IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch,*** 2004 BCSC 248

Date: 20040223
Docket: 33782
Registry: Kamloops

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, Chapter 241

Between:

The Plaza Cabaret Ltd.

Petitioner

And

General Manager, Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Petitioner: J. Barry Carter

Counsel for the Respondent: V. Nerys Poole

Date and Place of Trial: December 17, 18, 2003
Kamloops, B.C.

Introduction

[1] The Plaza Cabaret Ltd. carries on business as a licensed cabaret on Granville Street in downtown Vancouver. It applies for judicial review in relation to enforcement decisions of the General Manager, Liquor Control and Licensing Branch, made October 31, 2002, following a five-day hearing in April, May and July 2002. The General Manager's decisions resulted in the imposition of sanctions for contraventions under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, as follows:

1. Ten day suspension for contravention of s. 36(2)(b) of the *Act* on November 9, 2001: permitting unlawful conduct in the establishment.

2. Four day suspension for contravention of s. 4(7) of the Liquor Control and Licensing Regulation on January 12, 2002: permitting a number of patrons in excess of the Building Occupancy Limit.

3. $1,000 fine for contravention of s. 12 of the *Act* on January 12, 2002: permitting the consumption of alcohol outside permitted areas.

4. One day suspension for contravention of s. 38(3)(b) of the *Act* on January 19, 2002: permitting a number of patrons in excess of licensed capacity.

[2] The Plaza does not dispute the determination of contravention or penalty in relation to the consumption of liquor outside the permitted areas of the establishment. It challenges the other decisions for reasons I will outline in respect of each contravention. Enforcement of the 15 day suspension in respect of those contraventions was stayed pending outcome of this judicial review.

Judicial Review of Decisions of the General Manager

[3] The nature of the present liquor licensing and enforcement regime and the role of judicial review in relation thereto, have been described in recent decisions of this court: see *Zodiac Pub Ltd. v. General Manager*, [2004] B.C.J. No. 119, 2004 BCSC 96, and *532871 B.C. Ltd. (dba. The Urban Well) v. General Manager,* [2004] B.C.J. No. 169, 2004 BCSC 127. It will not be necessary to repeat what was said in either judgment except as required to explain the basis for the disposition of this application. I will consider the contraventions in turn.

Permitting Unlawful Activity

[4] Section 36(2)(b) of the *Act* provides as follows:

> 36(2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment
>
> ...
>
> (b) any unlawful activities or conduct.

[5] The Plaza was alleged to have authorized or permitted the sale of a drug or controlled substance in its premises on November 9, 2001. A 10 day suspension was imposed. The allegation arose in the following circumstances.

[6] Two undercover police officers observed what they thought to be drug transactions in the establishment. One of the officers asked the licensee’s bartender if he knew where he could "score some "E"". The bartender said it was easily available anywhere in the establishment. After prompting, the bartender pointed to an individual seated in a booth and said "talk to him, he might be able to help you". The evidence of the police officer was that the individual was the same person he and another officer had observed apparently exchanging pills for cash at the booth.

[7] In due course, the police officer approached the individual and purchased one small pill. The pill was sent to the RCMP lab for analysis. The result of the analysis was not tendered as evidence. The police officer testified that Ecstasy was an illegal drug. The officer did not relate Ecstasy to any of the drugs or chemical substances described in the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19.

[8] The General Manager summarized the bartender's evidence in the following terms:

> The bartender testified that the licensee has a "no tolerance" policy to drugs. If he was aware of drugs on the premises, he should tell the doorman who is hired by a private security firm. He recalled the conversation with the two constables. The bartender admitted he made a mistake. He explained his actions by saying he was just trying to pass off or ignore the constables who were questioning him about opportunities to buy drugs. He felt the first constable was wasting his time. Eventually he did direct the constables to the male patron sitting in the booth. He was aware the male patron was a friend of the general manager. The general manager was terminated effective April 15, 2002.

[9] The bartender was arrested by police at closing time, questioned, and released. He was suspended by The Plaza for approximately three weeks. The fate of the individual in the booth was not the subject of evidence.

[10] At the conclusion of the Branch's case, The Plaza made a no evidence motion. The General Manager summarized the submissions of the licensee and stated her conclusions as follows:

> The licensee made a no evidence motion. It argued there is no evidence that "E" or ecstasy is an illegal drug under the *Controlled Drug[s] and Substances Act*. There is therefore no evidence to substantiate any unlawful activity or conduct.
>
> In the alternative, if I find there is evidence of an unlawful activity or conduct, the licensee argues that the evidence must be decided beyond a reasonable doubt and not on a balance of probabilities.
>
> ...
>
> I reserved my decision on the licensee's motion until all evidence was presented and argument concluded. I will deal now with the licensee's motion. The licensee's argument is that, because ecstasy is not a substance included in Schedule 1 - Schedule IV of the *Controlled Drug[s] and Substances Act*, there is no evidence of any unlawful activity or conduct. I accept the constable's uncontradicted evidence that ecstasy is an illegal drug. I find the fact that ecstasy is not listed in the *Controlled Drug[s] and Substances Act*, is not relevant to my deliberations under the *Liquor Control and Licensing Act*.
>
> The licensee next argues that, any evidence of unlawful activity or conduct must be decided beyond a reasonable doubt. I acknowledge that standard of proof applies to criminal court proceedings. This enforcement hearing is not a penal or quasi-criminal proceeding. As a result, the civil standard of a balance of probabilities applies to this proceeding.

[11] The General Manager concluded that the contravention had been proved on a balance of probabilities. She rejected the due diligence defence advanced by The Plaza, a subject to which I will return.

[12] In *Urban Well*, *supra,* I stated my opinion, which differs from that expressed by Blair J. in *Zodiac, supra,* that the reasonableness of the General Manager's decision with respect to the finding of a regulatory offence under the *Act* should be assessed in the context of the burden of proof applicable to strict liability offences, namely, proof by the Branch of the *actus reus* beyond a reasonable doubt, and proof by the licensee of due diligence on the balance of probabilities. With respect, it is too simplistic to state, as she did, that the General Manager need only be concerned with proof on the balance of probabilities.

[13] On this application, The Plaza submits that the *actus reus* of drug-trafficking was not proved beyond a reasonable doubt because there was no evidence of the chemical composition of the pill in question, the only evidence regarding the pill was the answer given by a police officer to the leading question asked by counsel for the Branch, namely, "but that's an illegal drug, right?", and no evidence was led of the proper identification of the Ecstasy or of the fact that it is a banned drug under the *CDSA*.

[14] I do not accept the General Manager's conclusion that the fact Ecstasy was not listed in the *CDSA* was not relevant to the question before her. Whether Ecstasy is a scheduled drug is most relevant as the conduct in which the officer was engaged with the patron could not otherwise be unlawful. The question is whether the Branch's case must fail because Ecstasy is not described by that name in a schedule to the *CDSA*, although it is described therein as a chemical compound, the name of which was not identified in the evidence. In my opinion, the circumstances in this case are such that proof of the chemical nature of the substance the officer wanted to buy or the relationship of Ecstasy to one of the scheduled substances was not required to prove the *actus reus.* The bartender admitted he knew that Ecstasy was an illegal drug. That admission and the officer's testimony were sufficient to prove unlawful activity beyond a reasonable doubt.

[15] I agree with the petitioner that the police officer's evidence that Ecstasy was an illegal drug did not prove its chemical composition or link it to a substance identified in the *CDSA.* The officer was not called to testify as an expert. There was no evidence that he knew of the chemical composition of Ecstasy or that he could identify the substance named in any of the schedules to the *CDSA* that described Ecstasy. The officer did not testify, nor was there any other evidence, of the fact that Ecstasy is the common street name for a substance described in s. 1(9) of Schedule III to the *CDSA*, namely N-methyl-3, 4-methlyenedioxyamphetamine. That relationship is not so notorious or widely known that a trier of fact could take judicial notice of it.

[16] At the same time, the officer was attempting to buy what he testified to knowing as an illegal substance. There was no cross examination that would undermine his belief. He intended to engage in conduct that would induce another to sell him the substance. Moreover, but for his occupation, the purchase would result in the officer's possession of an illegal substance.

[17] Given the evidence of the officer's intention, there was no requirement that the Branch prove that which was purchased by the officer to have been a controlled drug or substance. Section 5(1) of the *CDSA* stipulates that no one shall traffic in a substance represented to be a substance described in any of the schedules to the *CDSA*. The Branch should have tendered evidence explaining that Ecstasy was a common street

name for a scheduled substance. However, the omission to do so in this case was not fatal to the finding that unlawful conduct occurred on November 9, 2001.

[18] The licensee chose to call the bartender as a witness. In cross examination, the following exchange occurred:

> Q. An individual comes up to you on November the 9th, asks where he can buy E, [indiscernible], and do you know if that's legal or illegal?
>
> A. These drugs?
>
> Q. Yes.
>
> A. It's illegal.

[19] The answer provided by the bartender is an admission that he knew transactions involving Ecstasy or "E" would be unlawful. That being the case, the General Manager's decision that unlawful conduct or activity occurred in the establishment on November 9, 2001, cannot be regarded as unreasonable, however the conclusion was stated. The bartender's admission assured the proof of unlawful conduct or activity in the establishment on November 9, 2001, beyond a reasonable doubt.

[20] The remaining questions in relation to this contravention are whether the employee permitted the unlawful conduct and, if so, whether that conduct can be imputed or attributed to the licensee itself or, if not, whether the licensee has made out a due diligence defence on a balance of probabilities.

[21] The General Manager determined that the bartender permitted the unlawful conduct. The General Manager properly stated the test: for purposes of the *Act*, unlawful conduct or activity is permitted when an employee exercises less diligence than is appropriate in the circumstances to prevent it, or when an employee shuts his or her eyes to the obvious, allowing something unlawful to go on, not caring whether an offence is committed or not.

[22] The General Manager found, as it was open to her to do, that the bartender permitted unlawful conduct to occur on November 9, 2001. Her conclusion was based on her finding that the drug dealing was open and obvious and the bartender had assisted the process by identifying the dealer.

[23] That said, in finding against the licensee the General Manager focused principally on the employee's conduct and attributed the same to the licensee without stating the basis for doing so.

[24] Section 36(2)(b) makes it an offence for a "person holding a licence or the person's employee" to permit unlawful conduct in the establishment. I do not construe the section to mean that the licensee is the guarantor of its employee's conduct. The word "or" is disjunctive. An employee may permit unlawful conduct. For that, he or she may be prosecuted under s. 48 of the *Act*. Section 20 of the *Act* does not contemplate regulatory enforcement against the employee.

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful

conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities. In this regard, the reasons of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, are relevant at p. 1331:

> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of *respondeat superior* has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattras*, [1979] A.C. 153.

[26] Later, in *Canadian Dredge and Dock Company Ltd. v. The Queen,* [1985] 1 S.C.R. 662, (S.C.C.), Estey J. said the following at para. 21:

> The essence of the test is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation operation assigned to him by the corporation. ...The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation. It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing.

[27] In this instance, the General Manager concluded that the bartender did not adhere to the licensee's policy of zero tolerance of drugs in the establishment so that the licensee was liable. The General Manager did not address the question whether the employee was the licensee's directing mind and will in the area of operations relevant to the unlawful conduct, namely the supervision of patrons wherever seated in the establishment. If the bartender were found to be the directing mind of the licensee for that purpose, his actions would be those of the licensee so that his lack of due diligence would necessarily be that of the employer. If he was not the directing mind and will for that purpose, one would be required to decide who was. Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.

[28] Having failed to consider the role of the bartender in the licensee's operations, the General Manager overlooked the remaining

question, namely whether those who were the directing mind and will of the licensee in relation to the supervision of patrons' activities on the night in question, if not the bartender, had been duly diligent in their attempts to prevent unlawful conduct by taking reasonable steps to supervise staff and patrons. That inquiry requires, of course, consideration of who, on the premises on November 9, 2001, was the licensee's directing mind and will in the establishment in so far as supervision was concerned and an answer to the question whether, on the balance of probabilities, that individual or those individuals, be it the general manager or others in authority on site at the time, took the steps reasonably to be expected of them that night to prevent drug-trafficking.

[29] In my opinion the appropriate disposition in relation to this contravention is to remit the issue of proof of due diligence by the licensee on the balance of probabilities to the General Manager for reconsideration in accordance with these reasons. The transcripts that were made available at the hearing of this application for judicial review suggest the record is sufficiently complete to permit the necessary factual determinations to be made with the benefit of submissions by counsel for the Branch and the licensee without the need to call additional evidence.

Exceeding Building Occupancy Limit

[30] An inspector visited The Plaza on January 12, 2002, counted the number of patrons in the premises, and issued a contravention notice alleging "overcrowding beyond BOL – Reg. 4(7)". On January 22, 2002, the inspector issued a notice of enforcement action. The notice alleged a contravention described as overcrowding beyond BOL on January 12, 2002, contrary to s. 4(7) of the *Regulation*.

[31] The term "BOL" was not defined in the notice. The term is not defined in the *Act* or the *Regulation*, but it is a well-understood acronym in the industry meaning "building occupancy load". The BOL is the maximum number of persons that may be in the premises at any point in time. It is determined by the Office of the Fire Chief, City of Vancouver, in accordance with regulations made pursuant to the Vancouver Fire By-law.

[32] On July 12, 1999, the Fire Chief fixed the BOL for The Plaza at 275 persons. In a manner and circumstances not described in the General Manager's reasons for decision, the BOL was subsequently increased to 414 persons where it stood at January 12, 2002. The Plaza admitted that the number of persons on the premises on January 12th exceeded 414.

[33] Section 4(7) of the *Regulation*, in respect of which the contravention was alleged, provides as follows:

> (7) the licensee and the licensed establishment shall at all times comply with the British Columbia Building Code or the Vancouver Building Bylaw, as the case may be, and with the regulations under
>
> (a) the *Fire Services Act*, and
>
> (b) the *Health Act.*

[34] The BOL was determined by the Fire Chief under the Vancouver Fire By-law and not under the British Columbia Building Code, the Vancouver Building By-law, regulations made under the *Fire Services Act*, or regulations made under the *Health Act*. The Vancouver Fire By-law is not described in s. 4(7).

[35] The Plaza says that because compliance with the BOL is not specified in s. 4(7) of the *Regulation*, or elsewhere in the *Act* or *Regulation*, the General Manager could not take independent enforcement action in respect of the licensee's failure to adhere to it.

[36] The General Manager says that The Plaza knew of the BOL, knew that the BOL exceeded licensed capacity, and knew that the substance of the General Manager's complaint was over-crowding so that it was in a position to answer the complaint. In the alternative, the General Manager says that if she did not have authority to enforce s. 4(7) of the *Regulation* because the Vancouver Fire By-law is not mentioned in the *Regulation*, then the court should substitute a one day suspension for that of four days given that the maximum licensed capacity of the establishment fixed at 275 persons had been exceeded on January 12, 2002.

[37] The General Manager stated her reasons in relation to the alleged contravention as follows:

> I am not persuaded by the licensee's argument that this allegation fails because regulation 4(7) does not state a specific section in the *BC Building Code* or the *Fire Services Act* or *Regulations* that has been breached. The *Liquor Control & Licensing Act* is the primary legislation on liquor laws in the Province of British Columbia. The *Act* and the *Regulations*, as subordinate legislation, establish the role of the branch and empower the general manager to supervise the conduct and operation of licensed establishments. I find that regulation 4(7) does provide the required statutory authority for the general manager to supervise the conduct and operation of licensed establishments.
>
> As well, regulation 4(7) gives the licensee sufficient notice to respond in an administrative hearing. It is not necessary to quote specific sections of the *BC Building Code* or the *Fire Services Act* or *Regulations* to inform the licensee of the contravention and to permit a reasonable response.
>
> I find the licensee contravened regulation 4(7) on January 12, 2002.

[38] The General Manager claims that the appropriate standard of review to be applied with respect to the interpretation and application of s. 4(7) of the *Regulation* is patent unreasonableness or reasonableness *simpliciter* with the result that deference should be accorded her interpretation that resulted in the conclusion that The Plaza had contravened s. 4(7) of the *Regulation*. The Plaza says the standard to be applied with respect to the interpretation of s. 4(7) should be that of correctness. I accept that submission.

[39] While some deference should be afforded the General Manager's determination that a licensee has or has not complied with the statutes, bylaws or regulations enumerated in s. 4(7), the General Manager is not empowered to interpret s. 4(7) in a manner that amends the section to add to the list a statute, bylaw or regulation to which no reference is made. By doing so, the General Manager is not interpreting the governing legislation but amending it. That is not her prerogative. The General Manager's conclusion that s. 4(7) requires compliance with the BOL is not correct.

[40] The remaining question in relation to the overcrowding issue, then, is whether, having specified a contravention of the BOL, it was open to the General Manager to make a determination that some other contravention had occurred.

[41] Section 20(1)(a) of the *Act* permits the General Manager to take enforcement action in respect of a licensee's contravention of the *Act* or the regulations or the licensee's failure to comply with a term or condition of the licence. Section 51(2) of the *Regulation* provides that an inspector who forms the opinion that a licensee has committed a contravention must provide the licensee with written notice of his or her opinion that the licensee has committed a "specified contravention". Section 51(2) provides that if, after considering the alleged contravention, the inspector proposes that enforcement action should be taken against the licensee in response to it, the inspector must provide the licensee with written notice of the proposed action.

[42] In this case, the inspector selected "overcrowding beyond BOL Reg. s. 4(7)" from the printed list of alleged contraventions appearing on the notice of contravention form. The inspector was at liberty to select the other possible contravention in respect of overcrowding described on the notice as "licence capacity – Reg. –".

[43] The *Act* and *Regulation* permit the General Manager to specify the capacity of the premises as a term or condition of the licence. Licensed capacity in this instance was 275 persons. Section 38(3)(b) of the *Act* provides that a licensee must not sell liquor except in accordance with the *Act*, the regulations and the terms and conditions of the licence. Given the range of suspension that might be imposed in respect of exceeding capacity, it is evident that the degree of non-compliance with a term or condition can affect the sanction that is imposed.

[44] Schedule 4 to the *Regulation* prescribes periods of suspension in respect of overcrowding in the following terms:

Item	**Contravention**	**Period of Suspension**			**Monetary Penalty**
		First Contravention	**Second Contravention**	**Subsequent Contravention**	**First Contra.**
OVERCROWDING					
13	A breach of section 4(7) of this regulation by failing to comply with the British Columbia Building Code or the Vancouver Building Bylaw, as the case may be, or regulations under the *Fire Services Act* or under the *Health Act.*	4-7 days	10-14 days	18-20 days	$5000-$7000
14	A failure to comply	1-3 days	3-6 days	6-9 days	$1000-

	with this regulation, or with the terms and conditions of the license, respecting capacity of the licensed establishment or of licensed premises				$3000

[45] 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 the excess carries the licensee beyond the BOL, a greater penalty is specified. Be that as it may, the *Act* and *Regulation* make it clear that exceeding licensed capacity is the offence under the *Act* and *Regulation*. The offence is not exceeding building occupancy load.

[46] In my opinion, it is not open to the General Manager to rely on s. 4(7) in an attempt to create a regulatory offence that the legislature and governor-in-council have not created by statute or regulation. The General Manager must restrict her enforcement action to contraventions specified by the *Act* or the *Regulation*.

[47] As the Court of Appeal stated in *Whistler Mountain Ski Resort v. General Manager, Liquor Control and Licensing Branch,* [2002] B.C.J. No. 1604, 2002 BCCA 426, the nature of the sanctions to be imposed in the regulatory context is potentially severe. In my opinion, it is incumbent upon the General Manager to ensure that administrative action is identified and determined to be appropriate in relation to offences specified by the *Act* and the *Regulation*. That was not done in this case. The determination that The Plaza had committed an offence by permitting patrons in excess of the BOL when such an offence did not exist was not only unreasonable, but patently unreasonable. The determinations of contravention and licence suspension with respect to exceeding BOL on January 12, 2002, must be quashed.

Over-Crowding by Exceeding Licence Capacity

[48] The General Manager determined that The Plaza had permitted entry to patrons in excess of its licensed capacity of 275 persons on January 19, 2002, and imposed a one day suspension. It was agreed that the number of persons counted on the premises was more than 275 but less than the BOL of 414.

[49] The Plaza says that the determination that capacity had been exceeded was unreasonable. A report prepared by a consultant to the Liquor Licensing Branch had recommended that any licensee be permitted to apply to increase licensed capacity to the lesser of 150% of present licensed capacity and the BOL. The Branch had agreed to act on the recommendation and outlined the policy that would be applied in the transition period in its Compliance and Enforcement Policy and Procedures Manual. The transition policy did not amount to a moratorium on excess capacity enforcement. Section 6 of the Manual provided as follows:

> 6(a) If the inspector finds that the percentage of patrons or persons over the licence capacity is more than ten per cent, and the number doles not exceed the building

> occupancy load in any given red-lined area, the inspector will not recommend enforcement action if:
>
> - no other contravention was identified at the time of the incident of overcrowding.
> - The establishment has not been designated as a problem establishment at the time of the contravention was identified.
> - the licensee has applied for a patron capacity increase and the local government staff have advised that the application is likely to be approved, and
> - the percentage of overcrowding does not exceed the patron capacity increase that is likely to be approved.

[50] The Plaza applied for an increase to the BOL. Quite appropriately, the General Manager followed the practice of consulting with local or municipal governments regarding the impact of capacity increases on the community thereby attempting to ensure that licensing decisions took into account the community's best interests. It was not until June 2002, that the City of Vancouver approved a public consultation and processing procedure in relation to applications from establishments such as The Plaza operating within its boundaries. It had not advised anyone that The Plaza's application for an increase was likely to be approved. Nothing in the evidence suggested that approval would be automatic.

[51] The General Manager's decision that the approval of a procedure for processing applications for increases could not be construed to mean that The Plaza's application for an increase would likely be approved was reasonable.

[52] The General Manager summarized the licensee's submission before her has follows:

> The licensee suggests that they are allowed to overcrowd beyond their licence capacity as a "one-off" provision to accommodate the capacity increase process. The licensee maintains it is appropriate to issue a contravention notice but not to recommend enforcement action. It follows the licensee argues no penalty should e imposed for this contravention.

[53] In the present judicial review proceeding, the licensee characterized its defence as one of due diligence saying it believed it could operate in excess of licensed capacity because it had applied for the increase. There was no evidence that the licensee took any steps in an attempt to determine whether its application was likely to receive favourable consideration. There was no evidence that it had made any inquiries of the City or the Branch in that regard. The licensee appears to have assumed that approval would be forthcoming. In fact, approval of an increase was eventually provided in the late summer of 2002. This notwithstanding, there was no basis, reasonable or otherwise, for the licensee's belief that it could operate in excess of its licensed capacity with impunity on January 19, 2002. It knew of its licensed capacity. It is reasonable to assume it was aware of the Branch's transition policy. While the defence of due diligence was available to the licensee, it was not made out on a balance of probabilities in relation to this contravention. The licensee's application to quash the General Manager's

decision in relation the over-crowding incident on January 19, 2002, must be dismissed.

Costs

[54] Success is divided. Each of the parties will bear their own costs.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield