

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*
R.S.B.C. 1996, c. 241

Citation: *The Cambie Malone's Corporation v.
British Columbia (Liquor Control and
Licensing Branch)*,
2010 BCSC 1175

Date: 20100820
Docket: S082451
Registry: Vancouver

Between:

The Cambie Malone's Corporation dba "Cambie Hotel"

Petitioner

And

General Manager of the Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Rice

Supplementary Reasons for Judgment

Counsel for the Petitioner:

A.D. Gay

Counsel for the Respondent:

T. Mason

Place and Date of Hearing:

Vancouver, B.C.
October 29, 2009

Written Submissions
July 6, 2010

Place and Date of Judgment:

Vancouver, B.C.
August 20, 2010

[1] On July 22, 2009, this Court issued its reasons for judgment in respect of the judicial review of a decision by an adjudicator under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "Act") declaring the Cambie Hotel in breach of its Liquor License No. 024168, including a contravention under s. 12 of the Act. Those reasons, along with a background of the case, are indexed at 2009 BCSC 987 [*First Decision*].

[2] Included in the matters for which the judicial review was sought was the finding that the claimant had contravened s. 12 of the Act.

[3] For some reason the Court misunderstood the parties to have agreed that the claimant would not press forward insofar as the review of the decision on s. 12 was concerned.

[4] These supplementary reasons for judgment are intended to correct that error by completing the review of the adjudicator's decision with respect to s. 12, particularly those aspects challenged by the petitioner as follows:

1. The adjudicator's finding that the Cambie Hotel breached the additional terms and conditions imposed upon it by the Liquor Control and Licensing Branch, contrary to s. 12 of the Act.
2. The adjudicator's refusal to admit certain evidence into the record.
3. The adjudicator's finding that the defence of due diligence was not made out on the evidence.

STANDARD OF REVIEW

[5] The case of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, remains the leading case on judicial review in Canada. It continues to apply in determining the standard of review of decisions of the adjudicator. See *Miller's Landing Pub Ltd. v. British Columbia (General Manager, Liquor Control Licensing Branch)*, 2009 BCSC 1352. In that case, Lynn Smith J. wrote, at para. 29:

A court is to ascertain first whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with respect to a particular category of question; second, and only if the jurisprudence has not determined this question, the court is to analyze the factors bearing on identification of the standard of review: *Dunsmuir* at para. 62.

In *Jacobsen Enterprises*, Mr. Justice Warren considered the question of the appropriate standard of review of an Adjudicator's decision under the *Act*. He concluded as follows at para. 48:

In my view the jurisprudence has established the degree of deference and it is that stated by Blair J. in *Zodiac*: "reasonableness *simpliciter*", that is whether any reasons support the decision. Is there a defect in the evidentiary foundation, that is, an assumption without a basis in the evidence or contrary to the overwhelming weight of the evidence, or is there a defect in the logical process by which the conclusions are sought to be drawn from it, that is a contradiction in the premise or an invalid inference: per Iacobucci J. in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.).

[6] Brown J. in *R.G. Facilities (Victoria) Ltd. (c.o.b. Save on Foods Memorial Arena) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2009 BCSC 630 at paras. 39-41 stated as follows:

Having now considered the guidelines laid down in *Dunsmuir*, notably: the subject matter of the dispute; the fact that the nature of the material questions of law that arise relate to the respondent's "home statute and regulations"; and the fact that, while these do touch on important aspects of procedural fairness, they also are not central to the legal system as a whole; and the fact that the issues involved require a consideration of intertwined facts and law, I find that the applicable standard of review is reasonableness. However, I do not find any special expertise is involved in deciding the issues decided by the adjudicator, with the exception of the legality of the penalty imposed. This influences to some extent the degree of deference called for on this review.

I reject the petitioner's submission that the alleged obligation of the Branch to specify the subsection allegedly contravened deprives the general manager of jurisdiction. Mr. Mulligan argued that before the general manager of the Branch owned jurisdiction to proceed and the adjudicator to decide, the general manager must have specified one of the subsections in the Contravention Notice. A failure to specify means the Branch lacks jurisdiction to proceed. However, the general manager's authority stems from the grant of authority in s. 3 of the *Act* and their appointment by the legislature. Subsection specificity is a matter that involves questions of procedural fairness. In cases of "serious deviation from fair procedure" jurisdiction may be lost, according to learned authors Daniel Philip Jones Q.C. and Anne S. de Villars Q.C. However, they hold that the better view is that

... procedural error goes to jurisdiction, and entitles the superior courts to review the legality of the delegate's actions.

Principles of Administrative Law, at pg. 8.

(see also *Bartel v. Manitoba (Securities Commission)*, 2003 MBCA 30)

However, in the circumstances of this case, all the issues, including those connected with procedural fairness, can be decided based on the reasonableness standard. Any deviations from the fair procedure required in this case can be rectified through a partial rehearing or other remedial steps.

[7] I find that as in *R.G. Facilities*, this case involves a matter of procedural fairness, but not one that is central to the legal system as a whole. Further, the deviations from fair procedure complained of in the case are capable of being rectified through a rehearing.

[8] As for the meaning of the “reasonableness standard”, the answer is found in *Dunsmuir*, at para. 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

ANALYSIS

1. Was the adjudicator’s finding that the Cambie Hotel breached the additional terms and conditions imposed upon it by the Liquor Control and Licensing Branch, contrary to s. 12 of the Act, reasonable?

[9] One first considers the Terms and Conditions imposed by the General Manager under the *Act*. These are set out in a booklet issued by the General Manager to the Cambie Hotel. The key passage (which the hotel is alleged to have breached) is as follows:

Customers may not bring their own bottles of liquor to consume in your establishment, and you may only sell and serve liquor in the licensed area of

your establishment (commonly referred to as the "red-lined area" of your floor plans).

You may not permit customers to consume liquor outside of the red-lined area, or to take liquor from the red-lined area to other parts of your establishment, except:

- Patrons may take liquor into the washroom as long as they are not walking through an unlicensed area (such as a hotel lobby), and you are properly supervising the washrooms.

[10] The petitioner submits that while the plain meaning is normally applied, in cases where it leads to an absurd consequence, the Court will embark on a more detailed analysis. What, if any, is the absurd result in this case? The petitioner submits that on a plain reading each licence provides for its own red-lined area and a patron, whether or not he has liquor in his possession, is deemed to violate the licence by leaving that licenced area for another.

[11] The *Act* complicates this analysis. In s. 1 of the *Act*, "establishment" is defined as follows:

"establishment" means a place or premises that may comply with the requirements of this Act and the regulations prescribing the qualifications of a place or premises for which licences may be issued, and includes within such a place or premises any area where liquor is manufactured, stored or served;

[12] The *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 [*Regulation*], promulgated under the *Act*, also contains the following relevant sections:

13 (1) Subject to subsection (2), a liquor primary licence and a food primary licence must not be issued in respect of the same establishment.

(2) Subsection (1) does not apply to an establishment if

(a) the licensee for the establishment would, but for subsection (1) of this section, hold, in respect of the establishment, a liquor primary licence and a food primary licence, as a result of the operation of Part 8,

(b) the licences referred to in paragraph (a) remain in good standing, and

(c) all renewals of or amendments to the licences referred to in paragraph (a) are effected in accordance with this regulation.

...

38 (1) A licensed establishment must be separated from an unlicensed area in a manner that is satisfactory to the general manager.

(2) If one licensed establishment in respect of which one category of licence has been issued adjoins another licensed establishment in respect of which a different category of licence has been issued, the establishments must be separated in a manner that is satisfactory to the general manager.

...

42 (1) A person must not consume liquor in a licensed establishment unless that liquor has been purchased from or served by the licensee of that licensed establishment.

(2) A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.

(3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

(4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

(5) A licensee who seals an unfinished bottle of wine in accordance with subsection (4) (a) must inform the patron of the requirements of section 44 of the Act.

[13] Two or more “licensed establishments” may exist on the same premises. In *Sandman Hotel Langley Inc. (c.o.b. Sandman Hotel (Langley)) v. British Columbia (General Manager Liquor Control & Licensing Branch)*, 2005 BCSC 197 [*Sandman*], Powers J. considered the situation where a hotel had a food primary license on the second floor and a liquor primary license on the first floor. He wrote:

25 The petitioner's argument that there is only one establishment ignores the fact that the definition of establishment refers to a place or premises. The definition of premises that the petitioner has provided makes it clear that premises can mean a building or a part of a building. Therefore, it is certainly possible to have two premises in one building, therefore, two establishments in one building. The plans of The Shark Club also support the argument that the licenses in question covered different areas in the same building. They do not overlap, and despite the name on the licence under establishment, they do not cover the same area in the hotel. For the purposes of s. 35, the areas are two separate establishments.

[14] In the Cambie Hotel, there were two red-lined areas, and at one time they adjoined one another, with the general manager evidently content to have the licensee demarcate the border between them using a white picket fence, a gate, and an employee guarding the gate. The policy reasons behind the enactment of s. 38 of the *Regulation* are evident upon reading, for example, *Sandman*. Different conditions may apply to the two adjoining licensed areas, e.g. admission of minors, hence the need for an appropriate separation between the two areas.

[15] In *Sandman*, the question was whether the food-primary license covered the entire “premises”, including the liquor-primary area where a minor was found in alleged violation of the hotel’s license. Powers J., having found that the two licensed areas were separate licensed establishments for the purpose of that violation, dismissed the hotel’s argument. *Sandman*, however, is not on all fours with the facts in this case.

[16] The question in the case at bar is whether the adjudicator’s interpretation of the license conditions were reasonable, that outcome fell within the range of possible and acceptable outcomes which are defensible in respect of the facts and law. License conditions imposed in the booklet included this direction: “You may not permit customers ... to take liquor from the red-lined area to other parts of your establishment, except... Patrons may take liquor into the washroom as long as they are not walking through an unlicensed area, and you are properly supervising the washrooms.”

[17] In my view, the use of the singular term and definite article in the phrase “the red-lined area”, of itself implies that there are not multiple “red-lined areas”. However, it is capable of being interpreted to refer specifically to the red-lined area pertaining to that license for which it was issued.

[18] The interpretation offered by the Cambie Hotel was more strongly supported by the sections of the *Act* and *Regulations* cited above. The definition of “establishment” in s. 1 of the *Act*, on a plain reading, contemplates multiple “licenses” being issued for one establishment. Although there is a prohibition in s. 13 of the *Regulation* on a liquor and food primary license being issued for the same

establishment, it is clear from the exception set out in s. 13(2) that it is possible for establishments existing prior to the enactment of that section to hold multiple licenses.

[19] Section 38(2) of the *Regulation* pertains to the physical separation between two adjoining licensed establishments. The need for such a separation is clear, on a policy level, as there could be different conditions set out for each of the two licensed establishments regarding, for example, whether minors are allowed in the establishment. However, there is nothing specifically in that section of the *Regulation* that would give the general manager the authority to prevent a patron from taking liquor from one licensed establishment to the other, assuming the license conditions of both licensed establishments were satisfied, and s. 42 were not violated in the process.

[20] The wording of ss. 42(1) and 42(2) of the *Regulation* prevents a person from consuming liquor in a licensed establishment that was not purchased from or served by the licensee of that licensed establishment. However, on any reasonable interpretation of the section, whether one interprets "licensed establishment" as meaning the entire area to which multiple licenses may be issued, or as meaning the area to which a particular license applies, if two licensed establishments were licensed to the same licensee, as was the case here, there would be no violation of this section of the *Regulation* if the liquor was purchased in one licensed establishment, carried over to the adjoining licensed establishment that was licensed to the same licensee as the first, and consumed there.

[21] With respect to s. 42(4) of the *Regulation*, in my view that section does not apply in this case. In this case, the licensed establishment, as contemplated by the *Act's* definition of the term "establishment", contained two licenses, each pertaining to a different area of the establishment, with the two areas adjoining each other. Moving liquor from one licensed area to another within the same "licensed establishment" did not run afoul of that section of the *Regulation*. To interpret that section otherwise seems to me to be incompatible with other sections of the *Regulation* and the *Act*. It also leads to the "ridiculous or frivolous consequence"

referred to Iacobucci J. in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 where he stated at para. 27:

a plain meaning analysis is not appropriate when it leads to absurd consequences, and “an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment”. The authors of *Sullivan and Dredger on the Construction of Statutes* (4th ed.), (Butterworth's Canada Ltd., 2002), at p. 145 go further to say that there is substantial judicial authority for the principle that:

- a) interpretations that encourage compliance should be preferred over those that do not, and
- b) interpretations that give effect to sham transaction or otherwise permit the ready avoidance of legislation should be avoided.

[22] All things considered, it may be a questionable policy decision for an adjudicator to interpret Terms and Conditions to prohibit crossing of the “red line” with liquor in hand when on both sides of the line the carrying of liquor is not prohibited. At the same time, one must acknowledge that matters of liquor control policy are properly the domain of the Liquor Control Branch which probably has more specialized knowledge than this Court of the measures required to manage the effects of liquor consumption in the Province. For, while I might myself consider that the adjudicator's conclusions were incorrect in this case, it is a “reasonable standard” that I must apply, I find that the adjudicator's decision must stand. The decision was not unreasonable.

[23] I conclude that the adjudicator's interpretation of the additional Terms and Conditions imposed upon the Cambie Hotel by the Liquor Control and Licensing Branch, as well as the terms set out in the *Regulation*, was reasonable, although in my view the interpretation was incorrect.

2. Was the adjudicator's refusal to admit certain evidence into the record reasonable?

[24] At the proceedings before the adjudicator, the adjudicator refused to admit as evidence photographs of signs placed by the petitioner prohibiting patrons from crossing the gate/fence between the two licensed areas of the Cambie Hotel with

alcoholic beverages. The photographs consisted of large stop-sign-sized signs mounted on the gate separating the two licensed areas from each other. The adjudicator refused to admit the evidence because it was tendered at the submissions stage of the proceeding rather than during the evidence stage. Then, in his decision, the adjudicator wrote that “[t]here is no evidence of the extent and nature of the signage before me, no evidence of the effectiveness of the signage...”

[25] Mr. Smith was counsel for Cambie Hotel at the hearing and testified in his affidavit in these proceedings that the sign issue arose after an inconsistency appeared in the evidence of the liquor inspectors as to the existence of signs within the establishment. Mr. Smith then says that he offered to produce photographs of the signs, but the adjudicator stated this was unnecessary. Mr. Smith in any event included the photographs in his closing submissions, but they were rejected by the adjudicator.

[26] The petitioner argues that this decision was overly formalistic and constitutes a denial of natural justice. It submits that while decisions about the admissibility of evidence are within the discretion of the administrative decision-maker, that discretion must not be exercised so as to exclude relevant evidence or otherwise breach the duty of fairness. Further, it is submitted that the failure to exercise discretion with regard to the admissibility of evidence should result in review in this case.

[27] The respondent did not offer any evidence contrary to the account of Mr. Smith. It simply argues that the adjudicator, in the absence of statutorily established processes or specific procedural requirements, is entitled to determine the hearing process and to maintain control over it as the adjudicator determines necessary to fulfill the adjudicator's mandate under the legislative scheme.

[28] In my view, it was neither reasonable nor fair of the adjudicator to exclude the evidence after leading the petitioner's counsel to believe that it would be unnecessary to lead the evidence prior to the closing submissions. The evidence was not only relevant, it was critical to the petitioner's defence of due diligence. The

evidence should have been admitted as rebuttal evidence and considered by the adjudicator after the inconsistency appeared in the evidence of the liquor inspectors with respect to the existence of the signs.

3. Was the adjudicator's finding that the defence of due diligence was not made out on the evidence reasonable?

[29] Given my finding that the adjudicator improperly excluded relevant evidence to the issue of due diligence, the adjudicator's decision on the issue of due diligence could not have been reasonable.

CONCLUSION

[30] The decision made by the adjudicator with respect to the interpretation of the Terms and Conditions in the context of the s. 12 violation was reasonable. However, the decision to exclude relevant evidence was, in my view, unreasonable. I therefore order that the decision of the adjudicator (with respect to the s. 12 violation only) be set aside and remitted again to the Liquor Control Branch for rehearing before a different adjudicator, where the Cambie Hotel will have the opportunity to adduce only the evidence it sought to adduce at the original hearing pertaining to the s. 12 violation.

[31] The defendant will have its costs.

"The Honourable Mr. Justice Rice"