IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***613952 B.C. Ltd. v. British Columbia (Liquor Control and Licensing Branch),*** 2004 BCSC 1413

Date: 20041029
Docket: L040849
Registry: Vancouver

Between:

613952 B.C. Ltd. doing business as Atlantis Club

Petitioner

And

The General Manager of the Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Petitioner: J.B. Carter

Counsel for the Respondent: T.A. Mason

Date and Place of Hearing: July 30, 2004
Vancouver, B.C.

[1] The petitioner, 613952 B.C. Ltd., who carries on business as the Atlantis Club, applies pursuant to s. 2 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, for an order quashing the decision of an adjudicator made under the provisions of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267. The adjudicator suspended the petitioner's license for ten days on the basis that on two occasions the petitioner had permitted more people into its establishment than is allowed by the terms of its license.

Overview

[2] There are a number of ways in which the regulatory scheme established by the ***Liquor Control and Licensing Act*** limits the number of patrons that may legally be permitted in licensed premises. When issuing or renewing a liquor license, the general manager of the Liquor Licensing Branch may impose terms and conditions on the licensee. Among other things, the general manager may fix the "patron capacity" or "person capacity" for the premises. In the case of the petitioner's premises, the patron capacity was fixed by the general manager at 350 people. Other regulatory schemes, for example, the Provincial Building Regulations, the British Columbia Fire Code Regulation, and local government by-laws also operate to limit the number of people that might lawfully occupy business

premises, whether licensed or not. The ***Liquor Control and Licensing Act***, through the ***Liquor Control and Licensing Regulation***, B.C. Reg. 244/2002, has attempted to incorporate the limitations created by these other regulatory schemes into the licensing and enforcement scheme it establishes. It has done this by defining "occupant load" in s. 1(1) of the ***Regulation*** as follows:

> **"occupant load"** means the least number of persons allowed in an establishment under
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> (a) the Provincial building regulations,
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> (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
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> (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;

[3] In Schedule 4, the ***Regulation*** defines a series of contraventions to which are assigned a range of potential penalties. Contraventions 14 and 15 provide as follows:

> 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.
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> 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.

The range of the penalties for a breach of Contravention 15 is greater than the range of the penalties available for a breach of Contravention 14.

[4] The parties agree that the "person capacity" or "patron capacity" of the petitioner's establishment was 350. The parties also agree that on the two days in question, that is February 23, 2003 and March 16, 2003, there were in excess of 466 people in the petitioner's establishment.

[5] The general manager gave the petitioner notice of his intention to take enforcement action in relation to both alleged violations. In both cases, the contravention alleged was in relation to Contravention 15 of Schedule 4 to the ***Regulation***. A hearing was held and on March 3, 2004, the adjudicator concluded that the infractions had been proven and ordered the suspension of the petitioner's license for a period of five days in relation to each allegation.

Issues on Review

[6] The parties agree that the appropriate standard of review is that of "correctness". The petitioner raises two issues: one involving a question of statutory interpretation, and specifically relating to the definition of "occupant load" in

s. 1 of the ***Regulation***, and the other relating to the fitness of the penalty. I will deal with them separately.

The Position of the Parties

[7] As pointed out above, the ***Regulation*** defines "occupant load" as meaning the "least number of persons allowed in an establishment under" several other regulatory schemes. None of those regulatory schemes prescribe a minimum number of persons that must be in a premise. For example, the British Columbia Fire Code Regulation does not require that a minimum number of people must be in any particular premise, rather it prescribes maximums. The petitioner argues that an "occupant load" must be zero or perhaps one because that is "the least number of persons" allowed in an establishment under the various regulatory schemes incorporated into the definition. Viewed from this perspective, argues the petitioner, the definition of occupant load is "incapable of application" and thus incapable of contravention. Because proof of contravention of the occupant load is an essential element of the breach alleged, the breach cannot be proven and the decision must be quashed.

[8] Anticipating that the respondent would argue that the definition was ambiguous and thus should be interpreted in a

manner that does not give rise to absurd results, the petitioner argues that there is no ambiguity on the face of the definition. There can be absurdity without ambiguity and that is what this regulation creates. For that proposition, the petitioner relies on ***Regina* v. *McIntosh***, [1995] 1 S.C.R. 686.

[9] The respondent argues that ***Regina* v. *McIntosh***, at least as it purports to set down a general principle of statutory interpretation, has been overruled by ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, and that the applicable cannon of statutory construction is that expressed by Dreidger in ***Construction of Statutes*** (2nd ed. 1983) at p. 87, and adopted by Iacobucci J. in ***Rizzo*** at para. 21 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[10] The respondent argues that, if this approach is employed, the meaning to be ascribed to the definition of “occupant load” is that ascribed by the adjudicator who determined as follows:

> The principles of statutory interpretation require that the words be given meaning in keeping with the intent of the statute and that they not bring about

> absurd consequences. In my view, the "least" number of persons should be interpreted as meaning the lowest number of persons that can be in the establishment in keeping within the limits of the provisions in paragraphs a, b or c of the definition. For example, if the Provincial Building Regulations as referred to in paragraph (a) in the definition, allowed a maximum of 350 persons in an establishment, and *The Fire Services Act* and British Columbia Fire Code Regulation as referred to in paragraph (b) of the definition, allowed a maximum of 375 persons in the establishment, and local government safety requirements as referred to in paragraph (c) of the definition, allowed a maximum of 400 persons in the establishment, the occupant load would be the "least" number of persons, i.e. the lowest number of persons, which in this example is 350, not one or zero, as submitted by counsel.

Discussion

a) Occupancy Load

[11] Before turning directly to the issue, some comment on ***McIntosh*** and ***Rizzo*** is in order. In ***McIntosh***, the court was dealing with the interpretation of the self-defence provisions of the ***Criminal Code*** and in particular s. 34(1) and 34(2). The narrow issue was whether s. 34(2) was available to an accused who was the initial aggressor in the altercation. In the course of addressing that issue Lamer J., on behalf of the majority of the court, held that there was no ambiguity on the face of the provisions, and in the absence of any ambiguity, the court's role is to apply the provision regardless of result. In other words, in the absence of ambiguity, the

court's task is not interpretation but application. In coming to the conclusion that there was no ambiguity, the court looked only at the words of the section. It did that not because it rejected the contextual approach as an appropriate aid, to the contrary, Lamer C.J. described it as a reasonable method of statutory interpretation (see para. 21), but rather because on the facts the contextual approach was of no assistance.

[12] The contextual approach requires the court to look to the intention of the legislature. The court in ***McIntosh*** found it impossible to glean the legislative intent from the self-defence provisions of the ***Code***. Further, in order to have resort to the "contextual approach", the statutory language must be at least "reasonably capable of bearing" a particular meaning. The meaning being pressed on the court in ***McIntosh*** required the court to read words into the section that were not there and that is, according to Lamer C.J., a legislative function not a judicial one. Finally, the court was there dealing with a penal statute and it is clear that in that context, when there are two possible interpretations, the one most favourable to the accused must be adopted, all other things being equal. For all of these reasons, the court found

the contextual approach to statutory construction of no assistance.

[13] None of the circumstances for rejecting the contextual approach in ***McIntosh*** are present here. First, it is clear that the legislature was attempting, by the definition in question, to incorporate the lowest maximum number of patrons permitted under the other regulatory schemes into this scheme. Second, for reasons I will discuss below, the language in question is "reasonably capable of bearing" the interpretation advanced by the respondent. Finally, assuming that for purposes of this issue the legislation in question is properly regarded as criminal or quasi-criminal in nature (see ***Whistler Mountain Ski Corp.* v. *British Columbia (General Manager Liquor Control and Licensing Branch)***, 2002 BCCA 426) of the two approaches open, the one most favourable to the subject is the one that the adjudicator adopted. In the result, ***McIntosh*** does not preclude resort to a contextual approach to the interpretation of the statutory provisions here under consideration.

[14] Before leaving this aspect of the matter, I should note that I do not accept that ***Rizzo*** overrules ***McIntosh***. In ***Rizzo***, it was clear that the provision under consideration admitted of ambiguity. To that extent, the issue faced by the court

was different than the issue in ***McIntosh***. Moreover, and perhaps because of that circumstance, ***McIntosh*** was not mentioned by the court in ***Rizzo***.

[15] In my view, there is a difficulty in the petitioner's position. It argues that, on a literal meaning of the definition, all licensees would be in breach of the provision if they had anyone in their establishment. According to the petitioner, that renders the provision "incapable of application" presumably because the result would be absurd. On the other hand, the petitioner argues that "[w]here by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, however, harsh or absurd or contrary to common sense the result may be". These two propositions are difficult to reconcile. The provision is not "incapable of application" if given the literal meaning the petitioner urges; rather, it could be applied albeit with obviously absurd results. Moreover, if applied literally, the allegations against the petitioner would be established.

[16] That said, however, the issue remains as to whether the adjudicator was correct in the conclusion he reached. I find that he was. The definition is poorly worded and if interpreted literally it would mean what the petitioner

suggests, namely, that any licensed premise with either no occupants or only one occupant would be in breach of the occupant load restriction. The alternative construction urged by the respondent and adopted by the adjudicator would be the most favourable to licensees. It would give effect to the obvious intention of the legislature. Finally, it would avoid the absurd result that would follow from the literal interpretation.

[17] The only potential bar to application of the modern rule of statutory interpretation is whether there is an ambiguity in the legislation. While it is not entirely free from doubt, I find that there is. The legislation might mean that the minimum number of people allowed in an establishment is the aggregate of the minimums under the three regulatory schemes referred to (this follows from the use of the word “and” between subparagraphs (b) and (c)). On the other hand, it might mean that which the petitioner suggests. Finally, and while admittedly strained, it might mean what the adjudicator found that it means. I am satisfied that the provision is reasonably capable of bearing the interpretation ascribed to it by the adjudicator. On that approach, the conclusion reached by the adjudicator is the correct one.

[18] I note also that no where is it suggested that the petitioner was misled as to the meaning of this provision. Indeed, they agreed before the adjudicator that the "occupancy load" applicable to their establishment was 466. I assume that is the lowest maximum number permitted under the three regulatory schemes incorporated by the definition.

b) Penalty

[19] The inspection of the petitioner's premises on March 16, 2003, revealed more than just overcrowding. According to the April 17, 2003 correspondence from the City of Vancouver, which was before the adjudicator, the March 16th inspection showed that there were "unsanitary washroom conditions, smoking violations and intoxicated patrons (vomiting and emergency services being called) and overcrowding (100 plus patrons) in contravention of the Fire By-law". The City suspended the petitioner's business license for two days as a result.

[20] Section 20(1)(e) of the ***Liquor Control and Licensing Act*** provides that:

> **20**(1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

> ...
>
> (e) the suspension or cancellation of a municipally, regionally, provincially or federally granted license, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

Acting under the authority of that power, the general manager suspended the petitioner's liquor license for the same two days as the two-day suspension issued by the City of Vancouver. The adjudicator found that this suspension by the general manager was not for reasons of overcrowding but because of the action taken by the City of Vancouver, which was itself taken for reasons, at least in part, unrelated to overcrowding.

[21] The petitioner argues that, by virtue of the two-day suspension in May 2003, the authority of the Branch was spent and no further suspension could be imposed for the March 16, 2003 violations. There were two bases upon which a suspension could be imposed arising out of the events of March 16, 2003: one relating to overcrowding and the other being the suspension of the petitioner's business license. There is no basis to conclude that the adjudicator was without jurisdiction or authority to punish for one because the general manager had already imposed punishment for the other.

[22] The second aspect of this petitioner's argument on this issue is that the adjudicator ought to have taken into consideration the general manager's earlier suspension when imposing a penalty for overcrowding because there was at least some overlap in the reasons for the two suspensions. The actions of the City of Vancouver, which formed the basis for the general manager's suspension, were at least in part based on overcrowding.

[23] It is not clear that this second issue was argued before the adjudicator. He determined as follows in relation to the March 16, 2003 suspension and the issue of the earlier suspension under s. 20(1)(e):

> On March 16, 2003, the evidence is that the occupant load was exceeded by a similarly significant number of persons; the area was congested, moving about difficult. In the circumstances a penalty greater than the minimum four (4) day suspension is warranted. I am satisfied that a five (5) day suspension penalty is appropriate.
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> I do not accept counsel's argument that the branch suspension of the liquor license for a two (2) day period from May 5 to 7, 2003, was for the same contravention. The Notice of Suspension found in Exhibit 3, tab 4, clearly states that the suspension is pursuant to section 20(1)(e) of the *Act*...
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> ...
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> Here, the City of Vancouver suspended the Business Licence necessary to operate the establishment for a two (2) day period which lead to the branch

> suspension of the liquor license for the same period.

[24] At the outset of his decision, the adjudicator noted that the Branch was seeking a five-day suspension in relation to the February 23, 2003 infraction and a seven-day suspension in relation to the March 16, 2003 infraction.

[25] The adjudicator imposed a five-day suspension in relation to the first breach, in effect, agreeing with the penalty sought by the Branch. He did not, however, agree with the Branch's suggestion in relation to the second breach. Instead of the seven days sought by the Branch, he imposed a five-day suspension. I am unable to conclude that the adjudicator did not take into account, to the extent it was appropriate to do that, the earlier two-day suspension issued by the general manager for the March 16, 2003 breach in fashioning the penalty he imposed for the s. 20(1)(b) aspect of that breach. Nor am I able to conclude that he was otherwise incorrect in coming to the conclusion he did.

Conclusion and Costs

[26] In the result the petition is dismissed. Because the petitioner has been unsuccessful in this application, costs would ordinarily be awarded to the respondent. The

petitioner's argument based on the interpretation of the definition of "occupant load" was not frivolous. It was an argument capable of being made largely because of the poorly worded nature of that provision. In these circumstances, it is appropriate that each party bear their own costs.

"G.M. Barrow, J."
The Honourable Mr. Justice Barrow