

NORTHERN TERRITORY LICENSING COMMISSION

REVIEW OF CHAIRPERSON'S DECISION

APPLICANT:	Victor Vincent
DECISION UNDER REVIEW:	Chairperson's decision to dispose of seized vehicle Toyota Land Cruiser NT 524-774 by tender and, if no suitable or actionable tender be received, then a destruction order be issued.
RELEVANT LEGISLATION:	Sections 95, 96 and 101 of the <i>Liquor Act</i> Sections 27, 28 and 29 of the <i>Licensing Commission Act</i>
MEMBERS:	Ms Jill Huck (Presiding Member) Mr Craig Spencer Ms Annette Smith
DATE OF HEARING:	18 August 2005
APPEARANCES:	Ms Kirsty Howey for the applicant Ms Mary Chalmers for the Police Craig Smyth, Counsel-Assisting the Commission

Background

1. This vehicle was seized pursuant to section 95 of the *Liquor Act* (the Act) at Barunga on 12 June 2004. A 4 litre wine cask had been found concealed under clothing in the rear of the vehicle. The applicant, Victor Vincent, was driving the vehicle and there were at least 8 adult passengers in the vehicle at the time. One of the passengers, Ryan Smiler, was later found to have an open cask of moselle in his bag. Victor Vincent and Ryan Smiler were charged with restricted area offences.
2. On 15 June 2004 Ryan Smiler was convicted and fined \$1000 for possessing liquor in a restricted area. On 18 October 2004 Victor Vincent was fined \$200 for each of two offences – “brought liquor into a restricted area” and “controlled liquor within a restricted area”. No convictions were recorded for Mr Vincent.

3. Under section 96 of the *Liquor Act* (the Act) a vehicle which has been seized under the Act is automatically forfeited to the Territory if a person is found guilty of an offence in connection with which it was seized. This provision was triggered by the conviction of Mr Smiler.
4. Attempts were made by an officer of Racing Gaming and Licensing to locate the vehicle's registered owner to notify him of his right to apply for the return of the vehicle. It was established that the registered owner had died in January 2003. Although it was clear from the Police précis of the arrest that Mr Vincent claimed ownership of the vehicle, there appears to have been no attempt to contact him to clarify the ownership issue or to notify him of his rights to seek the return of the vehicle. On 28 September 2004, in the absence of any claim for the vehicle, the then Chairperson of the Licensing Commission, John Withnall, made a decision under section 101 of the Act to dispose of the vehicle by tender and, if no suitable or actionable tender was received, then to issue a destruction order for the vehicle.
5. On 15 November 2004 KRALAS applied on Mr Vincent's behalf for the return of the vehicle. This application appears to have gone missing and another copy was faxed through to the Commission on Friday 18 February 2005. KRALAS was then advised that the Chairperson had already made the decision to dispose of the vehicle by public tender.
6. On 11 March 2005 an application was made on Mr Vincent's behalf for a review of the Chairperson's decision to dispose of the vehicle, stating that Mr Vincent had not received a copy of the decision until 24 February 2005. Reasons for the review request were provided on 18 March 2005. These reasons included the following information:
 - Mr Vincent was the owner of the vehicle;
 - Information about Mr Vincent's ownership of the vehicle had been available to the Chairperson at the time of the section 101 decision;
 - Mr Vincent was not knowingly involved in the offences;
 - Mr Vincent did not have any reason to suspect that alcohol was in the vehicle;
 - Mr Vincent is a non drinker; and
 - Mr Vincent had warned his passengers not to bring any alcohol into the restricted area and the passengers had assured him that they had not.
7. At its April 2005 meeting the Commission decided to conduct a review of the decision pursuant to section 28 of the *NT Licensing Commission Act*.
8. At the hearing of the review application, the Commission heard evidence from Victor Vincent and his wife, Nancy Mosquito. Both were assisted by an interpreter, Mr Speedy McGuinness. This evidence is summarised below:
 - Victor and Nancy live at Daguragu;
 - Victor is a non drinker and has been all his life;

- Victor is an active and well respected member of his community;
- Victor bought the vehicle from Robert Roy after the death of Robert's father, the registered owner. Victor is still paying off the vehicle;
- Victor and Nancy attend the Barunga Festival (the Festival) every year;
- On their way to the Festival in June 2004, they stayed overnight in Katherine and the next morning they encountered family members and others who asked for a lift to the Festival;
- These people had been drinking and were half-drunk. When Victor stopped at Riverview for food and fuel, he saw the passengers buy half a carton of beer, which they put in the vehicle. Neither Victor nor Nancy saw their passengers buy any wine, although they did see them talking to a group of people who were drinking Moselle;
- Later, as they were driving along, Nancy realised that some of the passengers were drinking wine from soft drink bottles; however she at no stage saw any wine casks. She does not think Victor realised that they were drinking wine;
- Victor confirmed that he did not know that some of the passengers were drinking wine, but was aware that they were drinking beer;
- With the exception of Victor, everyone in the vehicle was drinking alcohol during the journey;
- There were eight adults in the vehicle and lots of gear;
- Both Victor and Nancy knew Barunga was a restricted area and asked the passengers to finish their grog before they got to the restricted area;
- Victor pulled the vehicle over well before they entered the restricted area to make sure all the beer was finished and watched the passengers finish the beer. Nancy said she collected the empty cans in a plastic bag;
- Nancy said that they stopped again near the Barunga turnoff to make sure there was no alcohol in the vehicle. Neither saw any beer or wine in the vehicle;
- Neither knew that a cask of Moselle had been concealed in the back of the vehicle, nor were they aware of the open cask that was found in Ryan Smiler's bag;
- Nancy said that they were both shocked when the Police found the wine cask concealed under all their gear. The Police only found the wine cask after asking everyone to get out of the vehicle and then taking out all the blankets and clothing;
- Victor said that the whole sequence of events had made him sad and angry; and
- Victor was adamant that he did not know there was alcohol in the vehicle when they entered the restricted area, nor did he have reason to suspect that there was, having stopped the vehicle outside the restricted area so that the passengers could

consume the rest of the beer and after having checked the vehicle.

9. The Commission noted that there were some minor inconsistencies between the accounts of Nancy and Victor but nothing that cannot be explained by normal problems with trying to recollect details of events a year later. These inconsistencies were around the details of their activities before they left Katherine on the day in question, for example, who went to Woolworth's and what places they visited that morning before they left Katherine.
10. A letter from the Barunga Community Board of Management explaining the liquor restrictions for the Barunga Festival in June 2004, a Certificate of Proceedings for Victor Vincent's court case, and statements from the following people were tendered as evidence:
 - Ryan Smiler (passenger)
 - Felix Dodd (passenger)
 - Nancy Mosquito (passenger and Victor Vincent's wife)
 - Kathryn Stewart (Police Officer)
 - Ian Young (Police Officer)
11. There were some inconsistencies between the accounts contained in the statements. All were written 4 months after the seizure of the vehicle. The statements confirmed that Victor was the driver of the vehicle; that he was sober when the vehicle was stopped; that some of the passengers were drunk; that Victor knew Barunga was in a restricted area; that the wine was well concealed in the vehicle underneath the place where Banjo Smiler was lying; and that the wine belonged to Banjo Smiler. The statements were more equivocal about what Victor did or did not know about the wine being in the vehicle when they entered the restricted area. One of the Police statements indicated that when Victor was asked if he knew whether the wine was in the vehicle, he had said that "he didn't know and it belonged to Banjo". Only the statement of Ryan Smiler claims that Victor knew there was alcohol in the vehicle when they entered the restricted area. Nancy Mosquito's statement was consistent with her oral evidence and Felix Dodd's statement adds nothing to the evidence as he claimed to be drunk and asleep during key events.
12. There was no oral evidence given by the Police in the hearing of this review and no submissions made by Police about an appropriate outcome for the review.
13. Ms Howey stated that the evidence clearly established Victor Vincent as the legal owner of the vehicle. She said that Mr Vincent was a man of exceptionally good character who had not had any other trouble with the Police and had genuinely not known about the wine concealed in the back of the vehicle. She also said that Mr Vincent had no reason to suspect that there was alcohol left in the vehicle when they entered the restricted area. She argued that the Commission should set aside the Chairperson's decision and substitute a decision to return the vehicle to Mr Vincent.

Findings of fact

14. The Commission was favourably impressed by Victor Vincent as a witness and found his evidence very credible. The Commission made the following findings of fact:

- Victor Vincent was the owner of the vehicle having purchased it from the registered owner's son after the death of that owner;
- Victor Vincent is a man of exceptional good character and is a non-drinker;
- Victor and his wife Nancy gave at least eight people a lift to the Barunga Festival;
- Victor knew that there was beer in the vehicle and took steps to ensure that it was consumed before they entered the Barunga Restricted Area;
- Victor checked the vehicle before continuing into the restricted area;
- He did not know that there was a wine cask concealed in the back of the vehicle;
- The wine cask was concealed under a pile of clothing, on top of which one of the passengers was lying;
- He was also not aware of an open wine cask in one of the passenger's bags;
- Victor Vincent was found guilty of two restricted area offences and received small fines. No convictions were recorded in respect of these offences; and
- He was not knowingly involved in the offence.

The legislation

15. Section 101 of the Act reads as follows:

All things forfeited under this Part may be destroyed or otherwise disposed of in such manner as the Chairperson thinks fit, including, with the approval of the Minister where, in the case of a vehicle, vessel or aircraft, the Minister is of the opinion that the person was not knowingly involved in the act constituting the offence as a result of which it was forfeited and had no reason to suspect that it might be used in connection with such an offence, by selling or otherwise returning it to a person who, immediately before the forfeiture, had a legal or equitable interest in the vehicle, vessel or aircraft.

16. In *Ninnal v Minister for Racing, Gaming & Licensing & Anor* (2001) NTSC 68 Chief Justice Martin found that the Chairperson (and therefore the Commission standing in the Chairperson's shoes at the time of review) is not limited to considering the same statutory tests as the Minister when making a decision about how to dispose of a seized vehicle. Chief Justice Martin considered that the Chairperson had an open discretion to make a decision on the disposal of a vehicle "as *the Chairperson thinks fit*" and

that *the opinion of the Chairperson on the question of the owner's state of mind is of no effect in the statutory scheme*. However, the Chief Justice went on to say that where the Chairperson is considering returning a vehicle to a person:

...In the ordinary course of public administration, however, it is not likely that the Chairperson would be precluded from gathering and presenting to the Minister material, including any representations from the owner, upon which the requisite opinion of the Minister could be formed. But the only opinion countenanced by the legislature is that of the Minister.

17. In considering the exercise of the Chairperson's discretion in this case, we also took some guidance in relation to the exercise of unlimited discretion from the High Court of Australia decision *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. Justice Mason stated at pages 39-40:

What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.

18. The *Liquor Act* specifically requires the Commission to have regards to the Objects of that Act in making any decisions under the Act. The Objects are found at sections 3 and 6 and include objectives such as harm minimisation, taking into account the public interest and the protection and promotion of community amenity, social harmony and well-being. Given that these objects are mainly focused on the regulation of the liquor industry, the Commission considered that it was also relevant to look at the facts of the matter as they related to the much more specific subject matter, scope and purpose of Part VIII of the Act - that is, that Part of the Act which contains the restricted area provisions (including section 101). Part VIII is specifically concerned with providing a process by which a community can apply to ban or severely restrict the availability of alcohol in that community and, if such an application is successful, for the enforcement of the ban or restriction to be enforced by the full weight of the law.

19. The Commission also considered that the Minister's second reading speech for the *Liquor Amendment Bill 1988* provided some specific guidance regarding the purpose of section 101. The Minister relevantly stated:

There needs to be a compatible amendment after conviction to protect innocent parties who may not have had the opportunity to seek the return of their vehicle prior to the trial...

The weight of support I have encountered from [Aboriginal] communities has convinced me that offenders who breach the provisions of the restricted areas legislation should certainly continue to be punished but that discretionary powers need to be available for innocent parties.

Application of the law

As Mr Vincent is seeking the return of the vehicle, did he have a legal or equitable interest in the vehicle immediately before the forfeiture?

20. Although the registration details for this vehicle had not been officially changed, the Commission was satisfied that Mr Vincent had a legal or equitable interest in the vehicle before it was seized and could therefore apply for its return.

Was Mr Vincent knowingly involved in the act constituting the offence as a result of which the vehicle was forfeited?

21. The Commission has found that Mr Vincent was not knowingly involved in the offence. In coming to this conclusion we accepted his evidence that he genuinely did not know that there were two wine casks concealed in the vehicle. Although he was found guilty of two restricted area offences, we note that such offences are regulatory in nature and do not turn on whether the person was knowingly involved.

Did Mr Vincent have any reason to suspect that the vehicle might be used in connection with such an offence?

22. This is a more difficult test for Mr Vincent to satisfy. In his 2002 decision regarding Ms Ninnal's application for the return of her vehicle (*Ninnal 2002*) the Chairman of the Licensing Commission, Mr Peter Allen wrote :

In my opinion, a decision as to whether Ms Ninnal "had reason to suspect" requires an objective assessment; an assessment of inferences able to be reasonably drawn from the circumstances of the matter. The word "might" suggests to me that Ms Ninnal is required to demonstrate "no reason to suspect" that there was any reasonable chance of her vehicle being used to transport liquor into a restricted area. For the purposes of further explanation the word "might" as used in the section can be compared with the word "would". In my opinion, the word "might" goes to chance, a reasonable chance that the vehicle might be used, whereas "would" goes to reasonable probability; a lesser degree of difficulty for Ms Ninnal if linked with "no reason to suspect", but one not afforded her by s101.

23. In this case, Mr Vincent had driven a large group of people from Katherine to Barunga. All the adult passengers were drinking on the journey, with some being quite drunk. While Mr Vincent tolerated this behaviour, it was his evidence, and that of his wife, Nancy Mosquito, that he had stopped the vehicle before they entered the Barunga Restricted Area and made sure that all the remaining alcohol that he knew of was consumed. It was also their evidence that they had both checked the vehicle again at the Barunga turnoff and were satisfied that there was no alcohol left in the vehicle. Both were very surprised when a wine cask was discovered hidden in the vehicle. It is not without significance that the wine cask was only discovered when all the passengers were asked to get out of the vehicle and when all the gear in the rear of the vehicle was removed. The other open wine cask concealed in Ryan Smiler's bag was only found by Police at a later stage. In these circumstances it is entirely possible that Mr Vincent and his wife could have checked the vehicle and not discovered these two items.
24. Ultimately, this issue came down to one of credibility. The Commission found Mr Vincent and his wife to be very credible witnesses and believed their evidence that they had taken precautions to ensure that the vehicle was alcohol free before entering the restricted area and that Mr Vincent did not suspect that there was any alcohol remaining in the vehicle.
25. The Commission was satisfied, on the balance of probabilities, that by the time he drove into the restricted area, Mr Vincent did not have any reason to suspect that his vehicle might be being used in connection with a restricted area offence. Having reached this conclusion, the Commission went on to consider some other factors, which might support or undermine the rationale for exercising the Chairperson's discretion to decide to return the vehicle to Mr Vincent.

Other relevant considerations

26. Among other things, the Commission considered that the following factors were relevant to a decision to return the vehicle to Mr Vincent:
- Mr Vincent would appear to be the type "innocent party" for which section 101 was designed. Mr Vincent is a non drinker, had absolutely nothing to gain from the situation and had taken reasonable steps to ensure the vehicle was alcohol free;
 - Mr Vincent has already suffered considerable hardship as a result of the offences including: fines; loss of access to the vehicle; having to continue to pay for a vehicle he no longer has the use of; and damage to reputation;
 - The amount of alcohol involved in the offences was relatively small;
 - There was some administrative error involved in the handling of this matter in that Mr Vincent was not notified of the forfeiture of the vehicle nor of his rights to seek its return. Additionally some early correspondence from his lawyer was lost.

27. The Commission, having had regards to the purpose of section 101, the specific tests which the Minister must consider and some of the circumstances which are unique to this case, as well as the Objects of the *Liquor Act* and the purpose the Part VIII provisions, decided to revoke the original decision to dispose of the vehicle by tender.

Decision

28. The Commission decided to revoke the decisions of the Chairperson to:

- dispose of seized vehicle Toyota Land Cruiser NT 524-774 by tender; and
- if no suitable or actionable tender be received, then a destruction order be issued.

29. The Commission substituted a decision that the vehicle be returned to Mr Victor Vincent, who is a person who had a legal or equitable interest in the vehicle when it was seized.

30. This means that Mr Vincent's application for a review by the Commission of the Chairperson's decision has been successful. However, as explained to Mr Vincent at the hearing, the decision to return the vehicle to Mr Vincent can only be implemented with the approval by the Minister.

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Jill Huck
Presiding Member
7 November 2005