

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R.G. Facilities (Victoria) Ltd. v. Liquor
Control Licensing Branch (General
Manager),*
2013 BCCA 402

Date: 20130911
Docket: CA040268

Between:

**R.G. Facilities (Victoria) Ltd.
dba Save-On-Foods Memorial Arena**

Appellant

And:

**The General Manager of The Liquor Control
And Licensing Branch**

Respondent

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Hinkson

Oral Reasons for Judgment

Counsel for the Appellant: M. T. Mulligan

Counsel for the Respondent: T. Mason

Place and Date of Hearing: Victoria, British Columbia
September 9, 2013

Place and Date of Judgment: Victoria, British Columbia
September 11, 2013

Summary:

An appeal from an order dismissing an application for judicial review of a decision of an adjudicator made pursuant to the Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267.

The appellant owner and operator of an arena, was issued a ten day liquor primary licence suspension when Victoria Police observed a minor consuming liquor at the appellant's arena. The adjudicator interpreted the words "business days" in s. 67 of the Liquor Control and Licensing Act Regulations, B.C. Reg. 224/2002 ("Regulations") to include only those days on which liquor would be available to patrons of an event at the arena. The decision was overturned on appeal, however, the same penalty and the same interpretation of "business days" was applied by a second adjudicator.

The issue on appeal is the jurisdiction of the Liquor Control and Licensing Branch to impose an intermittent suspension.

Held: appeal allowed, and the order extending the period of suspension beyond 10 business days is set aside.

[1] **HINKSON J.A.:** This is an appeal from an order dismissing an application for judicial review of a decision of an adjudicator made pursuant to the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 ("Act"). The appeal involves the interpretation of the penalty provisions found in s. 67 of the *Liquor Control and Licensing Act Regulations* ("Regulations") B.C. Reg. 244/2002.

Background

[2] The appellant owns and operates an arena in Victoria, British Columbia, known as Save-On-Foods Memorial Arena. It holds a liquor primary licence which permits the provision and sale of alcohol at the arena, in accordance with the various terms and conditions of that licence.

[3] On November 3, 2007 members of the Victoria Police department observed a minor consuming liquor in the appellant's arena. A contravention notice was issued to the appellant for supplying liquor to a minor, contrary to s. 33(1)(a) of the *Act*. At a hearing before an adjudicator (the "first adjudicator") pursuant to the *Act*, the adjudicator found that the appellant had contravened s. 33(1)(c) of the *Act* by permitting a minor to consume liquor on premises controlled by the appellant, and imposed a ten day suspension of the appellant's licence pursuant to s. 20(2) of the *Act*.

[4] The first adjudicator ordered the suspension to commence at the close of business on September 12, 2008 and to run for ten "business days". In November, 2007, s. 67(1) of the *Regulations*, defined business day as "a day on which the licensee's establishment is normally open for business." The first adjudicator interpreted this to mean "a day on which the licensee's establishment would normally be open for business ... and at which liquor would normally be

available to patrons of an event hosted by the Save-On-Foods Arena.”: *EH07-159 Save-On-Foods Memorial Arena* (13 August 2008), online: <<http://pssg.gov.bc.ca/lclb/>> at pp. 40-41.

[5] The first adjudicator interpreted s. 67(2)(b) as meaning each succeeding business day on which the Arena had scheduled bookings for public events. Based on this interpretation, the respondent calculated the duration of the ten day suspension as running from the close of business on September 12, 2008, until November 15, 2008 and would not include non-event business days on which the Arena’s restaurant facility (which was only open for booked events) or its pizza concession stand (which was open daily from 11:00 a.m. to 2:00 p.m.) both sold small amounts of liquor. The appellant argued that if those days been included as “business days” the duration of the suspension should have operated from September 15, 2008, until September 24, 2008.

[6] The first adjudicator’s decision was the subject of a judicial review. His decision was overturned for procedural unfairness in reasons indexed at 2009 BCSC 630, and the matter was remitted to the respondent for rehearing before a new adjudicator (the “second adjudicator”) for consideration of the Arena’s due diligence defence. The judge further directed that if the appellant was convicted of the regulatory offence, the penalty imposed by the first adjudicator “shall stand”, subject to the second adjudicator considering any “mitigatory information derived from witness evidence that was not available at the first hearing” and “whether to give credit for those days (or for what portions of them) on which the petitioner suspended its liquor sales” (the “Order”). In particular the Order provided:

1. Pursuant to s. 5 of the *Judicial Review and Procedure Act*, a further hearing. The rehearing before a new adjudicator shall be confined to the alleged contravention of s. 33(1)(c) of the *Act* and the petition’s due diligence defence. The petitioner is at liberty to recall witnesses or additional witnesses, to demonstrate its due diligence as required by the case authorities. If the petitioner does not confirm within 14 days from the date of this Order that it wishes to exercise its rehearing rights granted by this Order, the adjudicator’s decision stands. If the petitioner confirms its desire for a further hearing, the adjudicator’s finding of a contravention under s. 33(1)(c) is quashed, to be replaced with the new adjudicator’s decision.

...

3. Should the new hearing result in a finding that RG contravened s. [33(1)(c)], the penalties imposed in the first adjudication stand; provided that the new adjudicator may consider mitigatory information derived from the witness evidence that was not available at the first hearing.

4. The adjudicator shall decide whether to give credit for those days (or for what portions of them) on which the petitioner suspended its liquor sales.

[7] On rehearing (*EH07-159 Save-On-Foods Memorial Arena* (25 August, 2011), online:<http://pssg.gov.bc.ca/lclb/>), the second adjudicator found that the appellant had not exercised due diligence by taking reasonable steps to prevent the minor from consuming liquor

on its premises, and found that the allegations in the notice of contravention had been made out. The second adjudicator reconsidered the first adjudicator's penalty and, in imposing what he found to be an appropriate penalty, made his own interpretation of the term "business day" in s. 67(1) of the Regulations. That interpretation differed from the interpretation of the first adjudicator.

[8] At pp. 19 - 21 of his decision the second adjudicator found:

Section 67 requires that a suspension ordered must take effect on succeeding business days. Until recent February 2011 amendments to section 67 of the Regulation, and at the time of the 2008 hearing decision, "business day" was defined as "a day in which the licensee's establishment is normally open for business." That section now reads, "In this section "business day" means, in respect of a licensee, a day specified by the general manager as a business day." I am satisfied that in the circumstances of this case the previous definition of "business day" applies. "Business" is not defined.

...

I do not agree with counsel for the licensee that the suspension would be effective on dates in which liquor is not being sold or served, nor do I agree that the following amount to the "business" for which the liquor licence has been granted: the operation of a restaurant, open for booked events; a concession stand open from 11 a.m. to 2 p.m. primarily for persons working within the facility and which amounts to a marginal business activity; a store; or the administration offices. Those, in my view are ancillary to the "business" for which the liquor license has been issued.

...

The licensee representative testified that the dates of the suspension served included four days of a home show, where liquor sales and service would have been otherwise available. He was unable to recall the dates; however he testified that they occurred during the period of suspension ordered in the previous hearing decision. The branch advocate argued that any days which the licensee suspended the sale and service of liquor cannot be considered as part of the 10 day suspension ordered because the branch was not advised of the suspension, nor was the liquor licence surrendered to the branch or the police.

There is no evidence before me to contradict what the licensee says about having served four (4) days of the ten (10) day liquor licence suspension. I accept the licensee representative's testimony that the four days of the Home Show when liquor sales and service were suspended by the licensee were within the period of suspension ordered in the previous hearing decision. In conclusion, I accept that the licensee has effectively served four (4) of the ten (10) day suspension. For the aforementioned reasons I do not accept the licensee has served the entire 10 day suspension.

[9] The appellant petitioned for judicial review of the second adjudicator's decision, limited to the period of the suspension ordered by that adjudicator. The petition was dismissed by a chambers judge in reasons for judgment indexed at 2012 BCSC 1349, and it is that dismissal that is the subject of the appeal before us.

Discussion

[10] The appellant frames the issue on its appeal as follows:

The learned judge erred in holding that the Liquor Control and Licensing Branch had jurisdiction to impose a licence suspension, other than on succeeding business days.

[11] Thus framed, the appellant argues that the standard for review is one of correctness: *Dunsmuir v. New Brunswick*, 2008 1 S.C.R. 190, at para. 59.

[12] The respondent contends that the second adjudicator made a finding of fact as to the nature of the appellant's business, and then made a finding of mixed fact and law that involved the interpretation of the respondent's home statute and regulations attracting a standard of review of only reasonableness: *Dunsmuir*, at para. 49.

[13] In *Dunsmuir*, Bastarache and LeBel JJ. for the majority warned at para. 50:

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[14] The chambers judge held at paras. 53 - 54:

[53] The respondent says the appropriate standard of review is "reasonableness" as this is an issue of mixed fact and law. I tend to agree that the issue is a mixed one, but because of the circularity of that approach - the court cannot consider whether the penalty is unlawful because it can only consider if it is reasonable and it is reasonable because it is not unlawful - I will consider the issue in the terms of the petitioner's submission as to the appropriate standard of review: that is, whether the adjudicator exceeded his jurisdiction by formulating a definition of "business" to be used within the statutory provision of "business day" and "open for business" in order to fashion an intermittent penalty.

[54] I am unable to find that the adjudicator did err or exceed his jurisdiction.

[15] In my opinion, the chambers judge correctly reviewed the decision of the second adjudicator on a standard of correctness, but erred in finding that the second adjudicator neither erred nor exceeded his jurisdiction.

[16] At the relevant time s. 67 of the *Regulations* provided:

s. 67(1) In this section, business day means, in respect of a licensee, a day on which the licensee's establishment is normally open for business.

(2) If a licensee accepts a suspension under section 64(3)(b) or if the enforcement

actions referred to in section 65(1) include a suspension, the suspension must

(a) unless the general manager considers that a different day of the week is more appropriate, take effect on the same day of the week as the day on which the contravention for which the suspension was imposed was committed, and

(b) continue in effect on each succeeding business day until the number of days on which the suspension has been in effect equals the number of days in the accepted or determined period of suspension.

(3) The general manager may, subject to subsection (2), may determine the date on which the suspension begins.

[17] The correct approach to the interpretation of legislation was affirmed by Iacobucci J., for the Court in *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27 as encapsulated by the following passage from Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) :

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[18] Counsel for the respondent conceded that the appellant's establishment can be open seven days a week, and the appellant's liquor primary licence permits the sale of liquor, subject to the terms and conditions of that licence each of the seven days of the week. Although the appellant's business might be generally described as that of entertainment, the second adjudicator found:

The arena is open from Monday to Friday at a minimum; events usually take place during evenings and weekends. The arena houses a store, a small concession, a restaurant and the administration office. The liquor licence covers the operation of the concession and the restaurant. The restaurant does not operate on a daily basis but only for booked events. The concession is open daily for lunch from 12 am to 2 pm. It does not attract business off the street but is for people working at the arena. On rare occasions police officers will come for lunch from their offices located in a neighbouring building. The concession represents a marginal business activity.

[19] The appellant contends that the chambers judge failed to appreciate the significance of the operation of the arena on days other than "event days". She found at para. 50 of her reasons that:

Both parties mentioned the issue of a small amount of alcohol being sold at some point in a pizza kiosk in the building. Apparently a contravention notice was issued but not pursued. This appears to have little relevance and was not a consideration for the adjudicator. I do not see this as determinative of the interpretation of the penalty within the context of s. 67.

[20] At para. 57, she concluded:

I am of the view that it was open to the adjudicator to interpret the words of the section in order to accord with and give effect to the purposes of the Act. The adjudicator imported a

rational and reasonable approach to the concept of “business days” based on the facts before him, given the context in which the licence is issued and the scheme of the Act. I am not persuaded that he exceeded his jurisdiction by deciding, in the context of this statutory scheme and this licence, to construe the term “open for business” to mean open for the business of serving liquor under the relevant licence, as opposed to open for any purpose whatsoever. For the purposes of the Act and the licence, an “establishment” by definition is a place for which a licence may be issued and liquor served.

[21] With respect, the significance of the operation of the kiosk, and indeed the other business activities of the appellant on the non- “event days” is, in my opinion, relevant to the issue of whether the appellant’s establishment is normally open for business on those non-“ event days”. The appellant’s arena is normally open for some business on those days. The Regulation does not require any particular purpose for which the arena must be open to count as a business day, only that it be normally open for business. The context and grammatical and ordinary sense of the words of the Regulation read harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament do not support the meaning of the words attributed to them by the second adjudicator.

[22] The suspension of the appellant’s liquor primary licence must therefore continue in effect on each succeeding day on which the arena is normally open for business until the number of days on which the suspension has been in effect equals the number of days in the determined period of suspension.

[23] The second adjudicator’s contrary conclusion is incorrect, and the chambers judge erred in finding that it was open to the second adjudicator to construe the term “open for business” to mean open for the business of serving liquor under the relevant licence, as opposed to being normally open for any purpose whatsoever.

Remedy

[24] The respondent concedes that success by the appellant on its interpretation of the term “normally open for business” means that it will have effectively served its suspension. The position that she took before the chambers judge was that if the judge acceded to the appellant’s submission that the second adjudicator erred in his interpretation of the term, it would not be open to a third adjudicator to impose a suspension greater than ten days. In these circumstances, she agrees that it would be unfair and unreasonable to again remit the matter for further adjudication.

[25] Given a similar concession in *Twilight Zone Cabaret v. British Columbia (Liquor Control and Licensing Branch)* [1995] B.C.J. No. 596, this Court set aside a suspension of a liquor licence where remission to the respondent would have been unfair.

[26] I would therefore allow the appellant's appeal, and order that the part of the second adjudicator's order extending the period of suspension of the appellant's liquor primary licence beyond September 24, 2008 be set aside.

[27] **NEWBURY J.A.:** I agree.

[28] **HALL J.A.** I agree.

[29] **NEWBURY J.A.:** The appeal is allowed.

"The Honourable Mr. Justice Hinkson"