

CANADA

PROVINCE OF NOVA SCOTIA

Case Number

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

- versus -

ROSS HARRINGTON & WINE KITZ

TRANSCRIPT OF DECISION

HEARD BEFORE: The Honourable Judge B. Beach, J.P.C.

PLACE HEARD: Halifax, Nova Scotia

DATES HEARD: June 16, 2009

CHARGES: That between the 10th day of April '07 and the 20th day of April '07, at or near Halifax, Nova Scotia, Ross Harrington and Wine Kitz and Pemberley Wines Inc. did offer to sell liquor, or in consideration of the purchase or transfer of any property or for any other consideration, give liquor to any other person, contrary to Section 78(1) of the Nova Scotia Liquor Control Act.

COUNSEL: Mr. S. Hughes, Crown Attorney

Ms. E. Buckle, Defence Attorney

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1 BEACH, J.P.C. (ORALLY)

2

3 I am dealing with a decision with respect to three matters
4 before the court pursuant to the Nova Scotia **Liquor Control Act**.
5 The information had been amended to include Ross Harrington and
6 Wine Kitz and Pemberley Wines Inc. named as the defendants.

7 I want to begin by saying to counsel, first of all, that I
8 appreciate your efforts in presenting an agreed statement of
9 facts. I know that this takes additional time and effort on the
10 part of counsel, but it does free up trial time for a busy court
11 and I just want you to know that your efforts in that regard do
12 not go unnoticed.

13 In addition, I want you to know that I found your briefs and
14 oral arguments helpful with this matter and I do not mind saying
15 that I have struggled in reaching my decision with respect to the
16 charges against Mr. Harrington and Wine Kitz and Pemberley Wines
17 Inc.

18 So having said that, I am going to begin with respect to the
19 first count on the information. Mr. Harrington is charged
20 pursuant to s. 78(1) of the Nova Scotia **Liquor Control Act**. The
21 charge reads as follows:

22 That between the 10th day of April 2007 and

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1 the 20th day of April 2007, at or near
2 Halifax, Nova Scotia, Ross Harrington and
3 Wine Kitz and Pemberley Wines Inc. did offer
4 to sell liquor or in consideration of the
5 purchase or transfer of any property or for
6 any other consideration, give liquor to any
7 other person, contrary to s. 78(1) of the
8 Nova Scotia **Liquor Control Act**.

9 On April 11th, Mr. Harrington sold a wine kit and other
10 products to an undercover officer, and the undercover officer
11 received from Mr. Harrington, a wine kit, an accelerator pack
12 which consists of super yeast, there was space rental, corks,
13 filter pads, the use of equipment and supplies, in exchange for
14 payment of \$126.98 and I have had an opportunity to review
15 Exhibit B which is the invoice. I have taken note of the
16 responsibilities of the parties set out in that invoice.

17 S. 78(1) of the **Act** provides as follows:

18 Except as provided by this **Act** or by the
19 **Regulations**, no person shall, within the
20 Province by himself, his clerk, servant or
21 agent, directly or indirectly, upon any
22 pretense or upon any device, expose or keep

1 for sale, sell or barter, or offer to sell
2 liquor, or in consideration of the purchase
3 or transfer of any property or for any other
4 consideration, or at the time of transfer of
5 any property, give liquor to any other
6 person.

7

8 Mr. Harrington is alleged to have sold or offered to sell
9 liquor in exchange for consideration.

10 Now in my opinion the defendant's difficulty with respect to
11 count one focuses squarely on the definition of liquor, which is
12 defined in s. 2 of the **Act**. Under Clause K:

13 'Liquor' means and includes any alcohol,
14 alcoholic, spirituous, vinous, fermented malt
15 or other intoxicating liquor or combination
16 of liquors and mixed liquor a part of which
17 is spirituous, vinous, fermented or otherwise
18 intoxicating and all drinks or drinkable
19 liquids and all preparations or mixtures,
20 whether liquid or solid, capable of human
21 consumption which are intoxicating, and any
22 compound, mixture or preparation whether in

6

1 solid or liquid form to which the addition of
2 water or any other liquid or any substance
3 will produce intoxicating liquor.

4 Now the Defence acknowledges that the definition of liquor
5 in the Nova Scotia **Liquor Control Act** is a broad one, but
6 suggests that it would be an absurd situation if everyone who
7 sells juice, and essentially this is what she contends Mr.
8 Harrington is selling, just high quality grape juice, and she
9 says that it would be an absurd situation if everyone who sells
10 juice and yeast could potentially be captured by the definition
11 contained in Clause K of the **Liquor Control Act** and I have been
12 directed to Chapter 9 of **Sullivan on the Construction of Statutes**
13 and appreciate receiving that from the Defence.

14 For purposes of completeness of the record, I want to refer
15 to the page 299 and page 300, and I quote:

16 When a Court is called on to interpret
17 legislation, it is not engaged in an academic
18 exercise. Interpretation involves the
19 application of legislation to facts in a way
20 that affects the well-being of individuals in
21 communities for better or worse. Not
22 surprisingly, the Courts are interested in

1 knowing what the consequences will be, and
2 judging whether they are acceptable.
3 Consequences judged to be good are presumed
4 to be intended and generally are regarded as
5 part of the legislative purpose.
6 Consequences judged to be contrary to
7 accepted norms of justice or reasonableness
8 are labeled absurd and are presumed to have
9 been unintended.

10 Further at page 300:

11 The modern understanding of the Golden Rule
12 or the presumption against absurdity includes
13 the following oppositions:

14 (1) It is presumed that the Legislature does
15 not intend its legislation to have absurd
16 consequences.

17 (2) Absurd consequences are not limited to
18 logical contradictions or internal
19 incoherence, but include violations of
20 established legal norms, such as Rule of Law.
21 They also include violations of widely
22 accepted standards of justice and

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1 reasonableness.

2 (3) Whenever possible, an interpretation that
3 leads to absurd consequences is rejected in
4 favour of one that avoids absurdity.

5 It may well be the case, as suggested by Mr. Harrington's
6 counsel, that if indeed Superstore was the defendant in this
7 matter and was charged pursuant to s. 78(1), it might be absurd
8 to find that their products fall under the definition of liquor.
9 The Superstore does not hold itself out as a wine store, it is a
10 grocery store with hundreds and hundreds of products and this is
11 not the situation that is before me. I think it is only proper
12 to consider this definition provided in the Nova Scotia **Liquor**
13 **Control Act** within the context of the facts that are before me.
14 The clear wording, in my view, must be applied to the facts of
15 this case.

16 This is not the Superstore. This is not a corner store.
17 This is Mr. Harrington, Ross Harrington, an officer and director
18 of Pemberley Wines Inc. It is a corporate body which owns and
19 operates a wine store called Wine Kitz. He has been in the
20 business of offering for sale wine kits, which are concentrated
21 grape juice, accelerator and so on. This is precisely the kind
22 of substance contemplated by Section K of the **Liquor Control Act**

1 and the legislators have seen fit to give their definition of
2 what is liquor, a very broad scope. So there is no question, in
3 my view, that a wine kit is a compound or mixture, which with the
4 addition of another substance, will produce intoxicating liquor.

5 I think with respect to the facts of this case, and it is my
6 decision with respect to the facts of this case, that the clear
7 meaning must be applied and that the doctrine of absurdity does
8 not operate in the defendant's favour and ,therefore, on the
9 first count I find the defendant guilty.

10 Now if I am incorrect in my conclusion with respect to the
11 application of the doctrine of absurdity, it would be my view,
12 and I am going to address this because there was considerable
13 attention paid to it in argument, it would be my view that the
14 transaction took place on April 11th and I am not persuaded by
15 the Crown's argument that it was a transaction covering a period
16 from April 11th and ending on April 19th. The only consideration
17 flowed on April 11th between the defendant and the undercover
18 officer.

19 Therefore, for the purposes of completeness, it would be my
20 view that if it were deemed absurd that the wine kit and
21 accelerator and so on to be considered liquor by definition, then
22 it is my view that sometime after the 11th of April, the mixture

10

1 became liquor and belonged to the purchaser and I would agree
2 with the Defence argument on that point.

3 Now I took particular attention of the decision out of
4 British Columbia and I thought it was interesting to note that
5 this issue with respect to the compounds or the wine kit and
6 accelerator and so forth was not addressed by Justice MacKenzie
7 in **Liberty Wine Merchants Limited vs. Isaac**. So I took some time
8 to find the definition of "liquor" in British Columbia and that
9 clarified for me the differences in this case as compared to the
10 one that Justice MacKenzie was resolving. The definition in
11 British Columbia **Liquor Control Act** is "(a) a fermented spiritous
12 and malt liquors, combination of liquors, drinks and drinkable
13 liquids that are intoxicating." So their definition is
14 significantly less broad.

15 I would concur with Justice MacKenzie's reasoning that the
16 transaction in that case involving the sale of the wine kit took
17 place before the goods became wine. As I have already said,
18 however, in this province the definition encompasses a much
19 expanded notion of what is liquor, and as a result, Mr.
20 Harrington as defendant is captured under that definition.

21 Now with respect to counts two and three. The second count
22 set out in the information was held to be duplicitous and I am

1 not going to go into any of the details of that. The Crown
2 elected to proceed on the basis that the defendants did keep
3 liquor, contrary to s. 78(2) of the Nova Scotia **Liquor Control**
4 **Act**, rather than manufacture.

5 S. 78(2) of the **Act** sets out that, "Except as authorized by
6 this **Act**, or the **Regulations**, no liquor shall be manufactured,
7 transported, kept or had by any person."

8 S. 98 of the **Act** states, "Except as otherwise provided in
9 this **Act** or the **Regulations**, no person shall lease or permit the
10 use of any building or premises, owned or occupied by him, for
11 the storage of liquor."

12 Now the defendants are charged under both sections and the
13 Defence has argued that the exemption provided in the **Liquor**
14 **Control Act** applies in relation to both sections. So while s.
15 78(2) deals with the keeping of liquor, and s. 98 of the **Liquor**
16 **Control Act** deals with the storage of liquor, it is difficult to
17 distinguish between what is meant by "keep" in s. 78 and "store"
18 in s. 98. But the Crown suggests that the difference is the
19 application of s. 69, which Mr. Hughes suggests will operate in
20 relation to s. 98 in some circumstances, but not in relation to
21 s. 78(2).

22 The Defence argues that both sections in the **Liquor Control**

12

1 **Act**, s. 98 and s. 78(2) allow for an exemption and that is
2 provided in s. 69(1).

3 So turning to s. 69(1), which is the section relied on by
4 the Defence, it allows duly licenced vintners to store liquor if
5 that storage is authorized by federal law. And the section
6 reads:

7 Nothing in this **Act** shall prevent any brewer,
8 distiller or vintner or other person duly
9 licenced under any statute of the Parliament
10 of Canada, for the manufacture of liquor,
11 from having or keeping liquor in a place and
12 in a manner authorized by or under any such
13 statute, or from selling liquor therefrom to
14 a person in another province or in a foreign
15 country.

16 The defendant received from the Canada Revenue Agency a
17 "Ferment on Premises Registration", and that is before me as
18 Exhibit "A" in this matter. Now in that communication there is
19 an account identifier number and the exhibit reads, "You have
20 been issued an account identifier number (and spells out the
21 number) and a licence number." And the communication states that
22 the licence number allows you to store bulk wine that is produced

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1 by an individual for their personal use until it is packaged and
2 it also states that the ferment on premise may not take part in
3 the production or packaging or the wine.

4 So it appears that that was precisely what Mr. Harrington
5 was doing, storing bulk wine produced by an individual for
6 personal use and there is no question that Mr. Harrington was
7 alerted in the correspondence to his provincial obligations and I
8 made note of that in that communication which reads:

9 Although Canada Revenue Agency is issuing you
10 a Ferment on Premises Registration pursuant
11 to the **Excise Act 2001**, this does not release
12 you from any other federal or provincial
13 obligations. It is your responsibility to
14 contact the province in which you intend to
15 operate a ferment on premise facility to find
16 out your provincial obligations and
17 entitlements.

18 Now the Crown suggests there are different ways of getting a
19 licence and different reasons for getting a licence and although
20 it may be difficult to grasp, it is up to Mr. Harrington who is
21 in the business to understand his obligations.

22 I am satisfied, however, based on the evidence before me,

14

1 that Mr. Harrington exercised diligence in doing what was
2 required of him. While Mr. Harrington may indeed in law have
3 only obtained a registration, it is clear that what was sent to
4 him suggested he had a licence. You can call it ambiguous; you
5 can call it an officially-induced error; but there is nothing
6 here to suggest that Mr. Harrington was in any way trying to
7 thwart his obligations in the conduct of his business. There is
8 nothing before me to suggest that. This is not a situation where
9 Mr. Harrington was visited by Liquor Control officials, at least
10 to the best of my knowledge given the facts before me and advised
11 or warned that he was not meeting his licencing obligations or
12 might be confused or mistaken about his obligations.

13 This is what we often see with municipal matters that come
14 before the Court where certain **Code** requirements are not being
15 met, that the officials will visit individuals and say, You are
16 not living up to your obligations and things are corrected and if
17 they are not corrected, the matters end up before the Court.
18 This is not that kind of situation where Mr. Harrington was
19 approached and ignored warnings and refused to comply with his
20 obligations. He thought he had complied with his obligations
21 and, in my view, I can certainly see why he would think that.
22 This is rather a situation where officials saw fit to engage in

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1 an undercover operation.

2 Now I expect that Mr. Harrington now fully understands his
3 obligations as a result of these charges and contact with his
4 lawyer and that he is well informed with respect to the licensing
5 requirements of the Province. And while his defence is
6 successful on counts two and three in this instance, I would
7 doubt that this would be the case, Mr. Harrington, in the future,
8 given that your attention has been clearly drawn to your
9 provincial obligations.

10 So on counts two and three, I find him not guilty of the
11 charges.

16

DISCUSSION

1 **MS. BUCKLE:** Thank you, Your Honour, we may be able to
2 move on to the penalty phase now, but I am wondering if I could
3 have a moment to speak with my friend before we do that.

4 **THE COURT:** Sure, why don't you take a few minutes while
5 we deal with some other matters.

6 **MS. BUCKLE:** Thank you.

7 **OTHER MATTERS HEARD** 10:19 - 10:32 HRS

8 **MS. BUCKLE:** Yes, Your Honour, I spoke with Mr. Hughes
9 very briefly. We're wondering if we could adjourn until next
10 week for penalty. We need to discuss the matter further. I am
11 back in this court on the 25th.

12 **THE COURT:** I am not here. I'm ...

13 **MS. BUCKLE:** You're not here.

14 **THE COURT:** That's the problem. Next week I'm away for
15 the better part of the week in other courts.

16 **MS. BUCKLE:** That's fine.

17 **THE COURT:** What about ...

18 **MS. BUCKLE:** I expect it to be very brief.

19 **THE COURT:** All right, what about the 23rd? Are you
20 available in the afternoon?

21 **MS. BUCKLE:** I have a hearing in Truro on the 23rd and
22 24th and 26th.

DISCUSSION

1 THE COURT: Okay. June the 30th at 1:30?

2 MS. BUCKLE: I'm not available at 1:30; I am available at
3 9:30 ... or any time in the morning.

4 THE COURT: We'll try for 9:30, but there will be a long
5 line-up.

6 June 30th at 9:30 then for sentencing.

7

8 MATTER ADJOURNED TO JUNE 30, 2009 - 09:30 HRS

CERTIFICATE OF COURT TRANSCRIBER

I, Margaret Livingstone, Court Transcriber, hereby certify that I have transcribed the foregoing and that it is a true and accurate transcript of the evidence given in this matter taken by way of electronic tape recording.

Margaret Livingstone
(Registration No. 2006-16)

DARTMOUTH, NOVA SCOTIA

June 24, 2009

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