IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Liquor Stores Limited Partnership v. British Columbia (General Manager, Liquor Control & Licensing Branch),*** 2008 BCSC 1264

Date: 20080918
Docket: S083540
Registry: Vancouver

In the matter of the ***JUDICIAL REVIEW PROCEDURE ACT***, R.S.B.C., 1996, c. 241 and in the matter of Decision No. EH07-143 of the General Manager, Liquor Control and Licensing Branch

Between:

Liquor Stores Limited Partnership

Petitioner

And

General Manager, Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the Petitioner:	Gordon Buck
Counsel for the Respondent:	Jonathan Penner
Date and Place of Hearing:	August 22, 2008 Vancouver, B.C.

I. INTRODUCTION

[1] This is an application for judicial review of an April 24, 2008 decision and order of an adjudicator appointed by the general manager of the Liquor Control and Licensing Branch.

[2] The petitioner owns a pub in Vernon, B.C., called the "Cold Beer and Wine To Go Pub". The pub operates under a Liquor Primary License pursuant to the ***Liquor Control and Licensing Regulation*** B.C. Reg. 244/2002 and its enabling legislation, the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267. (I will refer to the former as the "***Act***" and the latter as the "***Regulation***".) The license includes an endorsement allowing off-premises sales.

[3] The adjudicator concluded that the petitioner contravened s. 8 of the ***Regulation*** because its primary business at the time of an inspection was off-premises sales and not the operation of a pub for on-premises drinking. The adjudicator imposed a monetary penalty of $7,500.

[4] The petitioner says that the decision should be set aside because the adjudicator:

(a) incorrectly interpreted the term "take-away service" in s. 8(2)(d) of the ***Regulation***;

(b) breached the duty of procedural fairness by not calling for submissions on the meaning of "take-away service";

(c) applied incorrect criteria in determining whether the petitioner was operating a liquor-primary business;

(d) incorrectly applied a standard of proof of balance of probabilities, whereas she should have applied the standard of proof beyond a reasonable doubt; and

(e) reached an unreasonable decision.

II. THE DECISION

[5] The issue before the adjudicator was whether the petitioner was in violation of its license because it was operating the pub contrary to the primary purpose set out in its license.

[6] Section 8 of the ***Regulation*** provides as follows:

> **8** (1) A liquor primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on in the establishment is beverage service, entertainment or hospitality.
>
> (2) For the purposes of subsection (1), the primary purpose of the business carried on in the following establishments is not beverage service, entertainment or hospitality:
>
> (a) a facility frequented predominantly by or directed at minors and other young persons;
>
> (b) a theatre as defined in the *Motion Picture Act*;
>
> (c) a restaurant;
>
> (d) a take-away service;
>
> (e) a motor vehicle;
>
> (f) a video games arcade.

> (3) A liquor primary club licence may be issued, renewed or transferred only in respect of a club.
>
> (4) Neither a liquor primary licence nor a liquor primary club licence may be transferred from one establishment to another unless the new establishment is considered by the general manager to be
>
> > (a) located within a reasonably close distance from the existing establishment, and
> >
> > (b) within the same community as the existing establishment.

[7] The endorsement on the petitioner's licence permitting off-premises sales is authorised by s. 47 of the ***Regulation***. This section was not referred to by the adjudicator but as I discuss below, it is relevant to the interpretation of s. 8. It provides:

> Off premises sales
>
> **47** (1) The general manager may endorse a liquor primary licence and a liquor primary club licence for off premises sales if
>
> > (a) the licence results from a renewal, amendment or transfer of a licence already so endorsed,
> >
> > (b) a written application for the endorsement was received by the general manager before June 5, 2000, or
> >
> > (c) the establishment in respect of which the endorsement is sought is at least 30 kilometres from each of the following:
> >
> > > (i) a liquor store;
> > >
> > > (ii) a licensee retail store;
> > >
> > > (iii) an establishment the licence for which has been endorsed for off premises sales.
>
> (2) If a licence is endorsed for off premises sales,
>
> > (a) subject to paragraph (b), off premises sales are allowed only during hours of liquor service allowed on the licensee's licence,
> >
> > (b) no off premises sales may be made after 11 p.m.,

> (c) no liquor, other than coolers, beer, cider and wine, may be sold for off premises consumption, and
>
> (d) off premises sales must be made from the primary service bar area of the licensed establishment.
>
> (3) Despite subsection (2) (d), a licensee may offer off premises sales from an area of the licensed establishment other than the primary service bar area if the first mentioned area was approved for off premises sales by the general manager before June 5, 2000.

[8] The adjudicator interpreted the phrase "primary purpose" (of beverage service) to mean that the service of beverages:

> "…must in fact be the most important business that is carried on in the establishment …"[1]

The petitioner takes no issue with this aspect of her conclusion.

[9] The adjudicator then carried on:

> "…and this can be determined by several factors such as physical layout, menus, functioning of kitchen, as well as whether a reasonable person entering the pub would conclude that beverage service is the most important business carried on."

The petitioner says that this was a legal conclusion and that it was incorrect.

[10] It is clear from the adjudicator's decision that she interpreted s. 8(2)(d) of the ***Regulation*** to refer to the purchase of liquor for off-premises consumption. The adjudicator did not set out any rationale for arriving at this interpretation, and it appears this was because the point was not argued by either side. The petitioner says that this interpretation was incorrect.

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[1] P. 14

[11] The adjudicator's decision was based, in part, on the evidence of the liquor inspector which she summarised as follows:

> In the NOEA, the liquor inspector states that the clerk advised him the pub was not operational and she was selling off sales only. He says there were several stand up coolers displaying various types of beer, wine and coolers behind the sales counter. The inspector states that the clerk also informed him the kitchen was not operational and that liquor was not available by the glass. No food, snacks or non-alcoholic beverages were available. He states the clerk informed him the establishment had been operating in this manner since it opened on July 10, 2007. The inspector states there were no beer taps and no display of spirits as normally displayed behind other bars in pubs. He observed several unopened bottles of spirits under the counter and the clerk advised him they were not for sale and were going to be moved out. The liquor inspector states that when he told the clerk that he thought the licensee was not interested in running a pub, she responded, "I know". When he asked to see the liquor licence and floor plan the clerk was unable to find them.[2]

[12] The clerk's evidence was given both by affidavit and orally (by telephone). The adjudicator noted that the clerk denied the evidence of the inspector.[3] She reviewed the conflict in the evidence and concluded that the "clerk's evidence was unreliable and inconsistent".[4] She accepted the evidence of the inspector.

[13] In coming to her conclusions, the adjudicator referred to the following:

> I find it surprising that the licensee failed to provide non-alcoholic beverages as this is a basic requirement of a liquor primary licence. Section 9(c) of the *Regulation* makes it a condition of the licence that food and non-alcoholic beverages must be available at reasonable prices to the patrons. The licensee submits this was an oversight but given the knowledge and experience of those involved in setting up the establishment, I find this omission more likely indicates that this part of the business was not taken seriously. Further evidence that the

[2] P. 6, third para.
[3] P. 10, third and fourth paras.
[4] P. 15, fourth para.

> licensee did not take beverage service in the pub seriously include; the several inconsistencies in the evidence regarding menus and snacks, the absence of a policy and procedure manual, and the fact that the clerk could not locate the licence and floor plan.[5]

[14] The adverse inference drawn by the adjudicator arose in the following context. She first noted that records showing the sales of liquor for off-premise consumption and on-premise consumption would be relevant in determining the primary purpose of the pub, and that no such records were produced. She then went on to say:

> The director of the licensee testified he had seen the accounts of liquor sales in the pub, but chose not to bring them to the hearing. When questioned about the proportion of in-house to off premises sales, I found him to be evasive and he was not forthcoming. I also find it not credible that the manager who instructed the clerk in managing the computer and till and who visited the pub once or twice a week, had no knowledge about sales in the establishment. I conclude the absence of this evidence and reluctance to provide it, when it would indicate the main business being conducted in the pub, is likely because the information will establish that the Cold Beer and Wine to Go Pub was operating primarily as a take-away service.

[15] The adjudicator also reviewed the evidence of the petitioner's district manager, a manager of another branch of the petitioner who visited the subject pub once a week, the petitioner's district manager and a liquor license consultant. I will not review that evidence because I do not think anything turns on it.

[16] The adjudicator concluded that the petitioner's pub was not operated as a liquor-primary establishment.

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[5] P. 16, second para.

III. STANDARD OF REVIEW

[17] The ***Administrative Tribunals Act***, R.S.C. 2004, c. 45 does not apply to the ***Act*** and the ***Act*** does not contain a privative clause.

[18] Following ***Dunsmuir v. New Brunswick***, 2008 SCC 9, there are now only two possible standards of review: reasonableness and correctness.

[19] The parties agree – correctly – that the standard which applies to findings of fact or of mixed law and fact is reasonableness.

[20] With respect to questions of law, the petitioner says the standard is one of correctness. The respondent says it is reasonableness. Both positions flow from differing interpretations of the majority judgment in ***Dunsmuir***, written by Bastarache and Lebel JJ.

[21] The petitioner focuses on the following paragraph from that judgment:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> ***Dunsmuir***, para. 62

[22] Following from that, the petitioner says the standard of review has been determined by prior cases to be one of correctness. It points particularly to the Court of Appeal's decision in ***532871 B.C. Ltd. dba Urban Well v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2005 BCCA 416.

[23] The respondent focuses on the following paragraph from Bastarache and Lebel JJ.'s judgment:

> - A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied.
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (Toronto (City) v. C.U.P.E., Local 79, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> ***Dunsmuir***, para. 55

[24] The respondent says that the matter determined by the adjudicator is not one of general law. It points to two post-***Dunsmuir*** decisions of this Court which applied a reasonableness standard to administrative decisions of the General Manager.

> ***693753 B.C. Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)***, 2008 BCSC 103, at para. 54;
>
> ***Bastion Inn Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)***, 2008 BCSC 976.

[25] I agree with the respondent's submission that the question before the adjudicator was <u>not</u> "of central importance to the legal system and outside the specialized area of expertise of the administrative decision maker". In the case at bar, the legal question before the arbitrator was the meaning of "take-away service"

within her home regulation. That issue is one related specifically to the liquor licensing regime and therefore not one of general law.

[26] Nevertheless, there is still the question of prior authority.

[27] In ***Urban Well*** the Court of Appeal based its judgment on an application of the principles set out in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, 1998 1 S.C.R. 982, which in turn set out criteria substantially similar to those that ***Dunsmuir*** directs the Courts to address, namely the "pragmatic and functional" analysis. Therefore, I do not think that it can be said – and certainly not by a trial court – that the standard has not been previously determined in a "satisfactory manner", to use the words of Bastarache and LeBel quoted above.

IV. THE MEANING OF "TAKE-AWAY"

[28] The petitioner submits that the adjudicator incorrectly interpreted s. 8(1)(2) of the ***Regulation*** to refer to liquor being bought for off-premises consumption. It argues that that phrase should be interpreted as applying to take-away <u>food</u>.

[29] I do not agree.

[30] If the petitioner's interpretation were correct, a holder of a liquor primary license for beverage service would be able to sell as much liquor for off-site consumption as it wished, without an off-premises endorsement. This is so because that business – according to the petitioner – would fall within the scope of "beverage service" in s. 8(1), and not be disallowed by s. 8(2)(d) because it would not be a "take-away service".

[31] That interpretation makes no sense because:

(a) It renders the off-premises endorsement – s. 47 - meaningless.

(b) Section 9(c) of the ***Regulation*** states that it is a condition of a liquor primary (and liquor primary club license) that:

> (c) unless exempted by the general manager, food and non-alcoholic beverages must be available at reasonable prices to the patrons.

That requirement would serve no purpose if a primary liquor license allowed a licensee to predominantly operate as an outlet for the sale of liquor for consumption off-premises.

[32] Provision for a retail license is found in s. 14 of the ***Regulation***. The petitioner's position blurs the distinction the ***Regulation*** makes between a primary liquor license establishment and a retail license.

[33] With respect to the off-premises endorsement, in my view that does not change the essential character of a liquor primary license. The sale of liquor for on-site consumption must still be the primary business. To hold otherwise, would allow what is supposed to be the tail (i.e. the endorsement) to define the dog.

[34] The petitioner points out that in s. 47(1) of the ***Regulation*** the term "off-premises" is used to refer to liquor sales purchased for off-site consumption. Therefore, it argues, the drafter of the ***Regulation*** cannot have intended "take-away" to refer to liquor. I do not agree. As argued by the respondent, in s. 50(1) the term

"take-away bar" is defined (for the purposes of that section) as including sales of liquor and other products. I think these inconsistencies are less than ideal draftsmanship, rather than differences of substance.

[35] The petitioner points to the definition of take-away in the *Concise Oxford Dictionary* as "buy (food, etc.) at a restaurant for eating elsewhere …"

[36] If resort to a dictionary is necessary, I accept the respondent's submission that the *Oxford Dictionary* referred to is an English version and that in England the term "take-away" has a particular meaning associated with food. That is not the case in Canada, as is shown by the *Canadian Oxford Dictionary* which does not define the term in relation to food or alcohol. Rather, in that dictionary, the term for food to be consumed off-premises is "take-out".

[37] While the ***Regulation*** could have been drafted with more consistency, I see no reason to limit the term "take-away" to food when that is not specifically stated, nor is it the ordinary meaning of the phrase.

[38] In my view, "take-away service" in s. 8(2)(d) of the ***Regulation*** refers to either food or liquor. Therefore an establishment is not a liquor primary establishment if its primary business is serving food or alcohol or both for consumption off-premises.

V. PROCEDURAL FAIRNESS

[39] The petitioner argues that the adjudicator ought to have invited submissions on the proper interpretation of "take-away service" and that this constituted a breach of the duty of procedural fairness.

[40] Having concluded that arbitrator was correct in her interpretation of "take-away service" this issue is moot, but I will address it nonetheless.

[41] It appears to be true that the arbitrator took the definition of "take-away service" as a given. But so did the parties. Whether the petitioner was in violation of its license because its primary business was take-away liquor was the central issue to be determined. If the petitioner wished to advance a particular definition of the term, it should have done so.

[42] I conclude there was no breach of the duty of procedural fairness.

VI. THE TEST FOR "PRIMARY PURPOSE"

[43] The petitioner argues that the arbitrator applied an incorrect test in determining the primary purpose of the pub. The petitioner takes no issue with the arbitrator's opinion that that the "primary business must be the most important that is carried on". It does say she was wrong when she continued:

> … this can be determined by several factors such as physical layout, menus, functioning of kitchen, as well as whether a reasonable person entering the pub would conclude that beverage service is the most important business carried on.

[44] Is this a legal determination or a one of mixed law and fact? If the former, a standard of correctness would apply; if the latter, one of reasonableness.

[45] In ***Dunsmuir***, Deschamps J., writing for Charron and Rothstein JJ. stated:

> The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably

> intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.
>
> ***Dunsmuir***, para. 164

[46] It appears to me that the legal test was stated by the arbitrator in the part of her judgment that the petitioner does not take issue with, namely "the primary business must be the most important that is carried on". The part of the arbitrator's ruling that with which the petitioner takes issue pertains to the application of the rule, which is therefore a question of mixed law and fact.

[47] Turning to the petitioner's arguments, it first submits that: "None of the factors listed by the adjudicator as being indicative of whether the Pub had beverage service as its primary purpose have any basis in the ***Regulation***. The ***Regulation*** does not list any factors which the adjudicator must or may take into account."

[48] If this submission had any merit, the legislature would have to define every single term of substance in a statute or regulation. That is not so. In the absence of a statutory provision to the contrary, it cannot be an error for an adjudicator, or a court, to look to indicia in order to determine whether something falls within the scope of a statutory provision or definition.

[49] Next the petitioner says that the indicia listed by the adjudicator were inapt. With the possible exception of the "reasonable person" test, I do not agree. All of

the other items listed by the adjudicator might bear on the question of the primary business operation.

[50] The "reasonable person" test is more problematic. But it falls within the range of being reasonable. Even if that were not the case, that was one thing amongst many that the adjudicator considered. As I conclude below, she had ample evidence to reach the conclusion she did. Therefore even if the standard with respect to this determination is correctness, I would not set aside the decision or remit it for re-consideration.

[51] Although not argued by the petitioner, I have the same reservations with respect to the adjudicator's references to whether the petitioner was "interested" in operating a beverage service business. But I echo the comments made in the prior paragraph and would not set aside the decision on that basis even if the standard were one of correctness.

VII. THE STANDARD OF PROOF

[52] The petitioner argues that the required standard of proof for a liquor license violation is uncertain and that I should conclude that the manager must prove the violation beyond a reasonable doubt.

[53] I do not agree. That issue was determined recently by the Court of Appeal. In ***Cambie Hotel (Nanaimo) v. British Columbia (General Manger, Liquor Control & Licensing Branch)***, 2006 BCCA 119, Rowles J.A. stated for the Court:

> *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 *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.) at para. 11; *Hanson v. College of Teachers (British Columbia)* (1993), 110 D.L.R. (4th) 567 (B.C. C.A.), at 576; *Law Society (British Columbia) v. Ewachniuk* (2003), 13 B.C.L.R. (4th) 144 (B.C. C.A.) at para. 9. 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". [emphasis added]

VIII. ADVERSE INFERENCE ARISING FROM NON-PRODUCTION OF SALES RECORDS

[54] The petitioner submits that the adjudicator erred in drawing an adverse inference from the respondent not having produced its sale records. (The relevant passage from the adjudicator's decision is quoted above at para. 14.) It says this is particularly so, because the ***Act*** gave the general manager the power to require the production of these documents.

[55] The rules of evidence applicable to civil proceedings do not apply to enforcement hearings under s. 20. Tribunals are masters of their own procedure and evidentiary matters are considered matters of procedure.

Cambie Hotel, paras. 37-41

[56] Administrative decision makers are entitled to draw adverse inferences from the failure of a party to adduce relevant evidence under its control.

> Fact-finding involves the drawing of inferences from primary evidence. However, it is not uncommon for decision-makers to draw negative inferences from the failure of one party to introduce evidence, for example, by not calling a witness to testify, or by not cross-examining a witness, or by not submitting an affidavit. And in those circumstances, reviewing courts have taken the same position as do appellate courts. That is, they have permitted the drawing of the inference that, had such evidence been introduced, it would not have favoured the party who chose not to lead it. [footnotes omitted]
>
> D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 2004) at 12-21

[57] In this case, the proportion of the petitioner's sales that were related to off-sales would be relevant to the issue of whether it was operating its establishment primarily as a beverage service.

[58] The power of the manager to seek production of business records is provided by s. 73(1) of the ***Act*** and 34 of the ***Regulation***. It is a general power and not limited to enforcement proceedings. There was no obligation of the manager to seek such production and because he could not have known what was in the records it cannot be said that he did not seek their production because he knew it would favour the petitioner.

[59] I cannot conclude that the adjudicator's drawing an adverse inference was unreasonable under the circumstances.

IX. REASONABLENESS OF THE DECISION

[60] The petitioner's final argument is that the adjudicator's decision was unreasonable. This argument is based in large part on the petitioner's earlier arguments regarding irrelevant considerations and adverse inference, and I have stated my conclusions on these points.

[61] There is, however, one further point that the petitioner makes in this part of its argument. This is that the adjudicator did not place any weight on the fact that the liquor inspector performed an inspection of the Pub premises on June 5, 2007, as part of the process of transferring the liquor license for the Pub to the petitioner. At the time, and as found by the adjudicator, the kitchen and dishwasher were not operational, there was no beer on tap, there were no glasses being used to serve beverages, and coolers had been installed behind the main counter to hold liquor.

[62] The petitioner has not raised an estoppel argument and I therefore do not see how that evidence can be relevant. The prior opinion of the inspector – I will put it as high as that for the purposes of this argument – cannot in any way be determinative as to whether a license was in fact breached. That is a decision left to the adjudicator.

[63] As I have said above, there was ample evidence upon which the adjudicator could reach the conclusion she did.

X. CONCLUSION

[64] The petition is therefore dismissed.

"MYERS J."