IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Citation: *The Cambie Malone's Corporation v. General Manager of the Liquor Control and Licensing Branch,* 2009 BCSC 987

Date: 20090722
Docket: SO82451
Registry: Vancouver

Between:

The Cambie Malone's Corporation dba Cambie Hotel

Petitioner

And

General Manager of the Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Petitioner:	A.D. Gay
Counsel for the Respondent:	T. Mason
Place and Date of Hearing:	Vancouver, B.C. October 24, 2008 May 25 & 26, 2009
Place and Date of Judgment:	Vancouver, B.C. July 22, 2009

INTRODUCTION

[1] This is a judicial review of a decision by an enforcement hearing adjudicator appointed pursuant to the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the "***Act***"), declaring the petitioner, the Cambie Hotel in Vancouver, in breach of its Liquor Primary License No. 024168 under s. 36 of the ***Act***, and imposing a 12-day suspension of its license.

[2] The Adjudicator also found that there had been a contravention under s. 12 of the ***Act*** for which he ordered a 3-day suspension. That suspension, however, is not part of this judicial review.

FACTS

[3] On February 21, 2007, two liquor inspectors conducted a covert inspection at the Cambie Hotel. They observed what they believed to be drug dealing in the foyer of the hotel. The alleged dealer was a patron who occupied a seat in the licensed premises between deals. His purchasers would approach him at his table and he would escort them to the foyer to complete the deals.

[4] The inspectors reported what they saw to the police, who investigated and, on March 22, 2007, charged the patron with possession and trafficking in marijuana. The patron was later convicted of possession of a controlled substance for the purpose of trafficking. The Cambie Hotel was served with a contravention notice under s. 36(2)(b) of the ***Act*** as a result of these events.

[5] Section 36(2)(b) provides as follows:

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

[6] The enforcement hearing was held before Adjudicator Sheldon Seigel on January 17 and 18, 2008. He issued written reasons on March 12, 2008.

[7] At the hearing, the Liquor Licensing and Control Branch called four liquor inspectors and five Vancouver Police Department constables, who provided *viva voce* evidence and were cross-examined by the licensee. The licensee was represented by counsel. It did not call any witnesses and submitted evidence solely by way of documents. The Adjudicator noted that he was obliged to disregard much of the licensee's submissions, as it consisted of new information, including statements and photographs, which should have been adduced as evidence but was not.

[8] The Adjudicator found that the oral evidence of the Branch witnesses was uncontroverted and found all the witnesses to be credible. He stated that "[t]o the extent that anything contained in the written statements is inconsistent with evidence presented by the oral testimony of witnesses, I find the oral testimony more reliable."

[9] The Adjudicator's decision includes the following:

> On March 21, 2007, two [Vancouver Police Department] constables attended at the establishment in plainclothes. They observed "blatant drug transactions" taking place. The dealer was seen to recover items from his pant pocket and put the items received back in another pant pocket. The constables witnessed at least five such transactions in approximately ten minutes.
>
> They also testified that both a doorman and a bartender watched as some of the transactions occurred, but no staff member intervened. The constables said that throughout this visit, there was a staff member at the dealer's table or within a few feet of the dealer for the entire time that he was sitting, in between transactions. One constable testified that at one point there were two doormen sitting and chatting while the transactions were going on in plain sight of them.
>
> On March 22, 2007, Vancouver police set up a "buy and bust" operation at the Cambie Hotel in the liquor primary establishment. One constable observed at least ten hand-to-hand transactions occurred in the foyer of the establishment, each conducted by a patron who returned to a single seat in the establishment between transactions. Another testified that he witnessed seven such transactions on that occasion…
>
> At times there was a line-up of persons waiting outside the foyer to deal with the patron…

> During the transactions on March 22, 2007, the VPD officers noted that the bartender in the ... establishment was watching the transactions and could clearly see the 'target' patron when he was seated between transactions and when he walked into the foyer where the transactions were occurring. The constables agreed that the bartender also would have had a clear line-of-sight into the foyer.

[10] The licensee argued that it could not be said to have "permitted" the illegal activity within the meaning of s. 36(2)(b), relying on the following test from ***Ed Bulley Ventures Ltd. v. British Columbia***, June 28, 2001, LAB L-9905, a decision of the Liquor Appeal Board:

> ...[A] licensee may be said to permit something where the licensee does not exercise as high a degree of diligence as it should have in the circumstances, or where the licensee shuts its eyes to the obvious or allows something to go on, not caring whether an offense is committed or not.

[11] The Adjudicator found that the test for "permitting" relied on by the licensee was applicable in this case, "as it described the circumstances as I believed them to have occurred". He noted:

> I find that 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 establishment on March 22, 2007. I find that 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.
>
> Management has an obligation to train, supervise, monitor and control its employees. The actions of at least one doorman and one bartender indicate at the very least, a passive acquiescence with the sale of drugs in the establishment.
>
> ...
>
> By failing to take reasonable steps to prevent what could be readily seen to be occurring, and by failing to train, monitor, supervise and control at least two employees to a reasonable standard or by knowingly allowing the activity to occur, the licensee has permitted this activity to occur.

[12] Because the Adjudicator found that the licensee had permitted the illegal activity within the meaning of s. 36(2)(b), the onus was on the licensee to show that it exercised due diligence in the circumstances. The Adjudicator stated that in order to demonstrate due diligence, the licensee must show that it implemented adequate training and other systems to prevent the contravention and that it took reasonable steps to ensure the operation of the system.

[13] The licensee argued that it exercised due diligence because it had a policy prohibiting illegal activity in the establishment and enforced that policy by dismissing employees found to have contravened it.

[14] The licensee provided a statement signed by its president which the Adjudicator described as offering "indices of cooperation with police, zero tolerance, and good intentions, but insufficient evidence of any detail pertaining to actions taken to put these sentiments to work." The "terms and conditions" provided to the licensee's employees stated only that engaging in illegal activity was grounds for immediate dismissal, but did not make any reference to steps to be taken in the event that the employee observed illegal activity while on duty.

[15] The Adjudicator found that there was "insufficient evidence to support the existence of a set of rules relating to this issue that could be called policy, and even less evidence of enforcement by dismissal of employees." He also found that there was "no evidence of ongoing training, supervision, or scrutiny of employees with respect to monitoring the establishment for illegal activities." The Adjudicator noted that the licensee in its defence presented only written statements which were not tested by cross-examination. The Adjudicator found that the licensee failed to establish that it exercised due diligence.

[16] The Adjudicator imposed a 12-day suspension of the license, noting in his reasons that:

> The licensee's history includes at least one previous allegation of permitting unlawful activities in the licensed establishment.
> ...

> The licensee has been present at two prior compliance meetings related to the sale of illicit drugs in the licensed establishment (Feb 6, 2003 & Jan 24, 2006). Despite the licensee's stated commitment to enforce a zero tolerance policy toward illegal activities in the establishment, it appears that little or no change has resulted.
>
> The sale of illicit drugs is illegal conduct and a serious public safety issue. The licensee must take positive actions to ensure that unlawful activities do not occur in their establishment. The recommended penalty is in the middle of the penalty range for a first contravention of this offence as set out in item 8 of Schedule 4.
>
> I find that a twelve-day suspension for this contravention is reasonable under the circumstances.

POSITION OF THE PETITIONER

[17] The petitioner applies for an order quashing the decision of the Adjudicator or, in the alternative, an order directing the general manager to rehear the petitioner's case by way of a new hearing before a new adjudicator.

[18] The petitioner claims that the Adjudicator erred in the following ways:

a) By conducting the hearing without providing for a record to be kept in the form of a transcript or a tape recording of the proceeding;

b) By making key findings of fact in the absence of evidence to support them, and in admitting hearsay and other inadmissible evidence, rejecting admissible evidence, and failing to give due weight to the evidence which supported the position of the petitioner. In particular, the petitioner challenges the Adjudicator's findings 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. The petitioner argues that these findings were fundamental to the issues of whether the violation occurred, whether the defence of due diligence was available and what the penalty should be.

c) By failing to apply the proper test for "permitted", and in not making any finding as to who the directing minds of the corporate licensee were in relation to the permitting of the illegal activity;

d) By misapplying the defence of due diligence by failing to consider relevant evidence;

e) In sentencing, by considering unproven allegations of past violations and in making a finding in the absence of evidence.

POSITION OF THE RESPONDENT

[19] The respondent, the general manager of the Liquor and Licensing Control Branch, asks that the petition be dismissed. He or she submits that the Adjudicator's decision was reasonable, permitted by the ***Act*** and its *Regulation*, and that the petitioner cannot show that there was an error of law or jurisdiction on the part of the Adjudicator.

ANALYSIS

1. THE LAW

[20] The ***Act*** is public safety legislation that balances various competing interests, including the interest of the licensee in maximizing profits and the interests of public safety: ***Butterworth Holdings Ltd. et al v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2007 BCSC 6, at para. 19.

[21] The general manager of the Branch has a mandatory, statutory duty to administer the ***Act***, and to supervise all establishments licensed to serve liquor. Under ss. 3 and 6 of the ***Act***, the general manager is empowered, on his or her own motion, or acting on a complaint, to enforce compliance with the legislation, regulations and terms of licenses.

[22] Section 20(2) explains the powers of the general manager in taking action against a licensee:

> **20(2)** If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:
>
> ...
>
> (b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;
>
> (c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
>
> (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
>
> (e) cancel all or any part of the licensee's licence;
>
> (f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

[23] Part 7 of the *Regulation* sets out the requirements with respect to enforcement action that may be taken by the general manager.

2. STANDARD OF REVIEW

[24] The ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, does not apply to the ***Act***; therefore the common law standards of review apply. These standards were recently revisited by the Supreme Court of Canada in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190.

[25] In ***Dunsmuir***, the Supreme Court of Canada held that the standard of reasonableness will generally apply to "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues". The standard of correctness will usually apply to "legal issues", constitutional issues and "true questions of jurisdiction or *vires*": see ***Dunsmuir***, at paras. 51-59.

[26] The court is now required to undertake a "standard of review analysis". This consists of two stages. The court must first consider whether the jurisprudence has already satisfactorily identified the appropriate standard of review. Only if that inquiry proves unfruitful should the court undertake an analysis of the relevant factors to determine the appropriate standard: at para. 62. At that stage, the focus is on the degree of deference to be accorded. The factors indicating that the decision-maker should be given deference and that lead to the conclusion that reasonableness is the appropriate standard are as follows:

a) A privative clause;

b) A discrete and special administrative regime in which the decision-maker has special expertise;

c) The nature of the question of law at issue. "A question of law that is of 'central importance to the legal system... and outside the... specialized area of expertise' of the administrative decision-maker will always attract a correctness standard", while "a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate": at para. 55. Questions of law that involve the interpretation of the enabling statute will attract deference: at para. 166, *per* Deschamps J., concurring.

[27] Jurisprudence before ***Dunsmuir*** indicated that on review of a decision of the Adjudicator the standard was a deferential one of reasonableness or patent unreasonableness: see ***Butterworth Holdings Ltd.***, *supra*, ***Aztec Properties Co. (c.o.b. Bimini Neighbourhood Pub) v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2005 BCSC 1465.

[28] Jurisprudence post-***Dunsmuir*** suggests that the standard of review continues to be reasonableness: see ***693753 B.C. Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2008 BCSC 1037; ***Jacobsen Enterprises Ltd. v. General Manager, Liquor Control and Licensing Branch***,

2008 BCSC 1058. The jurisprudence to date has, in my view, satisfactorily identified the standard of review for decisions of the Adjudicator.

[29] Although a ***Dunsmuir*** "standard of review analysis" is therefore not strictly necessary, I am of the view that such an analysis supports the conclusion that reasonableness is the appropriate standard.

[30] The ***Act*** has no privative clause; however, the legislation sets out a discrete regime for the regulation of liquor sales in the province of British Columbia, under which the General Manager has broad powers of oversight and enforcement. For example, under s. 20, the General Manager is empowered to take action of his or her own motion against a licensee, and if satisfied that it is in the public interest to do so, impose penalties. Section 65 of the Regulation provides that the General Manager may take the enforcement action against the licensee that he or she "considers appropriate". The scope of the discretionary powers vested in the General Manager by the legislation indicates that on review the courts should afford deference.

[31] I note in support of this conclusion that Mr. Justice Ehrcke, in ***693753 B.C. Ltd.***, *supra*, found that the word "opinion" in s. 16(1) indicates that the legislative scheme contemplates that the Adjudicator's determination should be subject to deference on judicial review: at para. 55.

[32] It should be noted, however, that every judicial review hearing must consider a different matrix of alleged errors. Where the errors alleged are questions of law that are of "central importance to the legal system", questions of jurisdiction, or questions on which the adjudicator has no special expertise, a deferential standard of reasonableness will likely not be appropriate.

[33] In the wake of ***Dunsmuir***, the principal question for the courts is the characterization of the errors alleged, rather than the appropriate standard of review. If the petitioner alleges multiple errors to which different standards apply, then the court must analyse the errors individually and apply the appropriate standard to

each. In such a case, the court will usually first consider any breaches of procedural fairness, which do not require review of the decision *per se*. Next the court may review the result for any errors which attract the highest standard of correctness, and lastly for any errors to which reasonableness applies. The order in which the alleged errors are considered, however, is fact-dependent and may differ from case to case.

[34] In this case, the petitioner alleges that there is a requirement for a record of the proceedings, which is a question of procedural fairness.

[35] The remaining errors – the application of the test for "permitted", the application of the test for who is the "directing mind" of a corporate licensee and the issue of whether the licensee has been duly diligent – are questions of mixed fact and law. The issue of the appropriate sentence is an issue in which the adjudicator has considerable discretion within the guidelines set out by the *Regulation* and its accompanying Schedule. For these alleged errors the standard of review is reasonableness.

3. ALLEGED ERRORS

A. ABSENCE OF A TRANSCRIPT

[36] The petitioner alleges that the Adjudicator breached procedural fairness by conducting the hearing without providing for a record to be kept in the form of a transcript or a tape recording of the proceeding. It argues that without a record of the oral testimony it is not possible to review properly the findings of fact made by the Adjudicator. The petitioner argues that the court should direct that there be a new hearing.

[37] If there is no statutory obligation to record the proceeding, courts will not order a new hearing based on the lack of a transcript or defects in the record, unless the lack of a transcript is shown to raise a "serious possibility" of the denial of a ground of appeal or review: ***Canadian Union of Public Employees v. Montreal,*** [1997] 1 S.C.R. 793, 144 D.L.R. (4th) 577; ***532871 B.C. Ltd. dba The Urban Well v.***

British Columbia (General Manager, Liquor Control & Licensing Branch), 2005 BCSC 422.

[38] In this case, there was no statutory obligation to provide a transcript or record of the hearing. The issue is whether, because of the lack of a transcript, the petitioner will be denied a ground of review.

[39] From the standpoint of the court, the lack of a transcript to confirm the evidence submitted is unfortunate. However, the record as it stands, which includes affidavits from the petitioner and counsel for the respondent and the petitioner, as well as the notes of the police officers and liquor inspectors, is sufficient for the court to determine whether there was evidence to support the Adjudicator's findings. The petitioner's request for a new hearing on the basis of the lack of a transcript is denied.

B. ADMISSION AND WEIGHING OF EVIDENCE

[40] The petitioner also alleges that the Adjudicator admitted hearsay and other inadmissible evidence, rejected admissible evidence, and failed to give due weight to the evidence which supported the position of the petitioner, in relation both to key findings of fact and to the defence of due diligence.

[41] On judicial review the court is not concerned with the manner in which the decision-maker reviewed or weighed the evidence, but only whether the evidence viewed reasonably can rationally support the decision: ***Butterworth Holdings***, *supra*, at para. 17, citing ***Toronto (City) Board of Education v. O.S.S.T.F., District 15***, [1997] 1 S.C.R. 487, 144 D.L.R. (4th) 385, at para. 48.

[42] An administrative decision-maker is entitled to consider any evidence it deems relevant, reject some evidence and accept other evidence, weigh the evidence that it accepts, and come to a reasonable conclusion on that evidence. The duty of the decision-maker is simply to listen and act fairly to both sides, giving the parties a fair opportunity for correcting or contradicting any relevant statement

prejudicial to their views: ***Kane v. The Board of Governors (University of British Columbia),*** [1980] 1 S.C.R. 1105 at 1113, 110 D.L.R. (3d) 311.

[43] An administrative decision-maker is not bound by the strict rules of evidence: "[t]hey are not fettered by strict evidential and other rules applicable to proceedings before courts of law. It is sufficient that the case has been heard in a judicial spirit and in accordance with principles of substantial justice": see ***Kane***, *supra*, at 1112-13.

[44] On this judicial review, counsel for the petitioner, Brandon J. Smith, submitted his own affidavit stating as follows:

> No witness testified that anyone other than the doorman saw or "could have seen" the alleged transaction(s).
>
> The Adjudicator did ask one of the police officers if the bartender *could have* seen the transactions alleged to have taken place inside the alcove just outside the LCLB's red-lined area behind the first two sets of double doors. The officer responded he didn't know. When I asked if a busy line-up in front of the bartender would have obstructed the view the same officer responded that he supposed it might but didn't know. No evidence that anyone could have seen these transactions was ever presented other than these questions." [Italics in original; underlining added.]
>
> The Adjudicator writes in his decision that it was shown that the bartender and even another employee saw or ought to have seen the transactions. There was never any evidence presented which supports this determination." [Emphasis added.]

[45] The petitioner says that the Adjudicator found that on several occasions a bartender was watching illegal activity, that "multiple staff members" had knowledge of the unlawful activity, and that the floor manager knew or ought to have known of the illegal activities. The petitioner submits that the findings of the Adjudicator should be overturned, because there is no evidence indicating that a bartender, or anyone other than a doorman, was present with an opportunity to see the activity.

[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.

[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.

C. "PERMITTING", "DIRECTING MIND" AND DUE DILIGENCE

[48] The petitioner submits that the adjudicator committed an error of law in misconstruing the meaning of the word "permit" in s. 36(2)(b). As noted above, the petitioner, in arguing due diligence, set out the test from ***Ed Bulley Ventures***, *supra*.

[49] In ***Ed Bulley Ventures***, the Liquor Appeal Board carefully considered the meaning of the word "permit", considering six possible interpretations of the word, as well as the British Columbia Court of Appeal case ***Calais Investments Ltd. (dba Flamingo Motor Hotel) v. General Manager, Liquor Control and Licensing Branch*** (1996), 81 B.C.A.C. 309. ***Calais Investments*** had adopted the test from ***Gray's Haulage Co. Ltd. v. Arnold***, [1966] 1 All E.R. 896 (C.A.).

[50] The Adjudicator stated:

> The licensee used this quote [from ***Ed Bulley Ventures***] to argue that the licensee's management cannot be seen to have permitted the illegal activity described in the evidence. I find however, that the quote is quite applicable in this case as it does describe the circumstances as I believe them to have occurred. The licensee argues the intent and

> ideas of management, but does not provide any significant evidence of action to prevent the type of illegal activity that has occurred.

[51] The petitioner argues that this interpretation is not the law: in order to prove "permitting", the respondent must prove that the licensee, or its directing mind, had knowledge, either actual or imputed, of the unlawful activity.

[52] I find that the Adjudicator did not err in his interpretation of "permit". The petitioner is incorrect in arguing that the onus is on the general manager to show that the licensee or its directing mind had knowledge, actual or imputed, of the unlawful activity. In ***Whistler Mountain Ski Corp. v. British Columbia (Liquor Control and Licensing Branch)***, 2002 BCCA 426, 43 Admin L.R. (3d) 294, the British Columbia Court of Appeal found that the defence of due diligence is available for liquor licensing contraventions which are subject to administrative sanctions under s. 20 of the ***Act***: at para. 41. The general manager must prove the *actus reus* of the contravention on the balance of probabilities: see ***Aztec Properties***, *supra*, at paras. 10 and 11; ***New World Entertainment v. General Manager, Liquor and Licensing Control***, 2004 BCSC 616, at paras. 7-13. The onus is then on the licensee to demonstrate on a balance of probabilities that it took all reasonable measures to avoid the contravention.

[53] The evidence showed in this case that the illegal activity was carried on blatantly on the premises. 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.

[54] The petitioner further argues that, because the Adjudicator did not make any finding as to who were the "directing minds" of the corporate licensee, he erred in failing to make any finding concerning whether the directing minds were guilty of "permitting". The petitioner argues that, in order to be liable under s. 36(2)(b), the licensee, or a directing mind of the licensee, must have either actual or imputed knowledge of the illegal activity. The petitioner argues that the Adjudicator reached his conclusion on the basis that the licensee's staff, including a bartender and a

doorman, had actual or imputed knowledge of the unlawful activity, but that he did not consider whether the bartender and doorman were directing minds of the licensee.

[55] In ***Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch***, 2004 BCSC 248, at para. 27, Pitfield J. held that a directing mind need not be "an officer or director of the licensee", but could be an individual or individuals with "sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation of 'directing mind and will' of the licensee."

[56] Mr. Justice Pitfield went on to state, at paras. 23-25:

> ...[I]n finding against the licensee the General Manager focused principally on the employee's conduct and attributed the same to the licensee without stating the basis for doing so.
>
> Section 36(2)(b) makes it an offence for a "person holding a licence or the person's employee" to permit unlawful conduct in the establishment. I do not construe the section to mean that the licensee is the guarantor of its employee's conduct. The word "or" is disjunctive. An employee may permit unlawful conduct. For that, he or she may be prosecuted under s. 48 of the Act. Section 20 of the Act does not contemplate regulatory enforcement against the employee.
>
> If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

[57] As is clear from ***Plaza Cabaret***, the licensee must, in order to avoid liability for acts of its employees under s. 36(2)(b), show both that the employee was not a directing mind AND that the licensee was duly diligent.

[58] In finding that at least two staff members of the licensee, a bartender and a doorman, had actual or imputed knowledge of the illegal activity, the Adjudicator did

not consider the issue of whether these staff members were "directing minds". The Adjudicator instead considered a written statement provided by the general manager of the licensee, and noted as follows:

> The statement ... indicates that patrons have been barred from the establishment for participating in illegal activities and staff were trained to "identify any overt or suspected drug activity and were informed of their obligation to report any such instances to the manager on duty." It concludes that "every so often and despite our best attempts...we did have staff members in our employ who broke or ignored these and other rules which, once identified, resulted in disciplinary action, including dismissal.

[59] The Adjudicator found that this statement indicated that the licensee knew that illegal activities were occurring in the establishment. While this evidence is scant, it is sufficient to support a finding that the directing mind of the licensee had actual or imputed knowledge. 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.

[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.

D. PENALTY

[61] The petitioner submitted that the Adjudicator erred in law by considering historical unproven allegations of past violations when determining the appropriate penalty, and because the Adjudicator was influenced in his decision on the penalty by his finding that multiple staff members had actual or imputed knowledge of the illegal activity, a finding for which there was insufficient evidence.

[62] As stated above, there was evidence to permit the Adjudicator to come reasonably to the conclusion that multiple staff members, as well as the corporate licensee, had actual or imputed knowledge of the illegal activity.

[63] Under s. 20 of the ***Act***, the adjudicator has broad discretion over the enforcement action to be taken. Once a contravention has been established, the adjudicator can decide which of the sanctions set out in the Schedule should apply in the circumstances.

[64] However, once an adjudicator decides to impose a license suspension he or she is bound to follow the range of suspension set out in the *Regulation*, Schedule 4. There is no discretion to impose a lesser penalty than that prescribed in the Schedule, although there is discretion to impose a penalty greater than that provided for in the Schedule, if the adjudicator is satisfied that it is in the public interest to do so. Under Schedule 4, the prescribed minimum penalty for a violation of s. 36(2)(b) is 10-15 days for a first contravention.

[65] In this case, the Adjudicator exercised his discretion and imposed a 12-day suspension for the s. 36(2)(b) violation. It is clear from the reasons that although the Adjudicator noted that the licensee had some history of past compliance problems, this did not result in a penalty that was outside the usual range, but was in fact a penalty in the middle of the range for a first contravention.

[66] The decision of the Adjudicator on the appropriate penalty is reasonable and I will not disturb it.

CONCLUSION

[67] The Adjudicator's finding that the petitioner permitted unlawful activity on its premises and failed to demonstrate due diligence is reasonable. The 12-day suspension under s. 36(2)(b) is a reasonable penalty. The petitioner's application to quash the decision of the Adjudicator is dismissed.

"The Honourable Mr. Justice Rice"