

NORTHERN TERRITORY LICENSING COMMISSION

REVIEW OF DECISION OF CHAIRPERSON

APPLICANT FOR REVIEW:	HYACINTH TUNGUTALUM
CHAIRPERSON'S PROCEEDING:	Administrative decision under s.101 of the <i>Liquor Act</i>
THIS PROCEEDING:	Review pursuant to s.28 of the <i>Northern Territory Licensing Commission Act</i>
CORAM:	Mr John Withnall (Chairperson) Mr Craig Spencer Ms Annette Smith
DATE OF REVIEW HEARING:	03 August 2004

Mr Tungutalum sought a review of the previous Chairperson's decision under s.101 of the Liquor Act declining to return to Mr Tungutalum a dinghy which had been seized in relation to restricted area offences. It is common ground that Mr Tungutalum was a previous owner of the dinghy prior to its forfeiture. At the conclusion of the review hearing the Chairperson delivered an ex tempore decision recorded and transcribed as follows. The verbatim transcript has been non-substantively edited to facilitate readability and ensure clarity.

Mr Tungutalum originally applied for the return of his seized dinghy prior to any related conviction, which meant that technically he had applied direct to the Minister under Section 100A. I am unable to say whether that application went to the Minister's office, but in any event it was subsumed by the subsequent forfeiture of the boat upon relevant conviction in the Court of Summary jurisdiction. In any event Mr Tungutalum's legal aid service then formally re-applied on letterhead subsequent to the conviction, so that there is no doubt in our minds that the Chairman was properly seised of the matter under Section 101.

The Chairman had before him only the written material which is now evidenced in what we call the Hearing Brief. We have before us this morning the same material, albeit unverified and untested. We have the same package of documentation that the Chairman had plus the overlay of Mr Tungutalum's sworn *viva voce* evidence. The totality of that now does give us some concerns. There are seemingly internal discrepancies both in Mr Tungutalum's evidence and in the police documentary evidence, but notwithstanding, we have to agree that in the unusual circumstances there is absolutely no way, on the totality on the evidence before us, that Mr Tungutalum could have had any reason to suspect that the dinghy might be used in connection with the sort of offence for which anybody in the boat has been found guilty.

The only conviction relating to use of the dinghy was a conviction in relation to the bringing in, the *importation* of liquor into the Melville Island restricted area. However, the dinghy had actually been in the process of *leaving* the restricted area when it broke down. It had drifted out beyond the low tide line before being paddled back in at the direction of the police.

It is common ground between Mr Blackwell on behalf of the police and Mr Holdsworth on behalf of Mr Tungutalum that the guilty pleas in Court and the findings of guilt that followed were predicated on the boat *re-entering* the restricted area from a point outside the restricted area when it was directed to return to shore by A/Sgt Harris. Indeed, the offence of bringing liquor *into* the restricted area in the boat only occurred at the direction of the police! In our view the eventual conviction of the passenger concerned for this particular offence was very much dependent on the negotiated guilty plea.

Even if, and we hasten to emphasise the hypothesis, even if the boat had been full of grog, even if Mr Tungutalum were found to have been aware that people in the boat were drinking (which he denies on oath), it still cannot be said in our view that he must be taken to have known that a charge of re-importing it back into the Melville area was any sort of real possibility. It cannot be realistically said in the unusual circumstances that Mr Tungutalum was either knowingly involved in the particular offence as a result of which the boat was eventually forfeited or had reason to suspect that it might be used in connection with such an offence (ie. the offence of bringing back in liquor which was actually on its way out). On that legal ground, narrow and "technical" as it may be, we are of the view that we must recommend to the Minister that the return of the dinghy to Mr Tungutalum should be approved, however reluctantly.

We have looked carefully at our powers in terms of being a review panel under the *Licensing Commission Act* and we have come to the clear conclusion that we are determining the matter in the shoes of the Chairman. We are simply substituting a Chairperson's decision. We are therefore still constrained within the parameters of Section 101, as we see it, and so cannot simply order that the dinghy be returned. Such an order, even though by the Commission rather than the Chairperson, still requires the approval of the Minister.

We note Mr Blackwell's longish face at this point of the proceedings, and can appreciate the reasons for it, but it was an extraordinary factual situation on which to obtain a conviction for that specific offence of bringing liquor into the restricted area. We cannot really see that it could have been predicted by people in the outbound boat beyond the low water mark. We can understand that Acting Sergeant Harris acted quite properly as he saw it. He saw a dinghy load of people drinking. That unfortunately is not the be all and end all of it, and in effect the police subsequently plea-bargained themselves into the present unfortunate situation as regards the forfeited dinghy by dropping the charges of simple possession.

We formally recommend to the Minister that the dinghy and its appurtenant equipment be returned to Mr Tungutalum upon our foregoing reasoning. Although in our view any other outcome would be unsafe, we emphasise to Mr Tungutalum that the Minister must exercise his own discretion and has to reach his own conclusion as to Mr Tungutalum's state of awareness and its relevance to the basis of the dinghy's forfeiture.

John Withnall
Chairman
(Decision dated 03 Aug 04, this
transcript completed 25 Aug 04)