COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licensing Branch),* 2011 BCCA 439

Date: 20111031
Docket: CA038436; CA037396

Between:

The Cambie Malone's Corporation dba Cambie Malone

Respondent
(Petitioner)

And

General Manager of the Liquor Control and Licensing Branch

Appellant
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, August 20, 2011
(*The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licensing Branch)* 2010 BCSC 1175, Vancouver Registry S082451

Oral Reasons for Judgment

Counsel for the Appellant:	A.D. Gay
Counsel for the Respondent:	T.A. Mason
Place and Date of Hearing:	Vancouver, British Columbia October 27, 2011
Place and Date of Judgment:	Vancouver, British Columbia October 31, 2011

[1] **SAUNDERS J.A.**: These two appeals arise from enforcement proceedings under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 on allegations that the Cambie Malone's Corporation dba as Cambie Hotel violated both s. 36(2)(b) and s. 12 of the *Act* in relation to its Primary Liquor License. I shall refer to Cambie Malone's Corporation as the licensee. CA037396 concerns s. 36, CA038436; concerns s. 12.

[2] As to s. 36, it was alleged that the licensee had permitted an unlawful activity in the licensed establishment, being the selling of drugs by a patron. As to s. 12, it was alleged that the licensee breached terms and conditions imposed upon it by the Liquor Control and Licensing Branch, being that the appellant had permitted customers to take liquor from the red-lined area of the Primary Liquor Licence to other parts of the Hotel. After an oral hearing at which certain documents were received into evidence, witnesses called by the Branch testified, and no testimony was offered by the licensee, the parties made written submissions.

[3] In the disputed decision, the Adjudicator found the appellant had violated both ss. 12 and 36(2(b). He imposed a 3-day suspension of the liquor licence in respect to the s. 12 infraction, and a 12-day suspension in respect to the s. 36(2) (b) infraction. Under the legislative scheme, the Adjudicator's decision is the decision of the General Manager of the Liquor Control and Licensing Branch.

[4] The licensee brought a judicial review petition under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 challenging the findings of breach of the sections, and the penalties imposed.

[5] The hearing of the petition before Mr. Justice Rice proceeded in two stages, first addressing the s. 36 allegation and subsequently, and in separate reasons, the s. 12 allegation. Because of the manner in which this proceeded in the Supreme Court of British Columbia, two orders have been entered, one dealing with the judge's determination of the s. 36 issue, and a second one that encompasses the outcomes on both s. 36 and s. 12.

[6] The learned judge held in respect to the judicial review of the s. 36 decision that there was no basis upon which to interfere with either the determination that the licensee had breached s. 36(2)(b), or the penalty imposed. He dismissed that portion of the petition. The licensee's appeal CA037396 is an appeal from that order.

[7] The judge held in respect to the judicial review of the s. 12 decision, that the Adjudicator had erred in excluding evidence relevant to the issue of due diligence, a defence asserted by the licensee. In the order appealed by the General Manager in appeal CA038436, the judge ordered the s. 12 decision set aside and ordered a new hearing before a different adjudicator. Further he ordered costs in favour of the licensee.

[8] It is agreed between the parties that there shall be no costs in favour of either party, in the Supreme Court of British Columbia or in this Court. Accordingly, the order of costs that has been appealed should be set aside.

[9] I turn first to the licensee's appeal - CA037396. The allegations against the licensee followed observations by undercover liquor inspectors and police officers of a patron openly dealing marihuana on the premises of the hotel. The evidence described observations made on three days, February 21, 2007, March 21, 2007 and the date that is the subject of the enforcement proceedings, March 22, 2007. The Adjudicator found that on all three days observations were made of apparent drug transactions - on February 21, six or seven such transactions in an hour, at least some of which were observed by the doorman; on March 21 police officers observed five "blatant drug transactions" take place in the licensed area in approximately ten minutes, watched by a doorman and a bartender without intervention, and proximate to a staff member; on March 22 at least ten hand-to-hand transactions in the foyer of the establishment, at least one of which was within the licensed area and watched by the bartender who "would have had a clear line-of-sight to the foyer", with at times a line-up of persons outside the foyer to deal with the patron.

[10] Section 36(2)(b) of the *Act* provides:

> 36 (2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment
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> ...
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> (b) any unlawful activities or conduct.

[11] The Adjudicator found "at least two of the licensee's employees (one doorman and one bartender) either knew about or participated in illegal activities in the liquor primary licensed establishment on March 22, 2007." The Adjudicator also found "other staff members including the floor manager either knew or ought to have known that illegal activities were occurring in the LP licensed establishment on that occasion".

[12] Before the judge, the licensee contended that the Adjudicator erred in his treatment of evidence and made finding of facts unsupported by evidence, in particular that the bartender was watching the illegal activity, that multiple staff members had knowledge of the activity and that the floor manager knew or ought to have known of the activities. It contended that the Adjudicator erred in the proper test to be applied in determining whether it had "permitted" the activity and in failing to identify the directing minds of the corporate licensee, in misapplying the defence of due diligence and in both considering unproven allegations of past violations and making a finding in the absence of evidence in the course of imposing the 12-day licence suspension. It contended as well that the Adjudicator erred in failing to tape record the hearing or otherwise provide for a transcript to be prepared. The latter point was also taken in the licensee's factum but I understand is no longer being pursued as a stand-alone ground of appeal.

[13] The judge rejected all of the licensee's submissions with respect to s. 36. He concluded that there was no obligation to record the proceedings and the failure to do so did not demonstrate error. Applying *Kane v. The Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105 he rejected the complaints as to the handling of the evidence and the finding of facts of the Adjudicator. He found

that the notes of the investigating police officers provided an adequate basis for the finding there was illegal drug dealing on the premises. He said:

> [46] The notes of the investigating police officers provide an adequate basis for the finding that there was illegal drug dealing on the premises. These notes suggest that the transactions were obvious and frequent. At times, one or even two staff members stood near the doorway beside a particular dealer. Numerous transactions took place in full view of staff. The Adjudicator was entitled to infer from this evidence that multiple staff members had actual or imputed knowledge of the illegal activity.
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> [47] The court is not entitled to review the manner in which the evidence was weighed by the decision-maker. The Adjudicator was entitled to prefer the oral evidence of the police officers and liquor inspectors over the written evidence of the petitioner. The petitioner had a full opportunity to challenge the respondent's evidence in cross-examination and in argument. The petitioner's arguments on these grounds must fail.

[14] The judge likewise rejected the licensee's submissions on "permitting", "directing mind" and due diligence. He observed that the evidence in the case showed that the illegal activity was carried on blatantly on the premises. He held "it was reasonable for the Adjudicator both to find that the *actus reus* of the offence had been established and that the onus was on the petitioner to show due diligence". In rejecting the submission that the operating mind had not been determined by the Adjudicator, and the submission that it was not proved that the licensee had permitted the illegal activity, the judge referred to the Adjudicator's finding that at least two staff members had actual or imputed knowledge of the illegal activity. The judge observed "I note that even had the Adjudicator considered whether the doorman and bartender were directing minds, and found they were not, this would not alter the Adjudicator's ultimate conclusion, because he also found that the licensee was not duly diligent". The judge said:

> [60] I find that the standard for establishing due diligence set out by the Adjudicator, namely, the existence of adequate training and enforcement by the licensee, was reasonable. I also find that it was reasonable for the Adjudicator to come to the conclusion, on the basis of the evidence before him, that the corporate licensee had knowledge of the illegal activity and that the licensee failed to establish due diligence in accordance with the standard articulated.

[15] The judge accordingly dismissed the judicial review petition in respect to breach of s. 36. The judge also dismissed the petition in respect to the penalty imposed for the s. 36 infraction, noting the broad discretion of the Adjudicator to impose a penalty.

[16] On this appeal the licensee contends, as it did in the Supreme Court of British Columbia, that there was no evidence to support the findings of the number of staff members and identity of staff members who were aware drug transactions were taking place. It complains that the judge failed to give effect to an affidavit of its counsel at the enforcement hearing, to the effect that certain matters were unsupported by evidence. The licensee further argues that the judge erred in his interpretation of the word "permit" and that the *actus reus* of permitting, for purposes of s. 36, requires an element of awareness. Further it argues the judge erred in adopting the Adjudicator's findings with respect to due diligence. Last, it contends the 12-day suspension was unreasonable, that in imposing the suspension the Adjudicator took into account irrelevant information in the form of unproven allegations of previous s. 36(2)(b) violations, and that the Adjudicator erred in failing to consider a monetary penalty rather than a suspension.

[17] I do not propose to examine in length the submissions of the licensee on the factual findings that underpin the conclusion of a s. 36(2)(b) contravention. I am satisfied that there was an evidentiary basis for the facts found by the Adjudicator. Although the affidavit filed in support of the judicial review petition denies certain evidence having been called, the factual matters to which it now objects were relied upon by the General Manager in written submissions that were filed before the Adjudicator, without dispute by the licensee at that time that such was the evidence before him. Further, notes in evidence of the investigating officers and liquor branch personnel, while sketchy and no doubt expanded in the oral testimony, support the conclusion that there was ample evidence of, as the Adjudicator described them, blatant drug transactions such that the transactions would have been obvious to staff at the establishment, particularly the doorman and bartender, both of whom are in controlling positions in a bar. It is trite that facts may be established by both direct

evidence, and circumstantial evidence. In this case the record contains sufficient evidence from which the Adjudicator could make the findings of fact which are challenged in these proceedings.

[18] Concerning the use of the meaning of "permit", I see no error in the approach taken by the judge. Nor do I see error in the judge's consideration of the issues of due diligence. Accordingly and substantially for the reasons of the judge, I would dismiss the appeal from the finding of contravention of s. 36(2)(b) of the *Act.*

[19] I turn now to the question of penalty. The licensee refers to the Adjudicator's statement that its prior history "includes at least one previous allegation of permitting unlawful activities in the licensed establishment", and to references to two prior compliance meetings relating to the sale of illicit drugs at the licensed establishment.

[20] I see no error in the reference to the licensee's presence at compliance meetings – its attendance at compliance meetings, whatever may be encompassed by that term, indicates an awareness of the requirements of the license and is relevant to sanction. However the description of the history of the licensee as including at least one prior allegation of permitting unlawful activities" is, in my view, of a different character. It appears on my reading of the decision that an adverse conclusion was drawn from the fact of the prior allegation, which would have redounded against the licensee in determining the appropriate sanction. It is, I consider, clear that it is an error to consider as a negative fact allegations made but not proven.

[21] For this reason alone I consider the assessment of penalty must be set aside and the matter of penalty remitted for further determination under the *Act* and *Regulations.*

[22] I turn now to the appeal of the General Manager of the s. 12 decision. The General Manger says that the judge erred in holding the Adjudicator was unreasonable in excluding evidence of signage, and in ordering a hearing before a different Adjudicator.

[23] The allegation against the licensee is that it permitted customers to carry a drink across the red-line of the licensed area. In reaching his s. 12 decision the judge addressed the matter of evidence of signage in the premises. He said:

> [24] At the proceedings before the adjudicator, the adjudicator refused to admit as evidence photographs of signs placed by the petitioner prohibiting patrons from crossing the gate/fence between the two licensed areas of the Cambie Hotel with alcoholic beverages. The photographs consisted of large stop-sign-sized signs mounted on the gate separating the two licensed areas from each other. The adjudicator refused to admit the evidence because it was tendered at the submissions stage of the proceeding rather than during the evidence stage. Then, in his decision, the adjudicator wrote that "[t]here is no evidence of the extent and nature of the signage before me, no evidence of the effectiveness of the signage..."
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> [28] In my view, it was neither reasonable nor fair of the adjudicator to exclude the evidence after leading the petitioner's counsel to believe that it would be unnecessary to lead the evidence prior to the closing submissions. The evidence was not only relevant, it was critical to the petitioner's defence of due diligence. The evidence should have been admitted as rebuttal evidence and considered by the adjudicator after the inconsistency appeared in the evidence of the liquor inspectors with respect to the existence of the signs.

[24] The General Manager contends that it was within the discretion of the Adjudicator to decide not to admit the photographs after the hearing and witnesses had departed. Referring to *Prassad v. Canada (*Minister of Citizenship & *Immigration),* [1989] 1 S.C.R. 560, the General Manager says the decision whether to admit the evidence was discretionary and deference should apply.

[25] In my view the judge was entirely correct in these circumstances to conclude that it was a procedural error to deny the admissibility of evidence and then draw adverse conclusions on that basis, particularly as that evidence was germane to the defence of due diligence. Respecting the considerable latitude accorded decision-makers, the unusual sequence in this case had the result of offending procedural fairness and the judge was correct to set the decision on s. 12 aside.

[26] The General Manager then says that if the decision is to be set aside, the direction that the allegations be heard by a new Adjudicator goes farther than is

necessary and that the matter should simply be remitted to be decided under the *Act* and *Regulations.*

[27] The latter course is that ordered by this court in the recent case of *Cactus Club Turner Road Ltd. v. British Columbia (Liquor Control and Licensing Branch)* 2011 BCCA 414. In my view it is the appropriate order in this case as a basis has not been established for a court direction otherwise.

[28] Accordingly as to the s. 12 matter I would dismiss the appeal except as to the direction that the matter be remitted for hearing before a new Adjudicator, and I would simply order that the matter be remitted to the General Manager for determination in accordance with the *Act* and *Regulations*. In other words, I would allow the appeal on the s. 12 matter to a limited extent.

[29] In summary, I would allow the appeal of the costs order. I would dismiss the appeal of the order as it relates to the finding of breach of s. 36, I would allow the appeal in respect to the 12-day suspension by setting aside that penalty and remitting the matter of s. 36 penalty to the General Manager for determination under the *Act* and *Regulations.* I would allow the appeal of the order setting aside the finding of a s. 12 breach and ordering a new hearing only to the extent that I would remit that matter to the General Manger for determination in accordance with the *Act* and *Regulations*, leaving the balance of that order untouched.

[30] **NEWBURY J.A.**: I agree.

[31] **D. SMITH J.A.**: I agree.

[32] **NEWBURY J.A.**: The appeals are allowed to the limited extent indicated.

The Honourable Madam Justice Saunders