

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Citation: The Publik Restaurant PG Ltd. v. General
Manager of the Liquor Control and
Licensing Branch,
2009 BCSC 249

Date: 20090227
Docket: 41205
Registry: Kamloops

Between:

The Publik Restaurant PG Ltd. doing business as The Publik

Petitioner

And

The General Manager of the Liquor Control and Licensing Branch

Respondent

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Petitioner:

J. Barry Carter

Counsel for the Respondent:

Tyna Mason

Date and Place of Trial/Hearing:

January 14, 2009
Vancouver, B.C.

Introduction

[1] The petitioner, The Publik Restaurant PG Ltd. ("Publik"), who holds a food-primary liquor licence for a restaurant in Prince George, applies for an order quashing the decision of the Enforcement Hearing Adjudicator dated February 22, 2008. In the alternative, Publik seeks an order that the decision of the adjudicator be remitted to the respondent for reconsideration, pursuant to s. 5 of the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241.

[2] The adjudicator found three separate contraventions of Publik's licence. However, Publik seeks review of one only.

[3] The adjudicator's decision followed a hearing into allegations that, on December 7, 2006, Publik breached its liquor licence by operating in a manner contrary to the primary purpose of the business as stated in the licence. The adjudicator concluded that, during the evening hours of December 7, 2006, Publik had not been operating its business with the primary purpose of the service of food, and rejected Publik's due diligence defence. The adjudicator imposed a penalty of a 10 day licence suspension.

Background

[4] The legislation regarding a food-primary licence is found in s. 11 of the **Liquor Control and Licensing Regulation**, B.C. Reg. 244/2002. Section 11(1) provides that a food-primary licence in respect of an establishment may be issued "if

the primary purpose of the business carried on in the establishment is the service of food during all hours of its operation.” Subsection (3) of s. 11 states:

The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is or will be the service of food during all hours of operation, any or all of the following:

- (a) kitchen equipment;
- (b) furnishings and lighting;
- (c) menu;
- (d) types and hours of entertainment and games offered by the licensee;
- (e) advertising;
- (f) hours of operation;
- (g) financial records;
- (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment;
- (i) any other relevant consideration that may assist in the determination.

[5] Publik operates a restaurant known as “The Publik Restaurant” in Prince George in a complex that includes a hotel and a casino. As noted above, Publik holds a food-primary licence for that establishment.

[6] Food-primary licences are issued to establishments with a primary focus on food, i.e., restaurants. A licensee holding a food-primary licence must have as the primary purpose of its business the service of food during all hours of the licensee’s operations.

[7] Publik’s licence is subject to the terms and conditions contained in the publication “Food-Primary Licence, Terms and Conditions, A Guide for Liquor

Licensees in British Columbia” (the “Guide”). Under the heading “The Nature of Your Business,” the Guide describes differences between a “food-primary” licence and a “liquor-primary” licence. The Guide sets out the requirements that a licensee must meet at all times to ensure its establishment is being operated as a restaurant. These requirements mirror the provisions in s. 11(3) (a) to (h) of the **Regulations**. Under the heading “Operating hours,” licensees are reminded that “[y]ou must operate as a restaurant at all times. Restaurants cannot shift their operation to become a bar during certain hours of the day . . .”. Nevertheless, the Guide goes on to say (**bold** and *italics* in original):

Serving liquor without food: As long as you are running your business properly, as a restaurant, you may *occasionally* serve liquor to a customer, without food, at any table within the dining area.

Remember, though, your liquor inspector will look closely at exactly how many people are being served liquor without food, and how often.

Proceedings Before the Adjudicator

[8] Liquor inspectors undertook a covert inspection of Publik’s restaurant on the evening of December 7, 2006. Following the inspection, a “Contravention Notice” was issued to Publik on December 11, 2006, alleging (among other things) that the licensee was operating contrary to the primary purpose of its licence. Publik was provided with a “Notice of Enforcement Action” dated February 19, 2007, alleging contraventions had occurred on December 7, 2006, including that Publik was operating contrary to the primary purpose of its licence.

[9] A hearing was convened to determine whether or not the alleged contraventions had occurred. The hearing was conducted in Prince George on August 13 and 14, and December 17, 2007. Four liquor inspectors provided *viva voce* evidence. Three witnesses testified on behalf of Publik including the restaurant manager, the night leader and a shareholder/executive with Publik. No transcript was taken of the proceedings.

[10] In his decision, the adjudicator reviewed in detail the evidence presented by the Liquor Control and Licensing Branch and by Publik. With respect to the evidence tendered by the Branch from "Liquor Inspectors C and D," he stated (at pp. 12-13):

Liquor Inspectors C & D testified that on December 7, 2006 they were part of a three person inspection team assigned to perform covert inspections of licensed establishments in the Prince George area. Prior to commencing the inspections they met with local inspectors A & B and received background information concerning each of the establishments targeted for inspection. The project plan called for the three u/c inspectors to enter each of the establishments as patrons and make observations of the manner in which it was being operated. Local inspectors A & B would wait outside and enter the establishment if necessary. Communication was maintained through the use of BlackBerrys.

Inspector C and the third u/c inspector (who was not presented as a witness) entered the establishment together at approximately 9:15 p.m. followed shortly by inspector D. Inside the music was loud making conversation difficult. The lights were dim. They were greeted and seated by a hostess. A server approached the table and inspector D asked her about the daily specials. The server told them the liquor specials but did not offer any information about food specials. The u/c inspectors ordered two martinis and a glass of wine. The server returned with the drinks and asked them if they would be eating. They replied in the negative and she removed the cutlery and table napkins. The server did not present any menus nor were there menus on the table.

They testified that there was little evidence of food service. With the exception of a table with two female patrons sharing a desert [sic] and not consuming any liquor the patrons at all other tables appeared to be consuming liquor. There were approximately 20 patrons in the establishment when they arrived. This increased to 35 – 40 during their stay. Inspector C observed three or four couples arrive, order and consume drinks and depart, they were not served any food. She observed a total of seven food dishes served to patrons during the course of her stay. Inspector D observed a group celebrating a Christmas party seated in the upper level of the establishment with the remainders of three large plates of appetizers on their table. The group departed before the u/c inspectors. Inspector D also observed soup and salad served to a couple seated in the upper level.

Shortly after the u/c inspectors' arrival three males arrived and were seated at a table adjacent to theirs. One male . . . began pounding on the table shouting, "I need beer, beer, beer". The server brought a pitcher of beer and glasses. Another male and several young appearing females later joined them. One female patron was celebrating her birthday and was asked for identification by the server. More pitchers of beer and liquor were served to the table. . . .

Inspectors C & D observed another group of patrons seated at the table directly in front of theirs. There was no food or dirty dishes on the table. . . . Inspector D sent a text message to Inspector A on her Blackberry advising of their observations, inspectors A & B shortly entered the establishment. The u/c inspectors settled their bill and left the establishment at approximately 10:55 p.m. They made notes of their observations (exhibit 1, tabs 3 & 4).

[11] Following his review of the evidence, the adjudicator then summarized the submissions made on behalf of Publik.

[12] The adjudicator's "Reasons and Decision" begin at p. 27. He began his discussion of the allegation that Publik was "Operating contrary to primary purpose" by stating (emphasis in the original):

The regulatory requirements for the licensing of food primary establishments are found at section 11 of the Regulations. Section 11(1) provides that: "A food primary licence ... may be issued ...if the

primary purpose of the business carried on in the establishment is the service of food *during all hours* of its operation.”

[13] After setting out the provisions of subsections (1) and (3) of s. 11 of the **Regulations**, the adjudicator said (at p. 28):

Giving consideration to all of the evidence I find that The Publik clearly meets the provisions outlined in section 11(3)(a) – (g). I find that there was a staffed kitchen in a state of readiness to meet the requirements of a menu suitable for a food primary establishment. Furnishings, advertising, hours of operation and financial records insofar as the evidence was presented, were likewise suitable. While the inspectors expressed some concern over the dim lighting and the relatively loud music I do not have sufficient evidence to determine that they were not within the limits for food primary establishments.

[14] The adjudicator next considered the ratio of receipts of food sales to receipts from liquor sales in the establishment, s. 11(3)(h) of the **Regulations**. He noted (p. 28) that this ratio, while not wholly determinative, was nonetheless an important consideration. The adjudicator found that evidence from both the Branch and Publik was that the establishment operated on a day-to-day basis with a food/liquor ratio of at least 51% food, if the ratio was measured for the whole of the business day. If the ratio was measured during the evening hours of 8:00 p.m. to closing, the adjudicator found that a different picture was presented, with liquor sales prevailing by as much as 82.5% liquor to 17.5% food.

[15] For December 7, 2006, the evidence presented by Publik was that, for the whole of the business day, food sales represented 55% of total sales; Publik did not calculate the ratio for the evening hours separately. The Branch purported to calculate a ratio for the period from 8:00 p.m. to closing, and arrived at a sales ratio

of 76% liquor to 24% food. The adjudicator noted Publik's submissions that the Branch's calculations did not include plates of appetizers served to a group celebrating a Christmas party, as that would have been shown in the financial records as "catering." The adjudicator then undertook his own examination of the records and said (at p. 29):

It appears that the \$188 food total calculated by inspector B did not include the above noted appetizers. Given the timing of the entry and the evidence of inspector D it is reasonable to assume that these were the appetizers served to the Christmas party group. They may have been pre-ordered and pre-prepared and thus the instructions by the server to the kitchen, "do not make". This would greatly affect the food/liquor ratio as calculated by inspector B. There may be a satisfactory explanation why it was not included and it is unfortunate that one was not sought. In the absence of any satisfactory explanation I cannot consider the branch's evidence regarding the food and liquor sales for December 7, 2006.

[16] Having found that Publik met the provisions outlined in s. 11(3)(a) to (g) of the **Regulations**, and having rejected the evidence submitted by the Branch concerning the food-to-liquor sales ratios (s. 11(3)(h)), the adjudicator then went on to address s. 11(3)(i). This provision allows the general manager to consider "any other relevant consideration that may assist in the determination" of whether the primary purpose of the business carried on in the establishment was the service of food during all hours of its operation.

[17] On this point, the adjudicator wrote (at pp. 29-30) (emphasis in original):

In my view it is appropriate to consider evidence of how the establishment was being operated at the time of the alleged contravention. There are several points in the evidence that I am satisfied are relevant and probative to the issue. The first, how patrons

are being greeted. This is important as it may set the tone for the expectations between the licensee and its patrons. Here the only evidence is that of inspectors C & D. They were greeted and seated by a hostess. A server approached the table and inspector D asked her about the daily specials. The server told them the liquor specials but did not offer any information about food specials. They ordered two martinis and a glass of wine. The server returned with the drinks and asked them if they would be eating. They replied in the negative and she removed the cutlery and table napkins. The server did not present any menus nor were there menus on the table. This was not contradicted by the licensee. Witness E and F [both for Publik] testified that it is normal practice that the hostess or server would tell all patrons what the food and drink specials were for the night and would leave a menu on the table. Witness F who was present the night of December 7th did not testify that she was monitoring to ensure that this practice was being observed on the night of December 7, 2006.

It is also relevant and probative I believe to consider whether food is being served to all or a majority of patrons. The Guide (exhibit 1, tab 10 at p. 6) provides "As long as you are running your business properly you may *occasionally* serve liquor to a customer, without food, at any table within the dining area." The evidence here provided by u/c [undercover Branch] inspectors C and D is that there was little evidence of food service. With the exception of a table with two female patrons sharing a desert [sic] and not consuming any liquor the patrons at all other tables appeared to be consuming liquor. There were approximately 20 patrons in the establishment when they arrived. This increased to 35 – 40 during their stay. Inspector C observed three or four couples arrive, order and consume drinks and depart, they were not served any food. She observed a total of seven food dishes served to patrons during the course of her stay. Inspector D observed the remnants of three large plates of appetizers having been served to a group celebrating a Christmas party seated in the upper level of the establishment. She also observed soup and salad served to a couple seated in the upper level. Further, the inspectors observed that the adjacent table occupied by male patron #1 and several others was served significant amounts of liquor with only one food item. Likewise the table occupied by the male patron spewing liquor into the air also received liquor and no food items were observed. This evidence was not contradicted by the licensee. I find that this is significantly different than *occasionally* serving liquor to a customer, without food, at any table within the dining area.

[18] The adjudicator concluded (pp. 30-31):

On the evidence, with the exception of that concerning food and liquor sales as aforementioned, I find that during the evening hours of December 7, 2006, particularly the time during which the inspectors were in attendance the licensee was not operating with a primary focus on food service. While it may be that the establishment operated properly as a restaurant during the earlier part of the day, the focus shifted during the evening hours.

[19] The adjudicator then went on to consider the defence of due diligence, which he acknowledged is a complete defence to contraventions under the **Act**. He observed (at p. 34) that the onus was on Publik to demonstrate, on a balance of probabilities, that it implemented adequate systems to prevent the contravention and took all reasonable steps to ensure the effective operation of the system. Publik was also required to establish that the employee connected to the contravention was not the directing mind of the licensee. Finally, the adjudicator noted that the existence of policies was not sufficient to demonstrate due diligence if the directing mind on site at the relevant time ignored them, or made no effort to see that they were enforced.

[20] The adjudicator found (at pp. 34-35) that, as of December 2006, Publik was owned and operated by persons with many successful years in the restaurant industry in several different locations. An extensive training program with training manuals had been developed for persons commencing employment and achieving promotion within the operations and management of their various establishments. Weekly management meetings were held with all management level staff. All management level staff were required to hold pre-shift meetings with staff on duty. The ongoing business at each of the establishments was carefully monitored on a weekly basis, particularly concerning food-to-liquor ratios. Few liquor related

problems were ever identified by local liquor inspectors and where necessary corrective action was taken.

[21] However, the adjudicator also found (at p. 35) that Publik's principals were aware that The Publik operated with higher liquor ratios than their other establishments. He found they allowed the night operation to be managed by a newly promoted and inexperienced manager. Moreover, Publik's principals were aware from the time of their application that a lounge endorsement to their licence would allow for the type of operation they wished to undertake. The adjudicator found that Publik's principals delayed in making application for a lounge endorsement, as they feared that it would lengthen the licensing process, but allowed the establishment to operate as if a lounge endorsement had been obtained. Further, the adjudicator found (p. 36) that on December 7, 2006, at the time of the alleged contraventions, Publik's directing mind was the night leader on duty (witness F). She was in charge of the restaurant and responsible for the supervision of the hostess, servers and bar staff, and was part of the management structure for the establishment.

[22] The adjudicator concluded (at pp. 36-37) (emphasis in original):

The establishment has a policy that allows patrons to order two alcoholic beverages prior to ordering food. If food is not ordered further liquor service is prohibited. Witness F [the night leader] was enforcing that policy on the night of December 7, 2006 by observing the servers' screens to ensure that no more than two drinks were served prior to a food order being placed.

In my view the policy is not sufficient to meet the regulatory requirements of ensuring that the primary purpose of the business is the service of food *during all hours* of its operation. The only evidence of any other practices in place to ensure that the requirements were being met was the requirement that a hostess or server should tell patrons what the food and drink specials were for the night and should leave a menu on the table. The evidence of u/c inspectors C and D is that that practice was not followed when they were seated and served. There is no evidence that witness F was monitoring to ensure that this practice was being observed on the night of December 7, 2006.

I find that the licensee has not been duly diligent and consistent with the finding in ***Ed Bulley Ventures Ltd.***, the licensee has “permitted” the contravention.

In conclusion, I find on a balance of probabilities that on December 7, 2006 the licensee contravened section 20(1)(d) of the **Act**, and 11(1) of the **Regulations** by operating in a manner that is contrary to the primary purpose of the business as stated on the licence.

Positions of the Parties on this Application

[23] In its petition, Publik advanced a number of grounds on which relief was sought. However, at the hearing, counsel for Publik relied primarily on the following:

- (a) it was unreasonable for the adjudicator to premise his decision in whole or in part on the manner in which patrons were greeted at the establishment on December 7, 2006; and
- (b) it was unreasonable for the adjudicator to premise his decision in whole or in part on a determination of whether or not food was being served to all or a majority or patrons on the evening of December 7, 2006.

[24] Counsel for Publik points out that, once the adjudicator found that Publik met the provisions outlined in s. 11(3)(a) to (g) of the **Regulations**, and rejected the Branch's evidence concerning the food and liquor sales ratios, there was only a single route to a determination that Publik was acting outside the primary purpose of its licence. This route was under s. 11(3)(i), whereby the adjudicator could consider "any other relevant considerations that may assist in the determination." Mr. Carter was not aware of any other case where s. 11(3)(i) had been used as the sole basis for a determination that a licensee was in breach of its licence.

[25] Mr. Carter argues that the adjudicator should not have based his decision that Publik was operating in breach of its licence solely upon how patrons were greeted, and whether (according to the observations of the undercover inspectors) a majority or all of the patrons were being served food. He submits that the adjudicator's determination that Publik was operating its food-primary licence on December 7, 2006 contrary to the primary purpose of the licence was unreasonable on the facts of the case. Further, Mr. Carter argues it was not a decision that fell within a range of possible, acceptable outcomes that were defensible in respect of both the facts of December 7, 2006, and the application of the **Act** and **Regulations**. Mr. Carter argues in the alternative that, if the adjudicator's "other considerations" were considered reasonable, then the determination that the defence of due diligence fails is an unreasonable decision.

[26] Ms. Mason, for the respondent, argues that Publik had not shown there was any error or law or jurisdiction on the part of the adjudicator. She submits that the

adjudicator's decision was reasonable, and it ought not to be interfered with unless it is clearly wrong, citing ***Sentinel Peak Holdings Ltd. v. The General Manager, Liquor Control and Licensing Branch***, 2004 BCSC 885 and ***Aztec Properties Company Ltd. v. General Manager of the Liquor Control and Licensing Branch***, 2005 BCSC 1465.

[27] With respect to the adjudicator's conclusion (at p. 31 of the decision) that "during the evening hours of December 7, 2006, particularly the time during which the inspectors were in attendance, the licensee was not operating with a primary focus on food service," Ms. Mason says that there was evidence to support this conclusion. Citing ***Butterworth Holdings Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2007 BCSC 6 and ***Butterworth Holdings Ltd. v. General Manager of the Liquor Control and Licensing Branch***, 2007 BCSC 1513 ("***Butterworth No. 2***"), she argues that a court can only intervene where the evidence, viewed reasonably, is incapable of supporting a tribunal's finding of fact. The court cannot substitute its view of the evidence for that of the adjudicator where there is evidence that supports the adjudicator's conclusion.

[28] Further, Ms. Mason argues that, under s. 11(3)(i) of the ***Regulations***, the general manager has a broad discretion to identify "other relevant considerations." In the present case, the factors considered by the adjudicator were relevant and probative of whether the primary purpose of the business carried on in the establishment on December 7, 2006 was the service of food during all hours of the

business' operation. There was nothing unreasonable about the adjudicator relying on that evidence.

[29] Like Mr. Carter, Ms. Mason was not aware of any other cases where s. 11(3)(i) had been used as the sole basis for a determination that a licensee was in breach of its licence.

[30] With respect to the due diligence defence, Ms. Mason noted that the adjudicator accepted that Publik was entitled to advance the defence. However, in her submission, the adjudicator reasonably and properly concluded that Publik's evidence did not make out the defence.

Analysis and Discussion

[31] As Mr. Justice Warren recently observed in ***Jacobsen Enterprises Ltd. v. The General Manager of the Liquor Control and Licensing Branch***, 2008 BCSC 1058 at para. 45, a reviewing court must first determine the appropriate standard of review by conducting a standard of review analysis, even if the parties have agreed to the standard.

[32] In ***Dunsmuir v. New Brunswick***, [2008] 1 S.C.R. 190, 2008 SCC 9, the Supreme Court of Canada held that there are two standards of judicial review: correctness and reasonableness. The reasonableness standard will generally apply to questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues: see ***Dunsmuir*** at para. 51.

[33] Here, the question whether Publik breached its licence in view of the “other considerations” taken into account by the adjudicator is a mixed question of fact and law, and also engages the general manager’s discretion. Accordingly, the reasonableness standard applies. The standard of proof to be applied by the adjudicator with respect to the alleged contravention is proof on a balance of probabilities: see ***Aztec Properties*** at para. 11, and ***Empress Towers Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2006 BCSC 325 at para. 11.

[34] I agree with counsel for the respondent that it is not the function of the court on an application for judicial review to weigh or re-weigh the evidence, or determine issues of credibility. As long as there was evidence on which the adjudicator could base his findings, the court must not intervene: see ***Butterworth No. 2*** at para. 19.

[35] In this case, the adjudicator reviewed at length the evidence submitted by each side and the submissions made on behalf of Publik. He then undertook an analysis of the issues before him, dealing with the evidence and the submissions. The adjudicator was clearly entitled to consider “any other relevant consideration that may assist in the determination” whether the primary purpose of the business carried on in Publik’s establishment on December 7, 2006 was the service of food *during all hours of its operation*. He concluded that, in making the determination, how the establishment was in fact being operated at the time of the alleged contravention was a relevant consideration. In my opinion, this was a conclusion he was entitled to reach, and it was not unreasonable. The adjudicator went on to

identify several points in the evidence that he was satisfied were relevant and probative to the issue, and noted in particular how patrons were being greeted and whether food was being served to all or a majority of patrons. Again, in my view, this was not an unreasonable approach, and one that the adjudicator was entitled to take. The adjudicator reviewed the evidence on both points, and concluded that during the evening hours of December 7, 2006, Publik was not operating its establishment with a primary focus on food service. In my opinion, there was evidence before the adjudicator based on which he could reasonably draw this conclusion, and the adjudicator's conclusion falls within the range of possible acceptable outcomes which are defensible.

[36] The defence of due diligence is a question of mixed fact and law, and is also reviewable on a standard of reasonableness: see *Aztec Properties* at para. 19. Again I am required to show deference to the adjudicator in his assessment of the evidence before him. Giving that deference to the decision of the adjudicator, I conclude that there was evidence before him based on which he could reasonably conclude, as he did, that Publik was not duly diligent and had permitted the contravention of the licence.

[37] In summary, I conclude that there was evidence before the adjudicator based on which he could reasonably draw his conclusions, that the adjudicator's reasons follow a logical process and support the decision, and there is no basis for it to be quashed or remitted back for rehearing.

[38] It follows that the petition is dismissed, with costs.

“The Honourable Madam Justice E. J. Adair”