IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jacobsen Enterprises Ltd. v. The General Manager of The Liquor Control and Licensing Branch,*** 2008 BCSC 1058

Date: 20080801
Docket: 40957
Registry: Kamloops

Between:

Jacobsen Enterprises Ltd. doing business as Lakewood Inn/Jake's Pub

Petitioner

And:

The General Manager of The Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Warren

Reasons for Judgment In Chambers

Counsel for the Petitioner:	J.B. Carter
Counsel for the Respondent	T. Mason
Date and Place of Hearing:	March 10, 2008 Vancouver, B.C.

Introduction:

[1] The petitioner challenges the decision of the respondent, the General Manager of the Liquor Control and Licensing Branch, handed down December 14, 2007 which found that the petitioner had contravened sections of the ***Liquor Control and Licensing Act*** R.S.B.C. 1996 (the "Act") and imposed a penalty of a six-day suspension.

Background:

[2] The petitioner operates a pub at 100 Mile House, British Columbia and is the holder of a liquor primary license.

[3] On the evening of May 25, 2007, the petitioner's establishment was visited by undercover liquor investigators and the following day (May 26, 2007), the petitioner received a contravention notice alleging that on May 25, 2007 that there had been four contraventions of the Act and Regulations.

[4] On July 4, 2007, the Liquor Control and Licensing Branch issued a Notice of Enforcement Action ("NOEA") alleging that the licensee or an employee of the licensee (the server) was consuming liquor on the premises contrary to s. 42(3) of the Regulations and proposing a one-day suspension and also three allegations that the licensee had permitted intoxicated persons to remain on the premises contrary to s. 43(2)(B) of the Regulations and proposing a five-day suspension as a penalty. The NOEA provided a Notice of an Enforcement Hearing and because the petitioner did not waive any of the alleged contraventions and agreed to serve any penalty, a pre-hearing conference was held by telephone. At the pre-hearing, the petitioner stated that he would be self-represented and would be relying on statements of various employees of the establishment to refute the allegations of contravention.

[5] In the event that the contraventions were proven, his counsel advised that it would have been the first contravention by the petitioner and, accordingly, he had no previous experience with an enforcement hearing proceedings.

[6] The petitioner says that there was no specific discussion about the procedure or the opportunity to or advisability of calling employees to provide *viva voce* testimony at the hearing and he understood that he could provide these statements to counsel representing the liquor branch before the hearing and that he did so.

[7] The hearing was held at Williams Lake on November 7, 2007 before an Enforcement Hearing Adjudicator, Sheldon M. Siegel. At the beginning of the hearing the petitioner informed the adjudicator that he would not be represented by counsel and he says that he was informed by the adjudicator that the presence of legal counsel would "make no difference to the outcome".

[8] At the hearing, the petitioner gave evidence and produced the written signed statements of four employees refuting the allegations of contravention. No position or objection was taken at any time during the hearing to the production of the statement and no comment was made by the adjudicator about the production of statements or their appropriateness as evidence or of the petitioner's ability to have the employees call to testify orally at the hearing.

[9] The undercover inspectors testified at the hearing and particularly of their dealings with three individuals who were patrons of the establishment and with a server. Part of the evidence of one of the inspectors was about the use of a "Nystigmus" test in concluding that one of the patrons was intoxicated. The petitioner says that he had no prior notice of the intention to present this as evidence and in fact had no idea what the Nystigmus test was. In his ruling the adjudicator explained that a Nystigmus test involved slowly passing a bottle across the line of sight of a patron and observing the eye movements.

[10] The petitioner testified on behalf of the company and particularly about the female person B and her medical condition that causes her to act and look as if she is intoxicated; that he had seen her on May 25, 2007 and did not believe she was intoxicated; the male patron in the establishment lived at the hotel and was known as a "crackhead" and his behaviour was not caused by alcohol but by drugs; and he had also seen the patron on the night in question and he was not intoxicated.

[11] The four statements from the employees were tendered as evidence confirming Mr. Jacobsen's oral evidence outlined above and confirmed that the members of the staff are not allowed to drink on the job. The server's statement advised that although her shift was from 6:00 p.m. to 1:00 a.m., she had booked off early while waiting for a ride home, she had done some gratuitous cleaning of tables and had a drink but this was after she was off shift. The petitioner says that there was no objection to the use of these statements at the hearing.

[12] The ruling was delivered approximately six weeks after the hearing and the adjudicator found that two of the three alleged contraventions of allowing an intoxicated person to remain were proven but dismissed the third. He also found that the petitioner had contravened the regulations by having a server consume alcohol while working. He imposed a six-day suspension.

Petitioner's Submissions

[13] In summary overview, the petitioner's counsel says there was a failure to inform the licensee he should call the witnesses to the events of that night; there was no notice to the licensee of the intention to rely on the Nystigmus test; and those two defects coupled with the delay in informing the licensee of the observations of the undercover inspectors resulted in procedural unfairness sufficient to require that the decision of the adjudicator be quashed and the matter remitted for rehearing.

[14] Petitioner's counsel submitted that the appropriate standard of review of decisions that involve interpreting the law and considering irrelevant factors or failing to take into account relevant considerations is that of "correctness": ***Liquor Depot Saanich Ltd. v. The General Manager of the Liquor Control and Licensing Branch,*** 2007 BCSC 1200. If the court is reviewing decisions of the general manager, the appropriate standard of review is "reasonableness simpliciter": ***Zodiac Pub Ltd. (c.o.b. Zodiac Neighbourhood Pub) v. British Columbia (General Manager Liquor Control and Licensing Branch)*** 2004 BCSC 96.

[15] Counsel submitted that the adjudicator was in error in accepting and considering the evidence of the use of the Nystigmus test. Its acceptance was an irrelevant consideration going to jurisdiction and as such the appropriate test on review is one of correctness.

[16] With reference to the petitioner's use of the letters from the employees, the adjudicator was critical of this evidence stating that he found it deserving of little weight for a variety of stated reasons. Counsel says that this evidence was critical to any defence and with no experience in dealing with these matters his client should have been advised by either the branch or the adjudicator of "the opportunity" to call *viva voce* evidence and/or how conflicting evidence would be considered by the adjudicator. The result in these circumstances was that the petitioner was not afforded a fair hearing.

[17] Counsel submitted that an Enforcement Hearing under s. 20 of the Act carries with it serious and possibly permanent consequences for a licensee. There is no statutory right of appeal from the decision of the General Manager after a s. 20 hearing. Thus, an administrative decision which affects "the rights, privileges and interests of an individual" is sufficient to trigger the application of a duty of fairness: ***Baker v. Canada (Minister of Citizenship and Immigration)*** [1999] 2 S.C.R. 817 at ¶ 20.

[18] Counsel submitted that a number of factors are recognized as relevant to a determination of what is required under a common law duty of procedural fairness. The more the decision resembles judicial decision-making the more likely it is that procedural protections closer to a trial model will be required: ***Baker*** at ¶ 23. Procedural protections will be required where no appeal procedure is provided in the statute: ***Baker*** at ¶ 24. The greater the impact on the person, the more stringent the procedural protection that will be mandated: ***Baker*** at ¶ 25. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: ***Baker*** at ¶ 26.

[19] Counsel argued that the petitioner would have had a much greater opportunity to defend the alleged contraventions if he had called the employees to testify at the hearing.

[20] One of the "proven" contraventions was of B, but the statements of the employees was that she was well known to them and a person known to have mental problems as a result of a motor vehicle accident. The licensee himself had seen B that evening and he believed that she was not intoxicated. There were also the two written statements from bartenders that described her as being "mentally challenged" and "always appearing a bit off". This evidence of brain injury was a relevant consideration which counsel submitted the adjudicator failed to take into account. The adjudicator instead found that he was unable to make a determination based on the evidence before him that B had a medical condition that produced symptoms consistent with those of intoxication. This failure to take into account "all relevant considerations goes to jurisdiction in [sic] the appropriate standard of review being that of 'correctness'".

[21] When the adjudicator found that one of the two male patrons were intoxicated he was relying on the evidence of the undercover inspectors who observed "significant number of symptoms associated with intoxication". The adjudicator noted they were of considerable experience and they had used the Nystigmus test but the decision made no particular details of the test or of the inspector's experience. Further, no notice was given to the licensee of the intention to rely on the test. By accepting this evidence the adjudicator took into account an irrelevant consideration and the standard of review in such a situation is that of "correctness".

[22] Because this observation was made around 11:30 at night and notice of it was not given until the following day, the licensee had no opportunity to identify the particular patron and call him to refuter the allegation and his defence was seriously prejudiced and this failure to report in a timely manner is a breach of procedural fairness.

[23] With reference to the proven contravention of the server consuming alcohol while working was based entirely on the evidence of the liquor inspectors that

observed her wiping tables. The adjudicator failed to consider the statement of the employee that she was not working at the time and she was waiting for a ride home with another employee. The adjudicator noted that there was no way either the inspectors or other patrons would know that she had completed her shift, "because she was doing the work they would expect to see her doing". Again, the statement of the employee was a relevant consideration and the failure to consider it goes to jurisdiction for which the appropriate standard of review is "correctness". In the alternative, if the court concludes that the adjudicator did consider the statement of the employee, then counsel argues that by finding she was working when the "uncontroverted evidence that she was not employed at the time, is 'clearly wrong'".

[24] On the issue of penalty, counsel submitted that the adjudicator erred in assessing a penalty of five days for the infraction of permitting an intoxicated person to remain on the premises. There is no previous history of non-compliance and only two of the three contraventions were proven. The adjudicator failed to consider that a minimum penalty of a fine was appropriate.

Respondent's Submissions

[25] In response, counsel for the respondent submitted that the decision was reasonable, permitted by statute and the petitioner cannot show there was an error in law or of jurisdiction and accordingly the adjudicator's decision ought not to be interfered with unless it was clearly wrong: ***Sentinel Peak Holdings Ltd. (c.o.b. No. 5 Orange Street Hotel) v. British Columbia (Liquor Control and Licensing Branch, General Manager)*** [2004] B.C.J. No. 1352, 2004 BCSC 885 at ¶ 39-43; ***Aztec Properties Co. (c.o.b. Bimini Neighbourhood Pub) v. B.C. (Liquor Control and Licensing Branch, General Manager)*** [2005] B.C.J. No. 2231, 2005 BCSC 1465.

[26] Counsel relies heavily on the decision of MacKenzie J. in ***Butterworth Holdings Ltd. v. British Columbia, (General Manager Liquor Control and Licensing Branch, General Manager)*** 2007 BCSC 6 which noted that the Legislation is public safety legislation that balances the competing interests of the various parties, including those of the licensee to maximize profits and the interests of public safety.

The General Manager has a mandatory and statutorily imposed duty to administer the Act and to supervise all licensed establishments and as part of those duties to act upon a complaint or on her own motion to enforce compliance with the act, regulations and terms of the licenses: ss. 3 and 6. Because the Act is regulatory with public safety as its purpose, its focus is not on the individual rights of the licensee but on the regulatory, public safety purpose and the protection of the public: ***Whistler Mountain Ski Corporation v. BC (General Manager Liquor Control and Licensing Branch)*** 2002 BCCA 426.

[27] In response to the petitioner's submission that the adjudicator's decision ought to be set aside because of an error in law, the respondent submits that no error of law or jurisdiction has been established by the petitioner. The petitioner seeks to have the court reweigh the evidence, come to a different conclusion about the evidence, and then substitute the court's decision for that of the adjudicator. The respondent submits that this is simply not the role of the court in a judicial review.

[28] Again, relying upon ***Butterworth Holdings Ltd.***, the respondent submits that a judicial review is a search for jurisdictional error and the role of the court is supervisory and not one to rehear and reassess the evidence. The court is "to merely ensure that the adjudicator did not make a decision outside his jurisdiction".

[29] The record in a judicial review consists of the originating documents, the pleadings, the adjudication and the reasons for the decision if any, and other material required by the Legislation relating to a proceeding. This provides a sufficient record for a court to address a judicial review application.

[30] With reference to the standard of review, the respondent submits that a court reviewing a tribunal's findings of fact or the inference made on the basis of the evidence, can only intervene where the evidence, viewed reasonably, is incapable of supporting the findings of fact. If there is some evidence to support the adjudicator's findings of fact, the court has no role in weighing that evidence from an application for judicial review: ***Butterworth Holdings Ltd.***; and David P. Jones and Anne S. de Villars, ***Principles of Administrative Law***, 2nd Ed. (Toronto: Carswell, 1994) at ¶ 17.

[31] The respondent submits that the standard of review in a judicial review of the general manager's decision on findings of fact and for questions of mixed fact and law is the reasonableness test; the standard of review for questions of law is correctness: ***Dunsmuir v. New Brunswick*** 2008 SCC 9; ***Liquor Depot Saanich Ltd.***; and ***Lee & Lee Enterprises Ltd. v. A.G. (B.C.) and BYO Holdings Ltd.*** 2004 BCSC 1546. The adjudicator in this case was not dealing with a pure interpretation of law but a fact-based inquiry regarding the alleged contraventions and the court ought not attempt to make a decision that by statute is required to be made by the administrative decision-maker: ***Lang v. British Columbia (Superintendant of Motor Vehicles)*** [2005] B.C.J. No. 906 (B.C.C.A.), 2005 BCCA 244; ***Judicial Review Procedure Act***, s. 2 and 5; ***Neill v. British Columbia (Superintendant of Motor Vehicles)*** 2005 BCCA 151; ***Re Walker*** [1995] B.C.J. No. 130 (B.C.S.C.) citing ***Re Testa v. British Columbia (Workers' Compensation Board)*** (1989) 58 D.L.R. (4th) 676 (B.C.C.A.); and ***Evans v. Workers' Compensation Board*** (1982), 38 B.C.L.R. 86 (B.C.C.A.).

[32] The respondent submits that the adjudicator only needed to find that the contraventions alleged by the general manager were proven on the evidence on a balance of probabilities and no higher standard of proof is required: ***Aztec Properties Co.*** and ***Zodiac Pub Ltd.***

[33] In the case before the court the adjudicator applied the balance of probabilities standard of proof to his consideration of the contraventions which were in issue.

[34] In response to the petitioner's submissions that the adjudicator failed to properly consider the evidence, the respondent submits that it is important to note that the issue on judicial review is not whether the adjudicator "properly considered" the evidence but whether there was any evidence to support the decision. Accordingly, on judicial review the court is not concerned with the manner in which the decision-maker reviewed or weighed the evidence, but only whether the evidence, viewed reasonably, can rationally support the decision: ***Butterworth Holdings Ltd.***

[35] Generally speaking, a tribunal is not bound by the strict rules of evidence and is entitled to consider any evidence that the tribunal deems relevant. Some portions of the evidence may be rejected and others accepted and the tribunal may determine what weight to place on those portions of the evidence which it does accept provided that the tribunal's conclusion is one to which it could reasonably come on that evidence and when this occurs, the court has no power to interfere: ***Kane v. The Board of Governors (University of British Columbia)***, [1980] 1 S.C.R. 1105; ***McInnes v. Simon Fraser University*** [1982] B.C.J. No. 1779 (B.C.S.C.), aff'd on appeal [1983] B.C.J. No. 2187.

[36] As for findings based on creditability, the court on review must accord "extraordinary deference to the tribunal": ***Vinokourova v. Canada (Minister of Citizenship and Immigration)*** [1998] F.C.J. No. 1782. Natural justice, or procedural fairness, simply requires that the tribunal listens fairly to both sides and give the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views": citing Lord Parmoor in ***Local Government Board v. Arlidge*** [1915] C.C.S. No. 53. The respondent submits that the adjudicator considered all of the relevant evidence before him including the letters from the employees and the oral testimony from the liquor inspector regarding the Nystigmus test, the definition of which is found in both the Concise Oxford English Dictionary, 10th Edition, and Black's Law Dictionary, 7th Edition. The respondent submits that the petitioner failed to establish any breach of natural justice or procedural fairness that would amount to a loss of jurisdiction and an error in law.

[37] In response to the petitioner's submissions concerning the penalty imposed, the respondent submits that the adjudicator has no discretion to impose a lesser penalty and that which is set out in Schedule 4 of the Regulation: ***Liquor Control and Licensing Act***, s. 20. I note that Regulation Schedule 4 provides a range of the period of suspension for a first contravention of 4-7 days or breaches of s. 43(2)(B), offer service of alcohol to person who is intoxicated and a range of 1-3 days suspension for a breach of s. 42(3) where an employee drinks while working.

[38] Counsel for the respondent submits that the adjudicator has a broad discretion with respect to the enforcement action that may be taken and once the adjudicator decides that a contravention has been made then the adjudicator can decide which of the sanctions set out in the schedule should apply: ***Aztec Properties Co.***

[39] Counsel submits that the adjudicator exercised reasonable discretion which was his to exercise and that he imposed a suspension that was clearly within the range set out in the Regulations. Accordingly, counsel submits, it cannot be said that the application of the penalty of the duration required by the Act and the Regulation was unreasonable or clearly wrong. Further, there is no duty on the general manager to impose the same penalty for similar contraventions nor is there a binding policy requiring the imposition of the same penalty for similar contraventions. The decision makers are not alternately-bound by previous administrator's decisions and if they conclude that they are, then that can be held to a fettering of their discretion: ***Toronto (City) v. C.U.P.E. Local 79*** (1982), 35 O.R. (2d) 545 (Ont. C.A.), leave to appeal refused.

[40] Although it may be true that the disciplinary order will result in significant financial consequence for the licensee, nevertheless the public interest is paramount: ***Telep v. British Columbia (Superintendent of Insurance)***, [1985] B.C.J. No. 1864 (B.C.C.A.); and ***Whistler Mountain Ski Corporation***.

[41] Respondent's counsel submits that it is not necessary for the adjudicator to specifically find public safety at risk in order to justify the imposition of a penalty at the higher end of the permitted range (***Empress Towers Ltd. (c.o.b. Royal Towers Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*** 2006 BCSC 325), but in any event, the penalty imposed was not at the higher end of the permitted range.

[42] With reference to the remedy sought by the petitioner, the respondent submits that the remedies available to the court on a judicial review are limited. In the event that the courts finds a reviewable error and that the error warrants the court

exercising its discretion to grant relief, then the relief must be in the nature of an order of certiorari to quash and then remit the matter to the general manager for a rehearing. There is no power to direct the outcome of the reconsideration (***Re Testa*** and ***Re Walker***).

[43] In the event that this court should find that the adjudicator acted in such a fashion that the tribunal has lost jurisdiction due to a want of natural justice or procedural fairness, then the court may: 1) acknowledge the breach but recognize that the remedy is discretionary and refuse to grant it if satisfied that the breach did not affect the outcome of the hearing: ***Islands Protection Society v. British Columbia (Environmental Appeal Board)*** [1988] B.C.J. No. 1639, 34 Admin. L.R. 51 or, 2) quash the tribunal decision and order a reconsideration with directions if deemed necessary. However, the power to give directions does not embrace the power to direct the result of the consideration: ***Judicial Review Procedure Act***, s. 5; ***Re Testa*** and ***Re Walker***.

[44] The respondent submits that it is not open to this court to re-adjudicate on the evidence that was before the adjudicator or to substitute its decision for that of the adjudicator. The respondent says that the petitioner has failed to identify an error of law or jurisdiction on the part of the adjudicator and has failed to show that the adjudicator is clearly wrong and as a result the petition ought to be dismissed.

Analysis and Conclusions

[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: ***Speckling v. British Columbia (Workers' Compensation Board)***, 2005 BCCA 80, 46 B.C.L.R. (4th) 77. The Supreme Court of Canada in ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 required the reviewing judge who was dealing with a statute that delegated power to an administrative decision maker, to begin by establishing the standard of review by a "pragmatic and functional approach".

[46] Blair J. in ***Zodiac Pub*** at ¶ 6 wrote of the three standards of review which establish the degree to which courts on judicial review will defer to the decision of the administrative authority: "correctness", in which the decision receives an exacting review; "reasonableness, *simpliciter*", where the decision undergoes significant searching or testing of the findings of fact to determine whether they were clearly wrong; and, finally, "patent unreasonableness" in which considerable deference is accorded the administrative authority with the decision left to the authority's near exclusive determination: ***Baker***. Blair J. considered the decision of Iacobucci J. in ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20 and his description of the pragmatic and functional approach and concluded at ¶ 15:

> . . . although deference ought to be shown to the administrative authority's decision, it is not necessarily considerable deference which would lead to an application of the patent unreasonableness standard of review nor should the decision attract little deference leading to a correctness standard. In the result, I find that the appropriate standard is that of reasonableness *simpliciter* which requires that I not interfere with the adjudicator's decision unless Zodiac, the party seeking the review, positively shows that the decision was unreasonable.

[47] The majority in ***Dunsmuir*** held, at ¶ 62:

> . . . the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference 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.

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

[49] On my review of the decision of the adjudicator I note that he recorded at length the evidence and submissions of both sides and then performed an analysis dealing with the evidence and the submissions. I conclude that his reasons follow a logical process and do support the decision and there is no basis for it to be quashed and remitted back for rehearing.

[50] There are three other grounds raised by the petitioner, which require further attention, and I will deal with each of the grounds.

[51] First, I will deal with the complaint that the licensee was not told he could or should call witnesses. Part of the materials before me is a letter from the Registrar, Enforcement Hearings, Elizabeth Barker, addressed to the petitioner setting out what happened during the Pre-Hearing Conference held on August 1, 2007. The letter sets out in considerable and thorough detail the events of the hearing, the positions taken by each side at the pre-hearing and the procedure that will be followed, including the witnesses that will be called by the "Branch". The Registrar noted who would be called by the branch to testify and that:

> Both Larry and Andy Jacobson will give evidence at the hearing, and they will need to give further thought to who else **might be called to testify** on behalf of the licensee. [my emphasis]

Earlier in the letter, the petitioner is advised of the public importance in dealing with allegations of non-compliance and of the importance to exchange documents by no later than October 24, 2007. The Registrar also advised that once the hearing date was set, adjournments would only happen in exceptional circumstances. Further, and directly bearing on the ground of the words of the Adjudicator about the lack of counsel, the Registrar wrote:

> Once a date is set, hearings will only be postponed in exceptional circumstances. In general, a last minute decision to hire a representative who is unavailable for the hearing date scheduled, does not amount to an exceptional circumstance. So, **if the licensee wishes to retain legal counsel or another type of representative to assist with the hearing, it should do so immediately. Keep in mind that once a hearing date**

> **has been set, it is important that the licensee find a representative who is actually available on the date set.** [emphasis mine]

Accordingly, the licensee was specifically alerted of the ability to use counsellor representative and the importance of ensuring counsel/representative was available for the specific date.

[52] In concluding the letter, the Registrar asked both addressees to contact her if they had any questions or disagreed with the summary. There is nothing to indicate that the petitioner did so.

[53] In further reference to the statement attributed to the Adjudicator at the commencement of the hearing that a lawyer would make no difference to the outcome, given the obvious importance of the matter to the licensee and the fact the licensee had been alerted to the use of a representative, it is surprising that he did not use counsel. In any event I find there is no duty on the Adjudicator or the respondent to give legal advice. The statement attributed to the adjudicator that a lawyer would make no difference to the outcome is neutral and ought not to be taken as advice not to use one.

[54] Next, the licensee's failure to provide sworn statements or to have available employees present to testify was a decision made by the licensee, not the Adjudicator. Clearly, the Adjudicator did consider the "evidence" in the written statements which were filed as exhibits and in fact he made several references to the evidence set out in them. The fact that he stated that the letters were deserving of little weight was supported by several features including they were unspecific, all but one were undated and not made under oath or affirmation. Those frailties, coupled with the fact the authors were not available to test the veracity of the contents, when "contrary to the inspectors' evidence" led the Adjudicator to "prefer the inspector's [sic] evidence". In my view, the totality of the evidence, viewed reasonably, rationally supports the decision: ***Butterworth Holdings Ltd.***

[55] The licensee complains that the Adjudicator allowed into evidence and considered the inspector's evidence as "experts" including evidence flowing from the Nystigmus test. As the respondent argued, a tribunal is not generally bound by the

strict rules of evidence and may consider any evidence that the tribunal deems relevant provided that the tribunal's conclusion is one to which it could reasonably reach on that evidence: ***Kane*** and ***McInnes***.

[56] The reasons clearly show that the Adjudicator addressed each of the objections of the licensee including that the inspectors were not qualified as experts in determining intoxication. He found they were eyewitnesses whose evidence was designed to inform of the symptoms observed but in addition he found that the inspectors had both training and experience—described at length on page 4 of the Decision - that "qualifies" their observations. An adult lay person may well be able to testify as to the state of sobriety of another individual; the petitioner's objection it seems to me went to weight but it was within the ability of the adjudicator who saw and heard the evidence to ascribe what weight he found appropriate. It is not for a judge on judicial review to substitute his or her impression of the evidence.

[57] The Nystigmus test is a common and well-known test but in any event it was but one bit of evidence provided by the inspectors which included that they were seated at the table with both B and the male who was the subject of the Nystigmus test. They described the male as having bloodshot and glassy eyes, a flushed face and slow and deliberate movements. The Adjudicator noted that, "as a result of their observations and testing, each of the inspectors concluded that this male was intoxicated".

[58] With reference to the delay in reporting the non-compliance to the licensee, the Adjudicator considered that ground and in my view was reasonable in concluding as he did. Two of the individuals were known to the licensee and in fact the employee was available to testify at the hearing and her statement was considered by the Adjudicator. In any event, the Adjudicator reasonably concluded that she was known as an employee and it would not be known to the customers that she was no acting as an employee when she performed her usual duties even though she had booked off shift early.

[59] Finally, I find that in the circumstances of this case, the reasons provided by the Adjudicator reasonably support the penalty imposed and there was no error.

[60] In all of these circumstances, I find that the petitioner has not established that the decision of the Adjudicator was not reasonable. The petition is dismissed. Costs will follow the event but counsel are at liberty to speak to that issue if necessary.

"The Honourable Mr. Justice Warren"