IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: 532871 B.C. Ltd. v. Gen. Mgr. Liquor Control & Licensing Branch, 2005 BCSC 422

Date: 20050323
Docket: L041313
Registry: Vancouver

Between:

532871 B.C. Ltd. doing business as The Urban Well

Petitioner

And

General Manager Liquor Control & Licensing Branch

Respondent

Before: The Honourable Mr. Justice McKinnon
(In Chambers)

Reasons for Judgment

Counsel for the Petitioner:	D.G. Butcher
Counsel for the Respondent:	T.A. Mason
Date and Place of Hearing:	February 16, 2005 Vancouver, B.C.

[1] This is a review under the ***Judicial Review Procedure Act*****,** R.S.B.C. 1996, c. 241, of the decision of an adjudicator who found certain violations of the ***Liquor Control and Licensing Act*****,** R.S.B.C. 1996, c. 267.

[2] The adjudicator determined that the petitioner had permitted an intoxicated person to remain on its premises and also that it had permitted dancing, both in contravention of its license. A ten-day suspension of the petitioner's license was ordered for both infractions and in addition, a reduction in liquor sales hours was directed.

[3] The petitioner does not take issue with the suspension as an appropriate remedy in keeping with the "grid" approach to sentencing, if the infractions are upheld on this review. However, it does take issue with the reduction in hours as not being causally connected to the offences.

[4] The primary ground for review is a complaint that, as no recording was made of the hearing before the adjudicator, issues of due diligence cannot be properly explored. Due diligence is a defence and one which the petitioner says has not been adequately dealt with by the adjudicator.

[5] I was informed that as a matter of policy, the respondent determined it would not record proceedings before an adjudicator. This decision was made March 26, 2002.

[6] The petitioner complains that such a policy leads to a denial of natural justice. It says as there is some evidence in the "record" provided indicating attempts by the

manager to deal with both alleged infractions, the absence of a transcript of proceedings precludes it from locating evidence tending to support the claim of due diligence.

[7] Reviews of this kind are relatively new. Formerly, appeals were permitted from an adjudicator to the Liquor Appeal Board and then to the Court of Appeal but these were abolished when portions of the ***Liquor Control and Licensing Act*** were repealed in 2002. Appeals must now be taken under the ***Judicial Review Procedure Act*** to this Court and from this Court to the Court of Appeal.

[8] My brothers, Blair J and Pitfield J., have reached different conclusions respecting the standard of proof for these matters. In ***Zodiac Pub Ltd. v. General Manager Liquor Control and Licensing Branch*****,** 2004 B.C.S.C. 96, Blair J. determined that the standard of proof was the balance of probabilities. In ***532871 B.C. Ltd. dba Urban Well v. General Manager Liquor Control and Licensing Branch*****,** 2004 B.C.S.C. 127(coincidentally the same petitioner at bar), Pitfield J. determined that the standard of proof for the *actus reus* was beyond a reasonable doubt, while the defence of due diligence was on a balance of probabilities. This case is scheduled to be heard by the Court of Appeal in March, 2005.

[9] Counsel for the petitioner advised that he was not asking me to choose a standard of proof but rather that the matter should be remitted to the adjudicator for a “recorded” hearing from which a transcript could be obtained. He referred to the competing views respecting the burden of proof only as background information. He suggested that whatever the Court of Appeal determines to be the appropriate

burden of proof, a record would be necessary to see whether it has been met. I turn now to consider the offences alleged and how the adjudicator assessed the evidence respecting those offences.

[10] Section 43(2)(b) of the *Act* provides that:

> A licensee or the licensee's employee must not permit
>
> (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

[11] The evidence before the adjudicator was that liquor inspectors observed a male come from the washroom, held up by two other males. Various observations were recorded and recited at the hearing which would admit of no other conclusion but that the person was "intoxicated". However, the issue is one of due diligence. There is no offence in permitting a patron to become intoxicated, rather the prohibition is in permitting that patron **to remain** (my emphasis) once he or she has reached that point.

[12] The inspectors noted and testified that they had information this patron had been "cut off" liquor by the bar staff. In notes made at the scene by Inspector Dyck, he recorded the following:

> Friends say he was cut off. I spoke to manager Will Dunbar and told him to get intoxicated person safely out of premises. Will said he had made arrangements to do so.

[13] The only witness called by the licensee at this hearing was Mr. David Stewart. He told the adjudicator that in his discussions with his manager he was also told that this intoxicated person "was in the process of being moved out" when confronted by

the inspectors. I pause to note that there seems to be no issue that the adjudicator is entitled to accept hearsay evidence.

[14] The second "offence" results from an observation by inspectors that persons were dancing in contravention of s. 50(1). This section states:

> If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.

[15] Entertainment is not permitted under the petitioner's present license. No issue was raised before me that "dancing" is not entertainment. I wonder if watching or performing dancing by imbibing patrons could under any definition be considered "entertainment", but I will leave that for another day.

[16] There were three inspectors on the scene at the relevant time and all three noted four patrons dancing with no attempt by staff to stop them. Although a disc jockey was present, playing music, it apparently was not for dancing purposes but for audio enjoyment only. In any event, the disc jockey admittedly made no announcement respecting a prohibition on dancing, there were no signs stating dancing was not permitted and an area had been cleared so as to extend an implicit invitation to dance.

[17] A request was made by an inspector to the manager to stop the dancing, which he did. The manager then told an inspector that he was unaware that dancing was not permitted but he was aware that the licensee "was dealing with the branch about the issue of dancing".

[18] In his evidence before the adjudicator, Mr. Stewart said that steps were taken every day to prevent dancing, that signs would be posted to this effect and that on the evening in question his staff may have stopped the dancing if given the opportunity.

[19] An argument respecting the defence of due diligence was also proffered in respect to this offence. However, it was rejected by the adjudicator. In her conclusions she stated:

> Further, I find on the evidence before me and the licensee's admissions, that there was dancing in the establishment on March 14, 2003. In this case, the evidence is that the manager of the establishment was not aware that dancing was prohibited entertainment and contrary to the *Act*. In this circumstance it is not possible for me to conclude that every effort was made by the licensee to comply with the terms of its license.

[20] The petitioner alleges a denial of natural justice because the absence of a record prohibits it from fully exploring a defence of due diligence. I am unable to agree with that proposition.

[21] Due diligence is a defence to an alleged breach. However, the burden of establishing due diligence rests upon the party alleging it, here the petitioner. The obligation resting upon the respondent is to prove the "offence". In this case there is no real issue that an intoxicated patron "remained" on the premises and that four people were observed "dancing". The issue is whether the petitioner exercised due diligence to prevent these offences and whether the absence of a transcript of the proceedings has deprived it of exploring that defence.

[22] Insofar as the intoxicated patron is concerned, all that was advanced by way of due diligence was some reference about the manager having "made arrangements". The manager did not testify at the hearing.

[23] In respect to the dancing issue, the adjudicator noted that the manager did not know dancing was not permitted. The corollary of this is that he must have considered that it was permissible. However, the adjudicator also noted that the absence of signs to this effect, the employment of a disc jockey to play music conducive to dancing and the creation of a space for that purpose all combined to negate any claim of due diligence.

[24] In ***Zodiac Pub Ltd. (c.o.b. Zodiac Neighbourhood Pub) v. British Columbia (General Manager Liquor Control and Licensing Branch)***, supra, Blair J. at ¶16, citing **Canada (Director of Investigations and Research) v. *Southam* Inc.,** [1997] 1 S.C.R. 748, set out the process a reviewing court must follow. He stated:

> Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

[25] In my view, the adjudicator had ample evidence of these two offences to come to the conclusions which she did and the conclusions were "reasonable". She was also cognizant of the defence of due diligence which she said simply had not

been made out. The petitioner's complaint that the absence of transcripts denies it natural justice in terms of exploring this issue of due diligence is somewhat of a smoke screen. All I could gather from that position was that if a transcript existed, perhaps something might be found that could support the defence. That strikes me as a highly speculative fishing expedition.

[26] The only person who testified at the hearing was Mr. Stewart and he was not present on the night the offences occurred. Mr. Stewart conveyed all that he learned from his manager and that was considered by the adjudicator. The inspectors' notes made at the time, were made available to the petitioner and filed in the proceedings. There is no evidence that the presence of a transcript might advance the defence.

[27] The petitioner does not take issue with the respondents' contention that in law, a "record" does not necessarily mean the requirement for transcripts, see ***Kandiah v. Canada (Minister of Employment & Immigration)***, [1992] F.C.J. No. 321 and ***Canadian Union of Public Employees v. Montreal***, [1997] 1 S.C.R. 793. In both cases the courts specifically found that where (as at bar) there is no statutory obligation to provide a transcript of a hearing, the absence of same does not amount to a denial of natural justice.

[28] The petitioner submitted that the absence of a transcript created an "inadequate record" which in turn led to a denial of natural justice, citing ***C.U.P.E., Local 301 v. City of Montreal***, supra. In that case at ¶ 81 the Court stated:

> In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of

> the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice.

[29] There is no serious challenge to the record at bar. No complaint is made that the adjudicator failed to consider certain evidence or documents, rather the complaint is that as no transcript exists, there has been a denial of natural justice.

[30] The petitioner was given every opportunity to present its case and appears to have done so. It was given a full and complete hearing with consideration given to the defences raised. In my view the "record" relied upon by the adjudicator was a complete record and accordingly the absence of a transcript did not violate the rules of natural justice.

[31] I turn now to the second branch of the petition which claims that the amendment to the license was "arbitrary and capricious".

[32] Notwithstanding that description, the real complaint is one of "correctness". The petitioner says that the adjudicator ignored the legal test for imposing the penalty in that she did not appreciate the factors she was obliged to consider under section 20(2.2) of the *Act***.**

[33] The adjudicator imposed a four-day suspension for the intoxication offence and a six-day suspension for the dancing offence. In addition to this six-day suspension, she also determined that a change in the terms and conditions to the license was warranted and directed that liquor sales end at 12:00 midnight, Monday to Sunday. It is this penalty that the petitioner says was "arbitrary and capricious".

[34] The petitioner claims that the adjudicator ignored the provisions of s. 20(2.2) of the *Act* when imposing the license restriction. It submits that a reading of that section obliges the respondent to impose a penalty that is causally related to the offence.

[35] Section 20(2.2) states:

> The general manager must, in taking action against a licensee under subsection (2.1), take into account
>
> (a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), **and** (my emphasis)
> (b) the particular circumstances giving rise to the taking of action by the general manager.

[36] The adjudicator reviewed the "compliance history" at some length and found that history deserving of a greater penalty. However, the observations she made respecting "the particular circumstances giving rise to the taking of action…" do not appear supported by the evidence.

[37] In her reasons in support of the reduction in hours of sales, the adjudicator stated:

> The requirement of municipal approval before granting a patron participation endorsement is designed to meet public safety and public interest concerns. By continuing to operate in a manner that attracts contraventions and license suspensions, this licensee is ignoring the public interest that the branch is mandated to protect.
>
> …In keeping with the spirit of the Act and regulations, a penalty may be imposed upon a finding of a contravention both as recognition of the risks created by the contravention as well as deterrence to others. Harm need not actually have occurred.
>
> As well, the licensee is aware of how to engage the public interest and apply for a patron participation endorsement. It has, by its evidence,

> demonstrated an economic advantage to not making such an application. The licensee has not responded to the branch's attempts to educate it as to the terms and conditions of its licence. Nor has it voluntarily complied with the terms and conditions of its licence.

[38] The decision was couched, at least in part, in terms of public safety which might have some application if the evidence indicated crowds of people dancing, but in fact only four persons were dancing and then only briefly. That could hardly amount to a public safety issue. There was also reference to the licensing process which requires local government and public input. The suggestion was that by failing or refusing to apply for the kind of license necessary to allow dancing, the petitioner was doing an end run around local concerns. There was no evidence that dancing at the Urban Well had attracted public concern.

[39] In my view the reduction in hours of sales bears no relationship to the offence nor is it proportional to the offence. The dancing occurred at 10:45 p.m. so a reduction in liquor sales hours to midnight bears no relationship to the issue. Nor was there any evidence of public safety being compromised. There was reference to historical non compliance but the "grid" system of sentencing builds in repeat offender concerns which generally results in additional days of suspensions.

[40] Section 20 (2.2) specifically obliges the general manager to take into consideration the "compliance history" **and** (my emphasis) "the particular circumstances giving rise to the taking of action by the general manager." In my respectful view that was not done. The adjudicator appears to have concluded, with some exasperation, that the petitioner was an unrepentant recidivist in the area of "dancing" and thus the reduction in hours was appropriate. I do not agree.

[41] I accept the petitioner's submission that such a penalty does not comply with section 20 (2.2).

[42] In the result, the reduction in hours portion of the penalty is struck but in all other respects the findings of the adjudicator are upheld.

[43] Given the divided success of this review I believe that each party should bear its own costs. However, if either party wished to make submissions on this issue, leave to apply is granted.

[44] Judgment accordingly.

"R.A. McKinnon J."