IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *One More Glassy Ltd. v. British Columbia (Public Safety & Solicitor General),* 2009 BCSC 1371

Date: 20091007
Docket: S119300
Registry: New Westminster

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

Between:

One More Glassy Ltd. (dba Desi Junction Bar and Grill)

Petitioner

And

Ministry of Public Safety and Solicitor General, Liquor Control and Licencing Branch

Respondent

Before: The Honourable Madam Justice Hyslop
in Chambers

Judicial Review from: A decision made by the Liquor Control and Licencing Branch on March 24, 2009.

Reasons for Judgment

Jorawar Singh Athwal appeared on behalf of the Petitioner:

Counsel for the Respondent: S. Bevan

Place and Date of Hearing: New Westminster, B.C
August 18, 2009

Place and Date of Judgment: New Westminster, B.C.
October 7, 2009

[1] In this proceeding, the petitioner seeks judicial review of a decision made by the general manager of the Liquor Control and Licencing Branch ("general manager") on March 24, 2009 ("decision").

[2] The hearing was held on March 4, 2009, pursuant to s. 20 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (the "*Act*") and its regulation. In its decision, the general manager found that the petitioner contravened s. 44(1)(b) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 191/2009, August 20, 2009 (the "*Regulation*"), and imposed a four-day suspension of the petitioner's license as a penalty for the contravention.

[3] The petitioner seeks that the decision be quashed or the court substitutes an alternative and more appropriate penalty.

BACKGROUND

[4] The petitioner holds a food primary license with a lounge endorsement. The petitioner is permitted to sell alcohol for consumption on his premises from 11:00 a.m. to midnight, Monday through Sunday of each week.

[5] On November 21, 2008 at 7:15 p.m., the inspector entered the lounge and observed two patrons drinking beer from mugs whose size were not permitted. A contravention notice was issued and the matter was disposed of by means of a compliance meeting.

[6] On November 22, 2008 at 12:45 a.m. (the same business day as above), an inspector from the general manager observed three men, one of whom was the on-site manager of the petitioner drinking beer at a counter in the lounge area of the petitioner's establishment.

[7] A contravention notice was issued to the petitioner on November 27, 2008, followed by a notice of enforcement action issued January 12, 2009, proposing a four-day suspension. The petitioner chose not to waive the enforcement hearing pursuant to s. 64(3)(b) of the *Regulation*.

[8] As a result, the general manager commenced an enforcement action against the petitioner for an alleged contravention of s. 44(1)(b) of the *Regulation:*

> 44 (1) Unless otherwise authorized by the general manager,
>
> …
>
> (b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a).

[9] The matter proceeded to the enforcement hearing on March 4, 2009. Appearing for the petitioner was the primary shareholder and operating executor of the licensee.

[10] As a result of the hearing, the nominee of the general manager, Sheldon M. Seigal, rendered his written decision.

POSITIONS

[11] The petitioner concedes the contravention pursuant to the s. 44(1)(b) of the *Regulation*. Although the petitioner seeks to quash the decision in its petition, two issues arise. They are the general manager's rejection of the petitioner's defence of due diligence and the consideration of the unsubstantiated complaints of previous contraventions in determining the penalty.

[12] The position of the general manager is that there is no basis to interfere with the decision given the limited role of the court in a judicial review application. The reasons of the general manager are a reasonable outcome given the applicable law to these facts. It appears to the general manager that the petitioner is seeking a re-adjudication of the merits of the contravention and resulting penalty, when it is not within the power of the court to do so.

THE ACT AND REGULATION

[13] The *Act* and *Regulation* sets out the statutory framework for the administration of all establishments that sell liquor in British Columbia.

[14] The general manager, on its own, or as a result of a complaint, is entitled to enforce the *Act*, its *Regulation* and the terms of all issued licenses pursuant to ss. 3 and 6 of the *Act*. Section 20(1) of the *Act* sets out the powers of the general manager and s. 20(2) sets out the restrictions and penalties the general manager may impose on a licensee:

> **Action against a licensee**
>
> 20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:
>
> > (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;
> >
> > (b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;
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> > (c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;
> >
> > (c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;
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> > (d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;
> >
> > (e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.
>
> (2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:
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> > (a) [Repealed 1999-36-13.]
> >
> > (b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;
> >
> > (c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
> >
> > (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
> >
> > (e) cancel all or any part of the licensee's licence;

> (f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

[15] As it relates to this matter, having launched a contravention hearing and finding a contravention against a licensee, it is in the discretion of the general manager to determine that penalty. If the penalty is monetary or a license suspension (ss. 66 and 68 of the *Regulation*), the general manager must set a minimum penalty as set out in Schedule 4 of the *Regulation*.

ROLE OF THE COURT

[16] It is not for the court to re-weigh the evidence and substitute its own decision for that of the general manager. The court's role is supervisory. The court is to determine whether the general manager has stayed within the lawful authority of the legislation.

STANDARD OF REVIEW

[17] The standard of review is reasonableness and correctness. Madam Justice McLachlin at paras. 51-64 in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 describes this standard of review:

> **[51]** Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.
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> **[52]** The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). 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.

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision [page224] maker will always risk having its interpretation of an external statute set aside upon judicial review.

[55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness [page225] standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the

analysis required is already deemed to have been performed and need not be repeated.

[58] For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality [page226] and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

> **[62]** In summary, 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.
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> **[63]** The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
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> **[64]** The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

ANALYSIS

[18] The petitioner did not dispute the contravention. The general manager found there was a contravention in that liquor was not taken from patrons within half an hour after the time stated on the license for hours of liquor service.

DUE DILIGENCE

[19] Due diligence is a complete defence to a contravention. It is described by Mr. Justice Pitfield in *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, [2004] B.C.J. No. 329:

> [25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities. In this regard, the reasons of the Supreme Court of Canada in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, are relevant at p. 1331:

> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see Tesco Supermarkets v. Nattras, [1979] A.C. 153.

[20] The onus to prove due diligence is on the petitioner, *Plaza Cabaret*.

[21] There was no dispute at this hearing that the on-site manager was the controlling mind.

[22] The petitioner gave evidence that the on-site manager "knew better and was not authorized to so act" (decision, page 3). The petitioner advised the adjudicator that the on-site manager's position was terminated. Due diligence is not what the petitioner did after the contravention; in this case terminating the on-site manager, rather the staff training, policies, and the training of the on-site manager prior to the contravention . The general manager, in her decision, states:

> I find the on-site manager was in control of the establishment at all relevant times and entrusted with that responsibility by the Licensee. As such, the on site manager was the controlling mind. The controlling mind was knowingly responsible for the mechanism of the contravention. The Licensee presented only rudimentary evidence of typical staff training and no direct evidence of in house training of the manager. Accordingly I find there is insufficient evidence of diligence on the part of the Licensee to amount to a defence of the alleged contravention. [Emphasis added]

[23] I conclude that the general manager, in her decision, rejected the defence of due diligence in that she described only rudimentary evidence of typical staff training and found there was no direct evidence before her as to house training of the on-site manager. The rejection of the defence of due diligence is reasonable.

PENALTY

[24] The petitioner argues that the general manager considered unproven, alleged and anonymous complaints in considering the penalty.

[25] The general manager's reasons reflect an entirely correct understanding of the provisions of the *Act* and *Regulation* relevant to penalty, and the general manager's exercise of discretion under the *Act* and *Regulation*. The general manager's exercise of discretion on the penalty, so long as it is correct, is reviewable only for reasonableness.

[26] The petitioner sought to introduce its financial statement. It argued that employees of the petitioner would suffer unemployment and the petitioner financial hardship. In *Administrative Law in Canada*, 4th ed. (Markham, Ont: LexisNexis Butterworths, 2006 at 198 it states:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review. It is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. [Emphasis added]

[27] As to matters relating to the financial hardship over the public interest, in *Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)*, [2002] B.C.J. No. 1604, 2002 BCCA 426, Mr. Justice Hollinrake stated at paras. 45-46:

> [45] The appellant submits that the Board erred in determining that a large economic impact on the licensee is not a relevant consideration when determining an appropriate penalty. The Board stated at the end of its decision that "the appellant's contention that the 30-day suspension will have a large economic impact on the licensee is not a relevant consideration as the public interest in this case is paramount." The Board did not refer to any case law in making this statement or expand on its meaning.
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> [46] Read as the appellant reads this statement - "not a relevant consideration" - I can sympathize with this asserted error. However, by referring to the public interest being paramount, I think the Board showed that it was concerned with that interest over and above the economic interests of the appellant. That being the case, I can see no error here.

[28] The general manager stated in the decision:

> For the purposes of assessing penalty, I must consider past contraventions, proven and alleged, as a whole, and in the context of this enforcement action. The documents disclose no previous compliance history of similar contraventions during the previous twelve months. The contravention is therefore a first contravention. [Emphasis added]

[29] The general manager's stated concern in deciding whether to waive the penalty was the goal of voluntary compliance. In doing so, he concluded:

> … I have insufficient evidence that voluntary compliance would be so obtained.

[30] The evidence that he did have was a complaint of April 14, 2008 and a complaint of November 11, 2008, one of which involved providing liquor service after hours. Then there was the contravention notice issued on the same date of the contravention to which I have referred earlier in these reasons, which relates to the size of the beer mugs. The matter of the beer mugs happened on the same day as the contravention which is under consideration of the judicial review. It was reasonable for the general manager to conclude that voluntary compliance would not occur without a penalty.

[31] The general manager considered the past complaints only when he was determining whether to waive the penalty.

[32] In the decision and in assessing the penalty, the general manager stated:

> The documents disclose no previous compliance history of similar contraventions during the previous twelve months. The contravention is therefore a first contravention.

[33] In considering the penalty, the general manager gave the minimum penalty, four days, under the schedule. It was open to the general manager to consider a monetary penalty that is within his discretion. The purpose of the penalty is to ensure voluntary compliance and whether it is a suspension or a monetary penalty; deference should be given to the general manager. It was reasonable for him to choose either penalty.

[34] The petitioner's petition is dismissed with costs to the respondent at Scale B.

'H.C. Hyslop J.

HYSLOP J.