IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Kicking Horse River House Cafe Ltd. v. British Columbia (Liquor Control and Licensing Branch),*** 2012 BCSC 330

Date: 20120305
Docket: 4301
Registry: Golden

Between:

Kicking Horse River House Cafe Ltd.

Petitioner

And

General Manager under the Liquor Control and Licensing Act

Respondent

Before: The Honourable Mr. Justice Melnick

On judicial review from: A decision from the Liquor Control and Licensing Branch (Kicking Horse River House Cafe Ltd., dba River House Tavern, 25 May 2011, Case EH10-092)

Reasons for Judgment

Counsel for the Petitioner:	B. McKenzie
Counsel for the Respondent:	R. Mullett
Place and Date of Hearing:	Golden, B.C. February 7, 2012
Place and Date of Judgment:	Golden, B.C. March 5, 2012

[1] This is a review of the decision of an adjudicator to impose a penalty on the petitioner for a contravention of s. 73(2)(b) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 [*LCC Act*]. The review is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

I. BACKGROUND

[2] The petitioner, Kicking Horse River House Cafe Ltd. ("River House"), operates a tavern in Golden. Early in the morning of July 23, 2010, two RCMP officers noticed that the lights were still on in the tavern after its closing time. They also noted that some individuals were still inside and that the door was locked. They made their presence known, but the bartender, an employee of River House, did not promptly unlock the door to give them access. The police observed glasses and liquor being removed from the area of the bar while they waited. A short time later they were permitted access.

[3] Section 73(2)(b) of the *LCC Act* provides that a licensee must:

> (b) allow the licensed establishment to be inspected under this section, immediately upon being requested to do so by a person acting under the authority of this section,
>
> > (i) at any time provided for in the terms and conditions of the licence, and
> >
> > (ii) without limiting subparagraph (i), at all reasonable times.

[4] Consequently, River House was issued a Notice of Enforcement Action on September 16, 2010. The notice required River House's licence to be suspended for 30 days for its failure to allow its premises immediately to be inspected. River House disputed this notice. Consequently, a hearing was held on May 3, 2011, before adjudicator. Subsequently, in reasons dated May 25, 2011, the adjudicator ordered River House's licence be suspended for 15 days commencing July 6, 2011, in view of what he found was a serious contravention of the *LCC Act* by the employee of River House delaying access of the police for between 45 seconds and two minutes. He wrote as follows with respect to the penalty of a 15 day suspension that he imposed:

Pursuant to section 20(2) of the *Act,* having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulation.* I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee for this licence within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

In the circumstances of this case, I am satisfied that the licensee principal has not successfully or sufficiently stressed, upon the employee that he has placed in charge of the establishment, the need to fully and conscientiously carry out his duties, and a penalty is necessary to ensure future compliance. Here, the employee in charge of the establishment believed that he could delay the entry of police officers or at the very least was unaware that he must allow them immediate entry. His actions and demeanour at the door and inside, while not such as to prevent entry by the officers, was in my view, meant to dissuade them from entering and acting on their authority. The contravention is serious. The general manager of the branch has a duty to oversee the conduct of all establishments within the province. That duty is carried out through inspections by liquor inspectors and police officers and requires that inspectors and officers be immediately allowed entry into a licensed establishment.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulations* provides a range of penalties for a first contravention of this type. The liquor inspector, based on his belief through the information available to him at the time, has proposed a 30 day licence suspension. In the circumstances here, of a brief but deliberate delay and where the employee did not attempt to block or prevent entry, I find that the

> minimum suspension is sufficient to encourage future voluntary compliance. A 15 day suspension is necessary, appropriate and reasonable.

[5] At the hearing on May 3, 2011, the adjudicator was made aware by counsel for River House that it had taken a number of steps consequent on the event of July 23, 2010. It had disciplined the bartender by suspending him from employment for 30 days. Mr. Christopher Soper ("Mr. Soper"), the principal of River House, had hired a doorman to work every evening. Before the incident, Mr. Soper had worked with other bar owners to establish a bar watch program. River House had no obstructions on its windows so that anyone could readily see inside. Importantly, in the view of River House, Mr. Soper had instructed River House's staff, after the incident, not to lock the premises until the staff had finished closing and were leaving the premises. Thus, River House took the position before the adjudicator (as it does on this review) that a suspension was not required to ensure compliance by River House with s. 73(2)(b) of the *LCC Act* and that the failure of the adjudicator to exercise his discretion not to impose a penalty (or his imposition of such a severe penalty) was unreasonable.

II. DISCUSSION

[6] The parties agree that the standard I must use in reviewing the decision of the adjudicator is that of "reasonableness".

[7] In effect, much of what was submitted to the adjudicator by River House as to the steps it had taken both before and after the incident was germane to a due diligence defence although, apparently, that was not specifically raised as a defence. But clearly the position of River House at the May 3, 2011, hearing was that it was a responsible licensee, that the incident was out-of-context for how it usually operated; it had disciplined the responsible employee, and, even though responsible for the infraction, no penalty was required (or at least nothing as severe as a licence suspension) to ensure its future compliance.

[8] The issue now, of course, is not what I or another adjudicator may have done in the same set of circumstances by way of a penalty. It is whether the penalty was

reasonable in the context of the fact pattern found by the adjudicator, his assessment of its seriousness, and that River House had not "successfully or sufficiently stressed" upon the employee in question "the need to fully and conscientiously carry out his duties".

[9] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 the Supreme Court noted at para. 59:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* [*Dunsmuir v. New Brunswick,* 2008 SCC 9] was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[10] In this case, the adjudicator reviewed the facts put before him by both sides in a fair and relatively comprehensive manner. He may not have referred to every detail or every argument but, in my view, he did not fail to refer to anything that was critical to the case of River House. The essence of his findings is that there was a delay in the police (acting as liquor inspectors) being permitted access to the premises of between 45 seconds and two minutes. In his view that was a serious delay. In other words, it was not minor or inconsequential.

[11] He also concluded that the employee had not had the importance of permitting immediate access sufficiently stressed upon him. That was a criticism of River House, a fault found with it. In other words, even if due diligence had been pleaded, that conclusion amounted to a rejection of it.

[12] The adjudicator was aware that different options respecting penalty were available to him; he listed them. However, as counsel for River House correctly points out, he did not list as an option not to impose any penalty as one available to him in the exercise of the discretion he recognized that he had. The adjudicator

noted: “Imposing any penalty is discretionary”. In the context of his reasons, I do not take that as saying that he had the option not to impose any penalty. However, in these circumstances, where he regarded the breach as a serious one, and had listed penalty options available to him including at least one less serious than a suspension, is it likely that he would have considered not imposing any penalty at all, if he had listed that as an option available to him? I think not. As I noted in *Empress Towers Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)* 2006 BCSC 325 at para. 24:

> ...The granting of relief upon judicial review is discretionary and the tribunal’s decision should not be quashed if its decision would not have been any different had the error not occurred. (See: *Whitelaw v. Vancouver (City) Commissioners of Police* (1973), 35 D.L.R. (3d) 466 (B.C.C.A.); and *Islands Protection Society v. British Columbia (Environmental Appeal Board)* (1988), 34 Admin. L.R. 51 (B.C.S.C.)).

[13] I find nothing unreasonable about either the conclusion that there was a delay in providing access to the police nor that that delay was a serious violation of the *LCC Act.* The penalty imposed, while certainly a significant one in all the circumstances, is not unreasonable in my view.

III. CONCLUSION

[14] The petition is dismissed.

“Melnick J.”