IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Small House Ventures Inc. d.b.a. Lucky Bar v. The General Manager, Liquor Control and Licensing Branch,*** 2006 BCSC 1792

Date: 20061213
Docket: 063390
Registry: Victoria

Re: Judicial Review Procedure Act and the Liquor Control and Licensing Act

Between:

Small House Ventures Inc. d.b.a. Lucky Bar

Petitioner

And

The General Manager, Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Halfyard

Reasons for Judgment

Counsel for the petitioner: G. Harney

Counsel for the respondent: J. Penner

Date and Place of Hearing: October 27, 2006
Victoria, B.C.

Introduction

[1] This is an application by the petitioner for judicial review of the decision of an adjudicator

made on May 25, 2006 under the authority of the *Liquor Control and Licensing Act*. The adjudicator found that the petitioner had committed two offences on October 1, 2005. The first offence was failing to request two pieces of identification from a person appearing to be under the age of 25, before allowing that person to enter the petitioner's licensed establishment, contrary to s. 45(2) of the Regulations made under the *Act*. The second offence was supplying liquor to a minor, contrary to s. 33(1)(a) of the *Act*.

[2] The petitioner's defence to the charges was that it had exercised due diligence to prevent the occurrence of the contraventions. The adjudicator found that the defence had not been proved.

[3] The adjudicator decided that the petitioner should be penalized, and imposed a $1,000 fine for the first offence, and a $5,000 fine for the second offence.

[4] The petitioner seeks an order quashing the decisions as to guilt and penalty, pursuant to s. 2 of the *Judicial Review Procedure Act*. In the alternative, the petitioner claims an order setting aside the decisions, and remitting the case back to the Liquor Control and Licensing Branch for rehearing before a different adjudicator, pursuant to ss. 5 and 6 of the *Judicial Review Procedure Act.* The petitioner also claims costs.

Facts

[5] I will first summarize the essential facts which are undisputed.

[6] The petitioner owns and operates a bar on Yates Street in downtown Victoria, known as the Lucky Bar. It is a licensed establishment authorized to serve liquor to persons who are aged 19 years and older. Only persons who are 19 or older may lawfully enter the bar.

[7] In 2005, the Victoria police department, in conjunction with the Liquor Control and Licensing Branch and the Victoria Bylaw Office, decided to conduct an undercover operation "to determine if minors in the community were being served liquor in licensed establishments in the City of Victoria." (decision of the adjudicator, page 2).

[8] A 17 year old female and a 20 year old female auxiliary police officer were selected to be the undercover operatives. The 17 year old was 5'11" tall and weighed 170 lbs. She was given false identification documents which stated that she was over 19 years of age, but which contained physical descriptions that did not match her actual physical appearance.

[9] In the early morning of October 1, 2005, the two female operatives went to the entrance of the Lucky Bar and sought admission, together. There were two doormen at the entrance. There was a sign over the entrance door indicating that two pieces of identification were required for entry to the bar. The lighting at the entrance area was good. One doorman asked the 20 year old operative for two pieces of identification, and she presented two genuine identification documents and was allowed to enter. A second doorman asked the 17 year old operative for identification, and she showed him a false driver's licence which gave her age as being 21. The doorman did not ask her for a second piece of identification, but permitted her to enter the premises. The 20 year old operative paid the cover charge for both of them. Inside the bar area, the lighting was dim and it was very crowded. The two operatives went to the bar. The 17

year old asked the bartender for a Corona beer, and the 20 year old operative also ordered a Corona beer. The bartender took the caps off two bottles of Corona beer and placed one of them in front of each of the two operatives. The 20 year old operative paid for both bottles of beer. About 10 minutes later, the two operatives left the Lucky Bar.

[10] Some people who had previously met the 17 year old operative thought she was older than her actual age. She was taller than most of the people in the bar on the early morning of October 1, 2005. In the opinion of the 20 year old operative, the 17 year old girl appeared to be older than 17 years. Mr. Kindrat, the principal of the petitioner, saw her at the hearing, and expressed the opinion that she looked at least 21.

[11] The petitioner was not notified of the alleged contraventions until October 21, 2005. By then, the doorman and the bartender had no recollection of the relevant events. There were meetings between the petitioner and the enforcement officer. Eventually the officer formed the opinion that the petitioner had not exercised due diligence to prevent the contraventions. He recommended that charges should be laid, and formal proceedings were instituted.

[12] A hearing was held before the adjudicator on May 11 and 12, 2006, and witnesses were called by both sides. As mentioned, the petitioner defended against the charges by advancing the defence of due diligence. It was acknowledged that the doorman had failed to request two pieces of identification from the 17 year old operative. It was not formally admitted that she appeared to be under the age of 25, but the adjudicator made that express finding (decision, page 17). The petitioner admitted that, in serving the 17 year old operative a Corona beer, its bartender had supplied liquor to a minor. It is apparent that, if the defence of due diligence was rejected, findings of guilt were inevitable. The proceedings before the adjudicator were not recorded by a court reporter, or by audiotape recording.

[13] The adjudicator issued his decision on May 25, 2006. This petition was filed on July 27, 2006.

The Legislative Scheme

[14] The *Liquor Control and Licensing Act*, and the Regulations made thereunder, give the general manager jurisdiction to decide whether licensees have contravened the *Act* or the Regulations, whether any penalty should be imposed for such contravention, and the kind and amount of such penalty. The general manager is also authorized to delegate this power to an adjudicator. No objection is made with respect to these jurisdictional requirements.

The Alleged Offences

[15] Section 33(1)(a) of the *Act* states as follows:

> A person must not
>
> a) sell, give or otherwise supply liquor to a minor . . .

Section 45(2) of the Regulations states:

> A licensee must request two pieces of identification from any person appearing to be

under the age of 25 before

a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed or

b) selling or serving liquor to the person.

Grounds for Review

[16] The general complaint made by the petitioner is that the adjudicator erred in law and in fact, in the "exercise of a statutory power of decision" which he possessed. It is common ground that the decision of the adjudicator was "a decision made in the exercise of a statutory power of decision", and thus subject to review under the *Judicial Review Procedure Act*.

[17] The petitioner asserts that the adjudicator erred in failing to accept the defence of due diligence. I would paraphrase the specific allegations of error in this way:

a) the adjudicator erred by misapprehending the evidence relating to an aspect of the petitioner's policy for requesting identification documents.

b) the adjudicator erred in law in holding that s.45(2) of the Regulations required both the petitioner's doorman and its bartender to request two pieces of identification from the 17 year old operative.

c) the adjudicator erred in applying a test for due diligence that was wrong in law.

The Evidence of Due Diligence

[18] The adjudicator made some express findings of fact, but his express findings were not comprehensive (see pages 17 – 20 of the decision). However, the adjudicator summarized the evidence given by the witnesses in point form, and the credibility of the witnesses was not an issue. The evidence relied on by the petitioner to establish due diligence was given by Dave Kindrat (the principal of the petitioner), the petitioner's manager of the Lucky Bar, the doorman who allowed entry to the 17 year old female operative, and the bartender who served a beer to her. I find it convenient to set out the evidence given by these witnesses, as summarized in point form by the adjudicator at pages 11 – 14 of the decision. That evidence is as follows:

[19] The evidence of Dave Kindrat:

- Lucky Bar is not interested in catering to under-age patrons or even to 19-23 year old legal patrons.
- "Because Lucky's is so small, we have a lot of control over what kind of people are in that room. We are not fishing with a large net. On slow days, even though there are only 50-60 [patrons] in there, we still get to choose who we want. We don't care if you are going to be upset about getting ID'd."
- "Before I purchased the bar I knew the doorman and the bartender and the

manager and when I purchased it I asked if they would stay. They are both experienced and competent."

- Staff meetings are held four times per year, plus one annual meeting.
- Accountability agreements were in place for all employees when he got there. He up-dated them, but they remained in place.
- Bartenders and door personnel are instructed about requiring two pieces of ID constantly.
- "Minors are not much of an issue for us because rarely are 19 year olds wanting to come to our bar. It may be our advertisements or the music or whatever, but on any given day it is not likely they will want to get in."
- The 51 pieces of ID that they confiscated were from more than one year of checking.
- "I would have guessed MK was older than the handler. I would have guessed 21 years at least, but not 30."
- The bar has a policy of checking for ID for anyone not appearing 30 years old.
- Since October 1, 2005, he has tightened up the procedures further by implementing a staff exam and a "secret shopper" program.
- He has been to "Good Neighbour" meetings and talked with the inspector about help with compliance in the past.
- The doorman was suspended for failing to check ID. "We talked to him and the bartender about it."

[20] The evidence of the manager of Lucky Bar:

- He has been in the liquor service industry for 14 years.
- His policy at Lucky Bar is "110% compliance."
- The bar does not target young patrons. It is primarily an event venue and is known as a "graduate bar".
- The doormen are carefully chosen and very well trained.
- The doorman who failed to check two pieces of ID that night was well trained and is diligent. He cares about doing a good job and routinely turns away people who do not produce ID as required.
- The establishment offers no discretion to its employees to deviate from the rules.
- The bartenders are instructed to check ID if they are unsure of whether the patron appears under 30.

- The receipt of the contravention was a disappointment. The systems failed. He is dismayed and is motivated to improve the measures to ensure compliance.
- The staff accountability agreements have been up-dated and are used regularly.
- There are published door responsibilities lists. He identified them as being those at tab 8, Exhibit No. 1.
- He reviewed the obligations of the published lists with the doorman in question after the event.
- He indicated that they keep minutes of meetings in which ID is regularly discussed. He identified those minutes as at tab 8 of Exhibit No. 1.
- Drink prices are not cheap at Lucky Bar. The bar competes with service and calibre rather than price, and that keeps the younger patrons away.
- The doorman was suspended for a week without pay after the event and put on probation. He was retrained, and they revisited accountability statements together and had the doorman sign-off on them again. He was reprimanded.
- The employee tests were not in place at the time of the contravention but were put in place shortly afterward as a result of the suggestions of the C & E officer.
- "The bartender was reprimanded but not suspended. He should have caught [the minor] but it would be hard to punish him for that. It is his secondary responsibility - the doorman made the more serious mistake."
- After the contravention, the new tests were put into the policies and "the employees have to sign-off on them too."

[21] The evidence of the doorman at the Lucky Bar:

- He has worked as doorman at the Lucky Bar for 22 months as of October 1, 2005.
- He had previous experience as a doorman and was trained by Lucky Bar and his previous employer.
- He knows the rules, including the requirement to check two pieces of ID from anyone appearing under 25 years of age.
- He signed the accountability agreements at Lucky Bar and understood his obligations.
- He believes he is to check ID from anyone appearing under 30, and then get a second piece of ID if the ID shows they are under 25. "If they are less than 25, I absolutely have a second piece, if 30, I ask usually for a second piece."
- He attends all staff meetings several times each year.
- He knows he has no discretion to deviate from the rules.

- He has been retrained, reprimanded, and examined since the incident.
- He has no recollection of the particular minor but understands that he "got it wrong and was put on probation and suspended as a result."
- "I have accepted responsibility for the incident. It was not anyone else's mistake. It seems pretty obvious about that. I can't imagine what I was thinking at the time. The fact that the minor was served liquor in the bar was my responsibility - the door staff is the first line of defence."
- "There was a different approach taken after the suspension… more intensive and more of a rehashing and with more scrutiny."

[22] The evidence of the bartender at the Lucky Bar:

- He was originally trained as a doorman at Lucky bar and became a bartender in 2003.
- There is a small meeting before each shift and large ones three or four times per year.
- In the big meetings, the staff goes over the policies and procedures and review the accountability agreements and ID policies.
- He was trained to ask for two pieces of ID from anyone appearing under 30. That is the bar's policy.
- "As a bartender, my job description includes not serving minors."
- "I ask for ID if they appear under 30, or if I am not sure. Then if they are of age, I can serve them. If they produce one piece and they are under 25, I ask for another one. It happens every shift."
- He does not remember the incident, but acknowledges that it is his job to ask for ID if a patron appears to be under 30 years of age.

[23] In addition to the testimonial evidence, the petitioner presented voluminous documentary evidence to support the defence of due diligence.

The Standard of Review

[24] It was common ground that the standard for review for alleged errors of law, is correctness; and that for alleged errors of fact and mixed law and fact, the standard is reasonableness.

The First Ground

[25] The petitioner alleges that the adjudicator misapprehended the evidence concerning the

petitioner's policy (and thus found a defect in that policy), in this passage from his decision (at pages 17-18):

> The evidence establishes that the licensee had a stated policy of checking for I.D. if a person appeared to be under 30 years of age. The testimony of the doorman and the bartender confirm an irregularity: a single piece of I.D. is requested if the patron appeared under 30 years of age, and then a second one if the identification indicated an age of less than 25 years. As the Regulation states that two pieces of I.D. are required if the patron appears under the age of 25, the evidence suggests a potential flaw in the licensee's policy. If the patron appears to be under 25, but the first piece of I.D. establishes her age as greater than 25, she would not be asked to produce a second piece of I.D. as is required by law.

[26] The evidence as to policy which was given by the owner and the manager of the bar (as summarized by the adjudicator) did not distinctly state that employees must always request two pieces of identification from any person appearing to be under the age of 25 although this seems to be implicit in their testimony about using the standard of 30 years of age, rather than 25. But the adjudicator's summary of the doorman's evidence plainly stated that he knew he was supposed to "check two pieces of I.D. from anyone appearing under 25 years of age." The adjudicator did not reject that evidence. The evidence given by the doorman and the bartender (as previously summarized by the adjudicator), is somewhat unclear as to their practice concerning persons who appear to be under 30. I am uncertain whether the witnesses were referring to a class of persons who not only appear to be under 30, but also appear to be under 25. It may have been open to the adjudicator to find that the bartender had failed to correctly understand and follow the petitioner's policy. But having regard to the evidence given by the doorman, and in the absence of any rejection of his evidence, I do not think it was reasonable for the adjudicator to find "a potential flaw in the licensee's policy." In any event, the "potential flaw" referred to by the adjudicator could have no significance in the context of the present case, absent findings that the petitioner's policy actually contained the potential flaw identified by the adjudicator, and that this flawed policy was taught to the petitioner's employees. No such findings were made by the adjudicator, and in view of the documentary evidence, I do not think such a finding could reasonably have been made.

[27] In one respect, the adjudicator's treatment of this evidence could be characterized as being a misapprehension of the evidence. However, I am not persuaded that the adjudication relied on this "potential flaw," in concluding that the petitioner's policy was inadequate. I think the "flaw" he detected was the petitioner's failure to supervise its employees, not a failure to properly instruct them on their legal obligations.

The Second Ground

[28] The petitioner asserts that the adjudicator committed error of law as to the meaning of s. 45(2) of the Regulations, in the following passages of his decision:

> I find on the evidence that the licensee had two occasions on which it was obligated

> by regulation to check for two pieces of identification: upon M.K. presenting to the doorman for admission to the bar, and upon requesting a beer of the bartender.
>
> (page 17)
>
> . . .
>
> Both the doorman and after M.K. was allowed admission, the bartender, were obligated to request two pieces of identification from M.K. The evidence is uncontraverted that neither one of the employees did so.
>
> (page 18)

[29] The petitioner argues that in using the disjunctive word “or” between paragraphs (a) and (b), the legislature intended that the request for two pieces of identification from any person appearing to be under the age of 25, need only be made before allowing the person to enter any licensed establishment in which minors are not allowed to enter. It is contended that, if this procedure is followed at the entrance of licensed establishments such as the Lucky Bar, then the legal obligation has been met, and there is no need for any bartender or server inside the premises to repeat the procedure. It is acknowledged that, by reason of s. 33(1)(a) and s. 35 of the *Act*, the petitioner and the bartender had the legal obligation not to serve liquor to any person under the age of 19, and not to permit such persons to remain in the bar.

[30] Counsel for the petitioner submits that the ordinary disjunctive meaning of the word “or” should be adopted. He says the Legislature could not have intended “or” to be conjunctive in s. 45(2), because such interpretation would lead to a double obligation, which is both unnecessary and unreasonable. Counsel said that interpretation would require bartenders to request two pieces of identification from every patron who appeared to be under 25, repeatedly, because patrons often move around inside the bar, bartenders would be unable to remember who was who, and often more than one bartender or barmaid would be serving drinks. It was also contended that this checking would require bartenders or barmaids to take such patrons to a well-lit area, because the lighting in bars is generally dim. Counsel suggested that the interpretation proposed by the respondent would thus impose legal obligations on licensees that are unreasonable, impracticable and unduly onerous in practice.

[31] Counsel for the respondent concedes that the ordinary meaning of the word “or” is disjunctive. But he argues that, in s. 45(2) of the Regulations it is intended to have a conjunctive meaning. He submitted that, on reading the section in its proper context, the request for two pieces of identification must be made “before” doing each of the two things proscribed, i.e., allowing entry and serving liquor. It was said that this interpretation would be consistent with the purpose of the liquor laws, and the “evil” they seek to remedy.

The Law

[32] The fundamental rule of statutory interpretation is that

> . . . the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*,

and the intention of Parliament.

See ***Re Rizzo and Rizzo Shoes Ltd***., [1998] 2 S.C.R. 27 at paragraph 21; ***Bell Express Vu Limited Partnership v. Rex,*** [2002] 2 S.C.R. 559 at paragraph 26; ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City),*** [2004] 1 S.C.R. 485 at paragraph 8.

[33] In construing provincial enactments, the court must in all cases have regard to s.8 of the *Interpretation Act* of British Columbia, which requires legislation to be interpreted so as to "best ensure the attainment of its objects." See ***Haida Nation v. Minister of Forests*** (1998), 45 B.C. L.R. (3d) 80 (C.A.) per Esson, J.A. at paragraph 16. The *Interpretation Act* is consistent with the fundamental rule of statutory construction established by the case law.

[34] It follows that, when a question arises as to the meaning of words used in a statute or regulation, there is a presumption that the legislature intended the words to be read as having their plain and ordinary grammatical meaning. I think the method for determining whether this presumption should prevail or be rebutted, is apparent from the speech of Lord Atkinson in ***Victoria (City) v. Bishop of Vancouver Island*** [1921] A.C. 384 at 387, where he states:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

[35] Mr. Justice Esson, at paragraphs 9 and 10 of ***Haida Nation v. Minister Forests***, adopted this statement of Lord Atkinson as being an alternate way of stating the fundamental rule of statutory interpretation. Esson J.A. also expressed the opinion that the context in which the disputed words appear include the immediate context of the specific section or subsection, as well as the general context of the whole enactment.

The Application of the Law

[36] It is not in dispute that, in its ordinary grammatical sense, the word "or" has a disjunctive meaning. Accordingly, I think the plain and ordinary meaning must be adopted, unless it is shown that there is "something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that" that the word "or" was used in a special sense, different from its ordinary grammatical sense.

[37] I repeat s. 45(2) of the Regulations here, for convenience:

> A licensee must request two pieces of identification from any person appearing to be under the age of 25 before
>
> (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed or
>
> (b) selling or serving liquor to the person.

[38] If the word “before”, instead of being put at the end of the opening phrase of ss.(2), had been placed at the beginning of paragraph (a), and again at the beginning of paragraph (b), there could be no argument about what meaning was intended. In that case, it would be clear that the identification checking need only be done once. That meaning would have been even more clearly conveyed, if the words “if the establishment is one in which minors are allowed” were added to paragraph (b).

[39] However, in my opinion, there is nothing in the context, either immediate or general which indicates that the word “or” should be read as if it was “and”.

The requirement set out in paragraph (a) is expressly restricted to licensed establishments “in which minors are not allowed,” whereas paragraph (b) has no express restriction as to the kind of licensed establishment being referred to. But in my view, because the word “or” is used to separate the two paragraphs, the words “the person” in paragraph (b) are only intended to refer back to “any person appearing to be under the age of 25” in the introductory part of s.45(2). As I see it, the context does not suggest they are intended to also refer to “the person” in paragraph (a).

[40] The respondent did not advance the argument that s. 45(2) could reasonably bear more than one meaning. It was contended that the requirement for “double-checking” all persons appearing to be under the age of 25 was the only meaning that it was reasonably capable of bearing. The main focus of the argument of counsel for the respondent was that, if the word “or” is given its plain and ordinary disjunctive meaning, then that would be inconsistent with the purpose and object of the liquor legislation, and would not promote avoidance of the evil sought to be remedied by it.

[41] The object of this particular legislation is to prevent persons under the age of 19 from entering some licensed establishments, and from being served liquor in any licensed establishment. All licensed establishments, whether they be the kind which permit minors to enter or not, are required to take steps designed to ensure that liquor is not sold or served to minors (i.e., by requesting two pieces of identification from any person appearing to be under the age of 25). That is the method chosen by the law-maker to achieve this object. It seems to me that the method is based on the hidden premise that persons who appear to be over 25, will be at least 19 years of age. That explains why there is no obligation to request any proof of age, from persons who appear to be 25 or older. But when a person is asked for two pieces of identification, the person will not be permitted to enter without first proving that he or she is 19 years of age, or older.

[42] Judging the age of a person from his or her “appearance” involves a subjective assessment, to a significant extent. A bartender or server might be of the opinion that the doorman had allowed entry to a person who appears to be under the age of 25. Yet the person will already have proved to the doorman that he or she is 19 or older, assuming the doorman also believed the person appeared to be under 25.

[43] If bartenders and servers also had a legal obligation to require proof of age by all persons appearing to them to be under 25, there could be many instances in which the age-checking procedure would be needlessly repeated. Such a requirement could also offend

patrons who had already conclusively proved that they were 19 or older. In my opinion, the law-maker would not have intended such a result.

[44] I can think of only one good reason why a bartender or server in a licensed establishment such as the Lucky Bar should be required by law to double-check the age of any person who has been allowed entry by a doorman. The exception, to my mind, would be where the bartender or server is of the opinion that a patron is under 19 years of age, and believes that the doorman has made a gross error in allowing entry to the person. That obligation would be consistent with the law which prohibits selling or serving liquor to a minor.

[45] I am not persuaded that s. 45(2) can reasonably bear the meaning contended for by the respondent. I conclude that the law-making authority did not intend, in enacting s 45(2) of the Regulations, to require identification procedures for persons appearing to be under the age of 25, to be repeated after a person has been properly checked and allowed to enter the premises where liquor is served, nor did it intend to create an offence for failing to repeat this process inside the premises where liquor is served.

[46] In my opinion, in the case of licensed establishments to which persons under 19 are not even permitted to enter, the checking of identification documents must be done only before permitting entry to persons appearing to be under 25. In the other kind of licensed establishment, the identification checking must be done only before selling or serving liquor to persons appearing to be under the age of 25. It seems to me that this interpretation of the legislation would be consistent with the object of the legislative scheme, and would not result in the failure of the law to promote the purpose of the legislation, or fail to avoid the evil which the law is designed to prevent.

[47] Accordingly, it is my opinion that the adjudicator erred in his interpretation of s.45 (2) of the Regulations.

The Third Ground

[48] The petitioner submits that the adjudicator erred by applying the wrong legal definition of due diligence. It is argued that this error is apparent from the following statement of the adjudicator (at page 20 of the decision):

> The evidence of the doorman confirms that the licensee did not do all that it could prior to October 1, 2005, to prevent such contraventions from occurring. The management of Lucky Bar did alter its approach to compliance after the allegation . . . .

[49] Immediately before making this statement, the adjudicator made the following express findings:

> I find that such a system [i.e., the licensee's system for screening prospective patrons] should be capable of closer monitoring. There were three failures in the system involving two employees with respect to MK on October 1, 2005.

[50] The only other statements made by the adjudicator concerning the law relating to the defence of due diligence were the following (at pages 19 – 20 of the decision):

> Due diligence is a complete defence to the allegations if established on the evidence. . . .
>
> In examining the defence of due diligence, reference must be made to timing in two respects. The diligence must have been evident from systems and policies in place at the establishment at the time of the alleged contravention. This disentitles the licensee from claiming that actions taken in response to the alleged contravention are indicative of systemic diligence. The systems and policies must be scrutinized as of the moment of the contravention. . . .
>
> The diligence must relate to the occurrence on which the alleged contravention is based. The training and procedures followed by a bartender or server must be considered when assessing diligence related to the allegation of supplying liquor to a minor. The training and procedures followed by a doorman must be considered when assessing diligence related to the allegation of failing to request I.D. in accordance with the regulations, or allowing a minor to enter licensed premises. . . .
>
> The licensee provided a copy of the branch's Compliance Enforcement Desk Reference. It argued that the description of due diligence contained therein set a standard to which this adjudication must adhere. I disagree. Due diligence is a defence which may be raised by a licensee at an enforcement hearing. As indicated above, if found, it is a complete answer to the alleged contravention. The desk reference is not law. . . .

[51] The adjudicator did not articulate the essential elements of the defence of due diligence, nor did he refer to any legal authorities.

[52] The definition of the defence of due diligence in a case such as the case at bar, was stated by the Supreme Court of Canada in ***Regina v. Sault Ste. Marie (City),*** [1978] 2 S.C.R. 1299, in these words (at page 1331):

> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

[53] I infer that the adjudicator found that the petitioner had established that the actions of the doorman and the bartender took place without the petitioner's direction or approval, and that neither of those men were the directing mind of the petitioner. In order to establish due

diligence, it remained for the petitioner to prove on a balance of probabilities that it had "exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system." The adjudicator appears to have rejected the defence of due diligence on the ground that "the licensee did not do all that it could prior to October 1, 2005, to prevent such contraventions from occurring." In my opinion, he erred in law in doing so. As stated by Lamperson, J. in ***R. v. British Columbia Hydro and Power Authority***, [1997] B.C.J. No. 1744 (at par. 55), due diligence requires an accused person to take all reasonable steps to avoid the offence, not all conceivable steps.

The Effect of the Errors

[54] The petitioner has persuaded me that the adjudicator made three errors in reasoning to the conclusion that due diligence had not been proved. In my opinion, the petitioner must also establish that, if these errors had not been made, there is a reasonable probability that the adjudicator would have accepted the defence of due diligence.

[55] With respect to the inference drawn as to a "potential flaw" in the petitioner's policy, in my view it has not been shown that this error contributed to the adjudicator's rejection of the due diligence defence. As I see it, the adjudicator rejected the defence because he concluded that the petitioner's system for monitoring its employees was defective. The evidence he relied on in reaching that conclusion appears to have consisted of the evidence indicating that: "The management of Lucky Bar did alter its approach to compliance after the allegation . . . ." (decision, page 20) and his opinion that the petitioner's two employees had committed three contraventions, and not just the two charged.

[56] As to the error in interpreting s.45(2) of the Regulations, I note that the adjudicator made the following findings:

> Although there are only two alleged contraventions, the licensee actually failed to meet the standard of s.45(2) of the Regulation twice, in that neither the doorman or the bartender asked MK for two pieces of I.D. as required. (decision, page 19). . . .
>
> There were three failures in the system involving two employees with respect to MK on October 1, 2005. (decision, page 20).

[57] It seems to me that the adjudicator used the bartender's failure to ask the 17 year old undercover operative for two pieces of identification, as evidence to support his apparent conclusion that the petitioner had failed to institute a proper system for supervising its employees. The fact that the bartender committed a violation of s. 45(2) of the Regulations was irrelevant to the issue of due diligence, unless it was established that his conduct was caused or contributed to by the petitioner's failure to train him in a proper system, or its failure to supervise him adequately. The adjudicator did not make such a finding. The closest he came was in saying that the petitioner's system "should be capable of closer monitoring" (at page 20). It is my opinion that, if the adjudicator had not erred in his interpretation of s. 45(2) of the Regulations, there is a reasonable probability that he would not have concluded that the

petitioner's monitoring of its employees, was deficient. There was no suggestion in the evidence that the 17 year old operative appeared to be under the age of 19 years, and no charge was laid under s. 35 of the *Act*.

[58] This brings me to the error made by the adjudicator in defining the defence of due diligence. In applying the wrong legal test (i.e. whether the petitioner had done "all that it could"), the adjudicator required the petitioner to prove a fact that was not an essential element of the defence, and then rejected the defence when he found that fact had not been proved. As I see it, there is at least a reasonable probability that the adjudicator would not have rejected the defence of due diligence, if he had applied the correct legal test and had not made the other error I have described.

The Issue of What Remedy Should be Granted

[59] The petitioner submits that the proper remedy is to simply quash the decision of the adjudicator. The position of the respondent is that if the court decides the decision cannot stand, the case should be remitted back to the Liquor Control and Licensing Branch, for rehearing by a different adjudicator.

[60] In effect, counsel for the petitioner says that no reasonable adjudicator, properly instructed on the law and acting judicially, could reasonably conclude that the evidence failed to establish the defence of due diligence on the balance of probabilities. It is implicit in the argument of counsel for the respondent that the evidence could reasonably support that conclusion. It was further contended for the respondent that it was not open to this court to simply quash the decision of the adjudicator and that the only remedy available in law was to remit the matter for rehearing. I was referred to a number of authorities which were said to support this submission.

[61] Section 3 of the *Judicial Review Procedure Act* empowers the court to set aside "a decision made in the exercise of a statutory power of decision", on the ground of "error of law on the face of the record." It is no longer necessary for the error to have been made in deciding a jurisdictional issue. Section 2 gives the court power to grant the relief that the applicant would be entitled to on an application for certiorari. That relief has traditionally included quashing the decision of the tribunal. As I read sections 2 and 3, the court's power to quash a tribunal's decision is no longer limited to cases in which jurisdictional error is shown. The power to quash is also conferred in cases where the court concludes that the tribunal has committed error of law on the face of the record, in the course of making a decision which was within the tribunal's lawful jurisdiction to make.

[62] Counsel for the respondent referred me to the following authorities: ***Dennis v. British Columbia (Superintendent of Motor Vehicles)*** 2000 B.C.C.A. 653; 150 C.C.C. (3d) 544; ***Schindel v. British Columbia (Superintendent of Motor Vehicles)*** 2003 B.C.S.C. 914 (Vickers J.); ***Neill v. British Columbia (Superintendent of Motor Vehicles)*** 2005 B.C.C.A.; ***Plaza Caberet Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*** 2004 B.C.S.C. 248 (Pitfield J.).

[63] In the ***Dennis*** case, three adjudicators hearing reviews of the administrative suspensions of the driver's licences of the respondents under the *Motor Vehicle Act*, confirmed the suspensions. On application for judicial review, a judge of this court quashed the decisions of the adjudicators, and revoked the driver's licence suspensions. The Court of Appeal agreed with the chambers judge that the adjudicators had committed error, and that the decisions in each case should be set aside. But the court held that the chambers judge was wrong to revoke the suspensions. At paragraphs 25 – 27, speaking for the court, Madam Justice Saunders stated as follows:

> 25 Given the provisions of the Act, the usually remedy of quashing a decision will have the practical effect of reinstating the suspensions without according each respondent a hearing. This result generally should be avoided, and, in my view, the chambers judge was correct in declining this avenue. The question is whether he was correct in revoking the suspensions, rather than sending the matters back with directions for a new hearing.
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> 26 The appellant contends that there is no authority to support revocation of the suspensions, as the court cannot assume the function of the tribunal. While I consider that the appellant overstates the proposition, see for example, Renaud c. Quebec (Commission Day's Affairs Socialies), [1999] 3 S.C.R. 855 (S.C.C.), a court will only rarely make the decision which legislation assigns to the administrative tribunal. I do not consider this case to be one in which such a step should be taken.
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> 27 For these reasons, in the cases of Mr. Dennis and Mr. Morgan, I consider that the decision of the chambers judge to revoke the suspensions must be set aside. I would remit the matters back for a new hearing. It follows that the 21 day period from service of the notice of driving prohibition for each of those respondents is extended to the date of such hearing, and the driving prohibition stayed for the period of the extension. In the case of Mr. McKay, I would quash the decision of the adjudicator without remittance back to an adjudicator, on advice that he does not seek a new hearing.

[64] In the ***Schindel*** case, Mr. Justice Vickers heard a petition for judicial review of the decision of the Superintendent of Motor Vehicles which had confirmed an administrative driving prohibition. Vickers J. decided that the review conducted by the Superintendent was not in accordance with the principles of fundamental justice, and that the decision had to be set aside. He then dealt with the issue of the appropriate remedy and the argument of the respondents "that the only remedy available to the court is to order that the Superintendent rehear the matter." (paragraph 9). He concluded that the proper remedy was to order a new hearing, as was done in the ***Dennis*** case.) (paragraph 12). At paragraphs 15 – 16, Mr. Justice Vickers said this:

> 15 ***Renaud c. Quebec (Commission Day's Affairs Socialies)***, [1999] 3 S.C.R. 855 (S.C.C.), the court found that "the evidence in the record as a whole makes it impossible to arrive at any other conclusion than that the

> appellant meets the requirements of the definition of "spouses" in s. 1(7)(b) of the *Quebec Automobile Insurance Act*. As no other decision was possible, the decision of the Commission Day's Affairs Socialies was quashed. Because of the exceptional circumstances, namely, that no other decision could reasonably be made by the commission, the court made the decision that should have been made by the commission, to pay the compensation provided by the *Automobile Insurance Act*, together with interest, rather than sending it back for a rehearing. The distinction to be drawn is that as a matter of law there was only one decision that could be made as opposed to a decision that would require a trier of fact to reconsider the facts and make one or one or more decisions that might remain open after a fair consideration of all of the facts.
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> 16 In this case it is open to the superintendent on a consideration of all of the evidence to confirm or revoke the driving suspension: s. 94.6, *Motor Vehicle Act*.

[65] In the ***Neill*** case, a judge of this court quashed the decision of the adjudicator (which upheld the notice of prohibition), but the Court of Appeal held that the chambers judge had erred in finding that a fatal defect existed. In the course of his reasons delivered for the court, Mr. Justice Hall referred with approval to the reasoning of Vickers J. in the ***Schindel*** case. In the result, the court held that the petitioner had failed to establish that the decision of the adjudicator was unreasonable, and restored the decision of the adjudicator.

[66] In the ***Plaza Caberet Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch*** case, Mr. Justice Pitfield held that the general manager had erred in failing to consider the defence of due diligence, and remitted that issue back to the general manager. In my view, it is apparent from paragraphs 27 – 29 of the reasons that this remedy was ordered because the evidence presented at the hearing was capable of supporting the defence of due diligence. However, with respect to a different contravention, Pitfield J. held that the general manager had erred in finding that the petitioner had committed an offence unknown to the law. He concluded that this decision was patently unreasonable and ordered that the decisions on the issues of guilt and penalty be quashed (see paragraph 49).

[67] In ***Board of Education for Toronto v. Ontario Secondary School Teachers Federation***, [1997] 1 S.C.R. 487, the Supreme Court of Canada stated, in effect, that a decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not. (see paragraphs 44 – 45 and 48). In the case of ***Renaud c. Quebec (Commission Day's Affairs Socialies)*** which was mentioned in the authorities I have cited, the court stated that "the evidence in the record as a whole makes it impossible to arrive at any other conclusion" than that the appellant must succeed. The court described the contrary decision of the tribunal as being "patently unreasonable", and quashed the decisions under review. It appears that the court considered it to be an exceptional remedy for the court to make the decision that should have been made by the administrative tribunal.

[68] It appears that the adjudicator did not reject any of the evidence presented by the

parties. But he decided, in effect, that the facts asserted in the evidence were not sufficient to support the legal inference that the due diligence defence had been established on the balance of probabilities. He erred in law, in identifying the wrong legal test. He then erred in applying the wrong test to the facts. By reason of another error of law in the interpretation of the Regulation, the adjudicator took irrelevant facts into account. In light of the errors made, I am persuaded that the decision may be characterized as being unreasonable. But I think that, to justify quashing the decisions, rather than setting them aside and remitting the case for reconsideration, the petitioner must go further.

[69] In light of the authorities, I think the issue is whether the adjudicator's decision that the petitioner had failed to establish the defence of due diligence was not only unreasonable, but was patently unreasonable. Another way of stating the question is whether the evidence is incapable of supporting the conclusion that the defence of due diligence was not proved on the balance of probabilities.

[70] Counsel for the petitioner argued forcefully that no other inference could reasonably be drawn from the evidence than that the petitioner had proved the defence of due diligence. To strengthen this argument, counsel referred me to a considerable body of evidence which was presented at the hearing and favoured the petitioner's position, but which was not even mentioned by the adjudicator. Included in this evidence was a letter from a liquor inspector to the petitioner dated December 10th, 2003, commending the petitioner for demonstrating "full compliance with Regulation 45(2)" "by requiring two pieces of identification from two youthful agents employed by the Branch" on June 12, 2003. There was also considerable evidence of written instructions given by the petitioner to its employees, accountability agreements, and evidence of ongoing meetings with staff up to and including September 2005, showing that the petitioner continued to stress the importance of complying with the laws relating to minors.

[71] Had I been the adjudicator in this case, I might have concluded that the defence of due diligence had been made out. In my opinion, absent the errors described, there is a reasonable probability that the adjudicator would have accepted the defence of due diligence. However, I am not persuaded that this is the only conclusion that could possibly be drawn from the evidence in the record. For example, I think the evidence of the petitioner's changes in its monitoring methods following the contraventions, is admissible on the issue. The weight to be given to that, and the other evidence, should be for an adjudicator to decide.

Disposition

[72] Accordingly, I order that the case be remitted for rehearing before a different adjudicator. I would add that I did not find it helpful for petitioner's counsel to review previous decisions made by the present adjudicator, and to compare his previous decisions with those of other adjudicators on the issue of due diligence.

Costs

[73] The petitioner will have costs of this application at Scale 3.

"D.A. Halfyard, J."
The Honourable Mr. Justice D.A. Halfyard