IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sandman Hotel Langley Inc. v. General Manager of the Liquor Control and Licensing Branch,***
2006 BCSC 417

Date: 20060313
Docket: L052340
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*,
R.S.B.C. 1996, c. 241

Between:

Sandman Hotel Langley Inc., dba Sandman Hotel (Langley),
operating as The Shark Club

Petitioner

And

The General Manager of the Liquor Control
and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Petitioner	K.R. Tonge
Counsel for the Respondent	D. Roberts
Date and Place of Hearing:	Vancouver January 16, 2006, B.C.

INTRODUCTION

[1] This is an application by the Petitioner (the "Licensee"), pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 (the "***JRPA***") for review of a decision (the "Decision") made by an enforcement hearing adjudicator (the "Adjudicator") under the ***Liquor Control and Licensing Regulation***, B.C. Reg. 244/2002 (the "***Regulation***") of the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the "***Act***"), finding two contraventions of the ***Regulation*** by the Licensee.

[2] At all material times, the Licensee carried on business as the Sandman Hotel, on 202nd Street in Langley, British Columbia.

[3] The hotel contains a food and beverage establishment known as The Shark Club, for which separate licenses are held, a "Food Primary Licence" and "Liquor Primary License".

[4] The first allegation is that on August 29, 2004, the Licensee contravened s. 44(3) of the ***Regulation*** by allowing persons to consume liquor in a licensed establishment beyond a half hour after the time stated on the license for the hours of liquor service.

[5] The second allegation is that on September 1, 2004, the Licensee contravened s. 45(2) of the ***Regulation*** by failing to request two pieces of identification from a person appearing to be under the age of 25 before allowing her to enter the licensed establishment, or before selling or serving liquor to her.

[6] The two allegations resulted in a single Enforcement Hearing (the "Hearing") before the Adjudicator on May 9, June 3 and July 27, 2005.

[7] At the Hearing, eight witnesses gave evidence, and five exhibits were filed. The proceedings were recorded, and a transcript is before me on this application.

[8] The Decision of the Adjudicator was delivered on September 1, 2005 and at that time, he determined that both contraventions had been proven. He imposed penalties authorized under the ***Regulation***. The findings that the contraventions were proven are the subject of the Petition which is before me. The penalties are not before me for review.

[9] The Decision is before me and comprises 27 type-written pages.

[10] The only defence raised at the Hearing was that of due diligence. Evidence was called and argument was made with respect to this issue, both on the evidence, and on the law. The Decision addressed the issue of due diligence, both on the evidence and on the law.

[11] The arguments made before me were also framed primarily around the issue of due diligence, and the manner in which the Decision dealt with that issue.

[12] The Licensee seeks an Order that the Decision be quashed pursuant to s. 2 of the ***JRPA***, or in the alternative, that the Decision be remitted back to the Liquor Control and Licensing Branch (the "Branch") for a re-hearing before an alternative adjudicator pursuant to ss. 5 and 6 of the ***JRPA***.

[13] Those sections of the ***JRPA*** are as follows:

> 2(1) An application for judicial review is an originating application and must be brought by petition.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> > (a) relief in the nature of mandamus, prohibition or certiorari;
> >
> > (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
>
> 5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.
>
> (2) In giving a direction under subsection (1), the court must
>
> > (a) advise the tribunal of its reasons, and
> >
> > (b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
>
> 6 In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.

[14] The parties agree that the ***Administrative Tribunals Act*** is not applicable to these proceedings.

THE TWO INCIDENTS

Section 44(3) of the ***Regulation***

[15] The incident occurred on August 29, 2004.

[16] The subsection states as follows:

> [A] licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

[17] The Adjudicator, in his Decision, noted the following evidence, and made the following findings of fact:

1. An R.C.M.P. constable testified that at approximately 2:00 a.m. on August 29, 2004, he was dispatched to the Sandman Hotel to assist in the arrest of a male ejected from the Shark Club.

2. He observed several intoxicated persons coming from the Shark Club and was concerned that staff inside were losing control. He felt that he should address the problems with the manager of the Shark Club.

3. He entered the establishment at approximately 2:45 a.m. for the purpose of speaking with the manager. Inside, several staff were cleaning the licensed area and he saw three males seated at an elevated pedestal table on which there were three glasses of what appeared to be freshly poured beer. He noted one of the males drinking from one of the glasses. He asked them if they were drinking "after hours". One responded in the affirmative.

4. The constable located the manager seated in the far corner of the licensed area. He advised the manager of his observation of the three persons seated in the licensed area drinking beer after hours and provided a description of the three persons to him. The manager responded that they were the remaining door staff, who had not yet gone home. During the conversation, the manager said that "this was a grey area" which the constable felt referred to the general practice of staff

drinking after hours. He advised the manager that it was not a grey area, but "black and white" in that it was not permitted.

Section 45(2) of the ***Regulation***

[18] The incident occurred on September 1, 2004.

[19] The subsection states as follows:

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.

[20] The Adjudicator, in his Decision, reviewed the following evidence, and made the following findings of fact:

1. The Branch employs persons as agents who are between the ages of 19 and 25 years of age to assist in determining whether a licensee is complying with s. 45 of the ***Regulation***.

2. On September 1, 2004, two 19 year old female agents were assigned to check licensed establishments in the Greater Vancouver area. Photographs of each of them were taken prior to their commencing their duties. They both testified that the photographs accurately depicted that they were wearing more makeup and different hairstyles at that time than during their testimony at the Hearing.

3. They testified that they entered the Shark Club at approximately 9:15 p.m. There was no doorman or host at the door. They took a seat in the licensed area. The establishment was not busy. They were approached by a female server. They each ordered a liqueur and a coke. They were served those drinks. They each took a sip of their drinks and confirmed that they were alcoholic beverages. They left the drinks mostly

unconsumed. They departed the premises at approximately 9:25 p.m.

4. They testified that during their time in the establishment they were not questioned about their age, nor requested to produce identification by the server or any other staff member, although they did have identification available if so requested. Their evidence differed as to whether or not there was a sign posted advising of the requirement to produce identification. One agent was certain that there was, the other was not certain.

5. They testified that in their private lives, they are asked for identification 80 to 90 % of the time when they go to a nightclub.

6. One of the agents testified that she believed that the female server had been in her late twenties. In fact, she was only 19.

DUE DILIGENCE

[21] The *actus reus* of both incidents was not in dispute. The Defence raised at the Hearing, and on this Review, is due diligence. It is conceded by the Respondent that due diligence, if proven, provides a complete defence to both incidents. The burden of proving due diligence at the Hearing, was on the party raising it, that is on the Licensee. On this Review, the focus is not directly on the issue of due diligence; rather, the focus is on the Adjudicator's determination of that issue.

The Licensee's Argument

[22] With respect to both contraventions, the Licensee argues as follows:

1. The application of the reasoning of the Court of Appeal in ***Whistler Mountain Ski Corporation v. General Manager of the Liquor Control and Licensing Branch***, 2002 BCCA 426 provides a defence to the Licensee if it took reasonable care to avoid the alleged contraventions.

2. The Adjudicator correctly noted that ***Regina v. Sault St. Marie*** (1978), 40 CCC (2d) 353 sets out a two-step test, and he correctly determined that the Licensee had satisfied the first step. However, he erred in finding that the Licensee had not taken adequate measures to satisfy the second step.

3. The Adjudicator quoted the appropriate passage from ***Sault St. Marie*** as follows at p. 377-8:

> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

4. The Adjudicator accepted that the licensee met the first step of the test.

5. The Adjudicator accepted that the practices and training provided and the policies set were sufficient to establish a proper system to prevent commission of the offences, however he was not satisfied that the licensee took adequate measure to ensure the effective operation of this system.

6. The Adjudicator accepted the evidence of the police constable that he was "impressed with the demeanour of the general manager who appeared to be genuinely interested in dealing with the problems".

7. At p. 22 of the Decision, the Adjudicator stated:

> While the evidence supports the existence of management staff who may from time to time observe what is occurring and

> intervene where necessary, the evidence does not support that as being effective.
>
> Here the general manager was present, knew or should have known what was occurring, yet took no action.

8. The Licensee argues that the expectation of the perfect operation of the system is unreasonable and lends itself to absolute liability rather than strict liability of the license.

9. The mere fact that there was consumption beyond one half hour after liquor service hours and that the two Branch agents were not asked for identification does not mean that the licensee did not exercise reasonable care. It may only serve to put the licensee on notice that the level of diligence must be increased.

[23] With respect to s.44(3), consuming liquor after hours, the Licensee argues that:

1. The Adjudicator made a mistaken finding in regard to the general manager's credibility. The evidence from both the police officer and the general manager was that the general manager was not in a position to see the three males sitting at the front pedestal table and that they were not seated there when he walked by that area one half hour earlier because they were dealing with an altercation outside.

2. It is entirely reasonable that the general manager was attending to his normal routine of tending to cash receipts which took his attention away from the doormen and employees on the other side of the bar at the time the police officer walked through: this in no way equals "wilful blindness" or acceptance by the Licensee.

3. It was improper for the Adjudicator to infer that the general manager had "either approved of the after hours consumption or was wilfully blind to its occurrence" and that his findings of fact did "not support a finding of diligence" on the part of the Licensee.

4. It was improper for the Adjudicator to note several times in the Decision that one of the doormen involved in the incident was later hired as an employee by the Shark Club, because it deals with after the fact conduct, and there was no direct evidence

that this particular doorman was drinking alcohol more than one half hour after closing. Furthermore, the evidence of the general manager was that this doorman was a responsible employee in whom he felt confidence to carry out the policies and procedures of the Licensee.

5. There was no direct evidence from the Branch which could have supported any disciplinary action against the doorman, yet the Adjudicator found it a "strange result" that the doorman was hired by the Licensee.

[24] With respect to s. 45(2) and the age of the agents, the Licensee argues follows:

1. The subjective nature of s. 45(2) makes it impossible to consistently and adequately meet the requirements of the ***Regulation***, regardless of any advice or training which may be available through industry consultants or organizations.
2. There was no evidence from the Branch that there is such advise or training available in the industry.
3. Determining another person's age is difficult at the best of times. It can be affected by one's own age, life experience, and another's personal characteristics such as appearance, hairstyle, makeup, and clothing.
4. Determining whether a person appears under the age of 25 is entirely subjective and impossible to regulate. The licensee had policies and training in place, the employee in question was aware of these policies and had the training, evidently determining that the Branch agents did not appear under the age of 25 based on her personal subjective experience and assessment.
5. The Adjudicator failed to consider the subjectivity of this ***Regulation*** and substituted his personal judgment with that of the server.
6. The Adjudicator should have distinguished between his personal observation of the Branch agents, in the context of a Hearing, in a small hearing room and over an extended period of time (which only serves to confirm the finding that he believed

they appeared to be under the age of 25) and negating a defence of due diligence based on that observation.

7. The arbitrarily selected criterion of determining who "appears under the age of 25" is too difficult to objectively regulate.

The Decision

[25] The Decision relates all the relevant evidence in detail including the evidence of what happened that night. This includes evidence from three separate persons on behalf of the Licensee, each of whom gave evidence about procedures in place for ensuring that there is regular compliance with the ***Act*** and ***Regulations***.

[26] The Decision also notes the submissions made by the Licensee on the question of due diligence, and particular, notes the Licensee's argument that The Shark Club is a large enterprise with a number of useful procedures in places which are diligently followed. The Decision then lists those procedures which were heard in evidence. They are as follows:

1. New employees are usually persons having previous experience. Persons without experience begin at a junior position and are advanced when they obtain experience.

2. Staff are hired after two interviews then undergo orientation and training and are provided with a binder of materials. They attend regularly held staff meetings and incidents are discussed with them.

3. The establishment maintains a policy manual which is regularly updated.

4. Management staff are responsible for monitoring activities within the establishment and follow up if they see a problem.

[27] The Decision also notes that:

1. The server, at fault for not checking identification on September 1, 2004, was fired. Because the establishment had not been notified in a timely way of the incident, it was too late to take any further action.

2. The security company was told to reassign the two doormen known to have consumed liquor after hours on August 29, 2004.

[28] The Adjudicator then devotes four complete type-written pages of the Decision to the question of the law relating to due diligence and its application to his findings of fact (pp. 20 – 24).

[29] In discussing due diligence, the Adjudicator makes the following comments which the Licensee argues are in error:

1. He determined that the general manager of The Shark Club at the time of the alleged contraventions was the "directing mind" of the Licensee. The Licensee argued that this was a mistake because with respect to the incident of August 29, 2004, the evidence of the general manager was that he was unaware that the incident was happening. With respect to the second incident, his evidence was that he was not on duty at the time.

2. The Adjudicator then referred to several cases regarding the ***Tobacco Act***, R.S. 1997, c. 13. These cases involve charges against retailers selling tobacco products to underage persons. Due diligence was found where the accused retailers met the test outlined in ***Sault St. Marie***. These cases were raised by the Licensee, and were referred to in the Decision.

3. The Adjudicator then turned his attention to the evidence relating to due diligence under s. 44(3). He referred to the evidence of the police officer who entered the premises and observed the after hours drinking. He referred to the officer's evidence about his conversation with the general manager. He considered this evidence and compared it to the evidence of the general manager which evidence was clearly in conflict with what the police officer had said. The Adjudicator made a finding

of credibility and preferred the evidence of the officer, basing his finding upon the notebook of the officer, which contained notes made shortly thereafter, and which corroborated the evidence of the officer.

4. The Licensee takes issue with this credibility finding on the part of the Adjudicator.

5. The Adjudicator concluded that the general manager had "either approved of the after hours consumption or was wilfully blind to its occurrence". He also concluded that these findings did "not support a finding of diligence" on the part of the Licensee.

6. The Licensee argues that this is not a proper inference for the Adjudicator to draw.

7. The Adjudicator then analyzed the quotation previously referred to from ***Sault St. Marie*** and noted that it sets out a two step process. The first step is that there must be established a proper system to prevent the commission of the offence; the second step is the taking of reasonable steps to ensure the effective operation of the system.

8. The Adjudicator concluded that the evidence before him satisfied the first step with respect to a proper system being in place but that he was not satisfied, on the evidence, with respect to the second step. His words were "I am not satisfied that the licensee took adequate measure to ensure the effective operation of the system" (p. 22). He then proceeded to review the evidence which led him to come to that conclusion.

9. The Adjudicator noted several times throughout his judgment that one of the doormen was later hired as an employee by the establishment. The Licensee argues that this was an improper consideration on the part of the Adjudicator because it deals with after the fact conduct, and there was no direct evidence that this particular doorman was drinking alcohol more than half an hour after closing.

10. The Adjudicator referred to the fact that one on-site manager was called as a witness, but others were not heard from. The Licensee argues that this represents an error on the part of the Adjudicator, since the law does not require that every witness be called.

11. Then the Adjudicator turned his attention to s. 45(2). Again, he referred to the two-step process from ***Sault St. Marie*** and concluded that the first step was satisfactorily complied with

including hiring practices, training provided, placing of signs at the entrance and awareness of the staff of the requirement to check two pieces of identification. The Adjudicator proceeded to then say that the second step of ***Sault St. Marie*** was not complied with. He again says that "I am not satisfied that the licensee took adequate measures to ensure the effective operation of the system" (p. 23). He then goes on to refer to the evidence that leads him to this conclusion and explains why he is not satisfied with those measure. The Licensee argues that the evidence should have led the Adjudicator to a different conclusion and that the conclusion he arrived at sets up a standard of absolute perfection rather than of due diligence.

12. The Adjudicator then referred to several cases that were provided to him where there are examples of alleged contraventions, and where due diligence was found to have been present. The Adjudicator considered the evidence in each of those cases and compared the evidence which resulted in findings of due diligence, with the evidence in this case. In his view, this case did not reach the level of due diligence which was present in the other cases to which he was referred.

13. With respect to the question raised by the Licensee of the requirements of this subsection being too subjective, the Adjudicator noted that he was "…satisfied that there was nothing in their appearances depicted in the photographs that leave me to believe that either of the agents looked older than their real ages. I find that the agents, who were 19 and 20 years old at the time of the alleged contravention, were persons appearing to be under the age of 25 years…."

[30] In response to the foregoing arguments of the Licensee, I conclude as follows:

1. In my view, the Adjudicator was not in error in determining that the general manager was the directing mind of the Licensee. He concluded that "his responsibilities were to oversee all aspects of the operation including the hiring and training of staff". He also quoted the case of ***The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch***, 2004 BCSC 248, where the Court said this:

> Such person need not be an officer or director of the licensee. It would be the individual or individuals, perhaps the

> general manager or the shift manager or supervisor, who had sufficient authority in respect of the sphere of relevant operations to be worthy of the appellation 'directing mind and will' of the licensee.

2. The finding by the Adjudicator with respect to the credibility of the police officer over the general manager is one which he was entitled to make, so long as he followed the correct process in doing so. He did follow the correct process. This was not a criminal trial with criminal rules of evidence. This was an administrative hearing. The Adjudicator was entitled to receive the notes and consider them.

3. The Adjudicator's inference that the general manager had either approved of the after hours consumption or was wilfully blind to its occurrence is one which the Adjudicator is entitled to draw; it was within his jurisdiction to do so, so long as he considered all of the evidence correctly and fairly, and arrived at a reasonable conclusion. In my view, he did all of those things.

4. I conclude that the analysis by the Adjudicator of the relevant principles in ***Sault St. Marie*** was correct, and he instructed himself correctly with respect to that.

5. In coming to the conclusion that he was not satisfied that the Licensee took adequate measures to ensure the effective operation of the system, the Adjudicator considered all the relevant evidence, drew the correct inferences, and did not misapprehend the evidence. While a different decision certainly could have been arrived at, it is impossible to say that the Decision of the Adjudicator, based on this evidence, was unreasonable.

6. The Adjudicator's comments with respect to the hiring of the third doorman was not an improper consideration, and did not cause the Adjudicator to misapprehend the evidence or instruct himself wrongly. The evidence of the hiring of the doorman was led in response to an issue raised by the Licensee itself. That issue was that the Licensee had taken disciplinary steps against other of the transgressors. The bartender had been fired, and two of the contract security doormen were reassigned, at his request, to a different establishment. The Licensee asked that this behaviour be considered as evidence of due diligence. Consequently, it was perfectly appropriate for the Adjudicator to consider that the other doorman was treated differently.

7. With respect to the Licensee's argument that the law does not require that every single witness be called, I agree with that proposition. In this case, the Adjudicator's comments were not inappropriate because he did not use that comment to draw any adverse inference against the Licensee. He simply mentions that they were not called. It is clear to me that the Adjudicator was mentioning nothing more than that, if there was additional evidence to be put forward by the Licensee with respect to the issue of due diligence, it was not forthcoming from these other managers. The Adjudicator does not suggest that these managers might have had other useful evidence to give. He merely mentions that there was the potential for other witnesses to be called, and the potential for other evidence to be heard, and since he did not hear any of it, he can draw nothing from the absence of that evidence – either for or against the Licensee.

8. The standard imposed by the Adjudicator was not one of absolute perfection. The evidence was properly considered and while I may well have come to a different conclusion on the evidence, I cannot say that he was unreasonable in coming to the conclusion that he did arrive at based on this evidence.

9. The analysis by the Adjudicator of the several cases, that were referred to him as examples of contraventions where due diligence was found to be present, was correct. He compared the evidence in those cases to the evidence in the case before him and determined that the differences were significant enough for him to come to a different conclusion. It is not for me to assess whether or not he was correct in coming to this conclusion. I am only to assess whether or not the conclusion was reasonable. In my view, it was.

10. I agree with the Licensee that assessing age is a purely subjective exercise and impossible to determine with a consistent degree of success. However, that does not afford a defence to the Licensee, and certainly is not suggestive of any due diligence. To the contrary, the predictable difficulties in assessing age can be overcome with only one course of action – extreme caution in every instance. It is an insufficient exercise of due diligence to ask oneself if a person appears over or under the age of 25. Rather, the exercise requires that, in the absence of something approaching absolute certainty as to a person's age, identification should be asked for in every single case.

The Law

[31] I was referred to several court decisions that have dealt with due diligence in similar circumstances.

[32] The Licensee has referred me to ***R. v. C.C. Eric James Management Ltd.***, where the court concluded that the licensee's *employee* did not exercise due diligence, but that this did not, in that case at least, translate into a lack of due diligence on the part of the licensee (the employer). The court concluded that the policies and practices of the licensee were sufficient to constitute due diligence. The learned trial judge, in her reasons, stated that:

> The clarity of this latter mentioned policy may have been less than perfect, but I'm satisfied on the balance of probabilities that it was at least a strong suggestion, if not a requirement made by the employer, to aid employees in determining when to ask to see identification.

[33] The Licensee urges me to follow the same reasoning as in ***James Management***. The Branch replies that this was certainly a finding that was open to the Adjudicator if he had come to the same conclusion on the evidence. However, he did not. And the burden now is for the Licensee to convince me that his decision not to do so was unreasonable.

[34] The Licensee also refers me to the case of ***Regina v. 348059 B.C. Ltd.***, 2003 BCPC 58, where the learned judge concluded that the defendant corporation had exercised due diligence to prevent the sale of tobacco products to under-aged persons, and had considered the following factors in coming to that conclusion:

> 1) All new employees received oral instructions concerning the laws governing the sale of tobacco products;
>
> 2) All new employees were required to sign a document acknowledging the employer's instructions concerning the sale of tobacco products;
>
> 3) Those employees who did not follow the rules concerning the sale of tobacco products were disciplined by the employer and, in some cases, dismissed;
>
> 4) All signs required by the legislation were prominently posted in the employer's store.

[35] The Licensee argues that the factors in the instant case are precisely the same as in that case, and that I should therefore come to the same conclusion. The Branch argues that, once again, it was open to the Adjudicator to make such findings if he had been satisfied on the evidence. However, he did not do so, and the burden in this Court is now on the Licensee to satisfy me that his decision not to do so was unreasonable.

[36] The Licensee also refers me to ***R. v. 611016 Saskatchewan Ltd.*** (2004), 256 Sask. R. 268, 2004 SKPC 135. In that case, the court concluded that the employee made a mistake which the employer could not have foreseen, and that the employer had written instructions or policies in place about which the employee should have known. This satisfied the test for due diligence. Once again, the Branch argues that the Adjudicator in the case at bar could have come to that conclusion, but the burden now on the Licensee is to satisfy me that his decision not to do so was unreasonable.

[37] The Branch argues that there are cases that support its position, and these were also considered by the Adjudicator. In ***Aztec Properties Company Ltd. V. General Manager of the Liquor Control and Licensing Branch***, 2005 BCSC 1465, Melnick J. said at ¶ 18:

> An establishment may well have a general policy, but if the directing mind on site at the relevant time ignores it, or makes no effort to see that it is enforced, it can hardly be said that the mere existence of a policy is sufficient to demonstrate due diligence. In fact, that is what happened here. The Adjudicator just did not accept that, on the day in question, Aztec, through the steps that it had taken to prevent being over person capacity, had exercised due diligence.

[38] In a decision from the Liquor Control and Licensing Branch in a similar case, ***EH04-177/181 Muddy Waters*** (13 July 2005), Nanaimo (Decision of the General Manager, Liquor Control and Licensing Branch), the Adjudicator said at pp. 14-15:

> I acknowledge that telling age is a difficult task. However, the *Regulation* places a requirement on people serving alcohol and if that results in asking people who are older than 25 to produce identification, so be it. It is no answer to the *Regulation* to say that it is impossible to tell whether someone is 19 or 29, which is what the licensee's submission boils down to. If servers who are responsible for dispensing alcohol are unable to tell that difference, then it is incumbent upon them to ask for identification.
>
> One doesn't need to conclusively decide whether someone is over or under 25. There are government issued signs that tell patrons to expect to produce two pieces of identification. Both servers in this case noted that patrons consider it a compliment to be asked for identification. The cautious approach is to ask.

STANDARD OF REVIEW

[39] In order for this application to be successful under the ***JRPA***, it is not sufficient for me to determine that I might have come to a different conclusion than the Adjudicator on the same evidence.

[40] Counsel agree that the correct standard of review in this case is "reasonableness". In other words, there is a burden on the Licensee to satisfy me that the Adjudicator's decision was unreasonable in order to be successful in this application.

[41] The standard of review of decisions from administrative tribunals is not always one of "reasonableness". However, since counsel have agreed, and I am also in agreement with them, no analysis is necessary here with respect to the appropriate standard. I am proceeding on the basis that reasonableness is the correct standard to be applied.

[42] A leading case with respect to what is the correct standard of review, and what guidelines will assist in applying that standard, is the case of ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20.

[43] A number of propositions can be drawn from ***Ryan*** which are of assistance to me in applying the standard of reasonableness. Those propositions, among others, are as follows:

1. The standard of reasonableness involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"

2. Where the appropriate standard is reasonableness, “a court must not interfere unless the party seeking a review has positively shown that the decision was unreasonable.”

3. “An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.” The court must look to see whether any reasons support it. The court should “stay close to the reasons” and look to see whether any of those reasons adequately support the decision.

4. “Curial deference involves respectful attention, though not submission, to those reasons.”

5. When deciding whether an administrative action was unreasonable, the court should not at any point ask itself what the correct decision would have been.

6. “Applying the standard of reasonableness gives effect to the legislative intention that a specialized body [such as the Branch] will have the primary responsibility of deciding the issue according to its own process and for its own reasons.”

7. “The standard of reasonableness does not imply that a decision maker is merely afforded a “margin of error” around what the court believes is the correct result.”

8. “A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.” If any of the reasons are tenable, then the decision will not be unreasonable and the reviewing court must not interfere.

9. A “decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.”

10. Every element of the reasoning need not independently pass a test for reasonableness. Rather, the question is “whether the reasons, taken as a whole, are tenable as support for the decision.”

11. The reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

DECISION

[44] When I consider the reasons of the Adjudicator with respect to the evidence, the inferences drawn from the evidence, the findings of fact, and the discussion of the law, and I apply to them the guidelines from ***Ryan*** as to how one measures "reasonableness", I am unable to conclude anything but that the Adjudicator's decision was reasonable.

[45] Whether or not I might have come to a different conclusion than the Adjudicator, is not a factor which informs my inquiry into whether or not the Decision was reasonable. Reasonableness is not synonymous with "correctness". I am not entitled to ask what the correct decision should have been.

[46] Consequently, the Licensee has failed to meet the burden upon it. The application is dismissed.

[47] The question of costs was not discussed. Ordinarily, in the absence of submissions to the contrary, I would expect that costs would be in the cause. If either counsel wish to address me in this regard, I will leave it to them to arrange a convenient time. Failing that, costs will be in the cause.

"A. Silverman J."

The Honourable Mr. Justice Silverman