IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Strathcona Hotel et al v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2007 BCSC 40

Date: 20070329
Docket: 06/3253
Registry: Victoria

Re: *Judicial Review Procedure Act* and *Liquor Control and Licensing Act*

Between:

Strathcona Hotel of Victoria Ltd. dba Strathcona Hotel and The Magnolia Hotel Ltd. dba Magnolia Hotel -- Hugo's

Petitioners

And:

The General Manager, Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Petitioners: G.N. Harney, P. Waller and R. Alexander (Articled Student)

Counsel for the Respondent: D. Roberts

Date and Place of Hearing: March 19, 2007 Victoria, B.C.

[1] This is an application pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, to quash the decision of an adjudicator appointed under the ***Liquor Control***

and Licensing Act, R.S.B.C. 1996, c. 267 ("the Act"), or, alternatively, that the matter be remitted for a rehearing before another adjudicator. The decision under review was to the effect that the operators of the two petitioners had not demonstrated to the adjudicator that they had acted with due diligence in taking steps to prevent what was admitted to be an offence under the Act, the service of liquor to a minor.

I. BACKGROUND

[2] On September 30, 2005, the Victoria Police Department executed a sting operation on a number of licensed establishments in Victoria. Specifically, they employed a 17-year-old female ("M.K."), accompanied by a 20-year-old female auxiliary police officer as a handler and a plain clothes undercover police team to attempt to gain entry to establishments serving liquor. They were successful in the case of both of the petitioners (as, apparently, they were with respect to 11 out of 12 establishments over the two days of the operation). M.K. apparently is a mature looking young woman who, while she may then have appeared to have been 19, did not look as old as 25. That was of significance because Regulation 45 to the ***Liquor Control and Licensing Regulations*** (the Regulations) provided:

> **45** (2) A licensee must request 2 pieces of identification from any person appearing to be under the age of 25 before
>
> (a) allowing the person to enter the licensed establishment, if the establishment is one in which minors are not allowed, or
>
> (b) selling or serving liquor to the person.

Both establishments in question were ones in which minors were not allowed.

[3] There was evidence before the adjudicator that, in both cases, M.K. had been provided with false identification which did not match her description other than as to her sex and hair colour. In any event, the petitioners were not charged with a failure to request identification (because of course their respective doormen did so) but rather with serving liquor to a minor.

[4] At the hearing before the adjudicator, the petitioners did not challenge the fact that they had served liquor to M.K. Rather, they each took the position that they had acted with due diligence by having taken all reasonable care to avoid such a situation. However, that defence was rejected by the adjudicator in both cases (their challenges to both infractions were heard together in one hearing) on the basis that the evidence did not indicate that they took all reasonable steps to prevent service to minors. He found that the evidence put before him was insufficient to disclose the level of diligence required to defend the allegations against each of the petitioners.

[5] In coming to the conclusion that he did, the adjudicator largely rejected the evidence put forward by the petitioners on the basis that he took offence with certain passages in a book authored by one of the doormen of the petitioners which described violence ultimately being used to prevent the entry into licensed premises by patrons who themselves were violent or presenting danger to the door staff. In doing so, the adjudicator appears to have totally overlooked, or ignored, copious documentary evidence of policies of both petitioners strongly advocating against violent action and in favour of resolving altercations with patrons in any reasonable way short of violence. Interestingly, however, the adjudicator did indicate that he accepted the petitioners' evidence to the limited extent that one of the operators

testified that their *bartenders* do check for identification but he went on to state that he found that "... on the evidence that they do not do so as required by the Act".

[6] The actual policy manual of the petitioners changed from time to time. The adjudicator indicated that he was unable to determine from the evidence what information was available in that manual at the time of the infractions. However, he found that even if the full extent of the policy manual that was submitted as an exhibit was in place on the date of the infractions, "... there was a missing link between the provision of any reasonable training and process described therein, and the practices carried on at the establishments at their relative time". He found that "... management simply did not make adequate efforts to ensure that its employees carried out the requisite duties".

[7] In any event, he concluded that the evidence presented to him did not indicate that the petitioners had taken all reasonable steps to prevent service to minors.

II. DISCUSSION

[8] The question of whether the petitioners acted with due diligence to prevent the service of liquor to a minor is a question of mixed law and fact and is reviewable on a standard of reasonableness *simpliciter* (see ***Aztec Properties Company Ltd. v. General Manager of the Liquor Control and Licensing Branch***, 2005 BCSC 1465). It is not for this court to reweigh the evidence that was before the adjudicator but rather to determine whether the petitioners have demonstrated that the decision of the adjudicator was unreasonable.

[9] In the hearing, the onus was upon the petitioners to demonstrate that they had established a proper system to prevent the service of liquor to minors and that they had taken all reasonable steps to ensure the effective operation of that system (see ***R. v. Sault Ste. Marie (City)***, [1978] 2 S.C.R. 1299).

[10] It is evident from reading the decision as a whole that the adjudicator was under the mistaken impression that Regulation 45 required that not only the doormen at each establishment (each of whom, as noted, did request the required identification although, presumably, did not adequately vet it) but also that the bartenders demand identification before serving liquor to a person who appeared under 25 years of age. That was the position taken by counsel for the general manager in the hearing because that was the belief of the general manager at the time of the hearing. However, that misunderstanding of the law was laid to rest in two recent decisions of this court in ***Small House Ventures Inc. (c.o.b. Lucky Bar) v. British Columbia (Liquor Control and Licensing Branch)***, 2006 BCSC 1792, and ***Palomino's The Rock'n Horse Cabaret Ltd. (c.o.b. Evolution Cabaret) v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2007 BCSC 17. Those decisions determined that Regulation 45 did not require that a member of the "inside staff", such as a bartender, demand identification of a patron who may have appeared to be under 25 if the identification of that patron had already been requested (as here) by a member of the "outside staff" such as a doorman. That, of course, is a different issue from any responsibility that falls on a bartender to make inquiries where the person he or she is serving appears to be under the age of 19 years. However, that is not the issue in this case because there was no evidence before the adjudicator that M.K. appeared to be under the age of 19 years.

[11] Unlike ***Small House*** and ***Palomino's***, this was not a case where the adjudicator misdescribed in his reasons the standard of proof necessary for a licensee to demonstrate due diligence. However, it is equally clear that his reasoning that, notwithstanding having

established a proper system to prevent service of liquor to minors, the petitioners had not taken reasonable steps to ensure the effective operation of that system, was coloured by his erroneous view of the law that it was the responsibility of the bartenders as well as the doormen to ask for identification if the patron appeared to be under the age of 25. That is, that the petitioners had not ensured that *bartenders* enforce the policy (because, of course, neither had made any effort to do so in these two cases). For that reason alone, in my view it would be unjust to the allow the decision of the adjudicator to stand as it cannot be said that he came to the conclusion he did based on a correct understanding of the law as applied to the facts before him.

[12] Further, the adjudicator's application of the test for due diligence seems to have turned the test into one of absolute liability rather than strict liability. At p. 12 of his decision he stated:

> I accept that the licensee's employees know that persons appearing under the age of 25 must be checked for two pieces of identification, but I find that the evidence fails to disclose that they do so as required by the *Regulation*. Checking ID as required would have prevented the contraventions from occurring.

[13] A more careful check of M.K.'s identification would likely have prevented her being served. However, the test from ***Sault Ste. Marie*** does not hold the petitioners to that high a standard. Rather, the specific purpose of the test is to allow the petitioners a complete defence so long as they can demonstrate that adequate provisions were in place to prevent such an event from happening in the first place. The question here is whether an adequate and effective program was in place, not whether a contravention occurred. The adjudicator focused on the failure of the petitioners' employees to follow the programs, rather than on any deficiencies in the programs themselves.

[14] The adjudicator's finding that the petitioners' programs did not meet the test for due diligence appears to be a bald assertion. The adjudicator merely concludes at p. 12 that there was a "missing link" between "the provision of any reasonable training" and "the practices carried on at the establishments at the relevant time." This suggests that the petitioners had programs in place, but were not enforcing them. However, there was no evidence upon which the adjudicator could reach such a conclusion.

[15] In ***Karbalaeiali v. Canada (Deputy Solicitor General, Employment Standards Branch)***, 2006 BCSC 13, Madam Justice Morrison noted that a court is not permitted to make a fresh assessment of credibility (arguably except if that assessment is arbitrary or has no justification based on the evidence). She referred to ***Laguna Woodcraft (Canada) Ltd. v. British Columbia (Employment Standards Tribunal)***, [1999] B.C.J. No. 3135, 1999 BCSC 2103, at para. 17, in that regard. Further, as Mr. Justice Romilly noted in ***Waters v. British Columbia (Director of Employment Standards)*** (2004), 40 C.L.R. (3d) 84, 2004 BCSC 1570, at para. 25:

> 25 ... It is not a question of whether the Court would reach the same conclusion on the evidence, but rather whether there is any evidence to support the conclusion of the decision maker. ...

[16] The adjudicator appears to have based his assessment of the credibility of the witness of the petitioners on the basis of his negative reaction to portions of the instruction manual which described aggressive action having been taken by the author in extreme situations. He appears to have equated those statements with the policy of the petitioners.

[17] Although counsel for the petitioners suggested these statements were simply anecdotes, the fact is that under cross-examination at the hearing before the adjudicator, the petitioners' principal admitted that he agreed with the "approaches" in the instruction manual and that the manual had been given to all security staff. The petitioners can thus hardly assert that the statements were just anecdotes taken out of context.

[18] However, whether anecdotal or not, the discussion regarding the statements was not relevant to the issue before the adjudicator. The sole issues were whether the petitioners had in place an adequate policy respecting service to minors and whether they took all reasonable steps to implement it.

[19] The adjudicator drew an inference from the evidence of the instruction manual that was unreasonable. Although the adjudicator's reasoning is unclear, he seems to have concluded, based on the submission of the manual into evidence and the testimony of the petitioners' principal, one of two things: First, that the provision of this book to the petitioners' employees was so egregious that it demonstrated that the principal's judgment was so poor that his credibility was put in doubt. Alternatively, the inclusion of the manual was not vetted properly (although the principal attested that he agreed with its approaches) and therefore one could conclude that the principal was "heaping" information upon his employees to create a paper due diligence defence rather than a substantive one.

[20] Neither inference can stand. The mere fact that someone uses bad judgment in one instance does not put his entire testimony in doubt. There is nothing in the adjudicator's decision to suggest that the principal was untruthful, a charge that would have coloured his testimony.

[21] The second inference cannot be supported in the face of overwhelming evidence to the contrary such as the policy manual and numerous other documents which indicated that it was, in fact, the policy of the petitioners that their doormen and other employees take all possible steps to avoid such violent confrontations. This was not a case where the evidence disclosed that a policy had been presented to employees but no effective steps taken to implement it but rather that there had been extensive training of staff and even written agreements taken from them acknowledging that they were under the threat of the termination of their employment if they did not follow the rules and do things properly. However, although I cannot say that there was absolutely no basis in fact for his conclusions on fact and credibility, there was so little basis as to make me concerned about his rehearing this matter.

III. CONCLUSION

[22] I conclude that the decision of the arbitrator should be set aside as having been based on an error of law. In the circumstances of this case, I direct that there be a rehearing before another adjudicator.

[23] The parties may address the question of costs in written submissions.

"T.J. Melnick, J."
The Honourable Mr. Justice T.J. Melnick