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IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*,
R.S.B.C. 1996, CHAPTER 241

Oral Reasons for Judgment
The Honourable Madam Justice Gill
Pronounced in Chambers
April 23, 2004

BETWEEN:

**New World Entertainment Investments Ltd.,
doing business as Richard's on Richards**

Petitioner

AND:

The General Manager Liquor Control and Licensing Branch

Respondent

Counsel for the Petitioner: B. Carter

Counsel for the Respondent: E.W. Hughes

[1] **THE COURT:** These proceedings have been commenced pursuant to the ***Judicial Review Procedure Act***. The petitioner, New World Entertainment Investments Ltd., doing business as Richard's on Richards, seeks to quash the decision of the enforcement hearing adjudicator or to have the matter remitted for reconsideration. The hearing was conducted pursuant to s. 20 of the ***Liquor Control and Licensing Act***.

[2] The petitioner is a liquor licensee and owns a cabaret on Richards Street in downtown Vancouver. The hearing dealt with 11 alleged contraventions of the Act or Regulations, which occurred on November 9, 10 and 16, 2001. With one exception, it was found that the contraventions were proven.

[3] Mr. Carter, counsel for the petitioner, stated during argument that the issues on this review were as set out in the petitioner's written outline rather than as set out in the petitioner itself. I therefore refer to the outline.

[4] Six issues are raised.

1. Is the standard of proof on a balance of probabilities or proof beyond a reasonable doubt?

2. Was there a delay in commencing proceedings such that a remedy is available to the petitioner?

3. Is s. 78 of the ***Liquor Control and Licensing Act*** a proper basis for concluding that the petitioner was responsible for certain acts of its employees?

4. Is the petitioner responsible for acts of manufacturers?

5. Is the conduct of the petitioner in selling drink tickets to disc jockeys, knowing that those tickets

would be provided to patrons, a contravention of s. 12(1) of the Regulations?

6. Did the adjudicator improperly apply principles of due diligence in respect of the alleged violation of s. 43(2)(b) of the Act?

[5] Counsel agree on the standard of review. In matters of law the standard is correctness and on questions of fact or mixed fact and law it is reasonableness.

[6] I will deal with the issues in the order set out above.

1. Standard of proof

[7] There are conflicting judgments of this Court on this issue. In ***Zodiak Pub v. General Manager, Liquor Control and Licensing Branch***, 2004 BCSC 96, a decision rendered January 23, 2004, Blair J. concluded that in respect of an enforcement hearing pursuant to s. 20 of the ***Liquor Control and Licensing Act*** the standard of proof is on the balance of probabilities. In ***532871 BC Ltd. doing business as the Urban Well v. General Manager Liquor Control and Licensing Branch***, 2004 BCSC 127, Pitfield J. departed from the reasoning of Blair J. in ***Zodiac,*** concluding that the *actus reus* at the heart of the contravention must be proven beyond a reasonable doubt. The unfortunate result of these conflicting decisions

is that the law is now unsettled. That was, of course, a concern articulated by Wilson J. in ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590, wherein he stated:

> ... I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.

Wilson J. therefore concluded that he would only go against a judgment of another judge of this court if subsequent decisions had affected the validity of the impugned judgment, if it was demonstrated that some binding authority or relevant statute had not been considered or if the judgment was unconsidered in the sense of being an immediate decision without opportunity to fully consult authority.

[8] On this issue, I begin by saying that if the decision of Blair J. were the only decision of this court, I would, on the basis of judicial comity, decline to go against his judgment. The matter was fully argued. It is not suggested that relevant authorities were not considered. There was a full opportunity to consider the matter. As it happens, I also agree with his reasoning.

[9] The argument of the petitioner is that by application of the decision of our Court of Appeal in ***Whistler Mountain Ski Corp. v. General Manager Liquor Control and Licensing Branch,*** 2002 BCCA 426, the *actus reus* of any alleged contravention of the Act or the Regulations must be proven beyond a reasonable doubt, which was the conclusion of Pitfield J. In ***Zodiac*** that argument was rejected.

[10] ***Whistler Mountain*** involved an appeal from a decision of the Liquor Appeal Board relating to alleged infractions of the Act. There have since been procedural changes but the decision in question was, as here, made in proceedings taken against a licensee pursuant to s. 20. One of the arguments of the appellant in ***Whistler Mountain*** was that the Board had erred in determining that the defence of due diligence was not applicable to alleged violations of the Act and was only relevant to penalty. It was concluded that the defence applied to proceedings under s. 20 and the matter was remitted to the Board to consider the defence and to reconsider penalties should the Board accept the defence.

[11] Mr. Carter said in argument that in ***Whistler Mountain,*** there had been a bridging of administrative and criminal law. The argument of the appellant had relied on the classification of offences articulated in ***R. v. Sault Ste. Marie,*** [1978] 2

S.C.R. 1299. He also noted that the Court of Appeal considered but declined to follow the approach taken in ***Gordon Capital Corporation v. Ontario (Securities Commission)*** (1991), 1 Admin. L.R. (2d) 199 (Ont. Div. Ct.). In ***Gordon,*** the court had rejected the due diligence argument concluding that ***R. v. Sault Ste. Marie*** was irrelevant to proceedings taken under s. 26(1) of the ***Ontario Securities Act*** which were disciplinary or regulatory as opposed to criminal or quasi- criminal. Nevertheless, as Hollinrake J.A. said at ¶ 21, under the ***Liquor Control and Licensing Act*** there are two regimes for enforcement, criminal or quasi-criminal under s. 48 and administrative or regulatory under s. 20. The question in ***Whistler Mountain*** was whether the principle of due diligence that applied to charges under s. 48 also applied to the administrative or regulatory process under s. 20. I do not accept that a conclusion that the defence was available means that the burden of proof in administrative proceedings is proof beyond a reasonable doubt.

[12] In ***Zodiac***, Blair J. made reference to two earlier decisions of the Court of Appeal, ***Calais Investments Ltd. v. British Columbia (General Manager Liquor Control and Licensing Branch)*** (1996), 81 B.C.A.C. 309 and ***Mohammed v. British Columbia (Liquor Control and Licensing Branch)*** (1994), 51

B.C.A.C. 6, both of which involved appeals from enforcement hearings pursuant to s. 20. In ***Calais***, the suggestion that the Act was penal was rejected and it was held that it was properly characterized as regulatory. In ***Mohammed,*** an appeal was taken from a decision that Mr. Mohammed was not a fit and proper person to hold an interest in a licence. All members of the court agreed that the appeal should be dismissed. Lambert J.A. stated that the requisite degree of proof in such a case should be higher than a simple balance of probabilities. However, Legg J.A. refrained from agreeing that the degree of proof under s. 16 of the Act was higher than the balance of probabilities and Wood J.A. preferred to leave the issue to another day, when it was squarely before the court.

[13] In summary, I follow and concur with the decision in ***Zodiac*** and conclude that the standard of proof is a balance of probabilities. I would add that despite the petitioner's assertion that the decision in ***Zodiac*** is merely persuasive, it was not argued that if the evidentiary burden is not proof beyond a reasonable doubt it should at least be higher than the usual balance of probabilities.

2. Delay in Commencing Proceedings

[14] Contravention notices regarding the November 9 and 10 contraventions are dated December 14, 2001. The final contravention notice was served a few days later. Notices of Enforcement Action are dated February 25, 2002.

[15] The enforcement proceedings were brought as a result of undercover operations undertaken by Vancouver police officers who spent several hours on each of the nights in question at the petitioner's club. On behalf of the petitioner, it is argued that the combination of the covert operations and the fact that notices were not issued until mid-December made it difficult for the petitioner to marshall appropriate defence evidence and also made it impossible to voluntarily comply with concerns of the branch so as to avoid repeated offences.

[16] The adjudicator concluded that the petitioner was not unduly prejudiced in its ability to defend against the alleged contraventions. In my view, there is no basis for challenging that finding. As to what the petitioner's counsel describes as "voluntary" compliance, what is really being said is that had the petitioner been aware of alleged contraventions, further contraventions would not have occurred. That is not what I would have described as voluntary compliance. It was always within the ability of the petitioner to voluntarily

comply with, for example, prohibitions against serving liquor after certain hours.

[17] In my view, the submission that the timing of the notices made voluntary compliance impossible is totally without merit.

3. Section 78 of the *Liquor Control and Licensing Act*

[18] The adjudicator dealt with allegations that s. 10(2) of the Regulations had been breached. It states that no employee of a licensee shall consume liquor while working on the licensed premises. The adjudicator concluded that s. 78 of the Act placed responsibility on the licensee. Section 78 provides that where an offence under the Act or Regulations has been committed by an employee, the occupant of the establishment is deemed to be a party to the offence and is liable as a principal offender.

[19] Counsel agree that s. 78 has no applicability to proceedings taken under s. 20 of the Act. Counsel also agree that the defence of due diligence is available in respect of the alleged contravention. Mr. Carter says that due diligence was not considered and therefore the issue must be remitted to the adjudicator. Ms. Hughes, on behalf of the respondent, says that due diligence was argued and it should not be presumed that the adjudicator did not deal with the matter.

[20] I cannot accept the submission of the respondent. Nowhere in the reasons is the issue directly addressed and I assume that the adjudicator did not do so because it was concluded that s. 78 applied. However, it does not matter whether that assumption is correct. I have reviewed the reasons with care and, in my view, it would be inappropriate to infer that the defence was considered and rejected. Accordingly, the matter is remitted to the adjudicator for consideration of that issue.

4. Acts of Manufacturers

[21] Aside from the question of standard of proof, only one submission was made in respect of the adjudicator's finding that there had been no manufacturer's tasting and there was therefore a contravention of s. 12(1) of the Regulations. That argument flowed from the adjudicator's statement that apart from correspondence from agents, witnesses did not confirm a sampling.

[22] The conclusion of the adjudicator was that, amongst other things, there were no manufacturer's tables, displays, promotion material, licensed agent or staff. The factual conclusion that there was no manufacturer's tasting was, in my view, entirely reasonable. It is not necessary to say more to dispose of this argument.

5. Section 12(1) of the Regulations

[23] One of the issues before the enforcement hearing adjudicator was whether s. 12(1) of the Regulations had been contravened. Section 12(1) states that no licensee shall provide free liquor or liquor at a reduced price to customers. The evidence before the adjudicator was the general manager of the club booked disc jockeys. Different individuals were hired throughout the week. The contract with these individuals permitted the disc jockey to purchase drink tickets in advance for $4 per ticket which is reduced from the regular price of $4.50. Drink tickets were given to patrons by the disc jockey to get people up to dance. The adjudicator concluded that the licensee's customers were being given free liquor with the knowledge and consent of the licensee.

[24] The argument of the petitioner is that the licensee received payment for the liquor and s. 12(1) was not contravened. The respondent says that providing tickets to patrons which could be redeemed for liquor without cost is a contravention.

[25] There is an obvious difficulty with s. 12(1), at least in my view. As I understand the word "free", it means without cost or payment. Here, although patrons of the club did not pay, the licensee received payment.

[26] Counsel for the respondent referred to ***Rizzo & Rizzo Shoes Ltd. (Re)*** 154 D.L.R. (4th) 193 (S.C.C.) and the statements of the court at ¶ 21 regarding the interpretation of legislation. It was argued that the scheme and object of the Act and the intention of Parliament ought to be considered. It was submitted that in the present case the licensee and disc jockeys were acting in furtherance of the business of the licensee and thus, the adjudicator was correct. I do not find this argument to be persuasive. In my view, to interpret s. 12(1) in such a manner is inconsistent with its language. One would be concluding that in some circumstances the licensee could receive payment yet be found to have provided free liquor. That is not sensible.

[27] The evidence before the adjudicator included portions of the Compliance and Enforcement Policy and Procedures Manual, the Guide for Liquor Licensees in British Columbia published by the Liquor Control Licensing Branch and a Guide for Liquor Manufacturers and their representatives in British Columbia also published by the branch.

[28] The policy manual suggests that s. 12 is directed at over-consumption and destructive competition. I am not entirely clear as to what destructive competition means and there was no explanation in the materials. The guide for

licensees states that "You may not give liquor away in your establishment" and that all liquor must be paid for by patrons. The guide for manufacturers states that it is permissible for a manufacturer to join customers at a table in the licensed establishment and buy a drink for each customer at the table for purposes of introducing a particular product to the patrons. In my view, there is nothing in any of the materials which advances the argument of the respondent. I would also observe that materials published by the Liquor Licensing Branch which advised licensees not to give away liquor and advised manufacturers that they may purchase liquor for patrons would not seem to be consistent with the position now taken being that "free" means free to the patrons.

[29] There was an alternative argument that the contravention was in permitting the disc jockey to purchase tickets at a reduced price. Although the adjudicator makes reference to the price being reduced, throughout the reasons the issue is discussed under the heading "Free Liquor." The arguments made to the adjudicator as described in the reasons seem to be directed to the question of whether liquor was provided free as opposed to at a reduced price.

[30] In the hearing before me, argument was very brief. Counsel for the respondent simply asserted the proposition.

Counsel for the petitioner referred to the Compliance and Enforcement Policy and Procedures Manual which states that a licensee must not provide liquor at a price below the Liquor Distribution Branch purchase price. Counsel did not refer to any of the evidence before the adjudicator which may relate to this issue, assuming additional evidence beyond that referred to in the reasons was provided. The Notices of Enforcement Action while referring to s. 12 do not, in the summary of evidence, contain any references which would suggest that the contravention was in supplying liquor at a reduced price. I am therefore not prepared to consider the alternative argument regarding reduced price.

[31] In summary, insofar as the adjudicator has concluded that there was a breach of s. 12(1) by the disc jockey providing drink tickets to patrons, the decision is set aside.

6. Due Diligence - Section 43(2)(b)

[32] The adjudicator concluded that the licensee had permitted an intoxicated person to remain. The petitioner argues that the adjudicator's decision was based on the fact that an intoxicated person was left alone for 15 minutes and, as such, the adjudicator fell into error.

[33] I do not agree that principles of due diligence were not properly applied. Based on the observations of the police officers, the adjudicator concluded that a patron, apparently so intoxicated as to be unable to sit up or hold his head in his hand, had been checked by employees but then nothing further had been done for approximately 15 minutes. What ultimately occurred with that intoxicated individual was not observed by the officers and there was no specific evidence that the petitioner's general practice was being followed.

[34] The conclusion of the adjudicator was, in my view, reasonable considering all of the circumstances.

[35] That deals with all of the issues which I understood were raised apart from any issues of costs. As I asked when this matter was argued, if there are submissions to be made on costs, I would like to hear them this morning so that all issues regarding this matter can be concluded.

(SUBMISSIONS RE COSTS)

THE COURT: The order as to costs will then be that each party will bear their own costs.