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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **Skybar Ltd. v. British Columbia
(General Manager, Liquor Control and
Licensing Branch),
2006 BCCA 62**

Date: 20060208
Docket: CA032768

Between:

Skybar Ltd. doing business as Skybar

Appellant
(Petitioner)

And

The General Manager, 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, by telephone

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 primary issue in this appeal, from an order on judicial review of a decision of an adjudicator under the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the "***Act***"), is that raised by the respondent on the cross-appeal: whether the Coke Rule explained in ***R. v. Skolnick***, [1982] 2 S.C.R. 47 [***Skolnick***], applies to provincial enactments, including the ***Liquor Control and Licensing Regulation***, B.C. Reg. 244/2002 as amended to B.C. Reg. 81/2003 (the "***Regulation***"), that provide sanctions for violations of a regulatory scheme.

[2] Coke's Rule is a common law principle of statutory interpretation. In ***Skolnick***, Laskin C.J.C., writing for the Court, stated Coke's Rule, adopting the words of Blair J.A. in ***R. v. Cheetham*** (1980), 53 C.C.C. (2d) 109 at 54 [***Cheetham***]: "unless the statute otherwise clearly provides, an offender cannot be convicted as for a second or subsequent offence, unless that offence is committed after a previous *conviction* for a first or earlier offence." Further adopting what was said in ***Cheetham***, the Chief Justice noted that, "the *rationale* for the rule is plain. It is expected that the conviction and penalty for the initial offence and the peril of a more severe penalty for a subsequent offence will be present in the mind of the offender and guide his future conduct" (at 54). The Chief Justice also noted at p. 58 that the Coke Rule can only be ousted "by clear statutory provision or, at the most, by necessary implication." The Courts in both ***Skolnick*** and ***Cheetham*** were interpreting sentencing provisions of the ***Criminal Code***.

[3] The contraventions at issue in this case are breaches of a term and condition of the appellant's Liquor Primary Licence that permits operation of a nightclub on the second floor of the appellant's premises in downtown Vancouver. The General

Manager appeals from an order that what her delegate determined to be a second contravention for overcrowding under the **Regulation** was a "first" contravention for purposes of determining the minimum penalty range under Schedule 4 of the **Regulation**. In interpreting s. 1(1) of that Schedule, the chambers judge applied the reasoning of the Courts of Appeal of Ontario and Saskatchewan in **Cheetham, supra, Re Gill and Reg. of Motor Vehicles** (1985), 21 C.C.C. (3d) 234 (Ont. C.A.), leave to appeal to S.C.C. refused, 64 N.R. 396 (**sub nom. Re Heffren and Reg. of Motor Vehicles**) [**Gill**], and **Neal v. Highway Traffic Board**, [1986] 6 W.W.R. 229 (Sask. C.A.) [**Neal**] that Romilly J. had adopted and applied in **Mitran v. British Columbia (Superintendent of Motor Vehicles)**, [2001] 6 W.W.R. 593, 2001 BCSC 500. The neutral citation for the chambers judge's reasons for doing so is 2005 BCSC 235.

[4] In the General Manager's view, Coke's Rule does not apply because a regulatory suspension of a licence is a civil disability to protect the public, not a penalty for misconduct, or an additional civil sanction for repeated criminal conduct as were the motor vehicle operators' licences in **Gill** and **Neal**. Finally, the General Manager submits, the statutory provision to be interpreted comes within the proviso "unless the statute clearly otherwise provides."

[5] Before I turn to that interesting question, I will consider the three grounds of appeal. If the finding of contravention is set aside, it will not be necessary to consider the application of Coke's Rule.

[6] The appellant agrees the first two grounds of appeal are identical to those raised by the appellant in the appeal we heard together with this appeal (***Roxy Cabaret Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2005 BCCA 61). In judgment pronounced today, we agreed with the submission that the chambers judge had misunderstood the enforcement scheme in the ***Act*** and ***Regulation***, and rejected a submission that the Notice of Enforcement Action was deficient because it failed to identify a contravention of the ***Act, Regulation***, or a term or condition of the licence, albeit for different reasons than those given by the chambers judge and the adjudicator whose decision for the General Manager he was reviewing. For the same reasons, I would not accede to the first two grounds of appeal and would affirm the finding of a contravention.

[7] The third ground of appeal arises from an amendment to s. 6 of the ***Regulation*** that requires the General Manager to set the person capacity at the occupant load, as that term is defined in s. 1 of the ***Regulation***. The occupant load is the least of three numbers determined under provincial and municipal (including First Nations) fire and safety rules. The appellant's proposition is that Item 15 of Schedule 4 under which it was penalized "implies the person and patron capacity and occupant load are two different values and that occupant load is higher than person capacity," as does Item 14. In its submission, Schedule 4 does not contemplate a circumstance where person capacity and occupant load have the same value. Thus, the appellant submits, Items 14 and 15 cannot apply to the appellant's contravention of the terms of its licence on 7 September 2003.

[8] The Items are described in a section of Schedule 4 headed "Overcrowding" in a 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.

[9] However unfair the appellant may consider the result, the ***Regulation*** is clear.

The range of minimum penalty for overcrowding is now effectively that set out in Item 15 because person capacity (unlike the former patron capacity) cannot differ from the occupant load. The intent of the Legislature was evidently to retain the differentiation based on occupant load for so long as there are licences outstanding to which Item 14 may apply. I cannot find in the retention of Item 14 and the failure to make any change to Item 15 the implication that the Legislature intended no minimum for those who breach the person capacity limitation, leaving the minimum range to be determined by Item 46.

[10] It follows I would dismiss the appeal.

[11] The facts giving rise to the cross-appeal are these. Skybar's nightclub licence specifies a person capacity of 220; its maximum occupant load (as determined by the City of Vancouver Office of the Fire Chief) is also 220. Skybar admitted by waiver on 6 October 2003, that it contravened this provision of its licence (imposed by s. 6(4) of the ***Regulation***) on 17 August 2003, and paid a \$5,000.00 fine. On

21 July 2004, an adjudicator found that Skybar had committed another overcrowding contravention on 7 September 2003, and imposed a licence suspension of 12 days.

These facts are said to engage Coke's Rule.

[12] Because I am of the view Schedule 4 falls within the proviso to Coke's Rule, I need not consider whether it might apply to administrative sanctions in other circumstances. The Schedule provides:

1 (1) For the purposes of this Schedule,

- (a) a contravention is of the same type as another contravention if each contravention is described by the same Item of this Schedule, and
- (b) a contravention committed by a licensee is
 - (i) a first contravention if the contravention was committed at or in respect of an establishment and the licensee has not committed a contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention,
 - (ii) a second contravention if the contravention was committed at or in respect of an establishment and the licensee has committed one contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention, and
 - (iii) a subsequent contravention if the contravention was committed at or in respect of an establishment and the licensee has committed a second contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention.

[Emphasis added.]

[13] At the time of the contraventions in this case, s. 63 provided:

In this Part, "**finding of contravention**" means, in respect of an alleged contravention of a licensee,

- (a) an agreement by the licensee under section 64 (3) that the contravention occurred, or
- (b) a determination, made by the general manager under section 65, that the contravention occurred.

[14] The **Regulation** is clear that the question of whether a contravention is a first, second, or subsequent contravention depends on the timing of the commission of the contraventions, not on the timing of a finding that they have been committed. This is incompatible with Coke's Rule, which would require the General Manager to calculate the 12-month period from the date the finding of contravention is made. It necessarily follows that the Legislature intended that Coke's Rule should not apply.

[15] In summary, I would dismiss the appeal, allow the cross-appeal and set aside that portion of the order of the chambers judge remitting the General Manager's decision for reconsideration as to the appropriate penalty.

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

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



The Honourable Madam Justice Huddart

