IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***The Victoria Social Club Ltd. v. British Columbia (Liquor Control and Licensing Branch),*** 2009 BCSC 270

Date: 20090302
Docket: 08-3115
Registry: Victoria

RE: JUDICIAL REVIEW PROCEDURE ACT AND THE LIQUOR CONTROL AND LICENSING ACT

Between:

The Victoria Social Club Ltd. dba The Social Club

Petitioner

And:

The General Manager,
Liquor Control and Licensing Branch

Respondent

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Petitioner:	G. N. Harney and P. F. Waller
Counsel for the Respondent:	V. L. Jackson
Date and Place of Trial/Hearing:	November 4, 2008 Victoria, B.C.

[1] This is an application for judicial review of the decision of an adjudicator as delegated by the general manager of the Liquor Control and Licensing Branch. The decision was rendered at the conclusion of an enforcement hearing under the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267 (the "***LCLA***") on July 9, 2008 and held that the petitioner, which operates a night club in downtown Victoria known as "The Social Club", had contravened the Act and regulations by overcrowding the premises on December 1, 2007. The adjudicator confirmed the recommended penalty of a five-day license suspension.

Nature of the Order Sought

[2] The petitioner seeks an order that the decision of the adjudicator be quashed pursuant to s. 2 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 or alternatively, an order that the matter be remitted to the Liquor Control and Licensing Branch for rehearing before a different adjudicator pursuant to ss. 5 and 6 of the ***Judicial Review Procedure Act***.

Issues

[3] As I understand the petition and submissions of counsel, the petitioner raises the following issues:

1. That the decision is unreasonable as the adjudicator made findings of fact when evidence of those facts was not presented at the hearing and the adjudicator reached unreasonable conclusions on the evidence that was presented.

2. The procedure was unfair as the adjudicator had before him prior unproven allegations against The Social Club when he considered the penalty to be imposed and that the resulting penalty was unreasonable as it was based on irrelevant and prejudicial unproven allegations.

[4] The respondent alleges that there was ample evidence to support the adjudicator's findings of fact. The respondent also says that the penalty imposed was reasonable in the circumstances and that the decision of the adjudicator was not based on irrelevant and prejudicial unproven contraventions.

Facts

[5] On December 1, 2007, at approximately 1:25 a.m., the Victoria Police received a telephone call from plainclothes officers who were in attendance at The Social Club. The nature of the information provided was that the plainclothes officers said that the night club was seriously overcrowded and requested police attendance. The Victoria Police Department dispatched three members in uniform to the Club. The members were Sergeant Simpson, Acting Sergeant Cockle and Acting Chief of Police Naughton. All were officers of long experience, including experience with issues of overcrowding and enforcing of the liquor licensing laws in Victoria. Sergeant Simpson was the officer who was responsible for overseeing the enforcement of licensing laws with respect to licensed premises in Victoria and he took the lead role in the investigation.

[6] When the officers arrived they immediately observed that the Club was very crowded. At that time, under the terms of the license that The Social Club operated under, the maximum number of patrons allowed pursuant to the license was 305.

[7] Sergeant Simpson conducted a count of the patrons in the Club using a mechanical counter and said that on the first count, he counted 453 patrons in the Club. At the request of the employees of the Club, a second count was done that resulted in a count of 375 persons plus 47 individuals who employees of the Club said had left during the count. Sergeant Simpson thought that more than that had left but he added the 47 to the 375 that he had counted and obtained a count of 422, still well in excess of the license limit. Acting Sergeant Cockle also conducted a count, although he did so without a mechanical counter. His count was 450 patrons. In his evidence, the owner said that one of his employees also counted, and by that count there were only 304 patrons in the Club, one less than the allowed number. The evidence indicated that during the time of that count, there were a number of patrons seen leaving the Club.

[8] Both officers said that there was serious overcrowding. Acting Sergeant Cockle said that the overcrowding was the worst that he had seen in his experience. Both officers have significant experience: Sergeant Simpson had been a police officer in Victoria for 28 years and Acting Sergeant Cockle for 19 years. Both officers have experience in conducting "walk throughs" through licensed premises in the City of Victoria and doing counts of the number of patrons in a night club.

[9] The petitioner alleges that the adjudicator made several errors. First, it is alleged that the officers arrived at the Club with a preconceived mindset that the Club was overcrowded as a result of receiving a complaint from plainclothes officers who were already in the Club. Second, Acting Sergeant Cockle did not have a mechanical counter when he performed his count. Third, the method of counting used by Sergeant Simpson was alleged to be unreliable and created the possibility of double counting. I will pause here to say that Sergeant Simpson's method on the first count at least was to count roughly one-half of the patrons in the bar and then double that number. Sergeant Simpson felt that was a suitable way to count on that night as he said the Club was so crowded that people could not easily move around. Fourth, the adjudicator did not comment on the owner's offer to close the Club and do a recount. This offer was apparently rejected by the police as according to their evidence, many patrons had already left and presumably they were confident in their own count.

[10] It is also alleged that the adjudicator drew an improper adverse inference from the absence of two of the petitioner’s door staff who had been on duty that night. The owner's affidavit filed July 22, 2009 indicated that both of the doormen were required at their regular places of employment on the day set for the hearing and could not be present. In addition, in the same affidavit, the owner said that the adjudicator erred in saying that Mr. Harlow, one of the security staff at the Club, corroborated Sergeant Simpson's count. In fact, the petitioner says that all that Mr. Harlow did was observe the count and did not confirm or agree with the count. Lastly, the petitioner says that the adjudicator misconceived the evidence with

respect to an incident report or incident book. The owner said that the matter was recorded on an incident sheet that night. That evidence was apparently corroborated by Mr. Harlow. However, the incident sheet was misplaced or lost and was not available at the hearing.

Analysis

[11] In his decision, the adjudicator held that the allegation of overcrowding was made out. In doing so, he drew an adverse inference from the absence of two doormen who were on duty that night and who apparently could have given evidence about the number of patrons counted by employees of the Club. The owner explained that both employees were unavailable due to work commitments. The adjudicator felt that both could have and should have been available.

[12] In his analysis of the evidence given, the adjudicator said at page 12 of his decision:

> I find that each sergeant had exceptional recollection of the events of December 1, 2007. They were each able to consistently, and corroboratively answer questions on cross examination about peripheral matters such as ID checks that took place at the time of the inspection and conversations they had with various employees of the licensee. Persistent suggestion and controverted submissions put to them failed to produce any significant inconsistencies or wavering of their conviction. I find the VPD witnesses to have presented credible and accurate evidence. I note further, that the licensee's employee corroborated the evidence of the sergeant that his second count was 375 patrons, exclusive of those patrons who left between counts.
>
> I also find that each of the sergeants has considerable experience doing LPCs of like establishments, and in particular, considerable experience counting crowded rooms.

> I find that the club is regular in shape and there are raised areas from which one may and the VPD members did count patrons. I accept the evidence of the police witnesses that the establishment was so crowded that the patrons were basically stationary for the duration of the counts.
>
> I accept the sergeants' patron counts as correct and reliable.

[13] The adjudicator also considered and commented on the evidence presented by the owner. After reviewing the evidence, he made these comments at page 14:

> I find the evidence of the principal to be problematic. It demonstrated considerable partisanship and failed to address the critical components of the contrary evidence. I find an adverse inference is appropriate in light of the absence of evidence that should have been available as to the employee's counts prior to closing down the establishment.

[14] Further, on the same page, the adjudicator stated:

> I accept that the principal counted patrons as the club was closed, but I find it unnecessary to comment on the credibility of the counts recorded at that time as provided by testimony. I find that the establishment was emptying out prior to it being closed, and the number of patrons who remained until it was closed, does not reflect the number of patrons in the establishment 20 minutes earlier when the police began conducting counts.
>
> The employee testified that he conducted his own count and it totalled 304 after adding 15-20 patrons "just for anyone [he] missed." I find that either this evidence or this witness's count was contrived. In order for his count to total just one patron shy of the patron capacity of 305, he would have had to count 284-289, and add just enough to come one patron under the limit. I find it inconceivable that knowing the results of a police count with which this employee was dissatisfied, he would have counted 284-289 patrons and then told the officer that he counted 304. I find this evidence not credible.

[15] The adjudicator went on in the next paragraph to state that he noted the principal and the head of security Mr. Harlow disagreed on whether or not there was

an incident log book kept on the premises. He said that inconsistency reinforced his conclusion that in total the evidence was not reliable. As already noted, that conclusion is one that the petitioner submits was based upon an error by the adjudicator.

Standard of Review

[16] The leading case in this area is ***Dunsmuir v. New Brunswick***, 2008 SCC 9. Based on that decision, there are now two standards of review for cases of this nature: correctness and reasonableness.

[17] Correctness is a non-deferential standard applied when the question is one of general law where, because of the importance of such issues to the administration of justice as a whole, the courts do not defer to the decisions of the tribunal appealed from. This is because such questions require uniform and consistent answers on areas such as jurisdiction and the principles of natural justice. (***Dunsmuir***, *supra*, paras. 60, 61 and 90)

[18] ***Dunsmuir*** also adopted the comments of Le Dain J. in ***Cardinal v. The Director of Kent Institution***, [1985] 2 S.C.R. 643, where it was stated:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ... [p. 653]

[19] ***Dunsmuir*** holds that reasonableness, however, is a deferential standard. See ***Dunsmuir***, *supra*, paras. 47-56. As to questions of fact, the majority decision stated at para. 53:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically [citations omitted]. We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[20] In a separate concurring judgment, Deschamps, Charron and Rothstein JJ. Stated: at para. 161 of ***Dunsmuir***:

> [161] Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology -- "palpable and overriding error" versus "unreasonable decision" -- does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

[21] As there is, in most cases, no single correct outcome, there should be judicial respect for or deference to the outcome determined by the decision-maker. As to the adjudicator's findings of fact, the court should respect such findings barring errors of general law.

[22] Here, the adjudicator heard evidence of two police officers, Sergeant Simpson and Acting Sergeant Cockle. The evidence of the owner, Jeremy Petzig,

and Dan Harlow, a security manager, who were both present at the Club on December 1, 2007, was also heard. At the conclusion of evidence and argument, the adjudicator found that the Club was overcrowded and accepted the police evidence.

[23] As to the alleged error with respect to the corroboration of the count by one of the doormen, there is no transcript of the proceedings before the court and therefore, specific areas of evidence cannot be reviewed. However, it does not appear that the issue of corroboration was one that the adjudicator's findings of fact turned upon. It is my conclusion that there was ample evidence to support the adjudicator's findings of fact before him even if he was in error on that particular point of the evidence.

[24] As to the allegation that he drew an improper adverse inference from the failure of the two employees to testify, again, it does not appear that the adverse inference drawn by the adjudicator was central to his findings of fact. However, even if it were, the fact that both were apparently available in the city but for work commitments, and that there was no application for adjournment or request to receive their evidence in any other manner, such as by affidavit, I cannot say that the adjudicator was wrong in drawing an adverse inference as a matter of general law.

[25] Lastly, there is no evidence to suggest that the officers arrived at the Club with a preconceived notion of overcrowding or that they conducted themselves in such a manner so as to find support for that notion rather than to independently

investigate. The evidence that was given by the officers indicates that they each counted the patrons in the bar and that at the request of the bar staff, they counted again. No doubt there were changes in the number of patrons in the bar over the time that the counts were conducted and in addition, the very nature of counting patrons in a crowded bar leaves some room for error; hence, the approximate numbers. It is my conclusion that the decision of the adjudicator that the contravention occurred as alleged was a reasonable finding and I will not interfere with it.

Evidence of Unproven Contraventions

[26] The petitioner alleges that the adjudicator received a complete copy of the Notice of Enforcement Action that was provided to the petitioner. This document contains a summary of the police evidence, copies of police officers' notes, a copy of the police report, and various other documents relating to the enforcement action taken. In addition, it contains a complete list of the licensee's past compliance record. This record includes some allegations of prior alleged contraventions of the ***LCLA***, or Regulations made pursuant to that Act, where no enforcement action was taken and as a result, no proof was ever presented. It is alleged that the adjudicator had this information before him and that it was both prejudicial and improper for it to be a part of the materials that the adjudicator sees prior to the commencement of the hearing or when dealing with the issue of a penalty.

[27] It is also alleged that the process generally adopted at enforcement hearings is that submissions must be made on the penalty to be imposed if a contravention is

established at the same time as submissions are made with respect to the alleged contravention. This, says the petitioner, puts the licensee in the position of having to deal with the history of compliance and the record of alleged but unproven contraventions of the licensee prior to a finding of a contravention. Once again, the petitioner says that this is an improper process and that it was prejudicial to the petitioner.

[28] As a starting point in the analysis of this area of the review, it is perhaps useful to review the legislative scheme.

[29] Section 3 of the ***LCLA*** provides that the general manager is responsible for administering the Act and the Regulations made pursuant to the Act. As such, the general manager has the power to issue licenses for the sale of liquor (s. 12, ***LCLA***) and did issue a liquor primary license to the petitioner that was in effect on December 1, 2007.

[30] The ***LCLA*** provides that the general manager may take enforcement action against a licensee for a violation of the Act or Regulations (s. 27(2), ***LCLA***) and under the regulation-making powers of the Act, the general manager can prescribe a schedule of recommended penalties. The schedule of prescribed monetary penalties or license suspensions is set out as Schedule 4 to the ***Liquor Control and Licensing Regulation***, B.C. Reg. 244/2002 The provisions that relate to a contravention by overcrowding a licensed premises is listed as item 15 of the Schedule and provides a period of suspension of four to seven days for a first contravention, or a monetary penalty of $5,000 to $7,000.

[31] Section 24 of the ***LCLA*** requires that a written notice be sent to the licensee setting out the details of the contravention and the recommended penalty. This is done by the provision of a Notice of Enforcement Action.

[32] Section 84(2)(v) of the ***LCLA***, provides the power of the general manager to make regulations prescribing the practices and procedures to be followed by the general manager in conducting enforcement hearings under s. 20 of the ***LCLA***, such as the one under review. Finally, s. 64(3) of the ***LCLA*** Regulations provides that the general manager may hold an enforcement hearing to determine if alleged contravention was committed by the licensee. Section 65(1) allows the general manager to take enforcement action if he considers it appropriate to do so. Section 65(2) provides that nothing in the section requires the general manager to conduct an enforcement hearing.

[33] It appears that the usual practice is for the general manager to delegate his responsibilities to an adjudicator for the purposes of conducting an enforcement hearing. It also appears that hearings are typically directed unless the licensee admits to the contravention and accepts the penalty by way of a written waiver that can be filed with the general manager.

[34] It appears that it is usual for the adjudicator to receive the Notice of Enforcement Action prior to the enforcement hearing. This is apparently done on the basis that as the adjudicator is acting as the delegate of the general manager he or she is entitled to have full details of the allegations prior to the hearing.

[35] In this case, no challenge was taken to the right of the general manager to delegate the conduct of enforcement hearings to adjudicators and the usual approach of adjudicators is described in the "***Decision of the General Manager Liquor Control and Licensing Branch, In the Matter of Butterworth Holdings, Frizzell Holdings Ltd. and Legree Holdings Ltd. dba College Place Hotel***", Case No. EH06-037. At p. 9 of that hearing, the adjudicator, who is the same adjudicator as in the case under review, stated:

> The licensee argued that all documents relating to the history of unproven contraventions were irrelevant and prejudicial to the licensee. I disagree. This process is not a purely quasi-judicial function. The enforcement adjudicator presides over the hearing as the general manager of the Liquor Control and Licensing Branch, by statutory authority. The branch is, therefore, not a party at the hearing, but rather the hearing is an administrative function of the branch. Accordingly, the adjudicator, sitting as general manager, has no obligation to disabuse him or herself of knowledge of the history of the licensee or any documents relating thereto which may be contained in the branch file.
>
> In particular, branch policy and *Regulation* direct the adjudicator to the licensee's history, including unproven contraventions with respect to the issue of penalty. I have reviewed all of the documents contained in the branch's Book of Documents and I find all of them to be proper material to be before me.

[36] The same approach of the adjudicator appears to have been followed in the case before me. The decision of the adjudicator in that case was considered on a judicial review and was upheld, although it appears that the challenge to the decision was on other grounds. (2007 BCSC 6)

[37] The petitioner takes issue with the process followed by the adjudicator in assessing penalty in this case. The petitioner alleges that the adjudicator acted

improperly by admitting irrelevant evidence without authority and was therefore in breach of the duty of fairness. The petitioner also appears to argue that the legislative scheme of the ***LCLA*** does not provide independence to an adjudictor acting as the delegate of the general manager of the Liquor Licensing Board. In this the petitioner relies on the authority of ***Kane v. University of British Columbia***, [1980] 1 S.C.R. 1105, where it was alleged, among other things, that no one shall be a judge in his own cause (at p. 4). The Supreme Court of Canada held in favour of Dr. Kane and quashed a resolution of the University Board of Governors imposing certain disciplinary measures on Dr. Kane.

[38] In this case, there was no challenge made to the statute as creating a process that is in violation of the rules of natural justice or as violating a general right to a fair hearing by an independent tribunal under law. If a challenge to legislation is to be made, it is my view that it must be done specifically and clearly and in accordance with proper procedure. The power of the general manager of the Liquor Control and Licensing Board to hold enforcement hearings and to delegate his powers to an adjudicator is clearly set out in the ***LCLA,*** and there is no direct challenge to that legislation.

[39] On the facts of this case, there is no evidence that the adjudicator made any improper use of material in reaching the decision on penalty. In his decision, the adjudicator specifically noted no prior contraventions, offences or enforcement action of any type and imposed a penalty in the range for a first contravention for overcrowding. It was noted that overcrowding is a serious matter given the dangers

in the event of fire or the potential danger to emergency personnel if they have to enter the bar to perform their duties.

[40] I find that the adjudicator's decision on penalty was reasonable as that term is understood in ***Dunsmuir***, *supra*, and I will not interfere with it. While the petitioner submits that a monetary penalty is more appropriate, I cannot find that the decision of the adjudicator to impose a suspension was unreasonable in all of the circumstances of this case.

Submissions Respecting the Adjudicator

[41] Throughout the submissions on this matter there is an undercurrent of criticism of the adjudicator involved in this case. At the opening of the hearing before me, petitioner's counsel presented a chart of decisions of the adjudicator for the years 2006, 2007 and 2008. I will assume that the chart is complete although it was not attached to an affidavit attesting to the accuracy or completeness of the information set out.

[42] In the written submissions of the petitioner’s counsel, under the heading "This Adjudicator's Prior History", there is a submission that the adjudicator in this case was found to be in error with respect to his application of the defence of due diligence in other earlier decisions (***Smallhouse Ventures Inc. dba Lucky Bar v. British Columbia (Liquor Control and Licensing Branch)***, 2006 BCSC 1792; ***Palomino's The Rock'n Horse Cabaret Ltd. dba Evolution Cabaret v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2007

BCSC 17; ***Strathcona Hotel of Victoria Ltd. dba Strathcona Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, 2007 BCSC 40).

[43] In each of those cases, upon the application of the licensee, the reviewing judge sent the cases back for rehearing. All of the decisions were rendered between May 25, 2006 and June 30, 2006. The first of the review decisions was the decision of ***Smallhouse Ventures***, *supra*, which was released on December 13, 2006. This, of course, was well after all of the decisions had been rendered by the adjudicator. In the written submission, the petitioner's counsel states, at para. 28:

> Despite the setting aside of these decisions based on the erroneous application of the defence of due diligence, in an October 2008 decision Siegel [the adjudicator] stated the following:
>
> > The licensee submits that it was duly diligent. Due diligence is a defence to the contravention. In this case the licensee has conceded that the contravention occurred, and therefore due diligence is not available as the defence (***Tabor Arms Pub Ltd. dba Tabor Arms Pub***, EH08-070 ...).

[44] I am not certain of the exact point counsel is making here as he did not elaborate, but it is plain from the decision in ***Tabor*** that the adjudicator was not applying the defence of due diligence in that case as a defence or all. Nor was he asked to consider it except to show some efforts made by the licensee in mitigation of the suggested penalty.

[45] In two prior cases on judicial review it appears that petitioner's counsel has advanced similar criticism of this particular adjudicator. Halfyard J. commented on

the manner of doing so in ***Smallhouse Ventures***, *supra*, at para. 72 where he stated:

> Accordingly, I order that the case be remitted for rehearing before a different adjudicator. I would add that I did not find it helpful for petitioner's counsel to review previous decisions made by the present adjudicator, and to compare his previous decisions with those of other adjudicators on the issue of due diligence. [my emphasis]

[46] The second decision was ***Palomino's The Rock'n Horse Cabaret Ltd. dba Evolution Cabaret***, *supra*. In that case, Johnston J. said at paras. 60 - 62:

> [60] The Cabaret argues that the adjudicator erred in dismissing defences of due diligence in seven other hearings involving seven other licensees. In support of this complaint, the Cabaret produced seven other decisions of this adjudicator.
>
> [61] This petition must be considered only on the issues raised, and the issues raised can, in my opinion, relate only to the decision of this adjudicator on the evidence and issues arising from the particular infraction before him. It is neither relevant nor is it proper to confuse issues arising out of this discrete hearing, and the decision that flowed from it, with decisions made on other hearings, arising out of different investigations, based on different evidence and involving different arguments. [my emphasis]
>
> [62] To the extent that this argument was tendered to bolster the submission that, if I were to find error and remit the matter for rehearing, I should direct the rehearing before a different adjudicator, I reject both. It is for the General Manager to assign an adjudicator to hear an allegation of breach, not this court. There is no suggestion here of misconduct on the part of this adjudicator, nor is there any other basis upon which the court should interfere with the General Manager's jurisdiction to control the processes delegated by statute.

[47] I can only repeat with considerable emphasis that if an attack is to be made upon a particular legislative provision or in particular, an attack on the independence

or competence of a particular adjudicator, it must be made in a proper way and not by way of collateral attacks in a separate forum.

[48] For the reasons given, the application is dismissed with costs.

"J. K. Bracken, J."
The Honourable Mr. Justice Bracken