IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Skybar Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),*** 2005 BCSC 235

Date: 20050225
Docket: 36344
Registry: Kamloops

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

Between:

SKYBAR LTD. doing business as SKYBAR

PETITIONER

And

THE GENERAL MANAGER, LIQUOR CONTROL AND LICENSING BRANCH

RESPONDENT

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (In Chambers)

Counsel for the Petitioner	J.B. Carter
Counsel for the Respondent	J.G. Penner
Date and Place of Hearing:	January 10, 2005 Vancouver, B.C.

[1] Pursuant to the ***Judicial Review Procedure Act***, R.S.B.C., 1996, c. 241 Skybar Ltd. doing business as Skybar ("Skybar") seeks to quash the July 21, 2004 decision of the Enforcement Hearing Adjudicator ("Adjudicator") appointed as the delegate of the General Manager, Liquor Control and Licensing Branch ("General Manager") ("Branch") or, in the alternative, seeks to have the decision remitted to the General Manager for reconsideration

BACKGROUND

[2] Skybar operates a nightclub, two restaurants and two liquor lounges in downtown Vancouver. Skybar has three liquor licences. The "Food Primary Licence" permits a capacity of 178 persons on the first and third floor restaurants, the "Liquor Primary Licence" permits a capacity of 220 persons on the second floor nightclub, and a second "Liquor Primary Licence" permits a capacity of 71 persons in a "Third floor VIP lounge".

[3] On August 17, 2004 the Branch served a "Contravention Notice" for "Overcrowding beyond occ. Load" which was said to be a "Contravention" under Section 6(4) of the ***Liquor Control and Licensing Regulation*** B.C. Reg. 244/2002 as amended ("***Regulation***"). On October 6, 2003, Skybar signed a waiver admitting the Contravention and agreeing to pay a penalty of $5,000.00.

[4] The Branch served a further "Contravention Notice" on Skybar on September 7, 2003. This Contravention Notice stated that the Contravention was:

"Overcrowding beyond person capacity greater than Occupant Load, regulation, Section 6(4)".

[5] The Branch served a "Notice of Enforcement" on Skybar on December 11, 2003. The Notice of Enforcement alleged that, on September 7, 2003, Skybar contravened s. 6(4) of the ***Regulation*** by "Overcrowding beyond person capacity greater than Occupant Load, Reg. s. 6(4)".

[6] In this Notice of Enforcement Action, the Inspector set out the "role" of the Branch as follows:

> The role of the Liquor Control and Licensing Branch as the regulator of licensed establishments is to help provide an orderly and problem-free environment for licensed establishments. When an infraction occurs, the general manager of the Liquor Control and Licensing Branch will take whatever enforcement action is necessary:
>
> - to protect the public interest,
> - to ensure future compliance with the Act, the regulations, and/or the terms and conditions of a licence, and
> - to ensure that licensees, employees, patrons and the community recognize the seriousness of contraventions.

[7] The evidence in support of the Contravention Notice and the Notice of Enforcement was that a Liquor Inspector went to Skybar on 12:10 a.m. on September 7, 2003 with two City of Vancouver Fire Inspectors and the counts undertaken by the Inspector revealed a total of 498 and 448 persons present at that time. The enforcement being sought by the Branch against Skybar was a penalty of a 12 day suspension as the Branch took the position that this was a second

Contravention taking into account the admission made by Skybar on October 6, 2003 relating to the contravention of August 17, 2003.

[8] After a hearing with counsel present on behalf of Skybar, a decision was rendered by the Adjudicator on July 21, 2004 resulting in a suspension of 12 days to commence at the close of business hours on Friday, August 27, 2004. Pursuant to an agreement reached, the effects of the July 21, 2004 decision have been stayed pending a decision relating to this petition.

PROVISIONS UNDER THE ACT

[9] Section 1(1) of the ***Liquor Control and Licensing Act***, R.S.B.C., 1996, c. 267 ("***Act***") contains a number of definitions including the definition of "establishment" which is defined to mean: "... a place or premises that may comply with the requirements of this ***Act*** and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such space or premises any area where liquor is manufactured, stored or served".

[10] Section 20(1) of the ***Act*** states:

> 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:
>
> (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the license;

[11] Section 20(2) of the ***Act*** states:

> If the general manager has the right under subsection (1) to take action against the licensee, the general manager may do any one or more of the following, with or without a hearing: ...
>
> (c) imposing monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
>
> (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
>
> (e) cancel all or any part of the licensee's licence; ....

[12] There is no definition of "Contravention" under the ***Act***. Rather, the term "contravention" is defined under the ***Regulation*** and, as well, there are references to the phrase "alleged contravention" within the ***Regulation***.

[13] Section 84 of the ***Act*** provides that the Lieutenant Governor in Council may make regulations and s. 84(2) (s) and (t) allows the Lieutenant Governor in Council to make regulations relating to prescribing a schedule of monetary penalties and license suspensions for the purposes of section 20(2)(c) and (d) of the ***Act***.

REGULATIONS UNDER THE ACT

[14] Under s. 1(1) of the ***Regulation***, a "contravention" is defined to mean: "... a matter referred to in the "Contravention" column of Schedule 4". The term "occupant load" is defined to mean: "... 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". The term "patron capacity", is defined to mean: "... 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". The term "person capacity" is defined to mean: "... the maximum number of persons allowed by the general manager in the establishment".

[15] Section 6(1) of the ***Regulation*** provides that, before the General Manager approves the issuance of a license, the General Manager must:

> ... set the person capacity of the establishment, having regard to the public interest and the views of the local government or first nation if provided under section 10 or 53 of this regulation.

[16] Section 6(2)(3) and (4) of the ***Regulation*** provide:

> (2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.
>
> (3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.
>
> (4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

[17] Section 61(1) of the ***Regulation*** states:

> If, in relation to a contravention, the enforcement actions specified under section 64(2)(a) ... include a suspension, the period of the suspension must, subject to the subsection (2) of this section, fall within the range established for the contravention under Schedule 4.

[18] Section 64 of the ***Regulation*** states:

64 (1) If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice [the "Contravention Notice"] to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention.

(2) If, after considering the alleged contravention, the inspector proposes that enforcement actions should be taken against the licensee in response to that alleged contravention, the inspector must, after forming that opinion, provide written notice [the "Notice of Enforcement"] to the licensee

> (a) specifying which enforcement actions the general manager proposes to take against the licensee should the licensee agree under subsection (3) that the licensee has committed the contravention, and
>
> (b) notifying the licensee that, unless the licensee provides a notice of waiver in accordance with subsection (3),
>
> > (i) the general manager will determine whether the alleged contravention occurred and the enforcement actions, if any, that are to be taken in relation to that alleged contravention, and
> >
> > (ii) an enforcement hearing may be scheduled for that purpose.

(3) The general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result, unless, within 14 days after the date of the notice referred to in subsection (2), or within such longer period as the general manager considers appropriate, the licensee provides to the general manager a notice of waiver, in form and content satisfactory to the general manager, by which the licensee expressly and irrevocably

> (a) agrees that the licensee has committed the contravention,
>
> (b) accepts the specified enforcement actions,
>
> (c) waives the opportunity to have an enforcement hearing on the matter, and
>
> (d) agrees that the finding of contravention and the specified enforcement actions will form part of the compliance history of the licensee.

[19] Schedule 4 of the ***Regulation*** is headed "Enforcement Actions". There are various "contraventions" referred in Schedule 4. Under s.1(1)(b) of Schedule 4, 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.

[20] Under the general heading "Overcrowding", items 14 and 15 are stated to be:

Item	**Contravention**	**Period of Suspension (Days)**			**Monetary Penalty**
		First Contra-vention	**Second Contra-vention**	**Subsequent Contra-ventions**	
Overcrowding					
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	1-3	3-6	6-9	$1 000 - $3 000
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	4-7	10-14	18-20	$5 000 - $7 000

	is more than the occupant load				

STANDARD OF REVIEW

[21] The parties agree that the question to be reviewed is a question of law so that the appropriate standard of review is that of correctness because the interpretation of a statute is a purely legal question and one ultimately within the jurisdiction of the Court. In this regard, the expertise of the Court in matters of statutory interpretation is superior to that of the General Manager: ***Barrie Public Utilities v. Canadian Cable Television Association***, [2003] 1 S.C.R. 476; and ***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 553. I am satisfied that I must review the July 21, 2004 decision of the Adjudicator to ascertain whether the decision was correct or not.

THE DECISION OF THE GENERAL MANAGER

[22] At the hearing before the Adjudicator, counsel for Skybar made a number of arguments. For the purposes of this review, the two primary arguments made by counsel were that there could be only one contravention under s. 6(4) of the ***Regulation***: that those present were in a number over the licensed "patron or person capacity" so that the contravention alleged ("Overcrowding beyond person capacity greater than occupant load" was not a contravention. Second, according to Coke's Rule, a person cannot be found to have committed a second offence before the person has been found to have committed a first offence and the second offence must have occurred after the conviction for the first offence. Regarding the second argument, Skybar acknowledged that Coke's Rule would not apply if the rule had been modified by legislation but submitted that neither s. 64(3)(d) of the ***Regulation***

nor the definition of "second contravention" in Schedule 4 of the ***Regulation*** was sufficient to modify or displace Coke's Rule.

[23] In dealing with the first argument, the Adjudicator stated:

> Under section 6 of the *Regulation* there is only one contravention, that of being over the licensed capacity. Accordingly, there should not be a distinction between over licensed capacity less than or more than the occupant load. Counsel referred to *The Plaza Cabaret Ltd. v. General Manager, Liquor Control and Licensing Branch* (2004), B.C.S.C. 248, a decision by the Honourable Mr. Justice Pitfield. Although that case was addressing interpretation of the former Regulations, counsel referred specifically to Mr. Justice Pitfield's comments at paragraphs 39, 45 and 47.
>
> The licensee submitted that there is only contravention under section 6(4) and, accordingly, there can be no distinction between being over or under the OL [occupant load].
>
> I agree with Mr. Justice Pitfield in the *Plaza* case that the contravention is being over licence capacity. However, I find that his comments do not rule out different penalties. At paragraph 45 he states:
>
> > Schedule 4 makes it clear that the contravention in respect of which the General Manager must proceed in relation to capacity arises in respect of licensed capacity. To the extent that excess carries the licensee beyond the BOL [Building Occupant Load], a greater penalty is specified. Be that as it may, the *Act* and the *Regulation* make it clear that exceeding licensed capacity is the offence under the *Act* and the *Regulation*. The offence is not exceeding building occupancy load. (at pp. 16-17)
>
> I find the branch was clear in alleging the contravention of overcapacity beyond person capacity, which is the licence capacity, and clarifying that it was also alleging capacity greater than the occupant load.
>
> I find that there were not fewer than 400 patrons in the second floor Skybar nightclub when the inspectors arrived shortly after Midnight on September 7, 2003. The licensed capacity and the OL [occupant load] were 220 persons, including staff.

> I find that the definition of 'occupant load' in the *Regulations* is capable of reasonable interpretation and that it serves to establish the OL in this case at 220 persons. (at p. 19)

[24] In dealing with the second argument, the Adjudicator rejected the submission that Coke's Rule applied to contraventions under the ***Act***: "In my view, it is questionable whether Coke's Rule applies to administrative proceedings". The Adjudicator then assumed that Coke's Rule applied to administrative proceedings and concluded that the scheme set out in Schedule 4 of the Regulation "Ousts the Rule" (at p. 21). In this regard, the Adjudicator concluded:

> Coke's Rule provides a method for determining when a subsequent contravention has occurred. Schedule 4 provides a definition of subsequent contravention which includes "within the 12 month period preceding the commission of the contravention." By that definition, two aspects of Coke's Rule are altered – the 'conviction' is replaced with the 'commission' and a time period is added, after which it can no longer be considered a second or subsequent contravention. In my view, it is clear that one intention of the legislature was not to impose a greater penalty for contraventions one year after the previous incident.
>
> The BC Supreme Court recently commented on the interpretation of the Schedule 4 in 532871 *B.C. Ltd. dba The Urban Well v. General Manager Liquor Control and Licensing Branch*, 2004, BCSC 127. That case concerned the branch's decision dated February 20, 2003. The branch had alleged a number of contraventions over a period of time. An earlier contravention had occurred on March 16, 2001, and the general manager's determination of that contravention was dated April 5, 2002. In the February 20, 2003 decision, the general manager treated contraventions that occurred on November 24, 2001, February 22, 2002, March 1, 2002, March 2, 2002 and March 8, 2002 as second contraventions. Clearly, these occurred within 12 months of the earlier contravention, but earlier than the branch's determination.
>
> If Coke's Rule was applied to the previous scenario, the Court would have found that none of those contraventions could be treated as second contraventions because they did not occur after the conviction for the earlier contravention.

> However, before the Supreme Court, the licensee agreed that the general manager's interpretation of the 'second contravention' was appropriate. The Court's only comment on this aspect is:
>
> > The parties to this application agree that the general manager acted properly in adopting the view that a contravention did not occur until there was a determination thereof at an enforcement hearing regardless of the number of separate, unconnected incidents.
>
> The Court then left any further discussion of what constitutes first, second and subsequent contraventions until a case where the point is clearly raised.
>
> I have reviewed the *Urban Well* decision and do not see the point referred to by the Judge. However, I was the adjudicator on that decision, and I agree that there does have to be a finding before it can be said that a contravention occurred. That finding is either through the licensee signing a waiver or through the general manager's determination.
>
> By operation of the *Regulation*, the effect of a finding is that the contravention occurred on the date of the incident, not the date of the 'conviction.'
>
> I find that the contravention on September 6/7, 2003, is a second contravention for the purposes of imposing penalty. (at pp. 21-22)

DISCUSSION AND CASE AUTHORITIES

[25] There are no definitions of "contravention" other than as set out in the ***Regulation***. In this regard, a "contravention" is defined under s.1(1) of the ***Regulation*** to mean a matter referred to in the "Contravention" column of Schedule 4 and not to anything which may be set out in s.6 of the Regulation. Section 6(4) of the ***Regulation*** does not establish a contravention. Rather, that section merely establishes that it is a term and condition of the license that there not be at any one time more persons than the person capacity established under s.6(1) and (3) of the

Regulation. I find the that the Adjudicator was incorrect in assuming that whether a contravention had occurred or not was a question of whether there had been a contravention as was set out under s. 6(4) of the ***Regulation***. While it may well be that it is a "term and condition" of a licence that there not be more persons than the "person capacity" as set out under s. 6(1) or s. 6(3) of the ***Regulation***, contraventions are limited to what are defined under s. 1(1) of the ***Regulation***, being matters referred to in the "Contravention" column of Schedule 4 of the ***Regulation***.

[26] Under items 14 and 15 of Schedule 4, the General Manager must find that a licensee permitted more persons in the licensed establishment than the "patron or person capacity" set by the General Manager permitted and the number of people present was either less than or equal to the "occupant load" (Item 14) or was more than the "occupant load" (Item 15). Each of the terms "occupant load", "patron capacity", and "person capacity" are defined in the ***Regulation***. I take from the fact that those terms are defined in the ***Regulation*** that it was the intention of the Legislature to permit one or more of those terms to be included within the contraventions which are set out in the "Contraventions" column of Schedule 4 of the ***Regulation***.

[27] Accordingly, the use of the phrase "Overcrowding beyond person capacity greater than Occupant Load" in the September 7, 2003 Contravention Notice and the phrase "Overcrowding beyond person capacity greater than Occupant Load" set out in the December 11, 2003 Notice of Enforcement contain words which are set out Items 14 and 15 in Schedule 4. Based on the suspension of 12 days which was

ordered by the Adjudicator, it appears that the Adjudicator found that there had been a contravention under Item 15 although the Adjudicator does not clearly set out that the contravention he found as proven was the contravention set out in that Item.

[28] Item 15 states the Contravention to be: "permitting more persons in the licensed establishment than the patron or person capacity set by the General Manger and the number of persons in the licensed establishment is more than the occupant load". It is clear that the number of individuals at Skybar on September 7, 2003 (between 448 and 498) was in excess of both the "patron capacity" and the "person capacity". However, because the contravention provides a conjunctive requirement, it is also necessary to ascertain whether the number of persons at Skybar was "more than the occupant load".

[29] In this case, the Adjudicator found that the contravention under Item 15 had been proven. To prove Item 15, it was necessary for findings of fact to be made that the following had been established:

> (a) the premises were a "licensed establishment". That is clearly the case;
>
> (b) the "patron or person capacity set by the General Manager" had been exceeded by permitting more persons in the licensed establishment than either the "patron or person capacity";
>
> (c) in addition to permitting more persons than the patron or person capacity set by the General Manager, the number of persons was "more than the occupant load".

[30] I am satisfied that the Adjudicator was correct in coming to the conclusion that all of those things had been proven. While not repeating exactly the "contravention"

set out in Item 15, I am also satisfied that the Contravention Notice and the Notice of Enforcement nevertheless clearly set out the contravention defined by Item 15.

[31] Both “patron capacity” and “person capacity” are defined under s.1(1) of the ***Regulation***. The term “patron capacity” refers to the maximum number of people designated by the General Manager to be allowed in the area within the establishment where “liquor may be sold or served” while the term “person capacity” relates to the “maximum of persons” allowed by the General Manager in the establishment. The latter term includes staff as well as patrons and includes areas of the establishment whether or not there are areas where liquor may be sold or served. Under s. 6(1) of the ***Regulation***, the General Manager must set the person capacity and, under s.6(2) and s. 6(3) of the ***Regulation***, once the person capacity has been set by the General Manager the person capacity must be further reduced so that the person capacity is equal to the “occupant load”. However, this requirement on the General Manager must only be undertaken if there is to be an issuance, an amendment, or a transfer of a licence. Until the General Manager issues, amends or transfers a licence, it may well be that the “person capacity” or the “patron capacity” may be in excess of the “occupant load”. In the case of Skybar, I find that the Adjudicator was correct in coming to the conclusion that the “person capacity” and that the “patron capacity” was in excess of the “occupant load” which had been set for the establishment.

[32] In establishing the two criteria for the contravention set out in Item 15, the Legislature was providing for a situation where the patron or person capacity set by

the General Manager is greater than the occupant load. The contravention is then permitting more persons in the licensed establishment than the patron or person capacity and more persons in the licensed establishment than allowed by the occupant load which have been set. In enacting Item 14, the Legislature was providing for a situation where the patron or person capacity set by the General Manager is less than the occupant load. The contravention is also permitting more persons in the licensed establishment than the person or patron capacity set by the General Manager and more persons than the occupant load which had been set.

[33] I am satisfied that Skybar is incorrect in its submission that the contravention is set out in s. 6(4) of the ***Regulation*** and, because that is the case, there is no such contravention when it was alleged that there was overcrowding beyond person capacity greater than occupant load and, because that is the case, there could be no contravention by Skybar. As I am satisfied that the decision of Pitfield J. in the ***Plaza Cabaret*** as referred to in the decision of the Adjudicator was addressing the interpretation of the ***Regulation*** as formerly constituted, I am satisfied that the decision reached is not determinative of the issues which are before me.

[34] I find that the Adjudicator was correct in coming to the conclusion that the contravention set out under Item 15 in Schedule 4 had been made out and that the facts found by the Adjudicator justified the finding that the Branch had established that the contravention of permitting more persons than the patron or person capacity set by the General Manager and that the number of persons there that night were in

a number more than the occupant load. That being the case, the only question which arises is whether this was a first or second conviction.

FIRST OR SECOND CONVICTION?

[35] Skybar submits that Coke's Rule applies. The essence of the Rule is that an accused must be convicted of an earlier offence prior to the commission of the later offence in order for the later offence to be treated as a subsequent offence for the purposes of imposing a penalty: ***R. v. Skolnick***, [1982] 2 S.C.R. 47. In ***Skolnick***, the Chief Justice giving judgment on behalf of the Court provided a summary of Coke's Rule. That part which is applicable to the Petition of Skybar was phrased by the Chief Justice as follows:

> The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be. (at p.58)

[36] The Adjudicator came to the conclusion that Coke's Rule does not apply to administrative proceedings. I am satisfied that this is not correct. The Courts of Appeal in Ontario and Saskatchewan as well as a decision in this Court have established that Coke's Rule applies equally to any statutorily applied sanction or penalty whether penal or civil. The issue was settled in Ontario in the decision of ***Re Gill*** and ***Registrar of Motor Vehicles et al*** (1985), 21 C.C.C. (3d) 234 (Ont. C.A.); leave to appeal refused [1985] 2 S.C.R. viii which concerned an appeal from the Registrar of Motor Vehicles in respect to a licence suspension that arose from the conviction for two separate driving related offences that occurred on the same day.

The Registrar took the position that Coke's Rule was inapplicable to driving suspensions as the Rule only applied to criminal sanctions. In rejecting this proposition, Finlayson J. A. stated:

> What counsel for the appellants refers to as "the criminal rule" is not a criminal rule at all, but a rule of statutory interpretation derived from Coke's Institutes, vol. 2, involving the application of increased penalties for second and subsequent offences. In a federal constitution it can be applicable to both dominion and provincial legislation. (at pp. 237-8)
>
> The fact that it is a civil disability does not oust Lord Coke's rule however, and with great respect to the learned justice, Benn v. Registrar of Motor Vehicles was wrongly decided. To reiterate what I have said above, the rule does not relate solely to criminal sanctions but can include sanctions of any kind imposed by statute. The increase of licence suspensions from six months to three years cannot be construed as anything other than a penalty. Certainly it amounts to the deprivation of a property interest (a licence to operate a motor vehicle) and this could have consequences to an individual more serious than a term of imprisonment. In my view, s. 26(1) should be construed as a piece of legislation in the same way that comparable sections of the Criminal Code are construed, and if an ambiguity is found, as it was with respect to s. 234(1) in the Skolnick case, supra, and in the case of R. v. Negridge (1980), 54 C.C.C. (2d) 304, 17 C.R. (3d) 14, 6 M.V.R. 14, then Lord Coke's rule should be applicable. (at p. 240)

[37] Similarly, in ***Ontario (Ministry of Community & Social Services) v. O.P.S.E.U***., [1992] O.J. (Q.L.) No. 2235 (Ont. C.A.) Coke's Rule was applied in a labour context where there was an appeal from an administrative board that dismissed an employee based on multiple infractions. Writing for the majority, Finlayson J.A. stated that Coke's Rule was relevant to an appeal from an administrative labour board and the policy behind the rule to the labour law doctrines of culminating incident and progressive discipline:

> It is a rule of statutory interpretation derived from Coke's Institutes, Vol. 2, involving increased penalties for second and subsequent offences, and applies to both federal and provincial legislation.... (at p. 7)

[38] A similar conclusion was reached by the Saskatchewan Court of Appeal in ***Re Neal and Highway Traffic Board*** (1986), 29 C.C.C. (3d) 508 where Van Cise J.A. stated: "The fact that it is a civil disability does not oust Lord Coke's rule however.... to reiterate what I have said above, the rule does not relate solely to criminal sanctions but can include sanctions of any kind imposed by statute." (at p. 514)

[39] In ***Mitran v. British Columbia (Superintendent of Motor Vehicles)***, [2001] B.C.J. (Q.L.) No. 693 (B.C.S.C.), Romilly J. considered the history of Coke's Rule and concluded that the Rule applies not only to penal sanctions but also to: "... sanctions or penalties of any kind imposed by statute, including the suspension of drivers' licences." (at para. 47). In ***Mitran***, the issue was whether two convictions arising out of a single incident ought to be treated as one for the purposes of determining if a more severe penalty applied.

[40] Section 20(2) of the ***Act*** allows the General Manager to levy fines or suspend the licence of a licensee so that civil sanctions such as those provided by s.232 of the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318 can be put in place. I am satisfied that Coke's Rule is applicable to the civil sanctions set out under the ***Act*** and the ***Regulation*** unless it can be said that the Rule has been ousted by clear statutory provision. In this regard, the Chief Justice in ***Skolnick****, supra*, stated:

> The conclusion that I draw from the canvass of the authorities is that the Coke rule or, if I may say so, the policy it reflects, has been too long embedded in our law to be ousted except by clear statutory provision or, at the most, by necessary implication. (at p.58)

[41] In response to the finding in ***Gill****, supra*, the Ontario Legislature amended s.26(2) of the ***Highway Traffic Act*** to read as follows:

> In determining whether a conviction is a subsequent conviction or an additional subsequent conviction, as the case may be, for the purpose of clauses (1)(b) and (c), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[42] This wording was subsequently considered by the Ontario Court of Appeal in ***Ficko v. Ontario (Registrar of Motor Vehicles)*** (1989), 33 O.A.C. 120 where it was held that the new statutory provision specifically excluded the operation of Coke's Rule.

[43] In ***Neal****, supra*, the Court had considered whether Coke's Rule had been excluded by the operation of s.86(9.1) of the ***Saskatchewan Vehicles Act*** which stated: "Notwithstanding any other provision of this section ... a conviction is deemed to a second conviction or a subsequent conviction, as the case may be, on the basis of the time when the conviction is entered and not on the basis of the time when the offence was committed." The Court held in that regard that: "There is no specific provision in the ***Act*** which makes it clear that the Coke Rule or policy is to be excluded, nor is it clear by necessary implication that it is to be excluded." (at p. 515)

[44] As was the case in Ontario, the Saskatchewan Legislature responded with an amendment to the ***Vehicles Act*** with the addition of the following provision:

> 72(1) Where a person is convicted of an offence committed anywhere in Canada: ...

> (b) the conviction is a second conviction if, within the period of five years immediately prior to and including the date of the conviction, he has been convicted of more than two offences;
>
> 72(2) In determining whether a conviction is a second conviction, a third conviction, or a subsequent conviction, as the case may be, for the purposes of clause (1)(b), (c) or (d) and subsection 74(2), the only question to be considered is the sequence of convictions, and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[45] This new provision was considered by the Saskatchewan Court of Appeal in ***Santes v. Saskatchewan*** (**Saskatchewan Highway Traffic Board**) (1988), 61 Sask. R. 230 where it was held that the new provisions successfully excluded the operation of Coke's Rule.

[46] In ***Mitran***, *supra*, Romilly J. held that the language of s.232 of the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318 was not sufficiently clear enough nor did it, by necessary implication, exclude the operation of Coke's Rule.

[47] I am satisfied that nothing in the ***Act*** or in the ***Regulation*** displaces Coke's Rule. Unlike the amended s. 26(2) of the ***Ontario Highway Act*** and the amended s. 86(9.1) of the ***Vehicles Act***, the British Columbia Legislature has not seen fit to amend the ***Act*** or the ***Regulation*** to encapsulate and therefore displace Coke's Rule. I also find that there is presently no clear statutory provision or necessary implication of the ***Act*** or the ***Regulation*** which ousts Coke's Rule.

[48] A "contravention" is defined to mean a matter referred to in the "Contravention" column of Schedule 4 but s.63 of the ***Regulation*** states:

> In this Part [Part 7/Enforcement], "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.

[49] What is referred to as a "contravention" in s.64(1) of the ***Regulation*** is only the opinion of the Inspector that a contravention may have been committed. It is only after there has been a determination or an agreement reached that it can be said that an alleged contravention becomes an actual contravention. That is the purpose of an Enforcement Hearing: for the General Manager "... to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result...." (s.64(3) of the ***Regulation***). The "Notice of Enforcement" sent to a licensee under s.64(2) of the ***Regulation*** is forwarded only "after considering the alleged contravention" and the Inspector proposing that enforcement action should be taken "in response to that alleged contravention".

[50] Section 65(2) of the ***Regulation*** states: "Nothing in this section requires the general manager to hold an enforcement hearing, or any hearing, before making either or both of the determinations referred to in subsection (1) [that a licensee has committed a contravention as a result of which enforcement actions should be taken]. Merely because it is not necessary to hold an enforcement hearing does not result in an act becoming a contravention merely because an inspector has formed the opinion that a licensee may have committed a contravention.

[51] The General Manager submits that the question of whether a contravention is a first, second, or subsequent contravention depends on the timing of the alleged contravention and not on the timing of the conviction and relies on s.1(1)(b) of Schedule 4 of the ***Regulation*** to submit that this section "clearly ousts Lord Coke's Rule". I am satisfied that that is not the case. Up until an alleged contravention has been admitted or has been found after a hearing, it cannot be said that contravention "was committed at or in respect of an establishment...." While an alleged contravention may become a "second contravention", it is important to note that s.1(1)(b) of Schedule 4 uses the term "contravention" and not "alleged contravention" and that there must be a finding that the licensee "has committed one contravention of the same type.... within the 12-month period preceding the commission of the contravention...."

[52] I am satisfied that it is irrelevant that s.1(1)(b)(ii) of Schedule 4 provides a 12-month period during which there will be a consideration of whether there has been a second contravention. While that eliminates the possibility that there could be a second contravention more than 12 months after a prior contravention, it does not displace the general principle established by Coke's Rule that the second contravention can only take place if there has been a finding that, within the 12-month period preceding the commission of the second contravention, there has been a first contravention.

[53] I find that the language used in the ***Act*** is similar to the language set out in s.232 of the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318 and I come to the same

conclusion that was reached in ***Mitran****, supra.* The language is not sufficiently clear nor does it, by necessary implication, exclude the operation of Coke's Rule. I find that the Adjudicator was wrong at law in coming to the conclusion that there had been a second contravention.

[54] While I do not quash the July 21, 2004 decision of the Enforcement Hearing Adjudicator that there had been a contravention, I am satisfied that the decision should be remitted to the General Manager for reconsideration as to what the appropriate monetary penalty or period of suspension should be for this first contravention within the 12-month period ending September 7, 2003.

[55] In view of the results, both parties will bear their own costs.

"G.D. Burnyeat J."

The Honourable Mr. Justice Burnyeat