COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Roxy Cabaret Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),*** 2006 BCCA 61

Date: 20060208
Docket: CA032904

Between:

Roxy Cabaret Ltd., doing business as The Roxy Cabaret

Appellant
(Petitioner)

And

General Manager of the Liquor Control and Licensing Branch

Respondent
(Respondent)

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Hall
The Honourable Madam Justice Levine

Oral Reasons for Judgment

J.B. Carter — Counsel for the Appellant

J.G. Penner — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
8 February 2006

[1] **HUDDART, J.A.**: The essential question on this appeal is whether an inspector made a fatal error in a Notice of Enforcement Action provided to the appellant under s. 64(2) of the ***Liquor Control and Licensing Regulation***, B.C. Reg. 244/2002 as amended up to B.C. Reg. 81/2003 (the "***Regulation***"), such that it cannot be found to have committed a contravention of a term or condition of its licence.

[2] Roxy operates a nightclub in downtown Vancouver under a licence that was issued on 20 November 2002, as a "C" Cabaret Liquor Licence and converted to a "Liquor Primary Licence" by s. 71 of the amended ***Regulation*** when it took effect on 2 December 2002. The maximum patron capacity endorsed on the face of the licence was 275 patrons. The maximum occupant load, set by the Office of the Fire Chief of the City of Vancouver, is 300 persons.

[3] Because the enforcement scheme is not easy to understand, is said to change frequently, and is agreed to have been misunderstood by the chambers judge and the adjudicator for the General Manager in different ways, it will be helpful to begin with a brief description of the scheme in place with regard to the appellant's licence, with which both parties agree.

[4] Section 20(1)(a) of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the "***Act***"), permits the General Manager to take enforcement action against a licensee who has contravened the ***Act*** or ***Regulation***. It also permits enforcement of any term or condition the General Manager has imposed on a licence "in the

public interest" as permitted by s. 12(2) of the ***Act***. Part 7 of the ***Regulation*** sets out the procedure to be followed in an enforcement action. Section 64(1) mandates an inspector to provide a written notice to a licensee the inspector is of the opinion has committed a "specified contravention." This notice was provided to the appellant on three occasions by way of a standard-form ticket-like Contravention Notice.

[5] If, after considering the alleged contravention, the inspector proposes enforcement action be taken against the licensee in response to the alleged contravention, s. 64(2) requires the inspector provide written notice to the licensee "specifying which enforcement actions the general manager proposes to take against the licensee should the licensee agree [by way of a notice of waiver] under subsection (3) that the licensee has committed the contravention" and "notifying the licensee that, unless the licensee provides a notice of waiver ... 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 that, "an enforcement hearing may be scheduled for that purpose." This is the standard-form Notice of Enforcement Action by way of a letter from the inspector that the appellant received in this case.

[6] If a "finding of contravention" (as defined in s. 63(b) of the ***Regulation***) is made, the adjudicator, as the delegate of the General Manager, must decide whether to impose a penalty for the contravention. If the adjudicator determines either a monetary penalty or a licence suspension is warranted, ss. 66 and 68 require the adjudicator to apply the minimum penalty set out in Schedule 4 to the

Regulation. In this case, the minimum penalties prescribed for "Overcrowding" are found in Items 14 and 15 of the Schedule. The items are described under the column headed "Contravention":

> 14. Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is less than or equal to the occupant load.
>
> 15. Permitting more persons in the licensed establishment than the patron or person capacity set by the general manager and the number of persons in the licensed establishment is more than the occupant load.

[7] The differentiation with regard to occupant load is significant only to penalty. For Item 14, the minimum penalty for a first offence is 1–3 days; for a second offence within a 12-month period, 3–6 days; and for a subsequent offence within the same period, 6–9 days. For Item 15, the ranges are 4-7, 10-14, and 18-20, respectively. If any breach of the ***Act***, the regulations, or a term or condition of a licence, is not specifically referred to in Items 1 to 45 of the Schedule, Item 46 provides for ranges of 1-3, 3-6, and 6-9 days.

[8] In this case, two Liquor Branch inspectors, a City of Vancouver fire inspector, and a City of Vancouver licensing official attended the Roxy on 13 September 2003, just before midnight, where they counted its occupants. Their counts ranged between 358 and 395 persons. That night, one of the Liquor Branch inspectors provided a Contravention Notice to the appellant alleging "Overcrowding beyond Occ. Load" contrary to s. 6(4) of the ***Act***. On 4 October 2003, the same inspector sent a similar notice to the appellant by mail. Then, on 28 October 2003, Roxy

received a third notice, this time alleging "Overcrowding" contrary to s. 12(2) of the ***Act*** and s. 71(2)(b) of the ***Regulation***.

[9] The parties agree that the first two notices were intended to refer to breaches of the ***Regulation*** and were also faulty in that neither s. 6 of the ***Act***, nor s. 6(4) of the ***Regulation*** applies to the enforcement action in this case. Section 6(4) affects only licences granted after the amendment of the ***Regulation*** in December 2002. No one suggested the appellant or anyone in its position would have been prejudiced by those mistakes of the inspector.

[10] The inspector then issued a Notice of Enforcement Action on 10 December 2003. It alleged contravention of "Overcrowding beyond patron capacity more than occupant load, s. 12(2), Reg. s. 71(2)(b)." The Notice also set out the intention of the enforcement hearing advocate to recommend to the general manager a 5-day suspension penalty, that being in the middle of the range for a contravention listed as Item 15 of Schedule 4 to the ***Regulation***. On the basis of the four inspectors' testimony as to their counts, the adjudicator was satisfied that "on September 13, 2003, the licensee contravened Section 12(2) of the Act and 71(2)(b) of the Regulations by failing to comply with a term and condition of the licence by permitting overcrowding beyond patron capacity, more than the occupant load" and imposed a five-day suspension.

[11] The appellant petitioned for judicial review, alleging the adjudicator had erred in finding the alleged contravention was valid and in finding a contravention without a

valid occupant load certificate. The chambers judge found the adjudicator had erred in assuming that s. 6(4) of the ***Regulation*** establishes a contravention: 2005 BCSC 459, [2005] B.C.J. No. 668 (QL). In his view, s. 6(4) establishes only that it is a term and condition of the licence that there not be at any one time more persons in the premises than the person capacity established according to the ***Regulation,*** and that the contravention alleged was created by Schedule 4. As I explained earlier, s. 6(4) has no application to this case and the only function of Schedule 4 is to provide a guideline to the General Manager in determining the appropriate penalty following a finding of a contravention.

[12] The appellant's point on this appeal is that the contravention was invalid for a different reason – because the Notice of Enforcement Action was deficient. It ought to have identified the contravention as "overcrowding exceeding patron capacity" contrary to s. 12(2) of the ***Act*** and s. 71(2)(b) of the ***Regulation***, then specified "more than occupant load" as the reason for seeking an increased penalty under Item 15 in the section of the notice setting out the intention to seek the 5-day suspension. In its view, "Overcrowding beyond patron capacity greater than occupant load" is not a contravention specified in the ***Act*** or ***Regulation.***

[13] It is true that "beyond occupant load" is not and never has been a contravention in and of itself (see ***Plaza Cabaret Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2004 BCSC 248 at para. 45). However, it was a part of Items 14 and 15 and relevant to penalty before a definition of the term was added to s. 1 of the ***Regulation*** in December 2002. Thereafter, the

"occupant load" was to be the "least number of persons allowed in an establishment" under provincial building regulations, the ***Fire Services Act*** and British Columbia Fire Code Regulation, and any safety requirements established by the local government or First Nation of the area in which the establishment is located. The term was defined when the obligation was imposed on the General Manager by s. 6 of the ***Regulation*** to set a "person capacity" equal to the "occupant load" on all licences to be issued, amended or transferred after the enactment of the amendments.

[14] Because the appellant's licence did not expire until 31 October 2003, the General Manager had not set a "person capacity" under s. 6 of the revised ***Regulation***. Nor would he have had occasion to consider the occupant load under the new definition. For this reason, the appellant considers neither the adjudicator nor the chambers judge could conclude the alleged "contravention" had occurred.

[15] I agree the adjudicator erred when he concluded that "occupant load" was a term and condition of the licence and I have already explained why I agree the chambers judge erred when he concluded that Schedule 4 created the "contravention." I also agree the General Manager must restrict the enforcement action to the contraventions of the ***Act***, ***Regulation***, or terms and conditions of a licence. But I do not accept the Notice of Enforcement Action was deficient in that it did not allege a contravention of the ***Act***.

[16] The Notice of Enforcement Action alleged the appellant had contravened s. 12(2) of the ***Act*** and s. 71(2)(b) of the ***Regulation*** by "overcrowding beyond patron capacity." That information would have made clear to the appellant that a contravention of a term of its licence was being alleged. The addition of the words "more than occupant load" gave appropriate notice that the Branch would be seeking to bring the contravention within the provisions for penalty in Item 15. This is particularly appropriate because the differentiation between Items 14 and 15 based on occupant load is losing its significance as licences come to fall under the new rules. Thus, I see no prejudice and much benefit from the inclusion in the Notice of the words "more than occupant load." It told the appellant precisely the allegation he had to meet, both with respect to a finding of a contravention and with respect to penalty.

[17] It follows I would dismiss the appeal.

[18] **HALL, J.A.**: I agree.

[19] **LEVINE, J.A.**: I agree.

The Honourable Madam Justice Huddart