

**IN THE SUPREME COURT OF THE YUKON TERRITORY**

Citation: *202 Motor Inn v. Yukon Liquor Corporation*  
2004 YKSC 46

Date: 20040510  
Docket: S.C. No. 03-AP013  
03-AP014  
Registry: Whitehorse

Between:

**10532 YUKON LTD dba THE 202 MOTOR INN**

Appellant

And:

**YUKON LIQUOR CORPORATION  
AND THE YUKON LIQUOR CORPORATION'S BOARD OF DIRECTORS**

Respondent

Before: Mr. Justice L. F. Gower

Appearances:

James R. Tucker  
Zebedee D. Brown

For the Appellant  
For the Respondent

**MEMORANDUM OF DECISION  
DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): The 202 Motor Inn, being a trade name of 10532 Yukon Ltd., has appealed two decisions of the Yukon Liquor Corporation's Board of Directors, which arose from orders of the President of the Yukon Liquor Corporation, that the 202's liquor licence be suspended pursuant to s. 17(1) of the *Liquor Act*, R.S.Y. 2002, c. 140 (the "Act").

[2] The first decision dealt principally with a report by a liquor inspector that on March 2, 2003, one Mr. Niemen was permitted to be in the 202's licensed premises while in a drunken or intoxicated condition, contrary to what is now s. 70(1)(a) of the *Act*.

[3] The second decision dealt with a similar report by a liquor inspector that on June 14, 2003, one Mr. Fenton was permitted to be in the 202's licensed premises while drunk or intoxicated, also contrary to s. 70(1)(a).

[4] There were issues of credibility and contradictory evidence in both matters.

[5] Both of the Board's decisions were in writing pursuant to s. 18(7) of the *Act*. Both found that s. 70(1)(a) had been violated by the 202. In the first case, the Board suspended the 202's liquor licence for a period of five days, and in the second, for seven days.

[6] I was advised by both counsel on the Appeal hearing in this Court that they had intended to treat the underlying violations of the *Act* in both matters as strict liability offences. Accordingly, both counsel anticipated the Board could address the possibility of a defence of due diligence on the facts. Indeed, counsel for the 202 specifically invited the Board to consider such a defence in each case.

[7] However, in its written decisions, the Board failed to address the potential applicability of the defence of due diligence. On this point, counsel are agreed the Board's reasons in both these cases were deficient. Counsel for the Yukon Liquor Corporation says that is because they did not fully comply with s. 18(7) of the *Act*. Counsel for 202 says that is because the Board thereby committed an error in law contrary to s. 118(1)(b) of the *Act*. In any event, counsel are agreed the deficiencies constitute sufficient grounds for this Court to order that the Board rehear each of these two matters. Section 118(5) of the *Act* addresses the Court's authority to do just that.

[8] In hearing the oral submissions of both counsel on these appeals, I also raised the apparent failure by the Board to address itself in each case to whether the *actus reus*, or prohibited act, had been proven beyond a reasonable doubt. The Supreme Court of Canada, in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, stated that must be done before the onus shifts to the defendant to establish, on a balance of probabilities, the defence of reasonable care or due diligence.

[9] While counsel for the 202 raised that issue in the appeals before this Court, neither counsel raised it before the Board. Indeed, counsel for the Yukon Liquor Corporation made submissions in the first appeal to the Board suggesting the onus of proof of the prohibited act was on a balance of probabilities, which is clearly incorrect. Given the credibility issues and conflicting evidence in both

matters, this could well become an important aspect of the Board's reasons upon rehearing these cases.

[10] Here I note generally the importance of reasons to resolve confused and contradictory evidence on a key issue, as was stated in *R. v. Sheppard*, [2002] S.C.C. 26. Although *Sheppard* is a criminal case, it was also based largely on the previous Supreme Court of Canada case in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, which is an administrative law case.

[11] I also note in passing that in the first appeal, the Board sought legal advice on a point of procedure. Initially, the Board Chair attempted to obtain such advice from counsel within the Yukon Government Legal Services, until it was determined that counsel for the Yukon Liquor Corporation is also within Yukon Government Legal Services. The Chair next turned to a lawyer within the federal Department of Justice office here in Whitehorse, who clearly was not in a position to provide private legal advice to a territorial quasi-judicial tribunal such as the Board. In the end, the procedural problems were resolved and the matter went forward.

[12] I mention this here, as I did with counsel in the appeals before this Court, because it is an example of how the Board could benefit from retaining independent, private counsel on appeals pursuant to s. 18 of the *Act*. Indeed, if

that had occurred here, perhaps the Board could have been guided to avoid foundering on the errors of law I have just mentioned. That would not only have saved the licensee significant time and resources, but would also have been in the larger public interest.

[13] In summary, both counsel suggest these matters should be returned to the Board for rehearing. They also agree on the essential terms of the Order.

[14] I will award costs to the appellant in each appeal to this Court. However, given the duplication of effort in preparing the appellant's factums, I expect counsel for the 202 might reduce the number of units claimed in the appropriate tariff items for the preparation of documents, where there is a range of units provided.

[15] This Court orders in each appeal that:

(1) The Yukon Liquor Corporation Board of Directors rehear the question of whether the appellant permitted a person or persons in a drunken or intoxicated condition to enter, be or remain in the appellant's licensed premises, contrary to what is now s. 70(1)(a) of the *Liquor Act*,

(2) In providing its written reasons, the Board of Directors shall include consideration of:

(a) whether the Yukon Liquor Corporation has proven beyond a reasonable doubt the prohibited act, being the alleged violation of the *Liquor Act*, and if so,

(b) whether the appellant has established, on a balance of probabilities, a defence of due diligence; and

(3) The appellant is awarded its costs in this appeal.

[16] That completes my remarks, other than to indicate that obviously the terms of this Order will be in each file.

[17] Are there any questions or is there anything that I have overlooked?

MR. BROWN: No, My Lord. When you ordered that the Board rehear the questions, is it your intention that a whole new hearing be conducted or is that an order that we can discuss? I just wondered if you have anything specific in mind that we should be concerned with there.

THE COURT: No, I was not anticipating rehearing the evidence in that sense but rehearing in the sense that they go back and review the evidence that was before them that is part of the record, essentially the transcript.

MR. BROWN: I see. Thank you. That is fine.

THE COURT: Thank you.

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GOWER J.