

Date: 20040706
Docket: S83922
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Madam Justice Smith
July 6, 2004

BETWEEN:

THE VIPER CABARET INC.

PETITIONER

AND:

**MINISTER OF PUBLIC SAFETY and
LIQUOR CONTROL AND LICENSING BRANCH**

RESPONDENTS

Appearing on behalf of Plaintiff

J. Ginther

For the Respondents

No appearance

Place and Date of Hearing

New Westminster, B.C.

July 6, 2004

[1] **THE COURT:** This is an application for judicial review of a decision of a delegate of the General Manager, Liquor Control and Licensing Branch, pursuant to s. 20 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267.

[2] On November 13, 2003, the delegate found that the Viper Room Cabaret Inc., the petitioner in this matter, had

contravened s. 33 of the *Liquor Control and Licensing Act* and that the penalty imposed should be a license suspension of four days.

[3] The petitioner seeks judicial review on four grounds:

1. The imposed penalty is too harsh;
2. The police officer was not present during the hearing to be questioned by the petitioner;
3. The minor was not searched for false identification;
and
4. The liquor inspector's testimony and recollection of events were contradictory.

[4] The owner of the Viper Room Cabaret, Dominic Merlo, appeared in person.

[5] Because I have concluded that there was a denial of procedural fairness with respect to the absence of the police officer, I will not consider the other grounds.

[6] In summary form, the circumstances of the alleged contravention were these. A minor entered the Viper Room Cabaret on the evening of July 12, 2003, and was served three or four beers in the bar. A liquor inspector and a police

officer, Constable Chaisson, were checking for such contraventions in the early hours of July 13, 2003, and their inquiries led to the issuing of the contravention notice.

[7] On September 12, 2003, a telephone pre-hearing conference was held. The Branch Advocate, Shahid Noorani, and the licensee, Dominic Merlo, participated along with Elizabeth M. Barker, the Branch Registrar. Ms. Barker's confirming letter to the parties records that the Branch Advocate stated that he would call Constable Chaisson and Liquor Inspector Bains at the hearing. The letter further records that the licensee stated that, in addition to himself, he will call Eric De Paulo, the doorman, and Tyler Hall, the bartender, at the hearing.

[8] At the hearing the Branch Advocate did not call the police officer but he did call the minor herself to testify. As well, Mr. Merlo was unable to obtain the attendance of Eric De Paulo, who was in Tumbler Ridge.

[9] Mr. Merlo testified himself, as did Mr. Hall, the bartender. Mr. Merlo's position at the hearing before me was that he wished to cross-examine the police officer to attempt to undermine the reliability of the minor's evidence. He expected the police officer to be called as a result of what he had been told.

[10] He stated that it is extremely common for minors to carry false identification in order to gain entry to licensed premises and to be reluctant to show such false identification to the police or to liquor inspectors.

[11] I accept as a proper subject for judicial notice, that it is notorious in the community that minors attempt to use false identification. I also accept as a fair inference that minors would likely be reluctant to show such false identification to the authorities and indeed may simply fail to disclose it.

[12] Section 33 of the *Liquor Control and Licensing Act* states:

33(1) A person must not

- (a) sell, give or otherwise supply liquor to a minor,
- (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
- (c) in or at a place under his or her control, permit a minor to consume liquor.

(2) Subsection (1) does not apply if liquor is

- (a) given to a minor by his or her parent, spouse or guardian in a residence for consumption in the residence,
- (b) administered to a minor by or under the authority of a medical practitioner or dentist for medicinal purposes, or

- (c) given or otherwise supplied to a minor in accordance with the regulations.
- (3) A person has liquor in his or her possession when the person has it in his or her personal possession or knowingly
 - (a) has it in the actual possession or custody of another person, or
 - (b) has it in or at a place, whether or not that place belongs to or is occupied by the person, for the use or benefit of the person or another person.
- (4) If one of 2 or more persons, with the knowledge and consent of the rest, has liquor in his or her possession, it is deemed to be in the possession of each of them.
- (5) It is a defence to a charge under this section if the defendant satisfies the court that, in reaching the conclusion that the person was not a minor, the defendant
 - (a) required that the person produce identification, and
 - (b) examined and acted on the authenticity of the identification.
- (6) A person who contravenes this section commits an offence and is liable on conviction to a fine of not less than \$500.

[13] The legislation creates a scheme in which licensees are responsible if they serve liquor to minors. However, s. 33(5) provides a statutory defence to a charge if the defendant satisfies the court that the defendant required the person to produce identification and examined and acted on the

authenticity of that identification. As well, the common law defence of due diligence is available.

[14] I now turn to principles of the duty of fairness which apply in this case.

[15] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J., for the majority, reviewed factors affecting the content of the duty of fairness in a given set of circumstances. Those factors include:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual or individuals affected; the legitimate expectations of the person challenging the decision;
- the choices of procedure made by the agency itself; and
- other factors.

[16] The court stated in *Baker*, at paragraph 28:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[17] The process in this case involved a hearing with witnesses and an adjudicator with the power to impose penalties. The importance of the decision was significant. A four-day suspension of license or \$7,000 fine, which are the minimum penalties if any penalty is imposed, can have serious consequences to a business which is operating near the line of financial viability. The legitimate expectation of the licensee in this case was that the police officer would be available for cross-examination.

[18] In the end, the adjudicator accepted the word of the minor, that she had not been asked for identification and was not carrying any identification. Cross-examination of the police officer may well have elicited evidence that would have affected the adjudicator's determination with respect to the credibility of the minor.

[19] I find that the petitioner has shown that an opportunity to cross-examine the police officer may have made a difference to the outcome of the case.

[20] Mr. Merlo represented himself at the hearing, as he did in the judicial review proceedings. I asked him whether he had requested an adjournment in order to have the police officer or the doorman attend. He stated that he had not requested an adjournment and did not know that would have been possible. He also indicated that he had hoped to relate the doorman's evidence secondhand, but the adjudicator ruled it inadmissible hearsay.

[21] I note that the letter regarding the telephone prehearing conference confirms the enforcement hearing date and states:

Please note that the hearing date will only be postponed in exceptional circumstances.

[22] Counsel for the respondent submitted that there was no breach of the principles of natural justice through a denial of procedural fairness in these circumstances. I disagree and find that the petitioner should have been advised at the hearing that he could seek an adjournment in order to have the police officer and the doorman available to testify.

[23] At the outset of the judicial review hearing, counsel for the respondents advised the court that, without making any concessions as to a denial of procedural fairness, the respondents would be willing to consent to an order remitting this matter back to the adjudicator to permit cross-examination of the police officer.

[24] In these circumstances, I will allow the petition, set aside the adjudicator's order and remit the matter to the general manager or a delegate for a new hearing.

A handwritten signature in cursive script, appearing to read "Lynn Smith".