COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Victoria Social Club Ltd. v. British Columbia (Liquor Control and Licensing Branch),* 2009 BCCA 493

Date: 20091103
Docket: CA036909

Between:

The Victoria Social Club Ltd. dba The Social Club

Appellant
(Plaintiff)

And

The General Manager, Liquor Control and Licensing Branch

Respondent
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, March 2, 2009
(*The Victoria Social Club Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2009 BCSC 270)

Oral Reasons for Judgment

Counsel for the Appellant:	G. N. Harney P. F. Waller
Counsel for the Respondent:	V. L. Jackson
Place and Date of Hearing:	Victoria, British Columbia November 3, 2009
Place and Date of Judgment:	Victoria, British Columbia November 3, 2009

[1] **TYSOE J.A.:** The Victoria Social Club (the "Social Club") appeals from the dismissal of its petition seeking to quash the decision of an adjudicator dated July 9, 2008 under the *Liqour Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "*Licensing Act*").

[2] The Social Club operates a night club in downtown Victoria. It holds a license issued under the *Licensing Act* permitting it to sell liquor in its premises. One of the conditions imposed by the General Manager of the Liquor Control and Licensing Branch (the "Licensing Branch") in respect of the license was that the licensed capacity of the premises was 305 patrons. This capacity is referred to as the occupant load.

[3] The Licensing Branch came to believe that the Social Club had contravened its license on December 1, 2007 by permitting more than 305 patrons to be present in its premises. The Licensing Branch issued a notice of enforcement action dated January 11, 2008 to the Social Club informing it that the General Manager was taking enforcement action for the alleged contravention. The notice stated that the proposed penalty was a five-day suspension of the license.

[4] A number of documents were attached to the notice of enforcement action, and one of these documents was a two page history relating to the licensed premises. Included in the history was a listing of five previous contravention notices and two complaints. One of the contravention notices was stated to have been withdrawn and there was a notation that no enforcement action was taken with respect to the other four notices. One of the complaints was stated to have been dismissed and the other had a notation that a contravention was identified.

[5] A hearing was held before an adjudicator on May 30, 2008. At the hearing, the adjudicator heard evidence and also heard submissions with respect to both the alleged contravention and the penalty in an event a contravention was found. On July 9, 2008, the adjudicator issued his decision in which he found that there were approximately 450 patrons in the licensed premises in the early morning hours of

December 1, 2007, thereby placing the Social Club in contravention of the license. He also concluded that the type and extent of the contravention warranted a significant suspension, and he imposed a penalty of a five-day suspension of the license.

[6] The Social Club's petition was heard in Supreme Court on November 4, 2008, and the chambers judge issued his reasons for judgment on March 2, 2009 dismissing the petition (2009 BCSC 270). The Social Club raised several matters at the hearing of the petition but, as it is limiting its appeal to issues related to the unproven allegations of previous contraventions, I will only describe the portion of the reasons of the judge dealing with these allegations.

[7] The judge acknowledged that the notice of enforcement action was before the adjudicator from the outset of the hearing, and recorded his understanding of the position of the Social Club that it was both prejudicial and improper for the past compliance record to be part of the materials seen by the adjudicator prior to the commencement of the hearing or when dealing with the issue of a penalty.

[8] The judge reviewed relevant provisions of the *Licensing Act* and noted that it is the practice of the Licensing Branch to have adjudicators consider the licensee's history with respect to the issue of penalty. The judge stated that there was no evidence that the adjudicator made any improper use of the materials in question when reaching the decision on penalty and that the adjudicator's penalty was not unreasonable.

[9] On appeal, the Social Club says the chambers judge erred by failing to consider the relevance of the alleged prior contraventions and by failing to consider the prejudice suffered by the Social Club resulting from the unproven allegations being admitted into evidence. As I perceive the position of the Social Club on appeal, its complaint is broader than dealt with by the chambers judge. It is not only complaining that unproven allegations were part of the evidence when the adjudicator considered the appropriate penalty, but it also says the basics of

procedural fairness were offended by having the unproven allegations in evidence when the adjudicator was determining whether a contravention of the license had been proven. It may be that the chambers judge only dealt with the narrower issue because the reference in the petition to the unproven allegations was in relation to a claim that the penalty was unreasonable.

[10] Unlike a criminal proceeding, which is bifurcated between the phase related to a determination of whether the alleged offence was committed and the phase related to the imposition of a sentence if the offence is found to have been committed, an enforcement hearing under the *Licensing Act* deals with the potential penalty before a determination is made as to whether a contravention of the license has been proven. The combined nature of the hearing is mandated by s. 64(3) of the *Licensing Control and Licensing Regulation* (the "*Licensing Regulation*"), which reads, in part, as follows:

> The general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result ...

[11] This means that, subject to the exercise of the adjudicator's discretion to adjourn a portion of the hearing in appropriate circumstances, all of the evidence relevant to the potential penalty is to be introduced prior to the determination of whether a contravention of the license has been proven.

[12] Despite this mandated procedure, the courts may intervene in appropriate cases when the decision maker has relied on inadmissible evidence or unproven facts in making the decision. One of the case authorities relied upon by the Social Club, *Re Dallinga and City of Calgary* (1975), 62 D.L.R. (3d) 433, [1976] 1 W.W.R. 319 at para. 4, contains a summary of the law in this regard:

> ... I agree that it is not necessarily actionable error in law on the part of a development appeal board to admit irrelevant evidence at a hearing, as this would put a legal burden on a board in the conduct of a hearing which in my view the Act does not contemplate ...There are no doubt cases in which the evidence tendered is so obviously irrelevant or improper that it ought to be

> ruled inadmissible forthwith to avoid any implication that the board might be influenced by it. But generally, the touchstone is whether the board has allowed itself to be influenced in some measure by the evidence.

[13] In the present case, the evidence regarding the allegations of previous contraventions was not obviously irrelevant or improper. It appears to be the practice of the Licensing Branch to attach the history of the licensee, including allegations of prior license contraventions, to the notice of enforcement action. Depending on the evidence introduced at the hearing, these allegations could potentially be relevant to the adjudicator's decision with respect to the penalty to be imposed in the event a contravention of the license is found. As events transpired in this case, the allegations of prior contraventions did not become relevant.

[14] In deciding that the Social Club contravened the term of its license relating to occupant load, the adjudicator reviewed the testimony of the witnesses and, on the basis of this testimony, he concluded it had been proven that the Social Club had exceeded the occupant load on the day in question. The adjudicator did not refer to any of the unproven allegations of previous contraventions in reaching his conclusion.

[15] Similarly, the adjudicator did not refer to any of the allegations of prior contraventions when he was determining the appropriate penalty for the contravention of the occupant load term of the license. He imposed a penalty that was within the range of penalties for a first contravention as set out in Schedule 4 to the *Licensing Regulation*. In choosing the penalty of a suspension of the license, as opposed to the monetary penalty sought by the Social Club, the adjudicator noted the risk to public safety posed by overcrowding of the premises.

[16] In my view, the Social Club has not established that the adjudicator allowed himself to be influenced by irrelevant or unproven allegations of prior contraventions of its license. He did not explicitly rely on the allegations, and there is nothing in the circumstances to warrant an inference that he implicitly relied on them. The other evidence before the adjudicator was clearly sufficient to support his conclusion that a

breach of the license had been proven and to support the penalty he imposed. No prejudice to the Social Club has been demonstrated.

[17] I would dismiss the appeal.

[18] **SAUNDERS J.A.:** I agree.

[19] **GROBERMAN J.A.:** I agree

[20] **SAUNDERS J.A.** The appeal is dismissed.

D. Tysoe JA

The Honourable Mr. Justice Tysoe