IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***600428 B.C. Ltd. dba Tonic Bar v. British Columbia (General Manager, Liquor Control and Licensing Branch),*** 2004 BCSC 1422

Date: 20041102
Docket: 04 1577
Registry: Victoria

Between:

600428 B.C. Ltd. dba Tonic Bar

Petitioner

And:

The General Manager, Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Hutchison

Reasons for Judgment

Counsel for the Petitioner: J. D. Houston

Counsel for the Respondent: D. C. Roberts

Date and Place of Trial/Hearing: October 29, 2004
Victoria, B.C.

[1] In this case the petitioner seeks judicial review of a decision of an adjudicator appointed by the general manager to hold an enforcement hearing after a notice of contravention on the petitioner, popularly known as the "Tonic Bar".

[2] Under Regulation 64 of the Liquor Control and Licensing Regulations a general manager may hold an enforcement hearing to determine whether a licensee has committed an alleged contravention. The ***Liquor Control and Licensing Act*** permits the general manager to appoint a delegate in his stead, herein referred to as the adjudicator.

[3] There is no question that a contravention took place in the case at

bar and that was admitted before the adjudicator. What is at issue is whether or not the adjudicator erred in her decision in imposing a penalty which is alleged by the petitioner to be unreasonable.

[4] The petitioner takes the position that the standard of review is reasonableness and the respondent general manager, while reserving the right to say the standard of review is patent unreasonableness, is content to argue that this adjudicator's decision on penalty was reasonable.

[5] The gravamen of the offence in this case requires some background.

[6] Under the license issued to the petitioner two requirements become apparent. The licensee is first given a person capacity as a term and condition of the license which define the maximum number of persons permitted in the establishment at any one time. The person capacity of a license is by regulation not to exceed the occupant load. Occupant load is defined in s. 1 of the Regulations as:

> "**occupant load**" means the least number of persons allowed in an establishment under
>
> (a) the Provincial building regulations,
>
> (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
>
> (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

[7] The occupant load in the City of Vancouver where the Tonic Bar is situated apparently is more stringent than in other areas and municipalities in the province. This is made possible by Vancouver being governed under the ***Vancouver Charter*** rather than the ***Local Government Act***.

[8] For reasons that need not be alluded to here, the occupant load seems to have been something of a moving target, and the adjudicator at the end of the day found that the occupant load was 200 persons.

[9] There was evidence prior to the completion of the hearing that during the first day of hearing, August 12, 2003, and the second day of hearing, September 17, 2003, the occupant load increased to 227 persons.

[10] The reason that not much turns on that is that the petitioner conceded at the hearing before the adjudicator that they were not in compliance with the occupant load inasmuch on March 1, 2003, 255 patrons were found at the Tonic Bar, and on March 8, 2003, 251 patrons were the lowest count of the liquor inspector, and on April 26, 2003, it was estimated that between 287 and 304 patrons were occupying the Tonic Bar. There were in fact three other earlier non-compliance notices issued, but it is common ground that those three alleged non•compliances could not be, for technical reasons, proved against the petitioner and were dropped.

[11] Accordingly, the adjudicator had only the three contraventions of

March 1, 8 and April 26, 2003 to deal with.

[12] The petitioner in its submissions said that the adjudicator treated, and must treat by policy of the general manager, the three alleged contraventions as first offences. Indeed, that is the way the adjudicator treated the petitioner's misdemeanours.

[13] At the hearing, the petitioner took the position that the gravamen of the misdemeanours was public safety and called two witnesses to show that public safety should not be considered as having been violated.

[14] The Regulations make it clear that the occupant load is fixed by regulation.

[15] On the other hand, "patron capacity" is defined in the Regulations as:

> in relation to an establishment, means the maximum number of patrons allowed by the general manager in the area of the establishment designated by the general manager under section 12(3)(b) of the Act as the area where liquor may be sold or served;

[16] In the case at bar, the whole gravamen of the petitioner's misdemeanour was exceeding the occupant load, not the patron capacity, referred to throughout the adjudicator's reasons as the "OL". The adjudicator gave 29 pages of reasons, and it is only the penalty provisions that are alleged to be in error and unreasonable. At pages 25 and 26 of her reasons, the learned adjudicator says the following:

> Pursuant to ss. 20(2) of the *Act*, having found that the licensee has contravened the Act, the regulations and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:
>
> • impose a suspension of the liquor licence for a period of time
>
> • cancel a liquor licence
>
> • impose terms and conditions to a license or rescind or amend existing terms and conditions
>
> • impose a monetary penalty
>
> • order a licensee to transfer a license
>
> Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*.
>
> The branch's duty is to apply the penalty schedule in a fair and reasonable manner to achieve the objectives of ensuring compliance with the Legislation in order to safeguard public safety and community standards. The branch's decision on what level of penalty to recommend will depend on the branch's perception of the gravity of the situation -- meaning both the specifics of the contraventions

> and licensee's demonstrated attempts at compliance. That is, the branch will have to determine, without benefit of the hearing process, what appears most likely to achieve voluntary compliance. If the licensee disagrees with either the alleged contravention or the proposed penalty, the branch provides a hearing.
>
> The branch's primary goal in determining the appropriate penalty from the range in the Schedule is achieving voluntary compliance. The branch considers whether there is a past history of warnings by the branch and/or the Police, the seriousness of the contravention, the threat to public safety and the well being of the community.
>
> The licensee admitted contraventions for December 18, 2002 -- opening night, January 25, 2003, and February 9, 2003, but the branch will not be proceeding with them. They are not proved contraventions. However, the fact of the incidents indicates that the branch had been communicating with the licensee in an attempt to achieve voluntary compliance. After the sixth (6) contravention notice for overcrowding, the branch took more immediate steps to bring the licensee into compliance by imposing terms and conditions that required the licensee to file documents with the branch on a regular basis, reporting on the capacity. The licensee argues that the terms and conditions are a penalty and should have the effect of reducing the penalties for the earlier contraventions.

[17] Later, at page 27, the learned adjudicator said the following:

> I find that the branch's imposition of the terms and conditions, under s. 20(2) of the *Act*, acted to bring this licensee into compliance. That occurred well after the fact of most of the admitted contraventions. Until those terms and conditions were imposed, the evidence shows that the licensee was continuing to overcrowd without regard for the terms of the liquor licence or the OL. I find that the imposition of the terms and conditions was a forward looking attempt to achieve compliance, rather than a penalty for the past contraventions.
>
> The licensee was blatant in its continuing contravention despite the contravention notices and meetings with the branch personnel. This has to be recognized in a penalty in order for the branch to fulfill its duty of ensuring that licensees comply with the statutory requirements. The branch has to ensure that the industry appreciates that penalties will be meted and will be weighted according to the circumstances. I believe it is fair to suggest that blatant, continuing contraventions will attract greater penalties. It is equally fair to say that the greater the overcrowding, the greater the corresponding penalty.
>
> The Tonic Bar licensee is benefiting from a branch error for the first three (3) contraventions. The remaining three (3) contraventions are first contraventions. I find that the evidence

> supports imposition of penalties within the range for first contraventions.

[18] During the hearing, the court indicated it was troubled that the learned adjudicator would consider that unproved, or charged but withdrawn, offences gave rise to a more severe penalty being imposed. I find, however, on a fair reading of her reasons, she merely meant to point out that by imposing penalties in the range of first contraventions, the licensee was being treated fairly.

[19] In his argument, learned counsel for the petitioner says at paragraphs 26, 27 and 28 the following:

> 26. While accepting that the infractions occurred as alleged, the Petitioner sough [sic] a hearing on the issue of what, if any penalty would be appropriate in the circumstances. The Petitioner called two witnesses at the hearing, Mr. Bradley Walton, an engineer and Mr. Douglas Massie, both of whom were qualified as experts in matters of the building code and fire safety. Both Mr. Walton and Mr. Massie filed written reports which can be found at Tabs D. 16 and D. 18 respectively.
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> 27. Both Mr. Massie and Mr. Walton gave evidence that the City of Vancouver have double the exiting requirements of any other jurisdiction in British Columbia, and the most restrictive determination of occupant loads using the area of 1.2 sq. m. per person whereas the B.C. Building Code permits .75 sq. m. (Walton Report - p. 3 para 3)
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> 28. The Branch called Deputy Chief Richards to speak on the issue of the occupant load. When asked if all other jurisdictions in British Columbia, in determining their occupant loads, were creating a danger to public health and safety, his only reply was that the City of Vancouver was "safer" than the other jurisdictions because of their determination of occupant loads.

[20] He then goes on to criticize the learned adjudicator in paragraph 31 as follows:

> 31. Notwithstanding this uncontradicted evidence, the adjudicator found that public health and safety had been jeapordized [sic] due to the fact that the occupant load had been exceeded. She held:
>
> > It is trite to say, but I find that it is not the branch's function to second guess the OL capacities set by various municipalities. That is municipal responsibility. A licensee has choices it can make within the parameters of the municipal Bylaws. The Provincial Legislation has defined contraventions and the range of penalty for each contravention. Clearly, municipalities impose requirements based on their standards for safety, etc. ***Although the licensee contends that the facts of this case do not give rise to any safety concerns, I find that the fact of overcrowding does give***

> ***rise to safety concerns. Safety is one of the primary purposes of imposing capacity requirements. The branch's stated policy is directed to those overall, primary concerns and I find it is a legitimate statement.*** (emphasis added). [by petitioner's counsel]

[21] In the respondent's written reply, that argument is answered at paragraph 34, where the learned counsel for the respondent says as follows:

> 34. The Respondent's reasoning on this point is at p. 26 of the Decision:
>
> I do not accept the licensee's contention, to the limited extent that it was argued, that the expert evidence demonstrates that there are no safety issues and, therefore, the branch should not impose penalties. The branch will not look behind the municipal OLs to determine whether they are overly strict. In my view, comparing one municipality with another is not of assistance. There are many factors for a municipality to consider including density within the municipal borders, so it is not helpful to compare them as the licensee suggests. As noted at the hearing, the licensee made a decision to open a licensed establishment within the City of Vancouver borders and must comply with the City requirements. The Liquor Control and Licensing Act recognizes municipal safety requirements and provides a penalty schedule for contraventions of the OL capacities.

[22] The legislation requires the general manager to recognize the overload capacities as fixed by the particular municipality in which the licensee's establishment is situate. That is the offence for which these licensees were being sanctioned. The Regulations themselves set forth the penalties for overcrowding in Schedule 4 to the Regulations. For a first offence for overcrowding, the general manager may suspend the license for a minimum of 4 days and a maximum of 7 days for a first offence. The misdemeanour is described in the schedule as 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. Both those limits were exceeded on the 3 occasions, admitted by the licensee. The learned adjudicator made an order imposing the penalties as follows:

> **ORDER**
>
> The terms and conditions imposed by the branch on May 23, 2003, are hereby withdrawn.
>
> In the event that the licensee has not signed the waiver or paid the monetary penalty of one thousand dollars ($1000), I hereby order that the licensee pay the monetary penalty of one thousand dollars ($1,000) on or before Friday, April 16, 2004.
>
> Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Licence No. 3000028 for a period of eighteen (18) days to

> commence as of the close of business on Friday, April 16, 2004, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (s. 54(1) of the *Regulations*).
>
> Since I do not know whether the Tonic Bar would normally be open 7 days per week as of April 16, 2004, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that the Primary Liquor Licence No. 300028 for the Tonic Bar be held by the branch or the Vancouver Police Department from the close of business on Friday, April 16, 2004, until the licensee has demonstrated to the branch's satisfaction that the Tonic Bar has been closed for eighteen (18) business days.

[23] In his argument, learned counsel for the petitioner concedes that once suspension was ordered, that the minimum penalty would be 3 times 4 days, or 12 days' suspension, whereas the learned adjudicator ordered for the first contravention, 5 days' suspension; for the second contravention, 6 days' suspension; and for the third contravention, the maximum 7 days' suspension.

[24] In analyzing the argument of counsel for the petitioner, I cannot see that this adjudicator fell into error either in law or by imposing a penalty that was not reasonable in the circumstances.

[25] As learned counsel for the respondent points out, public safety is not the only issue in such an event as this, but as well, obtaining voluntary compliance is much at issue.

[26] The number of patrons allowed in a particular premises as made by particular municipal regulation must depend on the location and parameters set by individual fire chiefs or municipalities. Surely an adjudicator may take into account the size of Vancouver and the traffic congestion for firefighting equipment over smaller municipalities when comparing Vancouver's occupant load to other municipalities in British Columbia as a safety factor.

[27] This petitioner was seriously in contravention of the Vancouver fixed occupant load. In my view, the adjudicator exercised reasonable discretion which was hers and carried out her duties as required under the Act and its Regulations.

[28] Accordingly, the petition is dismissed with costs to follow the event.

“R.B.McD. Hutchison, J.”
The Honourable Mr. Justice R.B.McD. Hutchison