COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),*** 2006 BCCA 119

Date: 20060310

Docket: CA033293

Between:

Cambie Hotel (Nanaimo) Ltd. d.b.a. Cambie Hotel

Respondent
(Petitioner)

And

General Manager of the Liquor Control and Licensing Branch

Appellant
(Respondent)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Hall

D. Roberts — Counsel for the Appellant

S. Waddell — Counsel for the Respondent

Place and Date of Hearing: Victoria, British Columbia
20 February 2006

Place and Date of Judgment: Vancouver, British Columbia
10 March 2006

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Overview

[1] Following a hearing, an Enforcement Hearing Adjudicator, to whom the General Manager of the Liquor Control and Licensing Branch (the "General Manager") had delegated the task of determining whether the Cambie Hotel (Nanaimo) Ltd. (the “Cambie Hotel”) had supplied liquor to a minor on its premises, contrary to s. 33(1) of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the “***Act***”) found that the Cambie Hotel had done so and ordered a suspension of its liquor licence for four days.

[2] The Cambie Hotel then brought a petition under the ***Judicial Review Procedure Act***, R.S. B.C. 1996, c. 241, to quash the decision of the adjudicator. The chambers judge allowed the petition on the grounds that the adjudicator's findings that the young patron of the Cambie Hotel was a minor and that the substance she had consumed was liquor were unreasonable.

[3] On her appeal to this Court from the order of the chambers judge quashing the adjudicator’s decision, the General Manager contends that the chambers judge: (1) erred in law in holding that hearsay evidence going to the issue of the age of the young patron was inadmissible in the administrative hearing; (2) erred in law in holding that s. 20 of the ***Act*** imports the formal rules of evidence into the hearing; (3) erred in finding that it was unreasonable for the adjudicator to have found that the beverage consumed by the alleged minor was “beer”, as defined in the ***Act*** under the term liquor; and (4) erred by failing to accord the appropriate degree of deference to the adjudicator’s decision.

[4] The respondent Cambie Hotel has raised a further issue which the chambers judge did not find it necessary to consider. The respondent contends that the method and term of appointment of the Enforcement Hearing Adjudicator gives rise to a reasonable apprehension of bias. In my opinion, the decision of the Supreme Court of Canada in ***Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, [2001] 2 S.C.R. 781 effectively forecloses success on this issue.

[5] For the reasons which follow, I am of the view that the grounds of appeal advanced by the General Manager must be allowed. Accordingly, I would allow the appeal, set aside the order of the chambers judge, and re-instate the decision of the adjudicator.

II. Background

[6] On 23 July 2004, the first evening of Bathtub Days, a festival in Naniamo that attracts many people, several R.C.M.P. constables and a Branch Inspector from the Liquor Control and Licensing Branch were all present at the Cambie Hotel in Nanaimo at around 8:30 p.m. There were approximately 50 patrons in the bar at the time. One server and one bartender were on duty.

[7] The Branch Inspector pointed out to the R.C.M.P. constables a young patron who appeared to be a minor. Constable Lepine approached the person and asked for her identification. The young patron gave her name but said she did not have any identification. When she provided a birth date, the Branch Inspector quickly pointed out that the birth date she had given would make her 17 years old. The young patron then said she had lied and that she was actually 18 years old and again provided a birth date. Constable Lepine subsequently confirmed the young woman's name and date of birth on a Canadian Police Information Centre ("CPIC") check.

[8] Constable Lepine said the young woman looked underage and that she smelled of alcohol. In his view, she was intoxicated. He said he noticed symptoms of intoxication including glassy eyes and heavy eyelids. Constable Lepine issued to the young woman a violation notice for being in the premises when she was underage. She did not dispute her age when the constable provided her with the Notice of Offence for being underage.

[9] Constable Lepine told the bartender that there was an underage patron in the bar. The young woman was not more than 15 feet away at the time. The Branch Inspector said she had observed the minor for approximately ten minutes and the minor was not approached by any Cambie Hotel staff during that time. The bartender, who signed an acknowledgment of a Licensed Premise Check served on him by the constable for "minor in liquor establishment", agreed that the person looked young enough that she should have been checked for ID.

[10] Section 20(1) of the ***Act*** sets out the powers of the General Manager under the ***Act***. Section 20(1)(a) provides:

> 20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:
>
> (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

[11] Section 20(2) sets out the kinds of restrictions and penalties the General Manager may take or impose on a licensee, with or without a hearing:

> (2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:
>
> (a) [Repealed 1999-36-13.]
>
> (b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

> (c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
>
> (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
>
> (e) cancel all or any part of the licensee's licence;
>
> (f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

[12] On taking action against a licensee, the General Manager must provide the licensee with written notice of the action. Section 20(4) sets out the requirements:

> (4) On taking action against a licensee under subsection (2), the general manager must
>
> (a) provide the licensee with written notice of the action in accordance with the regulations,
>
> (b) set out in the notice the reasons for taking the action,
>
> (c) set out in the notice the details of the action including
>
> (i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and
>
> (ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served, and
>
> (d) [Repealed 2002-48-37.]

[13] Section 20(4.1) provides that the General Manager, by summons, may require a person to attend a hearing:

> (4.1) For the purposes of any hearing referred to in subsection (2), the general manager, by summons, may require a person
>
> (a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and
>
> (b) to bring and produce before the general manager all documents, writings, books, deeds and papers in the person's possession, custody or power

> touching, or in any way relating to, the subject matter of the hearing.

[14] A Notice of Enforcement Action (NOEA) dated 12 October 2004, was subsequently sent to the respondent alleging that, as licensee, the Cambie Hotel had contravened s. 33(1) of the ***Act*** by supplying liquor to a minor. Appendix A to the NOEA contained a summary of the evidence and the names of the witnesses that the General Manager intended to call.

[15] In this case, the General Manager delegated the task of adjudication to an Enforcement Hearing Adjudicator. That delegation is permitted as a result of s. 84 of the ***Act*** and s. 3 of the Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulations"). Section 84(1) of the ***Act*** provides that the Lieutenant Governor in Council may make regulations referred to in section 41 of the ***Interpretation Act***. Section 84(2)(m) provides:

> (2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> . . .
>
> (m) providing for the delegation by the general manager of any or all of his or her powers, duties or functions, including without restriction, powers, duties and functions relating to licensing or enforcement, to officers or other persons or to a committee, which may include the general manager or officers or both;

[16] Section 3(1) of the Regulations provides that the General Manager "may delegate any of his or her powers, duties and functions under the ***Act*** and this regulation to one or more officers or persons".

[17] An enforcement hearing was scheduled for 18 February 2005. Attempts were made to serve the young patron with a subpoena but they were not successful. The night before the hearing the young woman's mother was served with a subpoena for her daughter to attend but her mother said she was not in control of the young woman and could not ensure her attendance. In the end, the young patron did not attend the hearing.

[18] At the hearing, the respondent argued that because the young woman was not present to give evidence, neither her identity nor her age could be proved. The adjudicator concluded otherwise. In his decision dated 9 March 2005, he held (at p. 17):

> I find on the evidence that the alleged minor was indeed a minor. She provided a birth date, though it took two attempts, which was corroborated by the information provided by the R.C.M. Police CPIC check. The constable was satisfied that the minor was properly identified. The liquor inspector was satisfied that the minor was properly identified. The minor did not dispute her age when the constable provided her with a Notice of Offence for being under age. The absence or [sic] her testimony provided no impediment to so finding.

[19] As to whether the substance being consumed by the alleged minor was beer, the adjudicator said:

> I find that the minor was consuming liquor in the bar. I accept the evidence of the inspector with respect to her observations of the minor consuming a yellow liquid with foam top, and in a beer mug. I find that this was beer. Given the location (a Liquor Primary licensed establishment), the vessel (a beer mug), the presence of identical looking substances in front of people sitting with the minor, the time of day (8:30 p.m.), the proximity of the minor to the bar, and the description of the liquid, it is difficult to imagine it being anything but beer. Further, I accept that evidence of the R.C.M. Police constable that the minor was intoxicated.

[20] The adjudicator ordered a suspension of the respondent's Primary Liquor Licence for a period of four days to commence at the close of business on 31 March 2005.

[21] The respondent then brought its petition under the ***Judicial Review Procedure Act*** in the Supreme Court of British Columbia to review the decision of the adjudicator. In its Amended Petition, the respondent challenged the adjudicator's decision on a number of grounds, including the following:

> 2. There was insufficient evidence at law to prove that the person allegedly supplied liquor was a minor.
>
> 3. There was insufficient evidence at law that the substance allegedly consumed by the alleged minor was alcohol.
>
> * * *
>
> 7. Given the method and term of the appointment of the Adjudicator, by the Branch for a renewable term with no appeal, there is a reasonable apprehension of bias on the part of the Petitioner against the Adjudicator.

III. Reasons of the chambers judge for quashing the adjudicator's decision

[22] In reasons delivered orally on 16 August 2005, the chambers judge quashed the decision of the adjudicator and granted costs to the Cambie Hotel. After accepting that the standard of review he was to apply was "reasonableness", the chambers judge said:

> [2] . . . The petitioner alleges seven grounds to quash the decision. I am satisfied that the manager's decision is unreasonable with respect to the evidence of the age of the person in question, and the substance being consumed. I need not deal with the

other five grounds, and do not do so.

[23] As to the evidence of the age of the person to whom the Cambie Hotel had allegedly supplied liquor, the chambers judge said:

> [6] There is no admissible evidence of the age of this person. [Counsel for the General Manager] tells me that the law is that hearsay evidence is admissible in administrative proceedings to prove the truth of the facts asserted in the out of court declaration. I am aware of no such law of evidence.

[24] After referring to certain provisions in s. 20 of the ***Act***, the chambers judge said:

> [10] Those legislative provisions lead me to the conclusion that this is designed to be a formal hearing; that witnesses are to be heard under oath unless the general manager provides otherwise. And that the rules of evidence are the formal rules of evidence.
>
> [Underlining added.]

[25] The chambers judge also held that procedural fairness required that the licence infraction be proved by evidence admissible in a court of law because of the seriousness of the sanctions which could be imposed under the ***Act*** upon an infraction being proven. In that regard the chambers judge said:

> [11] On the authorities counsel have referred to me, the observation has been made on numerous occasions that the ramifications of a finding that there has been a contravention of a provision of the statute, or a lack of compliance, may result in a serious or severe sanction. The gravamen of the conduct with which this licensee was charged is described in s. 33(1) of the *Act*, which reads as follows:
>
> > (1) A person must not
> >
> > (a) sell, give or otherwise supply liquor to a minor,
> >
> > (b) have liquor in his or her possession for the purpose of selling, giving or otherwise supplying it to a minor, or
> >
> > (c) in or at a place under his or her control, permit a minor to consume liquor.
>
> [12] "Minor" is defined in s. 1:

> . . . means a person under the age of majority established by the *Age of Majority Act*;
>
> . . .
>
> [13] In my opinion, procedural fairness requires that if the government is going to allege a significant fact such as “minor”, then that is a fact which it must prove by admissible evidence. The manager found that the person in question provided a birth date. That is hearsay. That person was never heard from. That was not admissible evidence. He went on to say that the hearsay evidence was corroborated by information provided by the R.C.M. Police CPIC check; that is to say, hearsay evidence was corroborated by more hearsay evidence. The minor did not dispute her age when the constable provided her with a notice of offence for being underage, said the manager. There is more corroboration of hearsay evidence by the lack of more hearsay evidence. That is an unreasonable conclusion to come to on the evidence in this case. Counsel have spoken at length on the standard of proof. Standards of proof presuppose onuses of proof, and the onus was on the government to prove a minor was involved. The government could not do that with inadmissible evidence because inadmissible evidence is not evidence.
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> [Underlining added.]

[26] As to the reasonableness of the finding made by the adjudicator that the alleged minor was consuming “beer”, the chambers judge said:

> [14] The second aspect of this non-compliance allegation was that the minor was consuming liquor. Liquor means, again under subsection (1):
>
> (a) fermented, spirituous and malt liquors,
>
> (b) combinations of liquors, and
>
> (c) drinks and drinkable liquids that are intoxicating, and includes beer. . .
>
> [15] Read in context, that definition suggests to me that it must be the kind of beer that is intoxicating or that contains liquor, not simply beer; not root beer, not near beer.

[27] After setting out the portion of the adjudicator’s reasons in which he found that the substance the alleged minor had been drinking was beer (reproduced in paragraph 19 of these reasons), the chambers judge said:

> [17] It is not beer which is prohibited, it is beer as defined under the word "liquor" that is proscribed, and the finding of fact, on that evidence relied upon by the general

manager, I find to be unreasonable. . .

IV. Hearsay evidence in an administrative proceeding

[28] The first ground of appeal is that the chambers judge erred in finding that hearsay evidence is inadmissible in an administrative proceeding. ***T.A. Miller Ltd. v. Minister of Housing & Local Government***, [1968] 1 W.L.R. 992, [1968] 2 All E.R. 633 (C.A.) supports the appellant's argument on this point. In that case, objection was taken to the introduction of a letter as evidence when the writer was not called as a witness. The letter was admitted by the Inspector and statements therein were included in his findings of fact. In rejecting the arguments that the letter ought not to have been admitted because it was hearsay, Lord Denning said, at 995:

> . . . A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law: see *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore,* [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81. During this very week in Parliament we have had the second reading of the Civil Evidence Bill. It abolishes the rule against hearsay, even in the ordinary courts of the land. It allows first-hand hearsay to be admitted in civil proceedings, subject to safeguards. Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that that must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of
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> commenting on it and of contradicting it: see *Board of Education v. Rice*, *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [citations omitted.]
>
> [Underlining added.]

[29] There are many decisions to like effect, for example, see ***Canadian National Railways Co. v. Bell Telephone Co.***, [1939] S.C.R. 308 at 317.

[30] In J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 308, the following appears under the heading "Non-applicability of Hearsay Rule in Certain Proceedings":

I. Administrative Proceedings

> In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant, it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible

> in a court of law.
>
> The rationale for shying away from strict adherence to the hearsay rule, and the rules of evidence generally, is that administrative proceedings are not normally as adversarial as criminal and civil cases. Moreover, policy and social issues are often considered in such proceedings. Evidence with respect to these issues by its nature contains a hearsay component which cannot be separated out. Furthermore, individuals who are not legally trained are often members of the tribunal or act as representatives of the parties and would not be familiar with the rules of evidence.
>
> [Underlining added.]

[31] In D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 3rd ed. (Toronto: Carswell, 1999) at 282, the authors note the change to the hearsay rule brought about by the decision of the Supreme Court of Canada in ***R. v. Khan,*** [1990] 2 S.C.R. 531 and its applicability in the administrative law context:

> In the case of *R. v. Khan*, the Supreme Court of Canada revised the rules relating to the admissibility of hearsay evidence. In the subsequent professional misconduct hearing [*Khan v. College of Physicians and Surgeons (Ontario)* (1990), 76 D.L.R. (4th) 179], the Ontario Divisional Court found that the admission of hearsay evidence in the disciplinary hearing necessitated a new hearing. On appeal, the Ontario Court of Appeal [(1992), 94 D.L.R. (4th) 193] found that the principles of reliability and necessity outlined by the Supreme Court applied to administrative tribunals, as well as to criminal proceedings, and the evidence was ruled to be admissible.

[32] The decision in ***Ocean Port Hotel Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)***, 2002 BCCA 311, confirms that hearsay in administrative proceedings is not *per se* objectionable. In ***Ocean Port***, a hotel pub was alleged to have violated its liquor licence by, among other things, permitting minors to enter and remain within the establishment. A senior inspector concluded that the allegations had been substantiated on a balance of probabilities and imposed a two-day suspension of Ocean Port's liquor licence. An appeal of that decision was made to the Liquor Appeal Board (which does not exist under the present legislation) by way of a hearing *de novo*. At the appeal hearing, the Board heard evidence from R.C.M.P. officers and two witnesses for Ocean Port. The Board accepted the evidence of the officers over the other witnesses, finding their evidence more credible and consistent. On the appeal from the Liquor Appeal Board's decision (on issues that had been remitted to this Court by the Supreme Court of Canada), Donald J.A. addressed Ocean Port's argument that the decision could not stand because of the Board's reliance on hearsay:

> [14] It is said for the appellant that the appeal hearing was not fairly conducted because of the Board's excessive reliance on hearsay; and, furthermore, the findings cannot stand because they are largely based on hearsay.

> [15] I propose to review the findings with respect to the allegations against the appellant bearing two principles in mind: (1) as this is a statutory review, as distinct from a judicial review, the standard on questions of fact and mixed fact and law is reasonableness *simpliciter*…and (2) hearsay in administrative proceedings is not *per se* objectionable. As for the latter principles [counsel for Ocean Port] accepts that hearsay evidence was admissible. He said, however, that it was unfair and unreasonable to base findings on the dubious quality of the hearsay in this case. While I subscribe to the view that curial deference is not owed when breaches of natural justice are at issue, I would shift the focus of the analysis from hearing fairness to the reasonableness of the decision once hearsay evidence is conceded to have been properly before the decision maker.
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> [Underlining added.]

[33] In ***Ocean Port***, the alleged minors did not testify at the hearing. However, Donald J.A. determined that this did not preclude a finding that the allegation had been sufficiently proved:

> [21] The Board heard the testimony of Corporal Laseur that the appellant's doorman alerted him to a young woman in the bar whose age was questionable. Although Mr. Wright had checked the identification of the woman on a previous occasion and it appeared to him to be authentic, he did not request her identification on 4 October. Corporal Laseur approached this woman and another young woman in the bar and ascertained that neither could produce identification. He called the detachment office and determined they were under age. He saw to it both were charged with an offence.
>
> [22] The appellant argues that the evidence of the age of the patrons was hearsay. This argument is without merit. Mr. Wright referred in his own testimony in chief to the two women as "minors" and said "they were 18".

[34] The evidence of Mr. Wright to which Donald J.A. referred as confirming the age of the alleged minors did not alter the fact that Corporal Laseur's evidence about the age of the two women was hearsay. However, Mr. Wright's testimony was clearly relevant when considering the reliability of the hearsay evidence.

[35] Finally, I note that counsel for the respondent has not pointed to any authority that would contradict the appellant's submission that hearsay evidence is admissible in administrative proceedings if it is relevant and can fairly be regarded as reliable.

[36] On the first ground of appeal, I agree with the appellant's submission that the chambers judge erred in holding that the hearsay evidence was inadmissible in the enforcement hearing. In administrative hearings, hearsay evidence that is logically probative and may fairly be regarded as

reliable is admissible. What weight the hearsay evidence is to be given is a separate question.

V. Did the chambers judge err in holding that s. 20 of the *Act* imports the formal rules of evidence in the hearing procedure?

[37] The chambers judge concluded that s. 20 of the ***Act*** imports into an Enforcement Hearing the rules of evidence used in civil proceedings. The appellant's second ground of appeal is that the chambers judge erred in so concluding.

[38] The fact that the legislation provides for a formal structure for enforcement proceedings does not preclude hearsay evidence from being admitted at a hearing. The often stated principle of administrative law that administrative agencies or tribunals are masters of their own procedure is a practical principle and reflects the part administrative agencies play in carrying out various tasks and aspects of government policy. Evidence is generally considered as a matter of procedure.

[39] In a useful article entitled "Evidence before Administrative Agencies: Let's All Forget the "Rules" and Just Concentrate on What We're Doing" (1995), 8 C.J.A.L.P. 263 at 266, James L.H. Sprague notes:

> "Evidence" is considered, on the whole, to be a matter of procedure. It is an aspect of how one enforces or goes about bringing into effect one's rights rather than being a substantive right itself.

In a footnote to support that observation, Sprague cites ***R. v. Wildman***, [1984] 2 S.C.R. 311 and ***R. v. Bickford*** (1989), 51 C.C.C. (3d) 181 (Ont. C.A.).

[40] The principle that administrative agencies or tribunals are masters of their own procedure is subject, of course, to any restrictions imposed by the enabling statute and by procedural fairness. While a statute creating an administrative tribunal could provide that the rules of evidence in civil proceedings are to be applied by the tribunal when enforcing its provisions, the Act under consideration contains no such provision.

[41] On the second ground, I agree with the appellant's submission that the chambers judge erred in finding that s. 20 of the ***Act*** imports into an enforcement hearing the rules of evidence in civil proceedings.

VI. Application of the standard of review to the adjudicator's finding that the young patron was a minor

[42] Before the chambers judge it was common ground that the standard of review of the adjudicator's decision was reasonableness *simpliciter*. What that standard entails was considered in ***Canada (Director of Investigation and Research) v. Southam Inc***., [1997] 1 S.C.R. 748, in which Iacobucci J. said (at paragraphs 56 and 59):

> [56] . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
>
> . . .
>
> [59] The standard of reasonableness *simpliciter* is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In *Stein v. "Kathy K" (The Ship)*, [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:
>
> > . . . the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis in original.]

[43] In this case, the chambers judge concluded that two “facts” found by the adjudicator were unreasonable. The first fact was that the young patron in the respondent’s bar was a minor and the second was that the beverage she consumed was liquor.

[44] In finding that the young patron was a minor, the adjudicator took hearsay evidence into account. I have already stated my opinion that the chambers judge erred in holding that it was not open to the adjudicator to admit hearsay evidence in proof of facts necessary to establish the infraction alleged.

[45] The question on the appeal is whether the chambers judge was in error in holding that the adjudicator’s finding that the young patron was a minor was unreasonable. The weight to be attached to the hearsay evidence falls to be considered under the standard of review.

[46] The adjudicator’s finding that the young woman in the respondent’s licensed premises was a minor was based primarily, although not exclusively, on hearsay evidence. Both the constable and the Branch Inspector gave evidence that the young woman appeared to be a minor. That is direct evidence based on observations made by two witnesses. The age the young woman had given to the constable in response to his questions was not at odds with their observations. There was no contradictory evidence. Instead, the evidence of the bartender confirmed that the young woman looked young enough that she should have been checked for ID.

[47] The statements made by the young woman concerning her age and identity were given

directly to Constable Lepine in the presence of the Branch Inspector. The statements were attested to by those witnesses in their testimony at the hearing, and their contemporaneous notes were introduced into evidence. After Constable Lepine had obtained confirmation through CPIC of the name and the date of birth the young woman had given, the young woman was given a violation notice for being in the premises while a minor. She made no protest when given the ticket.

[48] As I have already stated, it was open to the adjudicator to rely on the hearsay evidence in reaching his conclusion that the young woman in the respondent's licensed premises was a minor. The hearsay evidence was probative of the issue of whether the young woman was a minor and it could reasonably be regarded as reliable.

[49] When the reasonableness *simpliciter* standard of review is applied in relation to the adjudicator's finding that the young patron in the respondent's licensed premises was a minor, I must conclude that the trial judge was in error in holding that the finding was "unreasonable". The finding of the adjudicator was supported by some logically probative evidence on which the adjudicator could lawfully rely.

VII. Did the trial judge err in finding that it was unreasonable for the adjudicator to conclude that the beverage consumed by the alleged minor was beer?

[50] Before the chambers judge, the respondent put forward affidavit evidence on a matter which had not been raised before the adjudicator. The affidavit evidence was to the effect that there were non-alcoholic "beers" being sold in the respondent's premises at the time of the alleged infraction.

[51] After making reference to the legislation, the chambers judge concluded that, read in context, the word "beer" found in the definition of liquor in s. 1 of the ***Act*** must be taken to be the kind of beer that is intoxicating. The appellant takes no issue with that conclusion.

[52] We do not have before us the transcript of the evidence before the adjudicator, but it is apparent from his reasons that he relied on the observations made by witnesses as well as Constable Lepine's evidence that the minor was intoxicated. For ease of reference, I will repeat what the adjudicator said when he concluded that the minor was consuming liquor in the respondent's licensed premises:

> . . . I accept the evidence of the inspector with respect to her observations of the minor consuming a yellow liquid with foam top, and in a beer mug. I find that this was beer. Given the location (a Liquor Primary licensed establishment), the vessel (a beer mug), the presence of identical looking substances in front of people sitting with the minor, the time of day (8:30 p.m.), the proximity of the minor to the bar, and the description of the liquid, it is difficult to imagine it being anything but beer. Further, I accept that evidence of the R.C.M. Police constable that the minor was intoxicated.

[53] The appellant submits that the chambers judge tacitly required the General Manager to prove the allegation as to what the minor was consuming to the criminal standard. Whether that is so is not entirely clear from the judge's reasons but I agree that, at the least, the chambers judge did require a higher standard of proof in relation to the fact alleged than a simple balance of probabilities. It seems to me that that may also have been the approach of the chambers judge in relation to the question of whether the young patron was a minor.

[54] In his submissions, counsel for the respondent referred us to ***R. v. Oakes***, [1986] 1 S.C.R. 103 for the proposition that while courts of law have generally preferred the view that only two standards of proof exist in Canadian jurisprudence, within the civil standard there are different degrees of probability depending on the nature of the case. In that case, the Supreme Court was considering the standard of proof that was appropriate for issues arising under s. 1 of the ***Charter***. Chief Justice Dickson made the following observations about the civil standard, at 137-38:

> [67] . . . Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:
>
> > The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
>
> This passage was cited with approval in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, at pp. 331-32:
>
> > I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences....

[55] Respondent's counsel argued that in view of the serious financial impact the sanctions the General Manager proposed in the NOEA would have on his client, the chambers judge was not in error in requiring clear and convincing evidence of the alleged facts that grounded the licence infraction. In support of that submission, respondent's counsel referred us to the following passage in ***Re Trumbley et al. and Fleming et al. and three other appeals v. Metropolitan***

Toronto Police (1986), 55 O.R. (2d) 570 at 592:

> . . . This does not mean that within the civil standard there would not be some variation and that, accordingly, depending on the seriousness of the allegations and of the potential consequences, the application of the civil standard may require clear and convincing evidence for a case to be regarded as proven. . .

[56] In the respondent's submission, the evidence before the adjudicator did not meet the "clear and convincing standard". In that regard, counsel pointed to the affidavit evidence that the hotel served de-alcoholised beer, that no sample of the liquid the minor had consumed was taken and no "smell test" was offered.

[57] In an enforcement hearing, the onus rests on the General Manager to prove the alleged licence violation to the civil standard. The case authorities suggest that the degree of proof required to meet the civil standard tends to increase with the gravity of the issue and the seriousness of the consequences for an individual whose professional standing may be affected by the decision: see ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226 at para. 11; ***Hanson v. College of Teachers (Disciplinary Hearing Sub-committee)*** (1993), 110 D.L.R. (4th) 567 at 576 (B.C.C.A.); ***Ewachniuk v. Law Society of British Columbia*** (2003), 13 B.C.L.R. (4th) 144 at para. 9 (C.A.). However, this case involves a corporation rather than an individual. The corporation is conducting part of its business in a statutorily regulated field that involves only economic interests. The provisions of the ***Act*** concerning infractions of liquor licences are explicit. Section 20(2) of the ***Act***, set out in paragraph 11 of these reasons, stipulates both the kind and the range of penalties that may be imposed. The recommended enforcement action the General Manager sought in the NOEA was a five-day suspension, which was one day more than the minimum prescribed for the contravention. In the circumstances described, I am of the view that the standard of proof required was not one of "clear and convincing evidence".

[58] When the reasonableness *simpliciter* standard of review is applied in relation to the adjudicator's finding that the substance consumed by the young woman was liquor, I see no proper foundation for the chambers judge to have interfered with the adjudicator's conclusion. The finding of the adjudicator was supported by probative evidence and the finding cannot be said to be unreasonable.

VIII. Apprehension of bias

[59] As noted at the outset, the respondent raised an issue concerning apprehension of bias which the chambers judge did not find necessary to consider in view of his conclusions on other issues before him. The essence of the respondent's argument on the point is that an adjudicator on an enforcement hearing who is appointed by the Liquor Control and Licensing Branch for a two-year term, which appointment may or may not be renewed, cannot reasonably be seen or perceived as being unbiased when he is an appointee of the branch of government that controls liquor licensing and investigates and prosecutes licence infractions.

[60] The appellant's response is that a point similar in substance to the one raised by the respondent was considered and rejected by the Supreme Court of Canada in ***Ocean Port Hotel Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)***, *supra*, and that the respondent's arguments, on the same reasoning, must also be rejected.

[61] It must be noted that the regulatory regime for determination of liquor licence infractions when ***Ocean Port*** was decided differs from the one now in effect. In his factum, the respondent describes the differences this way:

> [13] When *Ocean Port* was decided there was a hearing by a Department employee (Department of the Liquor Licensing, General Manager) and an appeal to the Liquor Appeal Board. That Board consisted of three members and **was appointed by cabinet through order in council.**
>
> [14] In the case at bar under the new regime, the trier of fact and the decision maker is a person appointed by contract for a limited period by the General Manager. The contract may or may not be renewed.

[62] In the respondent's submission, the difference between the two regimes is illuminated by the following observation of Donald J.A. in his reasons for judgment in ***Ocean Port***, 2002 BCCA 311 at paragraph 9:

> . . . The Branch's decision to suspend is subject to an adjudication in the fullest sense by a *de novo* hearing before the Liquor [Appeal] Board whose members are independent of the General Manager and thus the Branch. [Emphasis in original.]

[63] To substantiate its submissions, the respondent has referred to the affidavit of Peter K. Jones, described therein as an "advocate and consultant", and who was "a former Senior Inspector, advocate and adjudicator for the Branch for over 15 years". Mr. Jones acted for the respondent at the enforcement hearing in this case. Mr. Jones has deposed:

> 5. I am familiar with the previous system of dealing with alleged Liquor Act violations. Under that "old" system a Senior Inspector had the authority to suspend a licence for 7 days or less. Anything greater would go to the Deputy General Manager of Complainants and Enforcement who would conduct a hearing. He/she would present the Branch's case to an official appointed by the Branch. There was an appeal from that decision to an independent Liquor Appeal Board which was not appointed by the Branch but by Order in Council (Cabinet).
>
> 6. Under the "new" system, effective May 30, 2003, the Branch issues a NOEA and presents its case before an Adjudicator who is appointed by the General Manager under contract for, as I understand, two years. That contract is renewable by the

> Branch. I therefore have an apprehension of bias in that the renewal of contracts could be influenced by the nature of the adjudicator's record of decisions for or against the Branch.

[64] In support of its submissions that a reasonable apprehension of bias arises under the new statutory regime, the respondent relies on ***2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)***, [1996] 3 S.C.R. 919.

[65] I am unable to agree with the respondent's submissions. The statutory regime now in place to determine whether there are liquor licence infractions and, if so, what penalties are to be imposed, clearly differs from the regime embodied in the earlier legislation which was in effect when ***Ocean Port*** was before the courts. In ***Ocean Port***, the issue the licensee raised was whether members of the Liquor Appeal Board, who were appointed at the pleasure of the cabinet and who served on a part-time basis, were sufficiently secure in their appointments to preserve the appearance of independence. In addressing that issue, Chief Justice McLachlin, delivering the reasons of the Court, said, at paragraphs 18 through 24:

> [18] This appeal concerns the independence of the Liquor Appeal Board. The Court of Appeal concluded that members of the Board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties. More specifically, it held that the tenure enjoyed by Board members - appointed "at the pleasure" of the executive to serve on a part-time basis - was insufficiently secure to preserve the appearance of their independence. As a consequence, it set aside the Board's decision in the present case.
>
> [19] The appellant, with the support of the intervening Attorneys General, argues that this reasoning disregards a fundamental principle of law: absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice. The Act expressly provides for the appointment of Board members at the pleasure of the Lieutenant Governor in Council. The decision of the Court of Appeal, the appellant contends, effectively struck down this validly enacted provision without reference to constitutional principle or authority. In essence, the Court of Appeal elevated a principle of natural justice to constitutional status. In so doing, it committed a clear error of law.
>
> [20] This conclusion, in my view, is inescapable. It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.
>
> [21] Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles

of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui*, *supra* (*per* Lamer C.J. and Sopinka J.); *Régie*, *supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.

[22] However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta*), [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

[23] This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 . . . Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges - both in fact and perception - by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, at para. 61.

[24] Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the

> degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.
>
> [Underlining added.]

[66] The respondent distinguishes between the statutory regime considered in ***Ocean Port*** and the present regime on the basis that members of the now defunct Liquor Appeal Board, which conducted hearings *de novo*, were not appointed by the General Manager but by the executive, whereas Enforcement Adjudicators are appointed by the General Manager, whose responsibility it is to investigate and enforce licence infractions. The respondent's contention is that an apprehension of bias arises when the "renewal of contracts" of Enforcement Adjudicators could be influenced by the nature of the adjudicator's record of decisions for or against the Branch. Regardless of whether that may be so, it does not alter the principle referred to in ***Ocean Port*** that "the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute".

[67] The respondent further argues that there is a fundamental difference between the former regime and the present regime in that the Liquor Appeal Board constituted under the earlier legislation held hearings *de novo*, whereas under the present scheme there is no provision for an appeal to such an independent body. In my view, that difference in the legislation does not provide support for the respondent's argument that a reasonable apprehension of bias arises from the way in which the appointment of an Enforcement Adjudicator can be renewed. In ***Ocean Port***, the Chief Justice said this:

> [39] The appellant [the General Manager] ... contends that no reasonable apprehension of bias arose from the initial hearing. Even assuming the initial hearing might otherwise have offended the rule against bias, he argues, the overlapping of duties performed by senior inspectors was authorized by statute, and consequently cannot be attacked on this basis. Finally, he contends that a finding of bias in the initial hearing would not be fatal in any event, since it was cured by the subsequent *de novo* hearing before the Board.
>
> [40] In my view, there is considerable merit to the appellant's submissions. The mere fact that senior inspectors functioned both as investigators and as decision makers does not automatically establish a reasonable apprehension of bias. The respondent relies on *Régie*, where the Court held that an apprehension of bias arose from the plurality of functions performed by the Régie's lawyers and directors. *Régie*, however, is clearly distinguishable from the case at bar. The apprehension of bias in *Régie* resulted from the possibility of a single officer participating at each stage of the process, from the investigation of a complaint through to the decision ultimately rendered. The central concern in *Régie*, succinctly stated by Gonthier J., was that "prosecuting counsel must in no circumstances be in a position to participate in the adjudication process" (para. 56; see also paras. 54 and 60).

[41] The respondent makes no similar allegations in the present case. Its concern hinges solely on the fact that the Branch's hearing officers were employed by the same authority as its prosecuting officers. However, as Gonthier J. cautioned in *Régie*, "a plurality of functions in a single administrative agency is not necessarily problematic" (para. 47). The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623. Without deciding the issue, I would note that such flexibility may be appropriate in a licensing scheme involving purely economic interests.

[42] Further, absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias. Gonthier J. alluded to this possibility in *Régie*, at para. 47, quoting from the opinion of L'Heureux-Dubé J. in *Brosseau*, *supra*, at pp. 309-10:

> As with most principles, there are exceptions. One exception to the "*nemo judex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.
>
> . . .
>
> In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. . . . If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.

[43] Thus, even assuming the plurality of functions performed by senior inspectors would otherwise offend the rule against bias, it may well be that this structure was authorized by the Act at the relevant time.

[68] Liquor control and licensing obviously engages the public interest and public safety. Section 6 of the ***Act*** sets out the duties and powers of the General Manager:

> **6** The general manager must, subject to this Act and the regulations,
>
> (a) issue, renew, amend, transfer, suspend or cancel licences as provided by this Act and the regulations,
>
> (b) specify which regulations apply to a licence so granted,
>
> (c) supervise the conduct and operation of licensed establishments,

> (d) [Repealed 1999-36-2.]
>
> (e) appoint or designate any person he or she considers advisable as an analyst for the purposes of this Act,
>
> (f) authorize officials to issue licences and permits under this Act, and
>
> (g) perform all other acts required to properly and efficiently administer his or her responsibilities as defined by the minister and under this Act and the regulations.
>
> [Underlining added.]

[69] In my view, ***Régie*** is not analogous to this case and provides no support for the respondent's argument.

[70] It is clear from the Supreme Court's decision in ***Ocean Port*** that, absent constitutional constraints, it is open to the legislature to authorize overlapping functions that would otherwise contravene the rule against bias. That is what the legislature has done here. As noted earlier, s. 84 of the ***Act*** and s. 3 of the Regulations enable the General Manager to delegate the task of adjudication concerning alleged infractions.

[71] Accordingly, I would not accede to the respondent's argument concerning bias.

IX. Conclusion

[72] I would allow the appeal, set aside the order of the chambers judge, and restore the decision of the adjudicator, with costs on the appeal and in the court below to the appellant.

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

“The Honourable Mr. Justice Hall”