IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Skybar Ltd. v. British Columbia (General Manager Liquor Control & Licensing Branch)***
2005 BCSC 1542

Date: 20051102
Docket: L051265
Registry: Vancouver

Between:

Skybar Ltd., doing business as Skybar

Petitioner

And

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. Penner
Date and Place of Hearing:	September 19, 2005 Vancouver, B.C.

[1] Pursuant to s.2 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, the Petitioner seeks to quash the April 27, 2005 decisions ["Decision"] of the Enforcement Hearing Adjudicator ("Adjudicator") or, alternatively, that some or all of the decisions of the Adjudicator be remitted to the Respondent for reconsideration pursuant to s.5 of the ***Judicial Review Procedure Act***.

[2] The Petitioner carries on business as Skybar on three separate floors at 670 Smithe Street in Vancouver. Pursuant to the provisions of ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 ("***Act*** "), the Petitioner has three separate liquor licences for the establishment. The main floor has a "Food Primary Licence" with a capacity of 48 persons, the second floor nightclub has a "Liquor Primary Licence" with a capacity of 220 persons and the third floor has two licences: a "Food Primary Licence" with a total capacity of 132 persons and a "Liquor Primary Licence" with a total capacity of 71 persons.

[3] There was an 11-day enforcement hearing before the Adjudicator ending on March 1, 2005. The alleged contraventions included the following:

> (a) Liquor being removed from the red-lined area contrary to section 12 of the *Act* on March 31, 2004 on the second floor Liquor Primary Licence, on March 31, 2004 on the third floor Food Primary Licence, and on May 7, 2004 on the third floor Food Primary Licence;
>
> (b) Dancer prohibited acts contrary to section 50 of the *Act* on March 31, 2004 on the second floor Liquor Primary Licence;
>
> (c) Failing to produce a document, record or thing in contravention of section 73 of the *Act* on April 13, 2004 with respect to the second floor Liquor Primary Licence;

[4] In his April 27, 2005 decision, the Adjudicator found that the contraventions set out in (a) above were proven as alleged and $3,000 monetary penalties were imposed, that the contravention set out in (b) above was proven as alleged and a four-day licence suspension was imposed, and that the contravention set out in (c) above was proven as alleged and a 10-day licence suspension was imposed.

[5] A number of other alleged contraventions were heard relating to "over crowding beyond person capacity greater than the occupant load" in contravention of s.6(4) of the ***Liquor Control and Licensing Regulation*** ("Regulation") and these contraventions were found to have been proven as alleged. However, these Reasons for Judgment will not deal with that part of the Petition requesting that those decisions also be quashed. That relief sought in the Petition is adjourned generally pending the decision of the Court of Appeal dealing with the appeal of this Petitioner relating to a February 25, 2005 Judgment, (2005 BCSC 235).

RELEVANT PROVISIONS OF THE ACT

[6] The provisions relevant to this Petition state:

> 20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:
>
> (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 licence;
>
> (b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;

84(1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act.*

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows: …

(e) defining a word or expression used but not defined in this Act; …

(h) without limiting the powers of the general manager to impose conditions and restrictions on licences and on establishments, providing for types of entertainment and other activities that may be carried on in licensed establishments, and setting criteria by which the general manager may implement his or her powers under section 50 (2); …

(s) prescribing a schedule of monetary penalties for the purposes of section 20 (2) (c);

(t) prescribing a schedule of licence suspensions for the purposes of section 20 (2) (d); …

(w) imposing terms and conditions on licences issued under section 52; ….

(2.3) Regulations made under subsection (2) (s) or (t) may provide for different monetary penalties or licence suspensions according to

(a) the class or category of licence held,

(b) the nature of the circumstances referred to in section 20 (1) on which the monetary penalty or licence suspension is based, including the type or category of contravention of this Act or the regulations involved, or

(c) the number of occurrences of the circumstances referred to in paragraph (b).

(3) Regulations made under subsection (2) (i) may

(a) in the case of licences under section 12, set terms and conditions respecting all matters relating to the sale of liquor in establishments and all matters relating to the operation of establishments, and

(b) in the case of licences under section 12.1, set terms and conditions respecting all matters relating to the operation of establishments.

RELEVANT REGULATIONS UNDER THE REGULATION

[7] "Contraventions" are set out under the Regulation. Under Part 1 of the Regulation, s. (1)(1) of the Regulation provides the following definition for

"contravention". "Contravention" means a matter referred to in the "Contravention" column of Schedule 4." Regulation 64 (1) states: "If an inspector forms the opinion that a licensee has committed a contravention, the inspector must provide written notice to the licensee that the inspector is of the opinion that the licensee has committed a specified contravention".

[8] Schedule 4 provides for various periods of suspension or various monetary penalties for certain contraventions. For the purposes of this Petition, the following contraventions, periods of suspension, and monetary penalties are applicable:

Item	**Contravention**	**Period of Suspension (Days)**			**Monetary Penalty**
		First Contravention	**Second Contravention**	**Subsequent Contraventions**	
			Entertainment		
34	Permitting in the licensed establishment entertainment by one or more exotic dancers or strippers that is prohibited or restricted under section 50 of the Act	4-7	10-14	18-20	$5000 - $7000
35	Permitting in the licensed establishment any other entertainment that is prohibited or restricted under section 50 of the Act	1-3	3-6	6-9	$1000 - $3000

General					
46	Any breach of any provision of the Act, the regulations or the terms and conditions of the licence not specifically referred to in Items 1 to 45	1-3	3-6	6-9	$1000 - $3000

APPLICABLE STANDARD OF REVIEW

[9] The applicable standard of review of a decision of the Adjudicator on questions of fact or of mixed fact and law is that of reasonableness *simpliciter*. The decision of the Adjudicator ought not to be interfered with unless the Petitioner can show that the decision was "clearly wrong": ***Sentinel Peak Holdings Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)***, [2004] B.C.J. (Q.L.) No. 1352 at paras. 39-43. The Adjudicator need only find that the contraventions alleged by the General Manager were made out on the evidence on a balance of probabilities: ***Sentinel Peak Holdings,*** *supra,* at paras. 39-42. The role of Court is to ensure that the Adjudicator did not make a decision that was outside his or her jurisdiction to make: ***Wells v. British Columbia (Superintendent of Motor Vehicles),*** (2000) 8 M.V.R. (4th) 251 at paras. 9-11.

[10] The General Manager must restrict an enforcement action to a contravention specified by the ***Act*** or the ***Regulation***: ***The Plaza Cabaret Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)***, [2004] B.C.J.

(Q.L.) 329 (B.C.S.C.); ***Skybar Ltd. (c.l.b. Skybar) v. British Columbia (General Manager, Liquor Control & Licensing Branch)***, [2005] B.C.J. (Q.L.) 369 (B.C.S.C.); ***Roxy Cabaret Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)***, [2005] B.C.J. (Q.L.) 668.

[11] Section 12 of the ***Act*** enables the General Manager to impose terms and conditions on any licence. The terms and conditions are endorsed on the face of the licence. For this Petitioner, the licences had the following endorsement under the general heading "Terms and Conditions":

> This licence is subject to the terms and conditions contained in the publication "Guide for Liquor Licences in British Columbia".
>
> Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB.

CONTRAVENTIONS DEALING WITH THE ALLEGATION THAT LIQUOR WAS REMOVED FROM RED-LINED AREAS

[12] The November 29, 2004 Notice of Enforcement Action alleged that there had been a contravention of s. 12 of the ***Act*** with the contravention described as: "Contravening a Term and Condition (liquor removed from red-lined area)." The Petitioner argued that the endorsement on the licence ("liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the L.C.L.B") was not sufficient to prohibit the "carrying of liquor" outside the red-lined areas.

[13] As there is no endorsement on the three licences that prohibits the carrying of liquor outside of red-lined areas, the only provision that deals with this prohibition is within the "Guide for Liquor Licences in British Columbia" ("Guide"). The Petitioner submits that the Guide was not tendered into evidence and the Adjudicator was not in a position to take "judicial notice" of the Guide. The Petitioner submits that the Branch has neither identified nor established the term and condition of the licence which has been breached although it is incumbent upon the Branch to do so in the hearing process.

[14] Further, the Petitioner submits that there was no evidence tendered at the hearing that alcohol was either being sold, served or consumed in the stairwell between or outside of the red-lined areas on the second and third floor of the premises and that the Adjudicator erred in law by inferring from the evidence that alcohol was either being sold, served or consumed in the stairwell merely because it was being carried into that area by patrons.

[15] Counsel for the Petitioner stated that the Guide would usually be put into evidence but that the General Manager did not do so at this hearing before the Adjudicator. In any event, I find that the Guide was not put into evidence at this hearing.

[16] Counsel for the General Manager submitted that the Adjudicator was well aware of the conditions of the Guide as the Adjudicator is also an employee of the Branch, the Petitioner would be well aware of the provisions of the Guide, the

changes made to the Guide are forwarded to licence holders regularly, and the Guide is also available on the website maintained by the General Manager.

[17] The General Manager submits that the safeguards available in civil proceedings and criminal proceedings should not be available here because of the nature of the hearing before the Adjudicator so that it is not necessary to prove each element of the alleged contravention. The General Manager also submits that the Petitioner can point to no prejudice as a result of the Guide not being entered into evidence and that the Adjudicator was in a position to take notice of the content of the Guide when arriving at his decision.

[18] Despite not being in evidence before the Adjudicator, parts of the Guide were attached as part of the Decision. The attached page 53 of the Guide had the following paragraphs under the general heading “Where customers may consume liquor”:

> Customers may not bring their own bottles of liquor to consume in your establishment, and you may only sell and serve liquor in the licensed area of your establishment (commonly referred to as the “red-lined area” of your floor plans).
>
> You may not permit customers to consume liquor outside of the red-lined area; or to take liquor from the red-lined area to other parts of your establishment, except:
>
> - Patrons may take liquor into the washroom as long as they are not walking through an unlicensed area (such as a hotel lobby), and you are properly supervising the washrooms.

[19] The submissions of the Petitioner before the Adjudicator were described as follows by the Adjudicator:

> The licensee also submitted that both of the licenses in question are endorsed as follows: "liquor may only be sold served and consumed within the areas outlined in red on the official plan". There is no endorsement on the licenses that prohibits the *carrying* of liquor outside of the redlined areas. The licensee points to the provisions of the *Guide* as the only prohibition against taking liquor out of the red-lined areas, and it submits that the *Guide* is has not been entered into evidence in this hearing and is therefore not available for use in establishing these contraventions. Further, the licensee submitted that there is no evidence that any of the liquor carried outside of the redlined areas was indeed consumed there, in contravention of the terms on the face of the licence.
>
> The licensee argued that Section 20(1)(a) of the *Act* does not empower the general manager to convene a hearing for an alleged contravention of the *Guide for Liquor Licensees in British Columbia*. It said that the *Guide* does not constitute part of the *Act* or Regulation or make up terms of the licence.

[20] In his reasons, the Adjudicator stated:

> The licensee's managing partner testified that he was aware of the Guide that was in effect at the relevant time. He testified that the Guide allows patrons to take their liquor to the washroom as long as they don't pass outside a redlined area to get there. He said:
>
> > We did not ask everyone who was going through the staircase if they were going to the washroom. Our view was that we did not stop people from travelling through the staircase area from one area to another. Right or wrong, that is the way we saw it.

[21] In dealing with the argument that the Guide was not in evidence, the Adjudicator stated:

> The licensee submitted that the *Guide* is not in evidence in this hearing. I disagree. I find that the *Guide* is in full force and effect as to the terms and conditions of each of the licenses by reference. Each licence stipulates on its face that: "This licence is subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*". This term has the same significance as the one quoted by the licensee ("liquor may only be sold served, and consumed within the areas outlined in red on the official plan…") which

> appears immediately below it on each licence. The terms of the *Guide* confirm that patrons may not "take liquor from the red-lined areas". …
>
> I find that Section 20(1)(a) of the *Act* does empower the general manager to convene a hearing for an alleged contravention of the *Guide for Liquor Licensees in British Columbia*¸as I have already determined that by reference, the terms of the *Guide* are part of the terms and conditions of the licence.

[22] There are at least two difficulties with the Decision and the reliance on the Adjudicator on the Guide which was not in evidence. First, while the Adjudicator makes reference to the Guide and attaches portions of the Guide in the Decision, there was no evidence before the Adjudicator that the Guide that he was referring to was the same Guide in effect when the alleged contraventions took place between March 31, 2004, and May 7, 2004. Second, the Adjudicator took into account evidence that was not before him in arriving at the conclusion that there had been a contravention although the particular contravention alleged was that a term and condition of the licence had been contravened, the Guide may not form part of the licence, and only the Guide contains the contravention alleged.

[23] Section 1 of the ***Judicial Review Procedure Act*** defines "record of the proceeding" to include "a document produced in evidence at a hearing…" as well as "the decision of the tribunal and any reasons given by it." On the basis of the record before the Adjudicator, I can include that the Guide was not in evidence, the failure of the General Manager to put the Guide in evidence was drawn to the attention of the Adjudicator, the Adjudicator took into account the terms, conditions and prohibitions set out under the Guide when arriving at his Decision, and parts of the Guide were attached to the Decision.

[24] In ***Pfizer Co.* v. *Canada (Deputy Minister of National Revenue, Customs and Excise – M.N.R.)***, [1977] 1 S.C.R. 456, the Court reviewed a customs ruling with respect to the classification and resulting duties relating to certain antibiotics. The review board had drawn upon two publications for assistance in classifying the drugs. These secondary sources were not put into evidence and the board did not disclose to the parties that these sources would be consulted. On behalf of the Court, Pigeon J. stated:

> While the Board is authorized by statute to obtain information otherwise than under the sanction of an oath or affirmation (Tariff Board Act, c. T-1, s. 5(9)), this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it. .... The two texts mentioned by the Board were not mentioned. Counsel for the respondent did not put them before appellant's witnesses in cross-examination as he did for other texts. In my view, it was a grave error to rely on those texts in its decision as against the oral evidence. (at p. 463)

This statement was reaffirmed in ***Kane v. University of British Columbia***, [1980] 1 S.C.R. 1105 where the decision of the Board of Governors of the University was set aside because the Board heard from the President of the University without giving the opportunity to the appellant to be present and hear the additional facts adduced. I am satisfied that the principle established in ***Pfizer***, *supra* and ***Kane***, *supra*, is that it was inappropriate for the Adjudicator to make reference to and reply upon contraventions set out in a Guide which was not in evidence before him.

[25] More directly on point is a decision dealing with a suspension under the ***Motor Vehicle Act***, R.S.B.C. 1996, c. 318. In ***Dennis v. British Columbia (Superintendent of Motor Vehicles)*** (2000), 82 B.C.L.R. (3d) 313 (B.C.C.A.), the Superintendent of Motor Vehicles had reviewed and upheld a driving suspension for driving while over the blood alcohol reading was over .08. A breath sample had been provided by the individual a little more than an hour after driving. The Superintendent drew upon his own knowledge (as a form of "judicial notice") to extrapolate the individual's blood alcohol level at the time that he was driving based on this subsequent breath sample. Based on this extrapolation, the suspension was upheld.

[26] On behalf of the Court, Saunders J.A. stated that such an extrapolation was not permissible without having received submissions from the parties about the method of extrapolation:

> Counsel for the appellant urges upon us the reasons of Nemetz, J.A. in R. v. Stevenson (1972), 14 C.C.C. (2d) 412 (B.C.C.A.) and the decision in R. v. McBurney (1974), 21 C.C.C. (2d) 207 (Man.C.A.). However, in R. v. Stevenson, the majority opinion was delivered by Mr. Justice Tysoe, who stated at p. 416:
>
> > In short, my view is that there is not in this case the evidence necessary to prove directly or from which it can properly be inferred from the evidence that at the time of this accident the appellant had in fact in his blood more than the quantity of alcohol set out in Criminal Code, s. 236. Nor, in my opinion, is it so notorious a fact, if it be a fact, that a man who has a reading of 145 mg. of ethyl alcohol in 100 ml. of blood one hour and 20 minutes after an accident must have had in excess of 80 mg. at the time of the accident that judicial notice can be taken of the fact.

> I accept the proposition stated in Stevenson as still applicable today. While it may be a notorious fact that alcohol is eventually eliminated from the body, it is also a notorious fact that blood alcohol levels climb for some time after alcohol is ingested. It is the relationship of these two notorious facts, in the circumstances of an individual person, which is not so well known that judicial notice can be taken.
>
> As judicial notice cannot be taken, evidence is required linking the blood alcohol level to the time each respondent was driving. There was no such evidence. Only with some expert information could that link be drawn, and here that expertise resided with the adjudicator who did not disclose the expertise or the methodology to open it to challenge. (at p. 321)

[27] I also adopt the following passage from the decision appealed from in ***Dennis***

[1999] B.C.J. (Q.L.) No. 1568 where Melvin J. stated:

> In Re Vance and Hardit Corp. et al (1985), 53 O.R. (2d) 183 (Ont. Div. Crt.), concerning the manner in which evidence was before the Residential Tenancy Commission, the court stated at p. 187 as follows:
>
> > Apart from statute, it is well established that resting a finding of fact on undisclosed information or evidence can amount to a breach of the rules of natural justice and an error of jurisdiction.
>
> And finally, in Huerto v. College of Physicians & Surgeons (Saskatchewan) (1994), 26 Admin. L.R. (2d) 169 (Sask. Crt. Q.B.) the court was concerned with an appeal under the Medical Profession Act from a decision of the Discipline Committee finding the appellant guilty of professional misconduct. The challenge to the Discipline Committee decision related to the Committee applying its own personal knowledge to enhance the evidence.
>
> At p. 177 Halvorson J. said:
>
> ... But, if the committee meant it was entitled to determine the standard of care by supplementing the evidence with its own medical knowledge, serious problems arise....
>
> And further:

> While there is a degree of fuzziness in this paragraph, it conveys the impression the committee believed it was entitled to use its medical knowledge beyond simply assessing the evidence....
>
> For those two reasons I am satisfied that the adjudicators erred. Firstly, in conducting the extrapolation and using it as a basis for its decision without giving the petitioners the opportunity of leading evidence or making submissions on that subject. Secondly, by utilizing their own knowledge and training as a substitution for evidence that was essential to bridge the gap between the reading at the time of the test and the reading at the time of driving. In my opinion the use of specialized training cannot be a substitute for evidence. It should not be used to bridge a gap in evidence. Specialized training may be of assistance in understanding and evaluating evidence but it is not a substitute for evidence. Perhaps this distinction is subtle but in my view it is critical. Consequently, the decision in each of the three cases under consideration is quashed. The suspension of driver's licence in each case is revoked. (at paras. 21-5)

[28] Most recently, in ***Brunico Communications Inc. v. Canada (Attorney General)***, [2004] F.C.J. (Q.L.) No. 789, Von Finckenstein J. noted that knowing the case that one has to meet is the most elementary rule of procedural fairness:

> The Minister issued an Applicant's Guide for the funding cycle 2001-2002 which clearly stated that magazines but not newspapers were eligible for funding. It contained a definition of eligible magazines which excluded newspapers. However, newspapers were not defined.
>
> During the summer and fall of 2001, the Minister held consultations and, as a result, adopted a definition for newspapers in January 2002. But instead of applying it to the next funding cycle, the Minister applied it to the existing funding cycle and to applications already in the pipeline. In effect, the Minister applied the rules set out in the Applicant's Guide for 2002-2003 to applications received for 2001-2002. Or, to put it another way, for 2001-2002, the Minister published a guide that set out one set of rules and then applied another. (at paras. 18-19)

[29] In ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, Madam Justice L'Heureux-Dube commented on the duty of fairness:

> …The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision. (at para. 28)

[30] In ***Roseau River Anishinabe First Nation v. Roseau River Anishinabe First Nation (Council)***, [2003] F.C.J. (Q.L.) No. 251, Kelen J. described the application of the duty of fairness as follows:

> Decisions made by legislative bodies of a general nature and based on broad considerations of public policy are considered to be immune from the duty of fairness. In contrast, an administrative decision that is directed at a particular person and affects "the rights, privileges or interests" of that individual will trigger the application of the duty of fairness, see Baker v. Canada, *supra* ...” (at para. 42).

[31] The decision regarding the potential contraventions of the Petitioner obviously affected the privileges and interests of the Petitioner. I am satisfied that there was a duty of fairness imposed upon the Adjudicator in his deliberations. The content of the duty of fairness varies according to the context and, in ***Baker***, *supra*, several factors were identified as important to defining the context of the duty of fairness in a given situation: (a) the nature of the decision being made and the decision-making process; (b) the nature of the statutory scheme and terms of the statute pursuant to which the decision-maker acts; (c) the importance of the decision to the individual affected by it; and (d) the procedures chosen by the decision-maker, particularly if the statute has left the choice of such procedures to the decision-maker. (at pp. 837-844).

[32] In the case at bar, the finding of a contravention could lead to a lengthy suspension and/or a substantial fine. Without determining the degree of procedural fairness owed to the Petitioner, the consideration of material that was not in evidence violated both the most elementary rule of procedural fairness and the legitimate basic expectation held by the Petitioner that the Adjudicator would act in accordance with the statutory procedures set out in the ***Act***. In this regard, I adopt the following conclusion found in ***Brunico***, *supra*:

> This violated both the most elementary rule of procedural fairness (an applicant should know the case he has to meet) and violated the legitimate basic expectation held by the applicant (that the Minister would act in accordance with her own published Guide). (at para. 20)

[33] The contravention alleged may or may not have been the contravention which was set out in the Guide that purported to set out further terms and conditions in effect for the period March 31 through May 7, 2004 when the alleged contraventions were said to have occurred. While what is set out in any particular Guide may well be a "notorious fact" known to both the Petitioner and the Adjudicator, I am satisfied that the Adjudicator was bound to consider only the evidence before him. It is not sufficient for the Adjudicator to conclude that the Guide was in evidence because it was referred to in the licence "by reference". While the Guide may well be "in force and effect as to the terms and conditions of each of the licences by reference", the fact that the licence is in evidence does not make the Guide part of the evidence.

[34] Even if I could conclude that the Guide became part of the evidence because it was referred to in the 3 licences of the Petitioner, there is nothing which would

allow me to conclude that the Guide that was referred by the Adjudicator was the same Guide that was in effect at the time of the alleged contraventions. While the Adjudicator concludes that: "The terms of the Guide confirm that patrons may not "take liquor from the red-lined areas…", there is no way of knowing whether the Guide in effect at the time of the alleged contravention contained such a term or that the Guide in effect at the time the Adjudicator heard evidence was the same Guide which was in effect at the time of the alleged contraventions.

[35] There is also a serious question of whether the terms of the Guide "…are part of the terms and conditions of the licence" as is set out in the Decision of the Adjudicator. The 3 licences of the Petitioner all contain the provision that the licence is "…subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*". Absent are words such as "which Guide as amended from time to time forms part of the terms and conditions imposed on this licence issued under s.52 of the ***Act***." I am satisfied that the use of such a phrase is to be preferred to the phrase used under the general heading "Terms and Conditions" contained in the licences of the Petitioner.

[36] The phrase used does not fulfill the mandate given to the General Manager to impose terms and conditions or restrictions and limitations on the licences when issued and does not provide the necessary certainty so that a licence holder will know exactly what terms and conditions apply at any particular time. Section 20(1)(a) of the ***Act*** allows the General Manager to take action against the licensee for contraventions under the ***Act*** or the Regulation or for the failure of a licensee "to

comply with a term or condition of the licence". I find that the reference to the Guide in the licences of the Petitioner is too vague to allow me to conclude that the "terms and conditions" that might be contained in the Guide from time to time form part of the "terms and conditions" which can be imposed on licence holders.

[37] I am satisfied that no useful purpose would be served by the Decision being remitted to the Respondent for reconsideration as it would involve a new hearing. In my view, that would be inappropriate. A re-hearing under all of the circumstances would merely create a second opportunity to correct defects in the process. Given the nature of the proceedings, its significant impact on the Petitioner, and the likelihood that this part of my Decision will be the subject matter of an appeal by the Respondent, it would be inappropriate to send the matter back to the Adjudicator for reconsideration. Accordingly, the Decision relating to (a) above is quashed. On the assumption that I am incorrect at arriving at the conclusion that this part of the Decision should be quashed, it is necessary to consider the question of whether or not liquor was removed from the "red-lined" areas.

WAS LIQUOR REMOVED FROM "RED-LINED" AREAS?

[38] The August 19, 2004 Notice of Enforcement Action stated that the contravention was "Liquor removed from red-lined area" and that the General Manager would rely on Item 46 in Schedule 4 to establish the contravention. Accordingly, the General Manager relied on the "General" contravention of "Any breach of any provision of the Act, the regulations or the terms and conditions of the licence not specified referred to in Items 1 – 45".

[39] Having concluded that the terms of the Guide confirmed that patrons could not take liquor from the red-lined areas, the Adjudicator then concluded:

> In light of the finding above it is not required that I find that liquor was *consumed* outside of the redlined areas. The evidence however, paints a clear picture of uninhibited ingress and egress from the redlined areas of the second and third floor. I accept that there were regular sightings of volumes of patrons passing through and lingering outside of the redlined areas with liquor in hand. I find on the evidence, this to be a normal occurrence in Skybar on the dates in question. I must conclude therefore, that liquor was also consumed outside of the redlined areas, as to fail to so recognize would be an affront to common sense.

[40] The evidence relied upon by the Adjudicator in coming to this conclusion was set out as follows in the decision of the Adjudicator:

> A constable testified that on the evening of March 31, 2004, at approximately 11:00 p.m. she bought a beer in the second floor Liquor Primary area and carried that drink out of the redlined area and up the stairs to the third floor. While doing so she observed other patrons carrying drinks outside the redlined areas. She understood that liquor was not allowed in the stairwells or hall areas outside the redlined areas.
>
> A second constable testified that she too purchased liquor in the bar on the second floor on the evening of March 31, 2004, and carried that liquor up and down the stairwell and outside the redlined areas without being intercepted by Skybar staff. She testified that she observed patrons moving between floors and outside redlined areas between the second and third floors with liquor and that staff could plainly see this happening. She also testified that she entered the third floor Liquor Primary area with the drink and then exited outside the redlined area and in doing so stopped to talk to Skybar staff to make sure she was being observed with the drink outside the redlined area.
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> A third constable testified that she purchased liquor on March 31, 2004, in the second floor primary area and carried it out of the redlined area and approached a Skybar staff member. She asked about the third floor and showed her drink. She was directed up the stairs by the staff member and was not advised against, or stopped from, moving between licenses with her beer. She also observed patrons drinking

> and walking with their liquor between the third floor Food Primary Licence area and the second floor Liquor Primary Licence area outside the redlined areas.
>
> A fourth constable bought a bottle of beer on the third floor and carried it down the stairs into the second floor bar, after travelling outside the redlined areas of the two licenses. He testified that he observed many patrons drinking and carrying liquor outside of the redlined areas and on the stairs.
>
> A fifth constable testified that on March 31, 2004, he entered Skybar and walked to the third floor on the staircase. He noted many patrons passing from the second floor Liquor-Primary area to the third floor Food Primary area and from the third floor to the second floor with drinks, in plain sight of Skybar staff. He observed no patrons being stopped from so doing.
>
> Another constable testified that on May 7, 2004, he attended at Skybar in the early hours of the morning and observed people in the stairwell with beer and glasses of drinks outside of the redlined areas. He observed patrons leaving the third floor redlined area and also taking drinks between the second and third floors.

[41] The Petitioner submitted that two of these contraventions were really the same contravention as the purchase of liquor on the second floor, the removal of that liquor to the third floor and then the subsequent removal of that liquor from the third floor back to the second floor could only constitute one contravention. In that regard, the Adjudicator came to the following conclusion:

> I disagree that Contravention No. 1, and No. 7 are duplicitous. I accept the evidence that liquor was removed from each of the redlined areas (2nd floor Liquor Primary and 3rd floor Food Primary) on March 31, 2004. It seems that in the course of the inspections, one of the constables did purchase a bottle of beer on the third floor. Although this is not entirely certain from the evidence, it seems reasonable from the surrounding facts and I do so find. Had I not so found, the contravention would nonetheless be established by the carrying of the opened bottle out of the redlined area of the third floor even though it had been purchased at and wrongly removed from the second floor redlined area. Two contraventions may be committed with the same

> bottle of beer as surely as two crimes may be committed with the same weapon.

[42] The Petitioner also submits that there is uncertainty between the evidence relied upon and the conclusion of the Adjudicator who concedes that the matter is "…not entirely certain from the evidence…". In this regard, the Petitioner submits that there is nothing in the records maintained by the Vancouver Police Department about purchasing liquor on the third floor and moving that liquor to the second floor so that there was not sufficient evidence before the Adjudicator to reach the conclusion that he did regarding this contravention.

[43] I am satisfied that the Adjudicator was not clearly wrong in coming to the conclusion that was reached. The evidence of the purchase by the "fourth constable" is sufficient to allow the evidentiary basis upon which the Adjudicator could conclude that these were separate contraventions.

[44] I also find that the Adjudicator was not clearly wrong in coming to the conclusion that liquor was removed from red-lined areas. The evidence of the first, second, and third Constables clearly establish that liquor was being removed from red-lined areas.

CONTRAVENTION THAT THERE HAD BEEN A "DANCER PROHIBITED ACT"

[45] This contravention also calls into play the use by the Adjudicator of the Guide. In dealing with the general provisions relation to "entertainment" and "Dancer Prohibited Act", s. 50(1) of the ***Act*** deals with "entertainment" as follows:

> 50(1) If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.
>
> (2) Without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed or carried on in the establishment for which the licence is issued.

[46] Under s. 84(1) of the ***Act***, the Lieutenant Governor in Council may make Regulations and, pursuant to s. 84(3)(a) of the ***Act***, those Regulations may "set terms and conditions respecting ... matters relating to the operation of establishments ...." Pursuant to s. 84(4)(f), the terms and conditions respecting matters relating to the operation of establishments may also "... prohibit or restrict entertainment in an establishment in circumstances specified by the Regulations ...."

[47] In the licences for the Petitioner, there is no reference to "any type of form of entertainment". Accordingly, the only reference to "entertainment" is in the Guide. The Guide was not in evidence. On Page 17 of the Guide attached as part of the Decision and under the heading "Performances by Strippers or Exotic Dancers" are the following provisions:

> A stripper is an entertainer who strips off clothing during a performance; an exotic dancer is a performer who does not necessarily strip clothing during a performance.
>
> Performances must be confined to the stage or other approved areas (these areas will be noted on your liquor license). No performing is allowed in the audience area.
>
> Exotic dancers/strippers may not:
>
> - Engage in live, realistic or simulated sex acts, or in any acts involving coercion or violence, either simulated or real.

- Insert any object into, or extract any object from, the vagina or anus
- Urinate or defecate while performing
- Touch, share food and beverages, or pass objects to members of the audience
- Consume liquor immediately prior to a performance, during a performance or between performances
- Dance/perform on table tops or other areas outside the approved areas
- Touch, or share food and beverages with other performers

[48] The Adjudicator set out the following evidence before him in the Decision as being:

> Several constables testified that on March 31, 2004, Skybar was having a "ladies night". There were male strippers or exotic dancers present for entertainment. Only female patrons were allowed into the area of the second floor licence where the entertainers were performing.
>
> The entertainers were observed removing "stripper tippers" from patrons clothes, cleavage, and hands with their mouths. "Stripper tippers" were identified to the VPD members as strips of paper bought from Skybar staff with which patrons could tip the entertainers.
>
> Entertainers were also observed picking patrons to come on stage and simulate sex with them; "one woman was lying down and [the entertainer] had his penis dangling right above her face". One entertainer picked up a patron and put her on his shoulders facing opposite to him "burying [the entertainer's] face in the patron's crotch". One entertainer "smacked the ass of a woman", and one "buried his face in [a patron's] breasts". One of the entertainers was observed licking a patron's chest and neck. He was also seen to take a patron's hand and put it on his penis.

[49] In concluding that the contravention listed in Item 35 and Schedule 4 had been proven ("Permitting … entertainment that is prohibited or restricted under section 50 of the ***Act*** "), the Adjudicator dealt with the contravention as follows:

> The licensee argued that there is no restriction on entertainment on the face of the licence. There is a reference to the provisions of the *Guide* being part of the terms and conditions of the licence. The provisions of the *Guide* are clear, capable of identification in practice, and available to the licensee. The evidence of the managing partner of the licensee was clear that he understood the rules with respect to strippers or exotic dancers, and he knew what was "not supposed to" happen. I find that the provisions of the *Guide* apply to this contravention, that the licensee knew of the provisions in the *Guide* and that the licensee knew that the *Guide* applied to add terms and conditions to the licence.
>
> The evidence of multiple constables is consistent with respect to the alleged contraventions of touching members of the audience, and engaging in live, realistic or simulated sex acts. There was no evidence presented to dispute these allegations.
>
> I find this evidence to be conclusive of the facts alleged. I find the strippers or exotic dancers did touch members of the audience, did engage in realistic or simulated sex acts and did, accordingly contravene the provisions of the *Guide*, and by reference, the conditions of the licence. Contravention No. 5 has been proven.

[50] Because the Guide was not in evidence and because the contravention alleged requires reference to the Guide, I quash the alleged contravention in (b) noted above. If I am incorrect in arriving at this conclusion, I then conclude that the alleged contravention dealing with the provisions of the Guide dealing with "dancer prohibited acts" were proven. I cannot make a finding that the Decision of the Adjudicator was "clearly wrong". In fact, I find that the part of the Decision of the Adjudicator in this regard are correct. The acts of the male strippers contravene the prohibition against engaging in "…live, realistic or simulated sex acts…"

CONTRAVENTION THAT THERE HAD BEEN A FAILURE TO PRODUCE A DOCUMENT

[51] After the March 31, 2004 incidents which led to the contraventions noted above, an inquiry was made by the liquor inspector as to the availability of video data from the surveillance cameras located throughout the licensed areas.

[52] The Adjudicator described the evidence in this regard as follows:

> The liquor inspector testified that as a result of the police investigation, she inquired as to the availability of video data from the surveillance cameras which are located throughout Skybar. She visited with the club manager together with the second liquor inspector, and the club manager showed her the recording hardware. He indicated that he did not know how to make a copy at that time but that he would do so the following Monday. On the following Monday, the club manager advised the inspector that he had been instructed by Skybar's counsel not to produce the data. The inspector told him she could demand it and Skybar would have an obligation to produce the "tapes". The club manager replied that he would seek further instructions from counsel. The inspector testified that as a result she requested the tape in writing (Exhibit 1, Tab 7) and she received nothing in response.
>
> The managing partner testified that he believes the surveillance system produces information that is kept for one week only. He also said that he knows there is a practice of using the system to monitor the bar, but he does not know if there is any practice of keeping the tapes or CDs. He testified:
>
> > The problem was that in any issue, we talk to our lawyer. When we needed to produce it, I didn't get it. The time frame is seven days. Nobody came and said we wanted to see the video- they said we needed to produce the video.
>
> The club manager testified that there are seventeen surveillance cameras throughout the establishment. He stated that the images are digital and are stored on the hard drive in the main office on the first floor. Although he has recovered "short bursts" of images from the hard drive, it has been so infrequently as to require him to call a "tech guy" in Edmonton to find out how to do it. The club manager indicated that there was limited storage capacity and that the hard drive was recorded

over, after a period of time. He said; "it is about a two week phase, until it loops over".

He testified that he met with the liquor inspector on April 2, 2004, and told her he would record the images for her. Then soon afterward, he called her back but she was not there.

He stated:

> I did not hear anything after this letter or my message for [the inspector]. Next it was too late. The information would not have been there any more. Nobody ever showed up and requested to see the system. If they had, I would have let them view it.

[53] The letter referred to as Exhibit 1, Tab 7 was the April 7, 2004 letter to the Petitioner from the General Manager which stated in part:

> … I am requesting the surveillance Tapes or CDs for the entire premise as verbally requested on April 2, 2004 at Skybar.
>
> These records (Tapes/CD) should be provided to the Regional Vancouver Office located at 100 – 133 East 8th Avenue by 9:00 am on April 13, 2004 (Tuesday).
>
> The tapes/CD will reflect the time period between 8:30pm and 12:30am for each licensed area.
>
> The Tapes/CD will be as stated by Mike Shea, the General Manager, a mini movie format of the activities through the evening for each camera in the licensed areas #300593, #300594 and #300601.
>
> I have seen the surveillance cameras at Skybar, and understand that there are several cameras in place recording the activities in each of the licensed areas. I expect the Tapes/CD to be reflective of the number of cameras and the same quality of image as the live taping versions for each camera in the Skybar.

[54] The relevant section of the ***Act*** states:

> 73(1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager or a person designated by the general manager may
>
> (a) require the licensee to produce any prescribed document relating to the operation of the business licensed under this Act, and
>
> (b) inspect any of the following:
>
> (i) records in the possession of any person that may contain information relating to goods shipped, carried or consigned or received for shipment or carriage in British Columbia,
>
> (ii) premises of any person set apart or used as a warehouse for the storage of liquor, and
>
> (iii) establishments licensed under this Act and records, liquor and other things associated with the operation of the establishment ….
>
> (2) A person commits an offence if the person neglects or refuses to do any of the following under this section:
>
> (a) produce a document required to be produced;
>
> (b) produce and submit a record or thing for inspection or a sample of liquor;
>
> (c) allow premises to be inspected.

[55] The Adjudicator described the submissions that had been made on behalf of this Petitioner as follows:

> The licensee submitted that the language or Section 73 of the *Act* authorizes the general manager in two distinct ways: Subsection (1)(a) allows the general manager to *request* from the licensee a "prescribed document". Subsection (1)(b) allows the general manager to *inspect* "records" and "other things".
>
> The licensee submitted that there was no evidence provided that established that surveillance tapes or CDs were considered to be a "document" or in the alternative, that they were a "prescribed document". The digital images, argued the licensee, could only be described as "other things" under Section 73(1)(b) and as such, the general manager has no authority to request production of them. The

only authority granted to the general manager in this regard is to inspect the establishment.

The licensee identified the letter of the inspector, which requests production of the surveillance tapes or CDs, as being misdirected in terms of the request. It argued that the inspector did not demand inspection of "other things" under Subsection (1)(b) and therefore the licensee made no refusal.

The branch submitted that the failure or refusal to comply with Section 73 is a very serious matter. It argued that it is possible to characterize the recorded footage as a "record of any incident or record of events that occurred in or adjacent to the licensed establishment" which constitutes a prescribed document under Section 73, as that term is defined in Section 34(j) of the *Regulation*. The branch also identified the term "record" as being defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238 as including:

> "books, document, maps drawings, photographs, letters, vouchers, papers, and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise."

The branch also argued that Section 2(1) of the *Interpretation Act* confirms that the definitions therein apply to the *Act* and *Regulation*. The branch submitted that the inspector, on behalf of the general manager, properly made both verbal and written demands for production of the data, and did attempt to view the data on the inspection of the licensee's premises on April 2, 2004.

[56] In the part of the Decision which dealt with this contravention, the Adjudicator concluded:

Section 73(1)(a) of the *Act* authorizes the general manager or her designate to demand production of any prescribed document relating to the operation of the business licensed under this *Act*.

Section 73(1)(b)(iii) of the *Act* authorizes the general manager to inspect both establishments licensed under the *Act*, and "records… and other things associated with the operation of the establishment.

I find that Subsection 73(1)(b)(iii) does anticipate and capture the concept of digital surveillance data relating to the licensed

establishment, which the licensee possesses. Therefore, I find the general manager has the authority to inspect the data.

I find that as a practical matter, in order for the general manager or her designate to inspect the data, she must make a request for production of it.

I find that the correspondence of the liquor inspector, dated April 7, 2004, (Exhibit 1, Tab 7) does make request for production of that data.

The club manager testified that he made reasonable efforts to obtain the data for the inspector. I do not accept his testimony. I find that the club manager made little or no timely effort to produce this data.

The managing partner testified that the inspector did not ask to *look* at the data, but rather *for production* of the data. He found this to be a significant distinction and on that basis did not produce the data in a timely fashion.

There was no credible evidence presented as to the storage capacity of the surveillance system, or as to how long the data contained therein remains accessible. The only evidence regarding the amount of storage capacity in the system, and therefore the potential for an untimely overwriting of the digital information is hearsay. I give it no weight.

I am drawn to conclude that the licensee knew of the substantive contraventions of March 31, May 3, and May 6, 2004, and that his thorough surveillance data would be visually incriminating. I find that the licensee had the ability to comply with the request of the liquor inspector, and it chose not to produce the data.

Although the general manager has the authority to demand production, she does not have the ability to compel production of the data under Section 73 of the *Act*. However, failure to comply with the *Act* does attract a penalty in accordance with Schedule 4 of the *Regulation* for a contravention.

It would be no answer to this finding that the licensee had reasonably concluded as a result of the wording of Section 73 that it had no obligation to produce the data. I find that the evidence confirms that the licensee consulted with counsel and decided not to comply with the request in a timely fashion.

Also, I find that on a reasonable interpretation of Section 34(j) of the *Regulation*, the data recorded by the surveillance system is a *prescribed document*, as referred to in Section 73 as it is (sic) falls

> within the definition of "records of any incidents or events that occurred in or adjacent to the licensed establishment".

[57] I cannot conclude that the Adjudicator was clearly wrong on the part of the Decision which dealt with this alleged contravention. Under the heading "Production of Records", s. 34 of the Regulation states in part that the: "… following documents are prescribed in relation to a licensee:…(j.) records of any incidents or events that occurred in or adjacent to the license establishment …." I find that the "surveillance Tapes or CDs" requested by the General Manager are producible pursuant to s. 73(1)(a) of the ***Act*** as they come within the definition of "any prescribed document relating to the operation of the business licensed under this Act…"

[58] The definition of "record" is set out in s. 1 of the ***Interpretation Act***, R.S.B.C. 1996, c. 238: "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;" I am satisfied that the reference to "records of any incidents or events" in s. 34 of the Regulation must be interpreted to include what is set out as a "record" in the ***Interpretation Act***.

[59] I am also satisfied that there is no locational limitation placed on the ability of the General Manager to "inspect" the "records" or the "other things associated with the operation of the establishment…" as set out in s. 73(1)(b)(iii) of the ***Act***. Merely because that section refers to the ability to inspect "premises" set apart or used as a warehouse or "establishments licensed under the Act" does not allow me to then

conclude that the "records" referred to in s. 73(1)(b)(i) and in s. 73(1)(b)(iii) of the ***Act*** may only be inspected at the premises of licence holder.

[60] Accordingly, the Decision of the Adjudicator referred to in (c) above is not quashed.

SUMMARY

[61] The contraventions found by the Adjudicator relating to liquor being removed from red-lined areas contrary to s.12 of the ***Act*** and "Dancer Prohibited Acts" contrary to s.50 of the ***Act*** are quashed. The contravention and the ten day licence suspension relating to the failure to produce a document, record or thing in contravention of s.73 of the ***Act*** is upheld. In view of the outcome, both parties will bear their own costs relating to this application.

"G.D. Burnyeat J."

_____

The Honourable Mr. Justice G.D. Burnyeat