IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Empress Towers Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2006 BCSC 325

Date: 20060228
Docket: 37572
Registry: Kamloops

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

Between:

Empress Towers Ltd., doing business as Royal Towers Hotel

Petitioner

And

General Manager of the Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Petitioner: Kirsten R. Tonge

Counsel for the Respondent: Silvia Martorana

Date and Place of Hearing: February 8-9, 2006
Vancouver, B.C.

[1] The petitioner (“Empress”) brings this application for judicial review of the decision of an adjudicator, the nominee of the respondent, General Manager, Liquor Control and Licensing

Branch (the "General Manager"), who concluded that the licensee of Empress, Barswest Holdings Ltd. ("Barswest"), had:

> (a) allowed consumption of liquor in its licenced premises beyond one-half hour after liquor services hours, contrary to s. 44(3) of the ***Liquor Control and Licensing Regulation***, B.C. Reg. 244/2002 ("the ***Regulation***"); and
>
> (b) permitted an intoxicated person to remain in the establishment contrary to s. 43(2)(b) of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 ("the ***Act***").

[2] Empress seeks to quash the decision of the adjudicator or to have the matter remitted for reconsideration by her. Empress also takes issue with the penalty imposed upon it.

I. ISSUES

[3] Empress bases its petition upon the following grounds:

1. the adjudicator erred in her interpretation of s. 44(3) of the ***Regulation***;
2. the adjudicator erred in law in the application of the defence of due diligence;
3. the adjudicator erred by failing to consider the lack of enforcement history of Barswest and in imposing a penalty that was unreasonable;
4. the adjudicator erred in failing to consider there was no public safety issue; and
5. the adjudicator failed to properly consider all the evidence or applied an inappropriate standard of proof.

II. BACKGROUND

[4] Empress carries on business in New Westminster as Royal Towers Hotel. The premises include a nightclub, called "The Standard", which is leased to Barswest. Empress has owned the Royal Towers Hotel for a number of years and, before Barswest commenced operations in early November 2004, Empress had a number of third-party licensees operate the nightclub. The liquor primary licence provides for hours of operation of the nightclub from 7:00 p. m. until 2:00 a.m. Monday through Saturday, and 7:00 p.m. until 12:00 midnight on Sunday. However, at the time in question, the nightclub was only being opened for business on Thursday, Friday and Saturday evenings through to the closing time the following morning.

[5] On Tuesday, November 23, 2004, a staff party for management and employees of The Standard was held. This started with the consumption of alcoholic beverages at The Standard until approximately 10:00 p.m., when employees were taken to a restaurant and nightclub in downtown Vancouver by limousines. After the Vancouver establishment closed, approximately twenty staff members were brought back to The Standard, arriving at approximately 3:30 a.m. on November 24, 2004.

[6] At approximately 3:45 a.m., the police, having received a complaint of noise in the street near the Royal Towers Hotel, attended outside The Standard. After briefly interviewing a man sitting on a curb of the street outside the nightclub, they entered the premises where, according to two of the officers who were called as witnesses, they observed a strong smell of marijuana, very loud music, and a number of the persons present to be consuming what appeared to be alcoholic beverages. One employee was apparently belligerent and argumentative with the police. In the police's view, that individual was intoxicated. Another individual was found to be passed out. Some of those who were conscious were playing pool. Others were seated in an upper area of the nightclub. Upon the arrival of the police, a man behind the bar hastily began to remove bottles from it.

[7] By Notices of Enforcement Action dated December 22, 2004, the General Manager alleged that Empress had committed the contraventions noted in paragraph 1 above. A hearing was held before an enforcement hearing adjudicator on May 5 and 6, 2005. At that hearing, the adjudicator heard evidence, including that of two of the police officers who attended at the nightclub on November 24, 2004, as well as certain representatives of Empress. According to the evidence of the latter, when the staff of The Standard left in the limousines for Vancouver, they had left empty, and partially consumed, bottles of beer and glasses of liquor in the nightclub. According to the version advanced by Empress, when the staff returned to the nightclub and entered, it was not for the purpose of consuming more alcoholic beverages, but rather to wait in a safe place while taxis were called to take them home and so as not to disturb the neighbourhood by waiting outside. It was the evidence on behalf of Empress that the bottles and glasses seen by the police were simply those which had been left in place earlier in the evening. On the other hand, the evidence of the police included that of one officer who indicated that he viewed a female individual drinking from a long-necked tall brown bottle. However, the evidence given on behalf of Empress was that only clear "Corona" bottles of beer had been served when they had been drinking earlier the previous evening. In other words, there was a considerable conflict in the evidence.

[8] The adjudicator accepted the evidence of the police over that of the witnesses of Empress and concluded that what had been going on when the police arrived on the scene was the continuation of a party at which alcoholic beverages were being consumed beyond the hours of operation permitted in the licence and that intoxicated persons had been allowed to remain in the premises.

[9] An individual responsible for pursuing the investigation had recommended as penalties that the establishment be closed four business days for each of the two contraventions. The range of penalty available to the adjudicator, for what were regarded for the purposes of the hearing as two first offences, was between four and seven days if she chose to impose a penalty involving a closure of the premises. However, given the history of contraventions involving Empress as licensee, although perhaps committed by third party operators such as Barswest, the General Manager directed that a penalty of seven days for each infraction be sought. That is what the adjudicator imposed.

III. DISCUSSION

1. Standard of Review and Standard of Proof

[10] The standard of review for the adjudicator's interpretation of the law is that of "correctness". The standard of review for questions of mixed fact and law is "reasonableness". (See ***532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*** (2005), 43 B.C.L.R. (4th) 293, 2005 BCCA 416, rev'g 25 B.C.L.R. (4th) 353, 2004 BCSC 127 [***The Urban Well SC***]).

[11] The standard of proof to have been applied by the adjudicator with respect to each contravention was proof on a balance of probabilities. (See ***Aztec Properties Co. (c.o.b. Bimini Neighbourhood Pub) v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2005 BCSC 1465).

2. Adjudicator's Interpretation of s. 44(3) of the *Regulation*

[12] Section 44(3) of the ***Regulation*** provides:

> Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licenced establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

[13] As best I can determine from the argument presented on this review, the position of Empress is not so much that the adjudicator erred in her interpretation of this section, but rather that the evidence did not establish a contravention of the section. Ms. Tonge, on behalf of Empress, stressed the decision of Mr. Justice Pitfield in ***Urban Well SC***, where he held that, in the review under consideration before him with respect to the finding by an adjudicator of a contravention of intoxication (at ¶85), the evidence:

> … did not provide the basis from which a trier of fact, properly instructed and acting reasonably, could be sure that the patron was intoxicated and the *actus reus* was not proved beyond a reasonable doubt.

As a result, he concluded, there was no need for an explanation of due diligence by the licensee in the circumstances before him.

[14] While conceding that the standard of proof to be applied by the adjudicator was, in fact, the balance of probabilities, Ms. Tonge argued that, given the seriousness of the consequences, it was incumbent on the General Manager to demonstrate a higher level of proof on a balance of probabilities rather than simply a "mere balance of probabilities". For this she also relied on ***Whistler Mountain Ski Corporation v. General Manager, Liquor Control and Licensing Branch*** (2002), 43 Admin. L.R. (3d) 294, 2002 BCCA 426 [***Whistler Mountain***]. Ms. Martorana, for the General Manager, disputed this interpretation of ***Whistler Mountain*** and Ms. Tonge's suggestion that there should be different levels of proof within a balance of probabilities.

[15] It has been suggested that, in certain circumstances, the evidentiary burden of proof within the balance of probabilities should be higher than "a mere balance of probabilities". For example, in ***Jory v. College of Physicians and Surgeons of British Columbia***, [1985] B.C.J. No. 320 (QL) (S.C.), Madam Justice McLachlin, as she then was, found that the standard of

proof for a case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence, that is, something more than a mere balance of probabilities. Proof in such cases requires clear and cogent evidence. However, as noted by Mr. Justice Blair at para. 22 of ***Zodiac Pub v. General Manager, Liquor Control and Licensing Branch***, 2004 BCSC 96 [***Zodiac***], the application of a higher standard of proof within the umbrella of a balance of probabilities is restricted to situations in which the administrative authority is considering cases such as those involving professionals in disciplinary hearings. As well, Mr. Justice Blair went on to observe, at paras. 23 and 24 of ***Zodiac***:

> [23] In ***B.S. v. British Columbia (Director of Child, Family and Community Services***, (1998) 160 D.L.R. (4th) 264, (B.C.C.A.), Lambert J.A., at ¶26, wrote that the standard of proof in child protection cases is on the balance of probabilities, but added:
>
> > Sometimes, in applying that standard, the seriousness of the allegation being made is thought to require a higher and more particularized measure of confidence on the part of the decision maker that the balance of probability test has been met.
>
> [24] Although the situation in which Zodiac finds itself bears financial consequences with penalties of $5,000 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 v. British Columbia (Liquor Control and Licensing Branch)*** (1994), 51 B.C.A.C. 6] from the divestiture of a liquor licence.

[16] In my view, the circumstances of this case do not dictate that the General Manager had to make out her case against Empress on other than the normal balance of probabilities test of: "is it more probable than not that A occurred".

[17] Having said that, with one exception which I will deal with shortly, it cannot be said that the adjudicator made any reviewable error in the manner in which she conducted the inquiry nor in the manner in which she assessed the evidence. There was evidence before her (some fairly strong evidence if I may say so) from which she could have concluded, as she did, that persons were being allowed to consume liquor in The Standard at approximately 3:45 a.m. on the morning of November 24, 2004. That was clearly beyond one-half hour after the time stated on Empress' licence.

[18] Section 43(2)(b) of the ***Act*** provides:

> (2) A licensee or the licensee's employee must not permit
>
> …
>
> > (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

[19] There was ample evidence before the adjudicator from which she could determine that an intoxicated person (in fact more likely multiple intoxicated persons) had been permitted to

remain in the establishment.

3. Failure to Properly Consider All Evidence or Application of an Inappropriate Standard of Proof

[20] Although listed last in the grounds for review stated in the petition, it is convenient to deal next with the allegation that the adjudicator failed to properly consider all of the evidence. I have already noted earlier that I am satisfied that she applied the correct standard of proof, the balance of probabilities.

[21] The adjudicator did err when she concluded, at page 9 of her reasons, that: "I note that the owners did not deny to the police that staff were consuming". Although the evidence before her demonstrated that one officer had not received such a denial, there was evidence before her from a Mr. Ryan Moreno that Sergeant Steve Cara, one of the police officers, had asked if they were drinking and that Mr. Moreno had replied: "we said, no". However, Sergeant Cara had indicated in his evidence that Mr. Norman Jones, when asked, did not deny that liquor was being served after hours.

[22] It is unclear to me whether the adjudicator overlooked the evidence of Mr. Moreno or considered it but rejected it.

[23] Having said that, and in light of having reviewed both the decision of the adjudicator and substantial portions of the evidence before her that I was referred to by counsel, it is my view that, even if the adjudicator had acknowledged the evidence of Mr. Moreno with respect to his denying that liquor had been served, the adjudicator would not have come to any different conclusion on the evidence before her. I am also satisfied that she conducted her adjudication "… in a judicial spirit and in accordance with the principles of substantial justice" (Lord Parmoor in ***Local Government Board v. Arlidge***, [1915] A.C. 120 at 140, as cited at paragraph 29 of ***Kane v. University of British Columbia***, [1980] 1 S.C.R. 1105).

[24] Ultimately, I must consider whether, upon a reconsideration of her error, in the face of the evidence before her and the reasoning in her decision, there is any real possibility of her coming to another conclusion. In this case, I have determined that there is not. The granting of relief upon judicial review is discretionary and the tribunal's decision should not be quashed if its decision would not have been any different had the error not occurred. (See: ***Whitelaw v. Vancouver (City) Commissioners of Police*** (1973), 35 D.L.R. (3d) 466 (B.C.C.A.); and ***Islands Protection Society v. British Columbia (Environmental Appeal Board)*** (1988), 34 Admin. L.R. 51 (B.C.S.C.)).

4. Due Diligence

[25] Empress complains that the adjudicator found that the defence of due diligence was not available to Barswest or Empress. Specifically, she concluded her discussion on due diligence by finding:

> Accordingly, I find the defence of due diligence is not available either to Barswest or to the licensee.

However, a consideration of the whole of the discussion concerning due diligence in the decision of the adjudicator makes it clear that, by that statement, she was rejecting the defence of due diligence as having been made out; she was not rejecting the availability of the defence to Barswest or Empress. In fact, she started her discussion of due diligence with the following statement:

> It is well accepted that the defence of due diligence applies to contraventions under the ***Act***.

[26] What the adjudicator observed, quite properly, was that the approach to due diligence taken by Empress in the hearing before her was "unique". That is, rather than being directed to what would commonly be considered a defence of due diligence (steps taken to prevent the type of conduct complained of) the evidence was directed toward the "diligence" of management in inviting the employees into The Standard after returning from Vancouver to ensure that they did not disturb the neighbours, drink and drive, and so that the staff would be safe. She properly observed that this was not what the defence of due diligence was all about. In any event, she had already rejected the explanation of Empress that the employees had returned to The Standard for these purposes and accepted that, rather, the purpose had been to resume the party that had commenced there and had then continued in Vancouver.

[27] The adjudicator made no error with respect to her consideration of the defence of due diligence.

5. Failure to Consider the Lack of Enforcement History of Barswest

[28] The problem for Barswest as a result of this proceeding is that, although it does not itself have any previous infractions (or "compliance history"), it holds a licence from Empress, which does. Necessarily, the General Manager must deal with the holders of Liquor Primary Licences on the basis that they, as licensees, will be responsible for what goes on in their premises. Otherwise, the notion of compliance history would be meaningless. Every time a third party operator was found to have contravened a section of the ***Act*** or the ***Regulation***, a new individual or corporate third-party operator without a compliance history could simply be put into place. It is perhaps unfortunate for Barswest that its business arrangements are with Empress, who have a compliance history. However, it was entirely correct for the adjudicator to take into account the compliance history of Empress, the licensee, because this proceeding was brought by the General Manager against Empress as licensee. If the compliance history of Empress causes a problem as between Barswest and Empress, that should be sorted out between them; it is of no concern to the adjudicator.

[29] The adjudicator made no error in treating both of these contraventions as first offences but, nevertheless, in view of the history of contraventions, imposing suspensions at the highest end of the range prescribed by the ***Regulation***. That range is between four and seven days, and the adjudicator did not err by imposing penalties of seven days for each contravention.

6. Failing to Consider There was no Public Safety Issue

[30] In my view, it was not necessary for the adjudicator to specifically find that public safety was at risk as a justification for exercising her discretion to impose a penalty at the higher end of the permitted range. Certainly, voluntary compliance is a legitimate objective of the ***Act*** and, in any event, it cannot reasonably be suggested that public safety is not an issue where intoxicated persons are consuming alcohol in licenced premises at 3:45 a.m., well after licensed hours so permit, even if the individuals involved are all management and staff of the establishment.

IV. CONCLUSION

[31] For the reasons stated above, the application for Empress for judicial review of the decision of the adjudicator is dismissed. The General Manager is entitled to the costs of defending this application on Scale 3.

"T.J. Melnick, J."
The Honourable Mr. Justice T.J. Melnick