IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20051214
Docket: L051346
Registry: Vancouver

Between:

Roxy Cabaret Ltd., doing business as Roxy Cabaret

Petitioner

And:

General Manager of the Liquor Control and Licensing Branch

Respondent

Before: The Honourable Madam Justice B. Brown

Oral Reasons for Judgment
In Chambers
December 14, 2005

Counsel for the Petitioner:	B. Carter
Counsel for the Respondent:	J.G. Penner
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is a petition for a judicial review of a decision of the enforcement hearing adjudicator relating to infractions of the ***Liquor Control and Licensing Act*** R.S.B.C. 1996, c. 267. First, that the licensee sold liquor to an intoxicated person, contrary to s. 43(1) of the ***Act***; second, that the licensee or employee consumed liquor while working in the licensed establishment contrary to

s. 42(3) of the ***Regulation***, B.C. Reg 224/2002. A third infraction was dismissed and is not in issue before me.

[2] The hearing took place before adjudicator, Suzanne Beatty (phonetic), in October and November 2004. Her decision was issued May 5th, 2005. She found that the infractions had been proven and imposed a four-day suspension for the infraction of s. 43(1), and a three-day suspension for the infraction of s. 42(3).

[3] The petitioner raises the following issues: first, is the correct standard of proof, proof beyond a reasonable doubt, proof on a balance of probabilities, or proof of something higher than the usual or bare balance of probabilities; second, did the licensee permit sale of liquor to an intoxicated person; third, did the licensee allow an employee to consume liquor on the premises; fourth, was the penalty appropriate?

[4] First dealing with a standard of review. The parties are agreed that the standard of review of decisions of the adjudicator on a purely legal issue is correctness; on questions of mixed fact and law it is reasonableness simpliciter.

[5] I will now turn to the issues on this review. First the standard of proof. The adjudicator determined that the standard of proof to be applied was proof on a balance of probabilities relying on ***New World Entertainment Investments Ltd. v. British Columbia (Liquor Control and Licensing Branch General Manager),*** 2004 BCSC 616, a decision of Madam Justice Gill. The petitioner argues that this is not correct and urges me to follow an earlier decision of our court by my Brother

Pitfield - two decisions that is - ***Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch General Manager),*** 2004 BCSC 248 and ***532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (Liquor Control and Licensing Branch General Manager),*** 2004 BCSC 127.

[6] The petitioner relies on the ***Colchester*** principle respecting conflicting decisions of the same court described in an article by Scott Kerwin in the Advocate, Volume 62, Part 4, July 2004, page 541 where he says at page 546, referring to the decision of Mr. Justice Norse in ***Colchester Estates (Cardiff) v. Carlton Industries plc,*** [1984] 2 All E.R. 601:

> Mr. Justice Norse held that if a trial judge is faced with two conflicting decisions of his or her own court, and the judge in the latter case fully considered the earlier decision and decided to go against it, then he or she must be *convinced* that the second judge was wrong in order to go against the second decision. In other words, the trial judge would be bound by the rules of horizontal stare decisis to follow the second decision. This reasoning was applied by the B.C. Supreme Court in cases such as ***Jones v. New Westminster*** and ***Aho v. Kelly***.

[7] There are a series of decisions of our courts dealing with the standard of proof before the Liquor Control and Licensing Branch adjudicator. The first is a decision of Mr. Justice Blair in ***Zodiac Pub Ltd. (c.o.b. Zodiac Neighbourhood Pub) v. British Columbia (General Manager Liquor Control and Licensing Branch)*** 2004 BCSC 96, issued January 23rd, 2004. Mr. Justice Blair considered ***Whistler Mountain Ski Corporation v. British Columbia (General Manager Liquor Control and Licensing Branch)*** 2002 BCCA 426, ***Calais Investments Ltd. v. British Columbia (General Manager Liquor Control and Licensing Branch)***

(1996), 81 B.C.A.C. 309, and ***Mohammed v. British Columbia (Liquor Control and Licensing Branch)*** (1994), 51 B.C.A.C. 62 and concluded at para. 21:

> I conclude that there is no basis to import into a s. 20 enforcement hearing such as that faced by *Zodiac* the criminal standard of proof of beyond a reasonable doubt. To do so would run contrary to the legislative intent of the *Liquor Control Act* to regulate liquor production and sale through an administrative framework designed to ensure compliance with the legislation.

[8] With respect to the argument that the standard should be something more than the usual balance of probabilities, he considered ***Jory v. College of Physicians and Surgeons of British Columbia,*** [1985] B.C.J. No. 320, and ***Dr. Q. v. The College of Physicians and Surgeons of British Columbia,*** 2003 SCC 19 and ***B.S. v. British Columbia (Director of Children, Family and Community Services)*** (1998), 160 D.L.R. (4th) 264 and said at para. 22:

> However, the standard of proof requiring clear and cogent evidence to establish something more than a bare balance of probabilities appears to be restricted to those situations in which the administrative authority is considering cases against professionals in the disciplinary hearing.

[9] And continuing at paragraph 24:

> Although the situation in which *Zodiac* finds itself bears financial consequences with penalties of $5,000.00 and a five-day licence suspension, I do not construe these consequences as similar in magnitude to those arising from the disciplining of a professional person, from the protection of children, or, in the case of *Mohammed, supra*, from the divestiture of a liquor licence. I conclude that the adjudicator correctly determined on the circumstances and in light of the penalties faced by *Zodiac* that the appropriate standard of proof was on a balance of probabilities.

[10] In February 2004, Mr. Justice Pitfield issued the two decisions on which the petitioner relies, ***Urban Well*** and ***Plaza Cabaret***. Mr. Justice Pitfield considered ***Whistler Mountain***, amongst other cases, and concluded that the actus reus of the infraction must be proved beyond a reasonable doubt. The licensee could establish the defence of due diligence on the balance of probabilities.

[11] With respect to the decision of Mr. Justice Blair, he said at para. 83 in the ***Urban Well*** case:

> Finally, I must have regard for the recent decision of Blair J. in *Zodiac, supra*. I am bound by, and endorse in any event, his conclusion that the overall test on review of a determination of contravention is reasonableness. Our difference arises in relation to the manner in which reasonableness should be assessed and our differing understanding of the effect of the Court of Appeal's decision in *Whistler Mountain*. With respect, I do not regard the *Zodiac* decision as obliging me to apply the principle of judicial comity in circumstances where I have a different appreciation of the significance and meaning of the *Whistler Mountain* decision. I am also mindful of the fact that Blair J. clearly stated in his reasons at para. 34 that if the standard of proof beyond a reasonable doubt applied in any respect, it had been satisfied in relation to the General Manager's finding of intoxication, the *actus reus* at issue in the case before him. On that basis, the application of my interpretation of the *Whistler Mountain* case would not result in a different outcome on the facts in *Zodiac*. I also observe that the licensee in *Zodiac* claimed that the Branch should be required to prove beyond a reasonable doubt that the licensee permitted the intoxicated person to be on the premises. I concur in the conclusion stated by Blair J. in that regard. Such a requirement of proof does not arise in respect of a contravention under the *Act* because, where the *actus reus* is proved, guilt will be inferred if due diligence is not established by the licensee on the balance of probabilities.

[12] The issue was next considered by Madam Justice Gill in ***New World Entertainment*** in April of 2004. She considered the conflicting decisions of Justices

Pitfield and Blair and the ***Whistler Mountain*** decision and said at para. 11 in her decision:

> The question in *Whistler Mountain* was whether the principle of due diligence that applied to charges under s. 48 also applied to the administrative or regulatory process under s. 20. I do not accept that a conclusion that the defence was available means that the burden of proof in administrative proceedings is proof beyond a reasonable doubt.

[13] Referring to the conflicting decisions of our court she said at paras. 12 and 13:

> In *Zodiac*, Blair J. made reference to two earlier decisions of the Court of Appeal, *Calais Investments Ltd. v. British Columbia (General Manager Liquor Control and Licensing Branch)* (1996), 81 B.C.A.C. 309 and *Mohammed v. British Columbia (Liquor Control and Licensing Branch)* (1994), 51 B.C.A.C. 62, both of which involved appeals from enforcement hearings pursuant to s. 20. In *Calais*, the suggestion that the *Act* was penal was rejected and it was held that it was properly characterized as regulatory. In *Mohammed*, an appeal was taken from a decision that Mr. Mohammed was not a fit and proper person to hold an interest in a licence. All members of the court agreed that the appeal should be dismissed. Lambert J.A. stated that the requisite degree of proof in such a case should be higher than a simple balance of probabilities. However, Legg J.A. refrained from agreeing that the degree of proof under s. 16 of the *Act* was higher than the balance of probabilities and Wood J.A. preferred to leave the issue to another day, when it was squarely before the court.
>
> In summary, I follow and concur with the decision in *Zodiac* and conclude that the standard of proof is a balance of probabilities. I would add that despite the petitioner's assertion that the decision in *Zodiac* is merely persuasive, it was not argued that if the evidentiary burden is not proof beyond a reasonable doubt it should at least be higher than the usual balance of probabilities.

[14] Finally, in June 2004, Madam Justice Morrison issued her decision in ***Sentinel Peak Holdings Ltd., (c.o.b. No. 5 Orange Street Hotel) v. British Columbia (Liquor Control and Licensing Branch, General Manager),*** 2004

BCSC 885. She considered the following cases: ***Mohammed, New World Entertainment Investments, Plaza Cabaret, Zodiac Pub*** and ***Urban Well***, and she concluded at paras. 39 and 40:

> Having reviewed the four recent cases dealing with the amended *LCLA*, I agree with the views stated by Mr. Justice Blair in the *Zodiac* case. Namely, that the standard of review is that of reasonableness *simplicitor*, and the appropriate standard of proof is on a balance of probabilities.
>
> Should there be a higher standard within that test? The decision of our Court of Appeal in *Mohammed v. B.C. (Liquor Control and Licensing Branch)*, [1994] B.C.J. No. 2331 was cited by counsel. In that case the regal liquor Crown Royal had been stolen, and it was argued that the penalties were too severe. The court found that no error had been made with regard to two suspensions. In commenting on the proper burden of proof, Mr. Justice Lambert stated that in a case such as the one before them, 'the requisite degree of proof should be higher than a simple balance of probabilities.' While the court was unanimous in its decision with regard to disposition of the case, Mr. Justice Legg refrained from agreeing with that portion of Mr. Justice Lambert's decision, and Mr. Justice Wood suggested that they leave the question as to what might be the proper burden of proof to another day.

[15] The petitioner has referred me to the following cases on this issue: ***Urban Well***, ***Plaza Cabaret***, ***Whistler Mountain***, ***Zodiac Pub*** and ***New World Entertainment***. The petitioner asks that I follow Mr. Justice Pitfield on the ***Colchester*** approach to stare decisis. However, it is clear that the weight of authority from our courts does not favour the decision of Mr. Justice Pitfield but follows the decision of Mr. Justice Blair. Indeed, applying the ***Colchester*** principle, I would be obliged to follow the decision of Madam Justices Gill and Morrison because the ***Colchester*** principle provides that I would have to be convinced that the second judges were wrong in order to go against their decision.

[16] The matter itself was not fully argued before me. Apart from the decisions of our court, I was referred only to ***Whistler Mountain***. That, without more, does not satisfy me that I should prefer the decisions of Mr. Justice Pitfield to those of the other three judges of our court. Therefore, I will follow the decisions of Mr. Justice Blair and Madam Justices Gill and Morrison.

[17] With respect to the balance of probabilities, and whether it should be an elevated balance of probabilities in this case, the petitioner referred me to ***Claiter v. Rose***, 2005 BCSC 193, and to ***Hanes v. Wawanesa Mutual Insurance Co.,*** [1963] S.C.R. 154. In ***Hanes***, an insurance company sought reimbursement of payments it made to satisfy a claim against its injured arising from a motor vehicle accident on the basis that the insured was intoxicated at the time of the accident and had forfeited coverage. The trial judge applied the criminal standard of proof, proof beyond a reasonable doubt. Ritchie, J. speaking for the court, reviewed a number of authorities and said at page 162, referring to an earlier decision of that court, ***The London Life Insurance Company v. The Trustee of the Property of Lang Shirt Co. Ltd.,*** [1929] S.C.R. 117:

> ... I think that in the light of the authorities then existing it must be taken that in adopting this paragraph Mignault J. was adopting the rule in *Hodge's* case, *supra*, modified for application to civil cases, and that the statement must be read as meaning that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal the Court must be satisfied not only that the circumstances are consistent with the commission of the criminal act but that the facts are such as to make it reasonably probable, having due regard to the gravity of the suggestion, that the act was in fact committed.

[18] He referred also to a later decision of the Supreme Court of Canada, ***Industrial Acceptance Corp. v. Couture,*** [1954] S.C.R. 34 where Mr. Justice Fauteux said at page 43:

> In a civil case where the proof of the crime is material to the success of an action, the proof required isn't that which prevails in a criminal case where penal sanctions apply, but that which rules in civil cases.

[19] Mr. Justice Ritchie then continued and said at page 164:

> Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard or proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the 'balance of probabilities'.

[20] In ***Claiter***, Mr. Justice Holmes said at para. 52:

> As Chief Justice Laskin, writing for the court, summed it in *Continental Insurance Co. v. Dalton Cartage Company Ltd. et al.*, [1982] 1 S.C.R. 164:
>
> > The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.

[21] Therefore, I cannot conclude that the adjudicator erred in finding that the standard of proof is a balance of probabilities, considering the facts and penalties before her.

[22] I now move to issues 2 and 3. Was the adjudicator wrong when she found that the infractions were proven? Here the standard of review is reasonableness simpliciter. In ***Zodiac Pub,*** Blair J. at para. 16, quotes Iacobucci J. in ***Canada (Director of Investigation and Research) v. Southam Inc.,*** [1997] 1 S.C.R. 793 on this standard as follows:

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

[23] First, dealing with the Section 43(1) infraction, Section 43(1) provides:

> A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

[24] The adjudicator had evidence from which she could conclude, as she did, that a male and a female patron were intoxicated when they were served liquor by staff of the petitioner. Starting at page 31 of her reasons:

> On the totality of this evidence I am prepared to find, on a balance of probabilities that the licensee permitted the sale of liquor to an intoxicated patron. I accept the evidence of constable 1 and constable 2 that the male patron demonstrated the physical indicators of a dishevelled appearance including a glazed look, lack of motor skills such as unsteadiness of feet and fumbling of money. Based on this evidence, I find that the male patron was intoxicated. I accept the evidence of constable 1 that he witnessed the sale by staff 1 of two bottles of Miller Gin Dry to the male patron.
>
> I also accept the evidence of constable 2 that the female patron demonstrated the physical indicators of intoxication including droopy eyes and lack of motor skills such as unsteadiness of feet and fumbling with money. The female patron was also observed to show mental indicators of intoxication when she was resting her head on a friend's shoulder and lying on the floor by the pool table. Based on this evidence, I find that the female patron was intoxicated. I accept the evidence of constable 2 that he witnessed the sale by staff 2 of liquor to this female patron.

[25] These conclusions are not contrary to the overwhelming weight of evidence; they are not clearly wrong.

[26] Turning next to the infraction of s. 42(3) of the ***Regulation***, it provides:

> A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

[27] The adjudicator found at page 33 of her reasons:

> In incident 1, both constable 1 and constable 2 witnessed the liquid being poured from the same bottle and were able to identify the label. Constable 1 testified that it appeared that the male patrons and staff 2 and staff 3 randomly selected glasses of the liquid and immediately drank it. I find on the balance of probabilities, that staff 2 and staff 3 consumed liquor in the premises.
>
> In incident 2, constable 1 was not able to observe what was poured into the eight shot glasses. His testimony relied on statements made by staff 3. In this incident I am not prepared to find that staff 2, staff 3 and the porter consumed liquor on the premises.
>
> In incidents 3, 5 and 6, constable 2 observed the liquid being poured from the same bottle and the drinks being consumed by staff 3, staff 5 and staff 6. I find that in these three incidents, staff 3, staff 5 and staff 6 consumed liquor in the premises.
>
> In incident 4, constable 2 observed staff 4 drink three shot glasses of liquid. While he was not able to observe the liquid poured into the first two shot glasses, constable 2 did observe Jose Cuervo Tequila being poured into the third shot glass. I find that staff 4 did consume [liquor] in the premises with respect to drinking the third shot glass.
>
> In summary, I do not find that incident 2 has been proved on a balance of probabilities. However, I do find that incidents 1, 3, 4, 5 and 6 have been proven.

[28] There was evidence to support this conclusion, and it was not contrary to the weight of the evidence. It was not clearly wrong. For each of these infractions, the evidence may not be sufficient to prove it beyond a reasonable doubt, but was sufficient to prove the infractions on the balance of probabilities standard.

[29] I will now address the final issue, the penalty. Here the petitioner argues at page 7 of the argument:

> The enforcement adjudicator noted that there was no record of prior convictions, offences or enforcement actions of these types for the licensee within the year immediately preceding the incident. As a result, these contraventions had to be considered as first contraventions. However, the enforcement hearing adjudicator did note and therefore consider it a contravention notice on March 18th, 2003 for an employee consuming liquor on the premises which the branch did not pursue, as well as an enforcement action for an alleged contravention of employee consuming liquor on April 12th, 2003, which was dismissed. When imposing the penalty for the contravention of Regulation 42(3), the enforcement hearing adjudicator imposed the maximum licence suspension of three days. The petitioner's position is that the maximum licence suspension should not have been imposed and the enforcement hearing adjudicator wrongfully considered the contravention notices of March 18th, 2003 and April 12, 2003.

[30] The adjudicator said at page 40 of her reasons:

> For the contravention of employees consuming liquor on the premises, the penalty range is one (1) to three (3) day licence suspension for the first contravention. In this case, the branch is recommending the maximum licence suspension of three (3) days. I agree with this recommendation.
>
> In imposing the maximum licence suspension for this contravention I am mindful that this issue has previously been brought to the licensee's attention. I am also mindful that there were five separate instances involving five employees consuming liquor while working. When staff of a licensed establishment drink liquor while working it can impair their judgment and their ability to manage and control the establishment. This creates a public safety risk for other staff members, the patrons and the community. The maximum licence suspension for a first contravention is warranted.

[31] Therefore she is referring to the earlier notices, not as evidence of earlier infractions, but to demonstrate that this issue had been brought to the licensee's attention on earlier occasions.

[32] In my view, she was not clearly wrong to have done so. The petition is dismissed with costs.

(REASONS FOR JUDGMENT CONCLUDED)

The Honourable Madam Justice B. Brown