NOVA SCOTIA COURT OF APPEAL

Citation: ***Whiskey's Lounge Ltd. v. Nova Scotia Utility and Review Board***, 2007 NSCA 95

Date: 20071002
Docket: CA 275272
Registry: Halifax

Between:

Whiskey's Lounge Limited

Appellant

v.

Nova Scotia Utility and Review Board

Respondent

Judges:	Roscoe, Saunders & Fichaud, JJ.A.
Appeal Heard:	September 18, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed, as per reasons for judgment of Saunders, J.A.; Roscoe and Fichaud, JJ.A. concurring
Counsel:	Jan C. Murray, for the appellant Dale A. Darling, on behalf of the AGNS

Reasons for judgment:

[1] With the support of certain downtown merchants but over the protests of many neighbourhood residents, a licenced restaurant applied to amend the terms of its licence by acquiring unrestricted entertainment privileges which would include live entertainment, on any night, up until 2:00 a.m.

[2] The restaurant's application was denied by the Nova Scotia Utility and Review Board.

[3] The restaurant's appeal of the Board's decision brings the matter to this court.

[4] For the reasons that follow I would dismiss the appeal.

Background

[5] The appellant, Whiskey's Lounge Limited ("Whiskey's"), is a licensed pub-style restaurant that has been located at 29 Portland Street in downtown Dartmouth since 1993. Its current hours of operation are 10:00 a.m. to 2:00 a.m. Monday through Saturday, and 12:00 noon to 2:00 a.m. on Sunday. Since 1993 the terms of Whiskey's liquor license have permitted live entertainment, but with a maximum of two performers and only until 9:00 p.m. No entertainment, other than recorded background music, is allowed after 9:00 p.m.

[6] In April 2006, Whiskey's applied to the Alcohol and Gaming Division of the Department of Environment and Labour to lift the limits on its license which had been imposed by provincial authorities in 1993. Specifically, Whiskey's sought unrestricted entertainment privileges, as are currently enjoyed by several competing restaurants and pubs in other parts of metro.

[7] Although the processing of an entertainment permit does not ordinarily involve a hearing before the Board, it was seen to be warranted in this case. A public hearing was held before a single member panel on October 12, 2006.

[8] A signed petition in support of the application was filed with the Board. At the hearing, counsel on behalf of Whiskey's made submissions, as did Camille and

Jack Toulany who own and operate the establishment, and Tim Olive of the Downtown Dartmouth Business Commission. The Board received three letters opposing the application, and six individuals, all residents of the downtown Dartmouth condominium complex Admiralty Place, spoke against it at the hearing.

[9] A day after the hearing the Board panel member visited the area observing the Whiskey's establishment as well as other premises nearby.

[10] In a written decision dated November 16, 2006, the Board denied Whiskey's application basing its conclusion on what it termed a standard set by Section 6(c)(vi) of the **Liquor Control Act Liquor Licensing Regulations**.

[11] Similar applications regarding their respective entertainment privileges were made by three other downtown Dartmouth licensed establishments. Public hearings in those cases were heard on October 10, 11 and 13, 2006 respectively. Those three applications were also denied in decisions dated November 16, 2006.

[12] In a notice filed December 15, 2006, Whiskey's appealed the Board's decision pursuant to s. 30(1) of the **Utility and Review Board Act**.

[13] The Board takes no part in these proceedings. In responding, the Attorney General has limited its participation to commenting upon the issues of law that arise in this appeal.

Issues

[14] I see two issues here:

(i) the proper standard of review;

(ii) whether in denying the application the Board erred by asking itself if an extension of the hours of entertainment, would offend the quiet enjoyment provisions of the liquor licensing regulations.

Analysis

(i) ***The appropriate standard of review***

[15] To date, this Court has not addressed the standard for judicial review engaged when dealing with the Board's jurisdiction under the **Liquor Control Act**. Using the pragmatic and functional approach mandated by the Supreme Court of Canada in such cases as **U.E.S., Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048, and **Pushpanathan v. Canada (Minister of Citizenship and Immigration**, [1998] S.C.J. No. 46, I would conclude that our review of the Board's decision in this case attracts a standard of reasonableness.

[16] The four elements of the pragmatic and functional approach were described succinctly by Justice Fichaud in **Creager v. Provincial Denture Board of Nova Scotia**, [2005] N.S. J. No. 32 (C.A.) at ¶ 15:

> Judicial review of an administrative tribunal's decision involves different standards of review than those stated by *Housen* for an appeal from a court's decision. Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paras. 17, 21-25, 33; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 21. The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: *Ryan* at paras. 21, 41, 42; *Dr. Q* at paras. 17, 21-26, 28-30, 33-34.

[17] Before measuring the cumulative effect of these four contextual factors I will refer briefly to the legislative background facing us in this appeal.

[18] Authority for adjudicative functions under the **Liquor Control Act** (the **LCA**) were assigned to the Nova Scotia Utility and Review Board ("Board") in April 2000. Section 22 of the **Utility and Review Board Act**, R.S. N.S. 1992, c.11,

s. 1 as amended provides for the exclusive jurisdiction of the Board, and the Board's authority to hear and decide questions of law and fact:

> **Jurisdiction**
>
> 22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> **Questions of law and fact**
>
> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact.

[19] Section 46A of the **LCA** describes the duties of the Board.

> 46A The Review Board shall
>
> (a) license premises for the sale of liquor for consumption on the premises;
>
> (b) hold public hearings for any reason the Review Board considers sufficient;
>
> (c) subpoena, swear and examine witnesses in any matter or hearing if the Review Board determines that such action is necessary; and
>
> (d) perform such other duties as may be required by this Act or the regulations.

[20] Section 50(f) of the **LCA** sets out the regulation making powers under the statute to "provid[e] for the issuance of licenses and for renewals and transfers of licenses;"

[21] The Governor in Council has made regulations under s. 50 the **LCA**. See O.I.C. 83-755, N.S. Reg. 156/83 as amended up to O.I.C. 2007-445, N.S. Reg. 365/2007. I will underline those which relate to the present appeal:

> **Part II - Powers of the Board**
>
> 4 (1) The Board may

> . . . (f) impose conditions from time to time, upon the continuance or renewal of a license; . . .
>
> **Application for license**
>
> 6 Every applicant for a license shall
>
> (c) satisfy the Board that
>
> . . .
>
> (vi) the operation of the premises to be licensed will not interfere in any way with the quiet enjoyment of neighbouring properties, either public or private,
>
> . . .
>
> **Entertainment**
>
> 18 (4) The Board may, by condition of license, prescribe limitations on the type of entertainment to be presented to ensure the quiet enjoyment of neighbouring properties, and that the community as a whole is not adversely affected by the entertainment being presented in the licensed premises. . . .

[22] In my opinion at least these particular regulations 4, 6 and 18 are relevant to the question facing the Board in this case and their provisions I expect would be consistently applied in similar proceedings. Having provided the necessary legislative background I will now consider the four contextual factors that inform any pragmatic and functional appellate analysis of administrative decision-making.

- **Presence or absence of a privative clause**

[23] Section 30 of the **Utility and Review Board Act** provides for this Court's review of questions of law and jurisdiction. This enabling statute does not contain a privative clause, but clearly intends that the Board be accorded deference on questions of fact.

- **Relative expertise of the decision maker**

[24] This Court has noted that the Board (or a member constituting the Board) will have developed a certain expertise from repeated applications of a statute. See for example **Nova Scotia v. Johnson**, [2005] N.S.J. No. 261 (C.A.). The cases canvassed by the appellant in its factum demonstrate that the Board has considered the issue of entertainment privileges and their variation on many occasions.

- **Purpose of the Act as a whole and the provision in particular**

[25] The requirement that the enabling legislation as a whole be used when determining meaning is a principal feature of statutory interpretation. Professor Sullivan, in ***Driedger on the Construction of Statutes***, 3rd ed. (London: Butterworths, 1994) describes it this way on the first page of Chapter 11:

> Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by considering the rest of the Act, including both other provisions of the Act and its various structural components.

[26] The specific purpose of the **Liquor Control Act** is to prohibit transactions in liquor in Nova Scotia except those which fall under government control. As a result, the **LCA** creates a regime which regulates the sale of liquor in this province. Every potential aspect of the enterprise is specified as a way to manage a controlled substance, alcohol. The appellant's factum acknowledges the Board's right to do so. In the regulations under the **LCA**, the Legislature has addressed one of the predictable effects of licensing premises, that is that entertainment offered at such an establishment will potentially have a negative impact upon the quiet enjoyment of its neighbours.

- **The nature of the problem**

[27] The appellant has characterized the nature of the problem here as one of law. I disagree. In my opinion the issue before the Board was whether it ought to exercise its discretion and grant the application. That inquiry engaged the Board's interpretation of regulations 4, 6(c)(vi) and 18(4), together with the customary fact finding exercise which follows any assessment of evidence in a proceeding. Only then could the Board decide that the quiet enjoyment clauses were engaged at all.

[28] The interpretation of the phrase “quiet enjoyment” and the significance attached to its protection is readily apparent from the Board’s own jurisprudence. At ¶ 35 of the Board’s decision in this case, Commissioner Almon states:

> The legislation establishes that the concept of quiet enjoyment, as it relates to the licensing criteria the right of a person to quiet enjoyment of property free from disturbance and noise emanating from drinking establishments is to be a paramount consideration for the Board.

Over the years the Board has deliberately avoided subjecting the phrase “quiet enjoyment” to a narrow interpretation. The right to be reasonably free from the disturbances and noise emanating from drinking establishments is not limited to actual assaults or break-ins, but rather is taken to include any “offensive or disturbing activity connected with a bar that significantly limits the use and enjoyment of a person’s property.” **Re Portland Landing Dining Room & Lounge and Sternwheeler Dining Room & Lounge** (November 29, 1993, Nova Scotia Liquor License Board - Note: this decision is unreported and there is no docket number).

See as well: **R. R. & B. Meat Market Ltd. (Re)**, [2000] N.S.U.R.B.D. No. 94; **CrowBar Inc. (Re)**, [2001] N.S.U.R.B.D. No. 95; **Keltic Park Ltd. (Re)**, [2004] N.S.U.R.B.D. No. 6; **Dawe (Re)**, [2006] N.S.U.R.B.D. No. 7; **Sternwheeler (1992) Ltd. (Re)**, [2006] N.S.U.R.B.D. No. 104; **M & B. Toulany Enterprises Ltd. (Re)**, [2006] N.S.U.R.B.D. No. 105; **3062277 Nova Scotia Ltd. (Re)**, [2006] N.S.U.R.B.D. No. 106; and **Roberts (Re)**, [2006] N.S.U.R.B.D. No. 43.

[29] While the application before the Board required a careful review of the evidence, as well as a somewhat limited interpretation and application of relevant legislative provisions, the exercise was, for the most part, fact-driven. Given the hybrid nature of the question the Board was asked to decide, and its heavy factual component, a higher degree of deference is owing.

- **Conclusion on the Standard of Review**

[30] This Board is entitled to deference on questions of fact. It has had an opportunity to develop an institutional expertise in the area of liquor licensing, and in the interpretation of the **Act** and its regulations which control how licensed

premises are to be operated in Nova Scotia. The Board had the benefit and advantage of hearing the evidence presented at a public hearing. The regulations in question require that the operation of any licensed premises not interfere with the quiet enjoyment of neighbouring properties. While the Board was, to a certain extent, engaged in legislative interpretation, its decision to deny the application was informed by its view of the factual evidence presented at the hearing as to the impact unrestricted entertainment privileges would have on the quiet enjoyment of neighbouring properties. Using the pragmatic and functional approach, reasonableness is the appropriate standard of review.

(ii) ***Whether in denying the application the Board erred by asking itself if an extension of the hours of entertainment would offend the quiet enjoyment provisions of the liquor licensing regulations.***

[31] In **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247, Chief Justice McLachlin explained how the reasonableness standard is to be applied at ¶ 55-56:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basis adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[32] I am satisfied that it was reasonable for the Board to take into consideration the issue of quiet enjoyment in declining to extend the hours during which the appellant could offer live entertainment at its restaurant. My reasons for coming to

this conclusion are explained in my assessment of the appellant's arguments which follows.

[33] In attacking the Board's decision the appellant makes two points. First, the Board was wrong to refer to s. 6 of the regulations because it says that provision establishes the standard for the *granting* of liquor licenses in Nova Scotia. As we have already seen, this regulation provides:

> **Application for license**
>
> 6 Every applicant for a [liquor] license shall
>
> . . .
>
> (c) satisfy the Board that
>
> (vi) the operation of the premises to be licensed will not interfere in any way with the quiet enjoyment of neighbouring properties, either public or private, . . .

The appellant says that this regulatory provision establishes the burden upon any applicant seeking a liquor license in the first place, but not the burden to obtain an entertainment permit. It had already discharged the requisite test for being issued a liquor license, having held such a license since 1993. The appellant says the standard which the Board ought to have applied at this stage of their history is found in s. 18 of the regulations which state:

> **Entertainment**
>
> 18(1) All entertainment offered to the general public by a licensee, which includes recorded music used to facilitate patron dancing as well as the showing of any performances by means of video cassettes or the like, requires an entertainment permit to be issued by the Board. This requirement does not apply to licensees who are non-profit organizations or societies.
>
> . . .
>
> (4) The Board may, by condition of license, prescribe limitations on the type of entertainment to be presented to ensure the quiet enjoyment of neighbouring properties, and that the community as a whole is not adversely affected by the entertainment being presented in the licensed premises.

> (5) . . . All licensees may provide television, radio or pre-recorded background music. . . .

[34] The appellant points to what it says are key differences in the language used in s. 18(4), as compared to s. 6(c)(vi). At the hearing counsel for the appellant pointed to the words "may" and "community as a whole" in 18(4) as the basis for her argument that in applying this regulation the Board was engaged in a balancing process, weighing "the competing interests" of neighbours on the one hand, and the entire community on the other. Counsel urged that these distinctions ought to have led the Board to apply a less rigorous standard when considering its application for entertainment privileges, as compared to the standard a prospective licensee must meet. Thus, the appellant says the Board erred in referring to an inapplicable regulation and in failing to apply the proper balancing test set out in s. 18(4).

[35] Second, the appellant says the Board erred by effectively prescribing limits on the hours of entertainment. Here the appellant says s. 18(4) of the regulations prescribes limitations on the type of entertainment to be presented so as to ensure the quiet enjoyment of neighbouring properties, but that no similar authority is given to the Board to limit the hours of entertainment. To support its submission the appellant points to s. 50(1) of the **Act** which authorizes regulations limiting the days and hours during which liquor may be sold or dispensed, but that there is no similar statutory authority for prescribing the hours during which there may be entertainment at licensed premises. Having already decided that Whiskey's is entitled to provide live entertainment, the appellant says there is no section in the current regulations which would authorize the Board to set the hours during which entertainment may occur. The appellant says the Board lacked any statutory authority to limit the kind of entertainment they do provide, to particular times of the day or night.

[36] I do not find the appellant's submissions persuasive.

[37] Section 6 of the Liquor Licensing Regulations sets out conditions that must be present before a license will be granted. However, these conditions do not cease to apply after the license is granted. The wording of the section makes it clear that the "quiet enjoyment" requirement continues to be a condition of licensing throughout the "operation of the premises." It is reasonable to suppose that the legislature intended the quiet enjoyment protection would be afforded for the

duration of time that the establishment was open for business. In other words, any and all hours the privilege of entertainment was being exercised. "Quiet enjoyment" under s. 6 is not limited in its application to the time of licensing.

[38] Nor is the use of the word "type" of entertainment in regulation 18(4) a limiting provision which would preclude or restrict the continued application of the rest of the regulations, including regulation 6. Regulation 18(4) allows the board to "prescribe limitations on the type of entertainment to be presented to ensure the quiet enjoyment of neighbouring properties, and that the community as a whole is not adversely affected by the entertainment being presented in the licensed premises." As the Board observed, these provisions must be read with the rest of the **Act**, and s. 6 of the regulations in mind.

[39] It would have been unreasonable for the Board to have interpreted the regulations in a way that the licensing obligations under s. 6 of the regulations would not continue to apply to a licensee who sought to amend its license. In this case, the restriction on entertainment privileges were part of the initial conditions of the license, and were established based upon the s. 6 requirements. It would be absurd if a licensee could vacate the original restrictions on its license simply by applying for an amendment, thereby effectively nullifying their duties as licensees under s. 6.

[40] My review of the Board's decision and the entire record satisfies me that the evidence, the submissions, and relevant legal principles were all carefully considered.

[41] The appellant's position was articulated by counsel at the hearing in her opening remarks:

> "What Whiskey's is looking for is unrestricted entertainment privileges to be able to be competitive in the downtown Dartmouth area and have the freedom to try new things, entertainment that will draw people into the bar especially when the other bars are enjoying this privilege.
>
> . . .
>
> And Whiskey's isn't trying to attract a young or a rowdy crowd. They have an adult audience. . . . They want to be able to build on the adult audience that they already have during the lunch hour and build upon the clientele they know are in

> downtown Dartmouth . . . what Whiskey's is looking for is simply an even playing field. This is a fairness issue for them and there doesn't seem to be any justification for treating Whiskey's differently than the others (sic) bars that we have just mentioned. They have to be able to compete with these bars and they all want to be able to provide an alternative to downtown Halifax as downtown Dartmouth is growing.
>
> . . .
>
> That's (sic) been some suggestion from the opposition that they can't believe that they have to go through this again and if the entertainment privileges for Whiskey's . . . are amended, things will go back to the way they used to be when the entertainment privileges were revoked in the early '90s with prostitutes and drugs and bikers.
>
> And with all due respect, Whiskey's wasn't even part of that scene in the early '90s. They weren't around until 1997. They never had a license that was revoked because of noise or rowdy crowds. They never had strippers. They never had a clientele of bikers. That was long before Whiskey's came around."

[42] Whiskey's owners said there was extensive support for their application. They filed a petition with over 300 names, many of whom were business owners and residents on Portland Street and in the nearby downtown neighbourhood. They also received letters of support from people who wrote that Whiskey's was a clean and respectable establishment and was never the source of any trouble.

[43] Mr. Camille Toulany gave evidence. He described the significant financial investment he and his brother had made in the establishment and their hope to attract a mature adult crowd with comedy acts and light entertainment. He did not expect their clientele to be boisterous or unruly. He said some of his relatives live upstairs, above the restaurant and bar.

[44] Mr. Timothy Olive spoke in favour of the application. He heads the Downtown Dartmouth Business Commission. He saw Whiskey's application to expand its entertainment privileges as being appropriate for the neighbourhood and something that would have a positive impact upon the economic activity within the downtown business community. He said that times had changed and that the appellant's application was compatible with Dartmouth's current revitalization and planning strategy which included such things as sidewalk cafes, outdoor patios and other expanded services in keeping with a pedestrian and business-friendly

environment suitable to the enhanced growth Dartmouth is presently experiencing. He said bars like Whiskey's contribute positively to the downtown Dartmouth community and provide a unique hospitality experience. According to Mr. Olive, without such a revitalization which applications such as this promote, Dartmouth would continue to miss out in hosting a number of major waterfront events. He said that by not approving this type of expanded entertainment license application the Board "will send the wrong social and economic message to the residents and business that live and work in this area. This type of messaging will have a detrimental effect on prospective development opportunities . . . "

[45] Many local residents, some of whom live in the Admiralty Place complex which the Board determined to be about 250 feet away from the appellant's premises, spoke at the hearing. They described their continued frustration in having to deal with the noise, boorish behaviour, and other disruptions stemming from late night revelry in their immediate neighbourhood, no matter the source. Their vigorous objections to the appellant's application were captured very accurately by the Board in its decision:

> [40] The objectors, on the other hand, are unanimous in their opposition to amending the entertainment privileges for Whiskey's. They complained of loud music, disturbing noises 'from the lounges on Portland Street at closing time," and sounds of "screaming voices," all of which can make it impossible for the residents to sleep. The "barometer" or negative impact on the quiet enjoyment of their properties was felt most recently during the Dutch Mason Blues Festival where the Applicant's license conditions were temporarily amended by this Board to allow live entertainment during the ordinary hours of operation from August 11 to 13, 2006, inclusive. One opponent noted that, while "the drunken patrons do not identify which bars they have patronized," they all make quite a racket at closing time, even under the current licenses. Some complained that they cannot open their windows at night, even though one installed triple glazing to stop the sound, "to no avail."

[46] In my respectful opinion, it was not unreasonable for the Board to find "on the balance of probabilities, that permitting live entertainment in these premises would not be consistent with the standards set by the legislation in s. 6(c)(vi)."

[47] I do not propose to deal with the new regulations which were proclaimed in force August 17, 2007 and drawn to our attention by counsel at the hearing. They have no bearing on our decision in this case.

Conclusion

[48] Applying a reasonableness standard to the Board's decision, there is no basis for us to intervene. Even if one were to have applied a correctness standard to our judicial review, I would have concluded that the Board's decision was right. I would dismiss the appeal without costs.

Saunders, J. A.

Concurred in:
Roscoe, J.A.
Fichaud, J.A.