's employees were working in close proximity. There is considerable force to the respondent's argument that their failure to notice the minor, or to question her, indicates that staff did not exercise a sufficient degree of diligence in the circumstances. The evidence is that the minor appeared very young and was noticeably intoxicated. The Adjudicator specifically noted there was no evidence of any measures taken to remove her. We

do not find she erred in law by concluding that the appellant had violated Section 43(2)(b) of the Act.

46 Before leaving this ground, we note two points for the record. First, given the temporary nature of the violation, we agree with the Adjudicator's determination that no penalty should be assessed. Second, the defence of due diligence now available in relation to Section 43(2)(b) was not advanced on appeal (see Whistler Mountain Ski Corp., supra).

Ground No. 4

47 The appellant submits finally that the Adjudicator failed to observe the principles of procedural fairness by imposing a two-day suspension for the Section 35 violation. It contends that the minimum penalty of one day was appropriate in the circumstances.

48 Strictly speaking, it is perhaps unnecessary for us to address this ground. However, the point was argued by both sides and may become an issue should the general manager find a violation of Section 35 on reconsideration.

49 Schedule 4 of the Liquor Control and Licensing Regulations sets out periods of suspension for first, second and subsequent contraventions of the Act. Under Regulation 53(1), a suspension must fall within the range established for the contravention in the Schedule; however, this is qualified by Regulation 53(2) which allows a longer suspension if warranted by the circumstances of the contravention and the compliance history of the licensee. The period of suspension for a breach of Section 35 (Minors on licensed premises) is 1-3 days.

50 The penalty imposed by the Adjudicator was accordingly within the range for an initial contravention of Section 35. She considered the appellant's compliance history and concluded a two-day suspension was reasonable given all the circumstances of the case. There is absolutely no basis for interfering with that discretionary determination.

CONCLUSION

51 In the result, the appeal is allowed in part. The appellant's first, third and fourth grounds of appeal are dismissed. The second ground concerning Section 35 and the defence of due diligence is allowed, and that matter is sent back to the general manager for reconsideration.

52 As the appeal has been partially successful, we direct that one-half of the filing fee be refunded to the appellant.

qp/e/nc/qlebh

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