

NOVA SCOTIA COURT OF APPEAL

Citation: *King's Corner Bar and Grille Ltd. v. Nova Scotia (Attorney General)*,
2018 NSCA 9

Date: 20180129

Docket: CA 463483

Registry: Halifax

Between:

King's Corner Bar and Grille Ltd.
o/a Ma and Pa's Kitchen and Back Alley Lounge

Appellant

v.

The Attorney General of Nova Scotia and
the Alcohol, Gaming, Fuel and Tobacco Division of Service Nova Scotia
and Municipal Relations

Respondent

Judge: The Honourable Justice Hamilton
Appeal Heard: January 29, 2018, in Halifax, Nova Scotia
Subject: Administrative Law; Nova Scotia Utility and Review Board;
Sections 58, 61(1)(a) and 61(2) of the Nova Scotia *Liquor
Licencing Regulations*, NS Reg 10/2017

Summary: The appellant appealed the Nova Scotia Utility and Review Board's decision that found it violated ss. 58, 61(1)(a) and 61(2) of the Nova Scotia *Liquor Licencing Regulations*, NS Reg 10/2017 and suspended its licence for three days.

Issues: (1) Did the Board err in finding the appellant permitted liquor to be removed from its premises (s. 58)?
(2) Did the Board err in finding the appellant provided liquor to a person under the influence of liquor (s. 61(1)(a))?

(3) Did the Board err in finding the appellant permitted a drunk person on the premises (s. 61(1)(2))?

(4) Did the Board err in making a finding with respect to s. 61(1)(a) given the mistaken reference to s. 61(1)(b) in the Notice of Disciplinary Hearing?

Result:

Appeal Dismissed. The standard of review is reasonableness for the first three issues. The fourth issue is decided by us in first instance. In light of the video evidence showing liquor being removed from the premises, the Board made no error in finding the appellant violated s. 58. Similarly, the Board made no error in finding violations of ss. 61(1)(a) and 61(2) given the video evidence and the testimony of the police officer involved concerning whether certain patrons were “hammered”. Nor did the Board err in making a finding under s. 61(1)(a), given that the appellant was aware from the infraction report of the alleged violation of s. 61(1)(a) and suffered no prejudice as a result of the mistaken reference to the wrong subsection in the Notice of Disciplinary Hearing.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 5 pages.

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The Attorney General of Nova Scotia and
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and Municipal Relations

Respondent

Judges: Bryson, Hamilton, Van den Eynden JJ.A.

Appeal Heard: January 29, 2018, in Halifax, Nova Scotia

Written Release: February 1, 2018

Held: Appeal dismissed, per reasons for judgment of Hamilton, J.A.;
Bryson and Van den Eynden, JJ.A. concurring.

Counsel: Michael K. Power, Q.C., for the appellants
Duane Eddy, for the respondent the Alcohol, Gaming, Fuel
and Tobacco Division of Service Nova Scotia and
Municipal Relations

Reasons for judgment:

[1] Following the hearing, we dismissed this appeal with reasons to follow. These are our reasons.

[2] King’s Corner Bar and Grille Limited appeals the March 30, 2017 decision of the Nova Scotia Utility and Review Board (“Board”) that found it violated ss. 58, 61(1)(a) and 61(2) of the Nova Scotia *Liquor Licencing Regulations* (“*Regulations*”), NS Reg 10/2017, and ordered that its liquor licences and video lottery registration certificates be suspended for three consecutive days. David J. Almon, member of the Board, conducted the hearing.

[3] The sections of the *Regulations* at issue provide:

58 Except as provided in Sections 58A and 58B, a licensee must not permit liquor that was sold in their licensed premises to be taken from the premises.

...

61 (1) A licensee must not sell or provide liquor in their licensed premises to any of the following:

(a) a person who is apparently under the influence of liquor;

(b) a person who it is reasonable to believe will become drunk if they consume any more liquor.

(2) A licensee must not permit a person who is drunk to be in their licensed premises.

[4] The alleged violations were first raised with the compliance arm of the Alcohol, Gaming, Fuel and Tobacco Division of Service Nova Scotia and Municipal Affairs (“AGFT”) by the Bridgewater police, following certain alcohol related incidents at the premises owned and operated by the appellant on April 23 and 24, 2016.

[5] On being informed of these incidents, Compliance Officer Ryan MacLellan of the AGFT spoke with some of the appellant’s staff and with the police officers involved and reviewed videos from inside and outside the premises on the night/morning in question. On June 3, 2016, he issued and served on the manager of the appellant’s premises infraction reports for violations of ss. 58, 61(1)(a) and 61(2).

[6] Full disclosure of all materials was provided by AGFT to the appellant before the AGFT's Executive Director referred this discipline matter to the Board on November 10, 2016 pursuant to s. 47B(1)(b) of the *Liquor Control Act* ("Act"), R.S.N.S. 1989, c. 260.

[7] On November 18, 2016, the Executive Director sent a letter to both parties enclosing the Notice of Disciplinary Hearing. Both mistakenly refer to a breach of s. 61(1)(b) of the *Regulations* (providing liquor to a person who it is reasonable to believe will become drunk if they consume more alcohol) instead of a breach of s. 61(1)(a) (providing liquor to a person who is apparently under the influence of liquor).

[8] During the hearing it was clarified that it was a violation of s. 61(1)(a), not 61(1)(b), that the respondent was pursuing.

[9] Appellant's counsel referred to this discrepancy in his submissions before the Board, recognizing the Notice was in error:

You know, there's a big ...problem with regards to the notice. I thought we were dealing with a 61(1)(b). Apparently, we're not. Apparently, we're dealing with a 61(1)(a), but the Notice of Disciplinary Hearing, which was the notice that was supplied to me, [referred] to 61(1)(b)...I'm a little bit surprised to find out that ...it's not 61(b), it's 61(1)(a). **Well, clearly the document is in error, but again, that's not our fault.**

[Emphasis added]

He did not request an adjournment or seek to have the allegation under s. 61(1)(a) set aside on that basis.

[10] The first three issues are whether the Board erred in fact and law in finding the appellant permitted liquor to be removed from the premises (s. 58), provided liquor to a person under the influence of liquor (s. 61(1)(a)) and permitted a drunk person in the premises (s. 61(2)). The final issue is whether the Board erred in law in making a finding with respect to s. 61(1)(a) given the mistaken reference to s. 61(1)(b) in the Notice of Disciplinary Hearing.

[11] The analysis directed by *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 indicates reasonableness is the standard of review this Court is to apply to the first three issues. The *Act* provides for an appeal to this Court, but only on questions of jurisdiction and law, not on facts. The *Act* and *Regulations* set rules that licensees, such as the appellant, must comply with to ensure proper control of licensed

premises and provide provisions to enforce those rules. One of those provisions allows for a referral to the Board of disciplinary matters, giving it expertise. The conclusions reached by the Board in this case were highly fact dependent.

[12] We review the final issue in first instance as it involves the right to a fair trial and natural justice and was not dealt with by the Board.

Analysis

[13] To determine if the Board's decisions with respect to the first three issues are reasonable, we consider the reasons as an "organic whole, without a line-by-line treasure hunt for error", *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, para. 54. We consider the reasons together with the outcome to determine whether the decision-making process sufficiently demonstrates the hallmarks of justification, transparency and intelligibility and whether the result falls within a range of possible, acceptable outcomes that are factually and legally defensible, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, paras. 14-16.

[14] In providing its reasons, the Board thoroughly reviewed the evidence and explained the basis for its conclusions. It inferred from the fact certain patrons were drinking beer in the premises over an extended period of time that the appellant sold it to them.

[15] With respect to the Board's finding that s. 58 was violated, the Board noted that the surveillance video showed beer being removed from the premises, despite the presence of a doorman that evening on the premises. It also noted the appellant's admission that it was ultimately responsible to ensure compliance with s. 58 of the *Regulations*.

[16] With respect to ss. 61(1)(a) and 61(2), the Board preferred the evidence of the police officer. It accepted the police officer's testimony that a particular patron, who the video indicates was drinking, staggering, removed her outer shirt and did a "helicopter" with it on the dance floor and fell a couple of times, was highly intoxicated from alcohol and was not just acting in a boisterous manner to draw attention to herself as argued by the appellant. The Board accepted this evidence given the police officer's evidence that he knew that patron well and could compare her actions when sober to those shown on the video. The Board also

accepted the police officer's testimony that he would have jailed two other patrons for drunkenness in a public place if a taxi had not come along to take them home.

[17] The Board's decisions on the first three issues are largely fact based. Its reasons on these issues are transparent, intelligible and justifiable. They tell us why the Board reached the decisions it did. The result is in a range of possible outcomes. The Board's conclusions that the appellant breached ss. 58, 61(1)(a) and 61(2) are reasonable. The Board committed no error with respect to the first three issues.

[18] The final issue relates to the mistaken reference in the Executive Director's letter and in the Notice of Discipline Hearing to s. 61(1)(b) instead of s. 61(1)(a). The appellant was provided with a copy of the infraction report relating to s. 61(1)(a) prior to the hearing before the Board, making it clear that was the section at issue. Appellant's counsel recognized at the hearing before the Board that the reference in the Notice of Discipline Hearing to s. 61(1)(b) was an error. He did not request that the Board not deal with the s. 61(1)(a) charge and did not request an adjournment to allow time to respond to it. Given the substance of ss. 61(1)(a) and 61(1)(b), it is hard to imagine what additional evidence or arguments could have been made by the appellant.

[19] The appellant was aware from the infraction report of the alleged violation of s. 61(1)(a) it faced and hence suffered no prejudice as a result of the mistaken reference in the letter and Notice to s. 61(1)(b). There is no merit to the final ground of appeal.

[20] The appeal is dismissed.

Hamilton, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.