

2004 CarswellOnt 8974
Ontario Superior Court of Justice (Divisional Court)

1166134 Ontario Inc. v. Ontario (Alcohol & Gaming Commission)

2004 CarswellOnt 8974, [2004] O.J. No. 5599

**1166134 Ontario Inc. cob Nashville North,
Appellant and Registrar of the Alcohol and Gaming
Commission of Ontario et al., Respondents**

G.D. Lane J.

Judgment: December 17, 2004

Docket: 646-04

Counsel: David Shiller, for Appellant

Subject: Civil Practice and Procedure; Public

Table of Authorities

Cases considered by G.D. Lane J.:

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

G.D. Lane J.:

1 Motion by Appellant for a stay, pending the hearing of the Appeal, of the order of revocation of the Appellants License made by the Board December 14, 2004. The appellant was charged by the Commission with a series of incidents in 2003 of over-crowding, permitting drunkenness, serving intoxicated parties etc. There was evidence before it of servious nuisance to neighbours due to noise, and drunken patrons. There was acknowledgement by the Commission that there were some non-patrons involved as well. The evidence establishes clearly that the licensed permises were operated in 2003 in a most unsatisfactory manner. Although the hearings did not end until last wednesday, the evidence was from 2003 and Appellant's counsel asserted that there had been many and frequent inspections during 2004 with no additional regulatory action.

2 There were some affidavits filed as to events on December 9 and also annexing notes made of events by various inspectors and also as to events in the summer of 2004 but none of these led to action by any authorities. The affidavit of Mr. V[illegible text], owner of the licensed premises deposes as to added security and other measures already taken to try to alleviate the problem, together with a list of additional steps which will be taken. Counsel for the Commission was critical of this "deathbed repentance" and doubtful of its sincerity. However, there was no cross-examination of Mr. Volertini and thus no reason to reject this evidence.

3 This stay motion is to be decided by applying the 3-fold test para: *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994 CarswellQue 120 (S.C.C.)] - genuine issue for the appeal; irreparable harm in the absence of a stay; the balance of convenience. Only the third gives rise to difficulty. The genuine issue is conceded to exist; and I am satisfied that, if the premises are unable to sell alcoholic beverages until the appeal is heard, the licensee will suffer irreparable harm; indeed it seems probable the business will not survive; 45 people will lose their employment at once and perhaps permanently.

4 The balance of convenience is more difficult. On the one hand the community of Norval is subject to a nuisance only part of which is a normal accompaniment to any clause large venue. Much of the nuisance in 2003 was due to lax management of the licensed premises rather than to their mere existence. The breach of occupancy limits is particularly egregious as it can lead to mass tragedy; failure to control drunkenness can lead to serious results on a smaller scale. But we live in a society where decisions of this kind may be appealed and if that right is to be meaningful, the appellant must not be bankrupted in the interval between the decision and the appeal hearing. The appellant has proposed serious changes to the operation and in my view should be given an opportunity to survive the appeal period by putting those changes into operation.

5 The revocation of the license will be stayed until the result of the appeal is known upon condition that the appellant put into effect all the changes proposed in his Affidavit and that it operates within the law in every respect. Leave is given to the Commission to move to remove the stay upon fresh grounds arising after this date. Costs will be reserved to the panel hearing the appeal.