

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Palomino's v. British Columbia (Liquor Control and Licensing Branch)***,
2007 BCSC 17

Date: 20070105
Docket: 06/2282
Registry: Victoria

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

Between:

**Palomino's The Rock'n Horse Cabaret Ltd.
dba Evolution Cabaret**

Petitioner

And:

**The General Manager,
Liquor Control and Licensing Branch**

Respondent

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:

G.N. Harney and P. Waller

Counsel for the Respondent:

J. Penner

Date and Place of Hearing:

20061103
Victoria, B.C.

[1] This is an application to quash the decision of an adjudicator appointed by the General Manager of the Liquor Control and Licensing Branch ("General Manager"). The

petitioner, Palomino's The Rock'n Horse Cabaret Ltd. (the "Cabaret") asks the court to quash the decision outright, or, in the alternative, remit the decision back to the Liquor Control and Licensing Branch (the "Branch") for a rehearing before a different adjudicator.

[2] The decision under review was handed down April 27, 2006 by an adjudicator appointed for that purpose by the General Manager. Neither the validity of that appointment nor the authority of the adjudicator to conduct the hearing has been questioned.

ISSUES RAISED BY PETITIONER

[3] The amended petition raises the following issues:

1. The adjudicator erred in holding that the Branch could take enforcement action against the Cabaret for supplying liquor to a minor after having elected not to proceed against the Cabaret for permitting a minor to enter the Cabaret without lawful excuse;
2. The adjudicator erred by misconstruing the evidence on the Cabaret's need to have its staff check identification once a person had passed the identification screening at the door and had been admitted to the Cabaret;
3. The adjudicator erred in relying on his own observation of the minor at the hearing to conclude that the minor appeared to be under the age of 25;
4. The adjudicator erred in permitting the hearing to proceed notwithstanding that the Cabaret had not been given an opportunity to persuade the General Manager to pursue alternatives other than the enforcement action;
5. The adjudicator failed to properly consider the defence of due diligence;
6. The adjudicator erred in applying a standard of absolute liability rather than strict liability;
7. The adjudicator erred by concluding that staff inside the Cabaret's establishment were obliged by regulation to request and check two pieces of identification from persons appearing to be under the age of 25;
8. The adjudicator erred by concluding that a four day suspension was the minimum penalty prescribed for serving a minor;
9. The adjudicator failed to consider all of the relevant evidence, or to draw the correct inferences and the adjudicator misapprehended and misapplied the evidence;
10. The adjudicator erred in dismissing a defence of due diligence in seven other hearings involving seven other licensees;
11. The decision of the adjudicator was unreasonable and the evidence as a whole was not properly considered by the adjudicator or weighed against the correct test for liability.

BACKGROUND

[4] The Victoria City Police, together with Branch personnel and a representative of the Victoria Bylaw Department, initiated a project to test compliance with the law prohibiting

service to minors by licensed establishments. They obtained the services of a 17 year old female who was instructed to attempt to enter licensed premises in the City of Victoria and, if admitted, to obtain liquor. This project took place on two days, September 30 and October 15, 2005.

[5] M. K. participated in the investigation with the informed consent of her parents. She was at all times accompanied by a 20 year old police reservist, and was observed by nearby Branch investigators, as well as plain clothes members of the Victoria City Police department.

[6] M. K. testified that she was 5 feet 11 inches or 180 cm tall, 170 pounds or 77.1 kgs in weight, with brown eyes and brown hair. The Victoria City Police provided her with the drivers license and other identification belonging to another female who was described in the identification as 165 cm or 5 feet 5 inches tall, 130 pounds or 59.1 kgs in weight, with blue eyes and brown hair. The Victoria City Police officer who chose the false identification for M. K. said that he deliberately selected identification of a person who so little resembled M. K. that it should have been easy for establishments to either turn her away or refuse to serve her liquor.

[7] On October 15, 2005 M. K. and the police member reservist, described as her "handler", went to the Cabaret's establishment. M.K. was asked for identification at the door, and she presented the false driver's licence with which she had been supplied. The doorman looked only at the face of the driver's licence and allowed M.K. to enter the Cabaret's establishment. Once inside, M. K. approached the bar, ordered beer, and was served. The bartender did not question M. K., nor did the bartender request or examine identification.

[8] Sub-section 33(1)(a) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996 c. 267, provides:

- 33** (1) A person must not
- (a) sell, give or otherwise supply liquor to a minor,

...

[9] Sub-section 35(b) of the *Act* says that:

- 35** A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except ...

...

- (b) with lawful excuse ...

[10] The Cabaret conceded before the adjudicator, and on this application, that its bartender had served liquor to a minor, M.K., on October 15, 2005. It was common ground that liability, if any, for serving liquor to a minor was strict rather than absolute. Due diligence is a defence to a strict liability offence or infraction. Subject to other issues raised, the question for the adjudicator and upon this application was whether the defence of due diligence available to the Cabaret had been properly considered by the adjudicator, and whether or not it had been properly considered, had been proved by the Cabaret on a balance of probabilities.

[11] I will consider the issues arising from the petition in the order in which they were raised.

1. The adjudicator erred in considering the impact of the failure by the Branch to proceed on an allegation that the Cabaret permitted M. K. to enter its premises.

[12] This issue was first argued before the adjudicator by way of a preliminary objection and the adjudicator decided at page 4 of his decision:

The licensee submitted that by not alleging a contravention for allowing a minor into the licensed premise, the branch acknowledged that the licensee exercised due diligence. I find that this argument has no merit. The general manager is authorized by the *Act* to take enforcement action for alleged contraventions of the *Act* or *Regulation*, in her discretion. There is no basis in law for concluding that one enforcement action implies acknowledgement of anything relating to another potential allegation. ...

[13] The adjudicator went on to say:

... due diligence is a defence, which if successful is a complete answer to an allegation of a contravention under the *Act* or *Regulation*. It must be proven on the evidence and does not operate to interfere with the general manager's right to proceed with enforcement action in any manner in which she is authorized.

When M. K. and her handler presented themselves at the door of the Cabaret's establishment, and the doorman allowed M. K. to enter, the facts necessary to establish a contravention of s. 35 of the **Act** were complete, subject to a defence of due diligence.

[14] The Cabaret argues that, by failing to take enforcement action against it for allowing M. K. into its premises, the General Manager acknowledged that the Cabaret had exercised due diligence under s. 35 in the way in which it screened M. K. at the door. The amended petition states in para. 6:

... Accordingly, it is an error in law to then pursue an enforcement action alleging supply of liquor to a minor.

[15] It seems that there are three questions raised here:

1. Is or should the General Manager be obliged to pursue every infraction by some kind of enforcement action;
2. Does the General Manager's decision to not proceed on an allegation that the Cabaret contravened the Act by allowing a minor into the premises raise an estoppel, or any other legal bar, to proceeding under s. 33;
3. Could or should an inference of due diligence have been drawn from the General Manager's decision to not pursue an allegation arising out of the admission of M. K. to the premises.

[16] The answer to the first question is found in s. 20 of the **Act**, which confers upon the General Manager discretion to take action against a licensee for any of the reasons set out in the section. The reasons include a licensee's contravention of the Act or the Regulations

or a licensee's failure to comply with the term or condition of the licence (s. 20(1)(a)). The opening words of the section read:

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: ...
[emphasis added]

[17] The Cabaret has presented no authority to support an argument that s. 20 does not confer a discretion, but instead the General Manager is obliged by law to proceed against the licensee for every contravention of the Act or Regulations.

[18] I agree with the adjudicator that this argument has no merit. The discretion conferred on the General Manager under s. 20 is a complete answer.

[19] The second question is whether the General Manager's election to take no enforcement action arising out of the admission of M. K. to the Cabaret's licensed premises has the effect of erecting a legal bar to proceeding against the Cabaret for serving liquor to M. K. once she was inside the establishment. While this question appears to be raised by the petition, it was not developed in the Cabaret's argument. In any event, I consider it to have no merit because of the discretion conferred on the General Manager by s. 20.

[20] The third question is whether it was open to the adjudicator to infer that the General Manager, by taking no enforcement action arising out of the admission of M.K. into the establishment, conceded that the licensee exercised due diligence by adequately checking her age of a person before allowing her into the licensed premises. The Cabaret argues that the inference was available to the adjudicator here, and, on the allegation of breach of s. 33 for supplying liquor to a minor, the petitioner argues that the inference should have been inescapable. The Cabaret argues that, had the adjudicator drawn the inescapable inference the Cabaret had exercised due diligence at the door before letting M. K. into the premises, the due diligence carried over to the point where M. K. was served liquor in the premises.

[21] The standard of review on questions of fact or mixed law and fact is reasonableness. That is a proposition on which both counsel agree and for which both cite **532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (General Manager, Liquor Control and Licensing Branch)**, 2005 BCCA 416. Aspects of this argument bear on the issue of due diligence, to be dealt with below. At this stage, I conclude that whether or not an inference should be drawn is a question of fact and, subject to further consideration under the issue of due diligence, I am not persuaded that the adjudicator's failure or refusal to draw the inference sought was unreasonable.

2. The adjudicator erred in misconstruing the Cabaret's evidence as to the need of the petitioner's staff to check identification of patrons who had already passed the screening at the entrance.

[22] This alleged error attacks a finding of fact made by the adjudicator. The adjudicator's finding in this regard was based on evidence which the adjudicator quoted or paraphrased from the Cabaret's representative, given at the hearing. The adjudicator's understanding of the evidence is set out in his summary of the evidence of the Cabaret's principal, at pages 12 and 19, as follows:

... The minor is not checked inside as it is assumed that the minor was checked at the door. If someone was ordering a drink, the bartender would only ... or the serving staff would only ask for ID under extenuating circumstances. It should have been checked at the door.

[23] Mr. Fanthorpe, for the Cabaret, swears that at the hearing he went on to explain that by extenuating circumstances he meant signs of nervousness or other similar behaviours on the part of the person ordering liquor which might put the server on an inquiry as to the age of that person.

[24] This issue will also be considered as part of the error alleged under due diligence. At this stage, as a discrete question of fact, in my view, there was evidence on which the adjudicator could have arrived at the finding now challenged. It is not possible on the material before me to say that that finding was clearly wrong. Bearing in mind the reasonableness standard of review, I give no effect to this submission as a basis on which the decision of the adjudicator should be quashed.

3. The adjudicator erred in relying on his observation of the minor at the hearing to conclude that the minor appeared to be under the age of 25.

[25] The Cabaret objects that the adjudicator formed his own impression whether M. K. appeared to be under the age of 25 from looking at her as she gave evidence. In argument, the Cabaret submitted that the adjudicator should have had some objective evidence on this question, although it was not clear from submissions what the objective evidence should have been.

[26] The adjudicator was required to find the facts on the evidence before him. Part of the evidence before him was the attendance of M. K. to testify. The adjudicator was not only entitled, but in my view was required, to observe M. K. and to arrive at his own conclusion whether she appeared to be under the age of 25. Although the adjudicator gave no reasons for his conclusion "... on the evidence that MK did appear under the age of 25", the lack of reasons does not go to the Cabaret's objection. In my view, the lack of reasons for this finding is not a basis on which the finding itself can be said to be unreasonable.

[27] I give no effect to this argument.

4. The adjudicator erred in permitting the hearing to proceed notwithstanding that the Cabaret had been denied an opportunity to persuade the General Manager to pursue alternatives short of the enforcement action.

[28] The Cabaret objects that it was not given any, or any adequate, opportunity to persuade the General Manager not to proceed with enforcement action at one or more meetings before the hearing. This argument seems to be based on an expectation, perhaps based on what the Cabaret thought was common practice of the General Manager, that there would be an opportunity to negotiate a resolution short of the kind of enforcement proceedings employed here.

[29] This argument, it seems to me, asks this court to interfere in the prosecutorial discretion given to the General Manager under the **Act**. The Cabaret has not shown any statutory or other authority by which the General Manager could be required as a matter of

law, in the case of an alleged breach of the statute, to grant the Cabaret an opportunity to persuade the General Manager to take steps other than enforcement action.

[30] In my view, this is a matter within the discretion given to the General Manager under s. 20 of the **Act**, and the General Manager is not obliged, prior to an enforcement action, to engage in discussions or negotiations with a view to avoiding enforcement action. In my view, whether or not the General Manager has in the past, with other offenders and in other circumstances, engaged in such discussions, meetings or agreements, is something best left to the General Manager's discretion.

5. **The adjudicator failed to properly consider the defence of due diligence;**
6. **The adjudicator erred in applying a standard of absolute liability rather than strict liability.**
7. **The adjudicator erred in holding that staff inside the Cabaret's premises were obliged to request and check identification of people who appeared to be under age 25.**

[31] Because the arguments on these issues overlap, it is convenient to consider them together.

[32] These alleged errors include aspects of the error alleged under No. 2. Much of the Cabaret's argument centers on the proper construction of s. 45 of the **Liquor Control and Licensing Regulation**, B.C. Reg. 244/2002, and the interpretation given that regulation by the adjudicator.

[33] Section 45 of the Regulation is as follows:

- 45**
- (1) For the purposes of section 33 (5) of the Act, identification includes the following:
 - (a) a passport;
 - (b) a driver's licence that displays a photograph and the date of birth of the holder;
 - (c) an identification card, issued by a government agency, that displays a photograph and the date of birth of the holder.
 - (2) A licensee must request 2 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.
 - (3) The pieces of identification required under subsection (2) must include
 - (a) one piece of the identification referred to in subsection (1), and

- (b) one other piece of identification that displays the person's name and at least one of the person's signature and picture.
- (4) A licensee must not allow a minor to have liquor in his or her possession in the licensed establishment unless the licence issued for that establishment is a food primary licence or a liquor primary licence for a stadium and the minor is working as a server in the establishment.

[34] In an argument similar to that advanced under the first alleged error, the Cabaret here argues that the adjudicator erred by finding that the bartending staff had a legal obligation under s. 45 of the Regulation to consider whether M. K. appeared to be under the age of 25 and if she did so appear, to request two pieces of identification from her before supplying her with liquor.

[35] The Cabaret's first submission is that s. 45(2) of the Regulations must be read disjunctively, so that under subsection (a) a licensee is obliged to request two pieces of identification from a person who appears to be under the age of 25 only if the establishment is one in which a minor is not allowed to be. The Cabaret's establishment is such an establishment. The Cabaret says that this obligation was fulfilled when its employees at the door checked two pieces of identification before admitting M. K. to its premises.

[36] The Cabaret argues that subsection (b) applies only to those premises where minors are permitted, such as licensed restaurants, and that the obligation to check two pieces of identification only arises if a minor asks to be served liquor in such an establishment.

[37] The Cabaret argues that the adjudicator erred by reading subsection (a) and (b) conjunctively, that the adjudicator's error was compounded when he held the bartender to the standard set out in s. 45(2)(b), and the adjudicator's finding on whether due diligence had been established was, insofar as it was based on this error of law, clearly wrong.

[38] The General Manager says that the subsections are to be read conjunctively.

[39] The adjudicator's appreciation of this point can be found at two places in his reasons. First, at p. 5:

... It is a contravention to serve alcohol to a minor. It is also a contravention to fail to ask for prescribed identification for anyone appearing under the age of 25 years. This obligation is not discharged by passing the door screening. *It is well-established law that each and every employee of the licensee who comes into contact with a minor or a person appearing under the age of 25 years has a continuing obligation on behalf of the licensee to refuse service, check identification, or remove a minor from the premise.* [Emphasis added]

Further at p. 18:

I find that the bartender served the minor without consideration of age or identity. I find that she looked younger than 25 years old and as such, *the bartender was obligated to check identification as prescribed by the Regulation.* ... [Emphasis added]

[40] This issue has been decided by Halfyard J., in ***Small House Ventures Inc. (c.o.b. Lucky Bar) v. British Columbia (Liquor Control and Licensing Branch)***, 2006 BCSC 1792, where, at paras. 45 and 46 he says:

[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 of 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.

[41] The Cabaret argues that the adjudicator held it to an impossibly high standard when considering the due diligence defence – so high as to effectively impose absolute liability on the Cabaret. This is based partly on the interpretation of s. 45(2) of the Regulation and partly on the adjudicator's treatment of the Cabaret's evidence and argument at the hearing.

[42] ***Small House Ventures*** settles the argument on the correct interpretation of s. 45(2) of the Regulation, and does so in Cabaret's favour. The second basis of the argument is found in evidence of the Cabaret's representative - and the manner in which the adjudicator dealt with it – which I have already quoted, but will repeat here for convenience, from pages 12 and 19:

... The minor is not checked inside as it is assumed that the minor was checked at the door. If someone was ordering a drink, the bartender would only ... or the serving staff would only ask for ID under extenuating circumstances. It should have been checked at the door.

[43] The adjudicator appears to have taken this evidence, without referring to the witnesses' elaboration on extenuating circumstances, as effectively precluding a successful defence of due diligence. At p. 19 of his reasons the adjudicator says:

Most importantly, the licensee's misunderstanding of the requirements of the liquor licence as demonstrated by his own testimony, **eliminates any chance of establishing due diligence** with respect to the continuing obligations of the licensee and its staff in regard to minors in the establishment. [Emphasis added]

This is consistent with the adjudicator's statement at page 5 of his decision, where he says:

It is well-established law that each and every employee of the licensee who comes into contact with a minor or a person appearing to be under the age of

25 years has a continuing obligation on behalf of the licensee to refuse service, check identification, or remove a minor from the premise.

[44] It is apparent from these passages that the adjudicator erred on a matter of law in two ways: first, in his misinterpretation of s. 45(2) of the Regulations, and second, in his appreciation of the relationship among the Cabaret, as the party alleged to have contravened the regulatory scheme, the employees of the Cabaret, whose actions are alleged to have constituted the breach complained of, and the availability of a due diligence defence to an employer.

[45] This is perhaps exemplified by the adjudicator's statement at p. 18 of his decision:

I find that this licensee cannot escape responsibility for the contravention by any reference to appropriate training or policies in place in the establishment.

...

[46] It is necessary, at this point, to return to the principles established by the Supreme Court of Canada in **R. v. Sault Ste. Marie (City)**, [1978] 2 S.C.R. 1299, where the principles relating to offences of strict liability and the defence of due diligence were established. In the reasoning process leading to the result, Dickson J. considered what he called the "half-way house" between *mens rea* and absolute liability in the context of offences committed by employees or agents of the person accused. At p. 1322 Dickson J. states:

The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control" (*Lord Evershed in Lim Chin Aik v. The Queen*, [[1963] A.C. 160] at p. 174.). ...

[47] Dickson J. continues at p. 1331:

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

[48] While the adjudicator recognized that due diligence is a complete defence if established on the evidence, in my view he adopted an unnecessarily and unfairly restricted view of the defence in its application to the facts before him. He said at pp. 18 and 19:

The matter has been clouded somewhat by the insistence of the representative of the licensee that once the minor had passed the front door and been allowed entry to the establishment, the licensee was freed of any

responsibility to monitor its service to the minor. I have decided above that this proposition is incorrect. Due diligence must be established at the site of the contravention.

I find that the bartender served the minor without consideration of her age or identity. I find that she looked younger than 25 years old and as such, the bartender was obligated to check to identification as prescribed by the *Regulation*. She was 17 years of age, and carrying ID that did not match her observable physical characteristics. She was not asked for ID by the bartender and she was provided with liquor.

I find that this licensee cannot escape responsibility for the contravention by any reference to appropriate training or policies in the establishment. In this regard, I accept the testimony of the C & E [Compliance and Enforcement] officer, given under affirmation, as credible evidence of this state of knowledge of the employees. I do not accept the hearsay evidence put forth by the licensee as to the differing recollections of the employees. The licensee chose not to call those witnesses - notwithstanding advance notice of contrary evidence.

... Although the central issue occurs at the bar, the licensee's argument might be interpreted as a submission that the doorman's actions are indicative of the licensee's due diligence in refusing entry to minors. ... I find that even the doorman did not exercise due diligence or demonstrate appropriate training or experience in the discharge of his duties.

Most importantly, the licensee's misunderstanding of the requirements of the liquor licence as demonstrated by his own testimony, eliminates any chance of establishing due diligence with respect to the continuing obligations of the licensee and its staff in regard to minors in the establishment. ...

[49] I agree that the impugned action, the contravention on which the enforcement action was based, took place at the bar when the bartender served the under age operative two beers. The adjudicator was correct that that was an offence of strict liability, and the transaction was sufficient to establish contravention of the statute, unless due diligence was shown by the licensee.

[50] To interpret the sentence, "I find that this licensee cannot escape responsibility for the contravention by any reference to appropriate training or policies in place in the establishment" so as to mean that the Cabaret had not succeeded in discharging the evidentiary burden on it strains the language used. The word *cannot* and the phrase "by any reference to" clearly indicate that the adjudicator was not just preferring the evidence of the compliance and enforcement officer over the evidence of the witness called for the Cabaret, as he had the right to do, but that he was rejecting the very possibility that the Cabaret could establish due diligence by evidence of training or policies.

[51] The portion of the passages quoted above in which the adjudicator finds that the employees at the door did not act reasonably in examining M. K.'s false identification documents are based on evidence, and are reasonable in my view. M. K. testified that the doorman looked at the face of her driver's licence only, not at the back, and did not ask for a second piece of identification, as required by s. 45(2)(a) of the Regulations.

[52] Where the adjudicator fell into error was his conclusion that it is the due diligence of the bartender (the "site of the contravention") that he had to decide. I say that was wrong

because it is the due diligence of the Cabaret that is in issue, and whether or not the bartender showed due diligence was simply a piece of evidence that tended to prove or to disprove the larger question of the Cabaret's due diligence.

[53] Although it appears that the adjudicator considered the Cabaret's evidence of policies or training in place at the time, he did so in the context of his finding that the Cabaret "...cannot escape responsibility for the contravention by any reference to appropriate training or policies in place in the establishment."

[54] In my view, the errors of law made in relation to the defence of due diligence require the matter to be sent back for rehearing.

[55] Given that finding, I will deal briefly with the balance of the issues raised by the Cabaret.

[56] The Cabaret complains that the adjudicator erred in law in that he believed the minimum penalty for the infraction found was a four day suspension. The adjudicator imposed a five day suspension in this case. The Branch had sought the minimum penalty because this was a first contravention by the Cabaret.

[57] At page 20 of his decision, the adjudicator lists the penalty options open to him: "I have the discretion to order *one or more* of the following enforcement actions:" [emphasis added]. Later on the same page, the adjudicator says that the range of penalty for a first contravention is a four to seven day suspension *and/or* a monetary penalty of \$5,000 to \$7,000 [emphasis added]. While it is true that the adjudicator refers to the Branch recommendation of a four days suspension as "the minimum suspension of four (4) days", I do not read that as saying any more than that the Branch sought suspension rather than monetary penalty. That does not establish in my mind that the adjudicator, having just twice reminded himself of the range of penalties available, immediately lost sight of the range in arriving at the penalty he imposed.

[58] The adjudicator did err, in my view, when he said:

It is long settled law that the ability of the object of penalty to bear the burden of the penalty is not proper subject matter for consideration. ... To distinguish the level of effort or consideration to be devoted to the award by virtue of the magnitude of the impact of the penalty would be to place the process into disrepute.

[59] I have always understood that the ability of an offender to pay a monetary penalty was a relevant factor to be considered in imposing the penalty. In this case, it was appropriate to weigh ability to pay with other circumstances bearing on penalty.

[60] The Cabaret argues that the adjudicator erred in dismissing defences of due diligence in seven other hearings involving seven other licensees. In support of this complaint, the Cabaret produced seven other decisions of this adjudicator.

[61] This petition must be considered only on the issues raised, and the issues raised can, in my opinion, relate only to the decision of this adjudicator on the evidence and issues arising from the particular infraction before him. It is neither relevant nor is it proper to confuse issues arising out of this discrete hearing, and the decision that flowed from it, with decisions made on other hearings, arising out of different investigations, based on different evidence and involving different arguments.

[62] To the extent that this argument was tendered to bolster the submission that, if I were to find error and remit the matter for rehearing, I should direct the rehearing before a

different adjudicator, I reject both. It is for the General Manager to assign an adjudicator to hear an allegation of breach, not this court. There is no suggestion here of misconduct on the part of this adjudicator, nor is there any other basis upon which the court should interfere with the General Manager's jurisdiction to control the processes delegated by statute.

[63] In summary, this matter is remitted for rehearing before an adjudicator delegated by the General Manager to hear the matter.

"R.T.C. Johnston, J."
The Honourable Mr. Justice R.T.C. Johnston