

IN THE SUPREME COURT OF YUKON

Citation: *40078 Yukon Inc. v. Yukon Liquor Board*
2011 YKSC 89

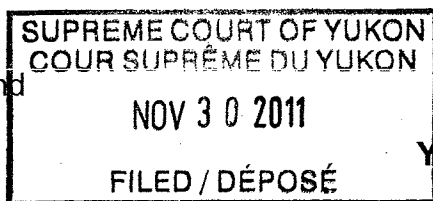
Date: 20111130
Docket No.: S.C. No. 10-A0100
Registry: Whitehorse

Between:

40078 YUKON INC. D.B.A. HEATHER'S SNACK HAVEN

Petitioner

And



YUKON LIQUOR BOARD

Respondent

Before: Mr. Justice Foisy

Appearances:

Peter Sandiford
Debbie Hoffman

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The petitioner, Heather's Snack Haven, is pursuing the judicial review of a licencing decision by the respondent Yukon Liquor Board (the Board). On September 30, 2010, the Board issued a decision limiting the petitioner's off-sales licence to the times when it is serving alcohol under its food primary licence. The petitioner says that, in imposing this condition, the Board erred in law by failing to comply with internal Board policies and/or the *Liquor Act* and associated Liquor Regulations. The petitioner also takes the position that it was denied procedural fairness in the application process, and

that the Board exceeded its jurisdiction in making a retroactive policy amendment. The petitioner seeks to quash the limiting condition in the licence.

BACKGROUND

[2] The petitioner is a corporation that operates a convenience store and restaurant within the same Whitehorse premises. On November 17, 2009, it applied to the Yukon Liquor Corporation for a “Food Primary – beer/wine” licence (the “food primary” licence) and an “Off premises liquor – beer/wine” licence (the “off-sales” licence). In its application, it proposed to have a kitchen operating between 7 a.m. and 3 p.m. Monday to Friday and between 10 a.m. and 3 p.m. on Saturday and Sunday. It applied to sell liquor (beer/wine) in the restaurant between 11 a.m. and 3 p.m. and to sell liquor (beer/wine) via off-sales between 11 a.m. and 11 p.m., except for Sundays and holidays, on which days it applied to sell off-sales between 11 a.m. and 10 p.m. In a decision dated January 27, 2010, the Yukon Liquor Board approved the food primary licence in principle but denied the off-sales licence.

[3] This denial of an off-sales licence was quickly challenged by the petitioner, and on February 10, 2010 it filed a petition with this court. Although that proceeding was resolved between the parties, the settlement agreement between the petitioner and the Board provides important background for the current proceeding.

[4] In the settlement agreement, which is captured in a letter dated August 12, 2010, the parties agreed to the Court quashing the Board's January 27, 2010 decision, except for the portion that granted the petitioner its food primary licence, and agreed to a court order for the Board to reconsider the off-sales licence. The Board further agreed to make its reconsideration “subject to the same laws, regulations and policies as were in

effect ... on the date of January 27, 2010". This condition reflects the petitioner's concern about how the Board interpreted and reacted to changes made to the *Liquor Act* and Liquor Regulations. The Board was to make its reconsideration based on the facts that were before it at the November 17, 2009 hearing.

[5] The Yukon Liquor Board issued its reconsideration decision on September 30, 2010. In this decision, although the Board granted an off-sales licence to the petitioner, it was made subject to the condition that the off-sales licence hours be the same as the food primary licence hours. As indicated above, this condition lies at the heart of the petitioner's judicial review application.

Legislation

[6] The petitioner's application for a liquor licence came relatively shortly after amendments were made to the *Liquor Act* (R.S.Y. 2002, c. 140) and the Liquor Regulations (C.O. 1977/037).

[7] The legislative provisions at the heart of this proceeding are sections 27(2) and 27(3) of the Liquor Regulations, which were amended by O.I.C. 2009/36. Section 27 currently reads:

27. (1) In this section,
"main licence" means the liquor license in respect of which an off-sale licence is issued; «*licence principale*»

...
(1.2) It is a condition of every off-sales licence that liquor, in the opinion of the board, be made reasonably available to the public for consumption on the premises under the main licence.

(1.3) Without limiting subsection (1.2), the board may, in determining whether an off-sales licence is being operated in compliance with subsection (1.2), consider

(a) the amounts, types and prices of liquor made available under the main licence and the off-sales licence;

(b) the times during which liquor is made available under the main licence and the off-sales licence;

(c) the manner in which liquor is made available or served under the main licence; and

(d) the amounts and types of liquor sold under the main licence and the off-sales licence.

(1.4) Subsection 27(1.2) and (1.3) apply to all off-sales licences and their respective main licences whether issued before or after subsection 27(1.2) and (1.3) come into force.

(2) The hours for an off-sales licence shall be identical to the hours of the licence with which it is issued in conjunction.

(3) Notwithstanding anything else in these regulations the Board may regulate the hours of sale for an off-sales licence.

[8] Prior to the amendments in O.I.C. 2009/36, sections 27(2) and 27(3) each referred to a “liquor off-premises licence” rather than an “off-sales licence”. Sections 27(1), (1.2) and (1.3) are entirely new. The term “off-sales licence” did not appear in the *Liquor Act* or Regulations prior to the 2009 amendments. Section 2 of the Regulations now defines off-sales licence as “an off premises liquor licence”.

[9] Notably, prior to April 1, 2009, s. 23 of the *Liquor Act* considered two classes of off-premises licences, namely “off premises liquor licences” and “off premises beer licences”. S.Y. 2008, c. 6, which came into force on April 1, 2009, amended the licence classes by, among other things, removing “off premises beer licences” from the list of available licences. It seems that an off premises liquor licence would encompass the sale of beer; per the definition in s. 1, “liquor” means any beverage that contains more than one-half per cent by volume of alcohol at 16 degrees Celsius «*boisson alcoolisée*».

[10] In addition to its ability to regulate off-sales hours through s. 27 of the Liquor Regulations, the Board is given discretion to impose conditions on off-sales licences by s. 47 of the *Liquor Act*, which reads:

Off-premises sales of liquor

47 The board may, subject to the regulations, issue a licence allowing the retail sale of liquor in any licensed premises for off-premises consumption subject to any conditions the board may direct.

[11] As per s. 30(2) of the *Act*, the applicant is entitled to an opportunity to make representations regarding any conditions.

[12] The Board has chosen to exercise its regulatory jurisdiction in accordance with various Board-authored policies. Of significance in this case is a one-page Board policy titled “Off Sales”, the relevant parts of which are reproduced below. The “Hours of operation” section of the policy was amended on February 17, 2010, and the clause that was added on this date assumes some importance in the petitioner’s argument:

OFF SALES

Section 47 of the *Liquor Act* provides for a licence allowing the retail sale of liquor in a licensed premises (the “primary licence”) for off-premises consumption.

Application:

...

Licenseses may apply for and operate both an off premises liquor licence and an off premises liquor licence – restricted to beer and wine for the same establishment.

Hours of operation:

Off-sales are not allowed before 9:00 a.m. or after 12:00 midnight. The primary licence must operate at least four consecutive hours during the day, being open and offering on-premises consumption.

Under an Off Premises Liquor Licence, off-sales are only allowed during the hours the primary licence is operating. This does not apply to Off Premises Liquor Licences –

Restricted to Beer/Wine that were approved and operating prior to April 1/09.

...

The clause added on February 17, 2010 is underlined.

ISSUES

[13] The petitioner has framed the following issues:

1. Did the Board err in law by limiting the off-sales hours to the hours of the food-primary licence?
2. Did the Board err in law by imposing a condition limiting the hours of off-sales without allowing the petitioner to make representations?
3. Did the Board exceed its jurisdiction by making an amendment to its Off Sales policy that applies retroactively?
4. Did the Board unlawfully act for an improper purpose, in bad faith, or in an arbitrary or discriminatory manner by limiting the petitioner's off-sales hours?

[14] The parties agree that the standard of review is correctness: see *City Furniture (Y.T.) Ltd. V. Yukon Liquor Corporation*, 2000 YKSC 517.

ANALYSIS

Issue 1: Did the Board err in law by limiting the off-sales hours to the hours of the food primary licence?

[15] The terms of the settlement agreement required that the Board consider the petitioner's off-sales licence under the legislation and policies that were in place on January 27, 2010. As noted above, prior to February 27, 2010, the Board's Off Sales policy restricted liquor off-sales to the hours of the main licence, but did not apply this restriction to beer/wine off-sales.

[16] Although the petitioner argued that the Board has improperly fettered its discretion to regulate off-sales hours under Regulation s. 27(3) by essentially incorporating the mandatory s. 27(2) limitation into its current policy, I do not need to address that argument in this context. I agree that an informal Board policy cannot be so restrictive that it prevents the exercise of discretion granted by statute or regulation (*Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)*, 2001 ABQB 624; *Canada (Attorney General) v. Mavi*, 2011 SCC 30). However, prior to the February 17, 2010 amendment, the policy explicitly acknowledged a Board discretion to vary hours for beer and wine off-sales. This was the version of the policy that the Board was directed to refer to in its September 30, 2010 decision, and this was the type of licence that the petitioner sought. Here, the relevant Board policy recognized a Board discretion to set the hours it deemed appropriate, whether or not they were the same as the primary food licence.

[17] However, unfortunately, this does not end the matter, as the Board did not actually refer to any version of the policy in its September 30, 2010 decision. Rather, it considered the amended s. 27 of the Liquor Regulations in some detail and proceeded from there. In particular, the Board referenced the considerations listed in s. 27(1.3) as relevant factors in determining whether the petitioner's application for an off-sales licence should be approved. Per the Regulations, it is a condition of every off-sales licence that liquor "be made reasonably available to the public for consumption on the premises under the main licence" (s. 27(1.2)). Section 27(1.3) sets out a non-exhaustive list of factors that the Board can consider when assessing whether the condition in s. 27(1.2) is met. While the scheme of the Regulations suggests that ss. 27(1.2) and (1.3) are

applicable in the context of an issued and operative licence, the Board indicated that it also considers the factors relevant in the context of an application, as it helps ensure future compliance. In considering s. 27(1.3)(b), “the times during which liquor is made available during the main licence and the off-sales licence”, the Board noted “that section 27(2) of the Regulations requires that the off-sales license shall be identical to the hours of the license with which it is issued in conjunction”. While true, the Board nowhere acknowledges s. 27(3) that explicitly gives it discretion to regulate the hours of an off-sales licence ‘notwithstanding anything else in these regulations’.

[18] By ignoring its discretion to set off-sales hours different from the hours of the liquor primary licence, either pursuant to s. 27(3) of the Regulations or pursuant to its pre-February 17, 2010 policy, I conclude that the Board erred in law (see e.g. *Karbalaeiali v. British Columbia (Deputy Solicitor General)*, 2007 BCCA 553).

[19] It was incumbent on the Board in these circumstances to refer to s. 27(3), either in discussions with the petitioner or in its decision on the off-sales licence. The Board did neither. Further, it seems to me that as a matter of practice, in circumstances where the Board is being asked to consider off-sales hours that differ from an applicant’s primary licence hours, the Board should not only refer to s. 27(3) but also give reasons for choosing not to exercise the discretion they are given by this subsection.

2. Did the Board err in law by imposing a condition limiting the hours of off-sales without allowing the petitioner to make representations?

[20] As noted, s. 30(2) of the *Liquor Act* requires that the Board “give the applicant an opportunity to make representations concerning the conditions” it decides are necessary

in a liquor licence. The petitioner says that it was not afforded this opportunity and that the Board imposed multiple conditions. I disagree.

[21] In its September 30, 2010 decision, the Board was “prepared to approve the application for the Off-Premises – Beer/Wine Licence, in principle, subject to the following conditions”. The conditions were: (a) that the hours of the off-sales licence be identical to the food-primary licence (including written notification to the Liquor Corporation that this was the case); (b) that the requirements of the *Act* and Regulations be complied with and the food primary licence be in place by January 27, 2012; (c) that if (b) was not complied with, both the food primary and the off-sales licence would expire on January 28, 2012, and; (d) that once the food primary licence was in place, the petitioner had until September 30, 2012 to comply with the requirements of the *Act* and Regulations and put the off sales licence in place.

[22] Although described as “conditions”, with the exception of the hours provision in (a) these requirements essentially set out a timeline. At the time of its initial application in January 2010, the petitioner was renovating the premises to accommodate seating for the restaurant that would base the food primary licence. I have no information about the status of the renovations at the time of the September reconsideration. As I view it, the timing ‘conditions’ do not alter the content of the licence at all or make the licence contingent on anything other than the statutory requirements. While it would have been preferable for the petitioner to have had the ability to make submissions on the feasibility of this timeline, by imposing one, the Board did not require the petitioner to make any modifications to its application. I also note that the petitioner could have been selling liquor well before the dates set out, which were significantly over a year into the future.

[23] With respect to the hours provision in condition (a), I find that the petitioner did have the opportunity to make representations. At the January 27, 2010 hearing, Heather Achtymichuk (one of two directors of the petitioner corporation) was advised of s. 27(2) of the *Act* and given the option of adjourning to 're-think' the hours of off-sales operation in her application. This is so, even though she was advised that the Board had no option but to limit the off-sales hours to the food-primary hours. She advised that she would continue on with the application. At the time of the Board's September reconsideration, although, as per the agreement with the petitioner they were acting on the same factual basis as they had in January, they were clearly alert to the issue of off-sales times and aware of the petitioner's position with respect to parallel food primary and off-sales hours. They were specifically directed to refer the pre-February 17, 2010 version of the off-sales policy. The petitioner's position on this issue was very clear.

3. Did the Board exceed its jurisdiction by making an amendment to its Off Sales policy that applies retroactively?

[24] I do not need to decide this issue, as, pursuant to the August 2010 settlement agreement, the amended policy played no role in the Board reconsideration and the decision being reviewed.

4. Did the Board unlawfully act for an improper purpose, in bad faith, or in an arbitrary or discriminatory manner by limiting the petitioner's off-sales hours?

Discrimination

[25] The petitioner submits that limitations the Board imposed on the hours of its off-sales licence were discriminatory. In support of this argument, it has provided the Court with the Board's licencing decisions in two other situations between the dates of April 1,

2009 and February 17, 2010. In both cases, the Board ‘approve[d] in principle the Application for a Liquor Primary Licence and an Off Premises Liquor Beer/Wine Licence’. There is no information about whether or not the hours of operation for the off-sales licences in these cases were the same as the hours of the food primary licence. On the available facts, I am unable to find that the Board ‘preferred’ any applicant over any other or applied its then-policy in an unfair or discriminatory manner.

Bad faith

[26] Again, the material before me contains no evidence that the Board discharged its duty capriciously or with regard to an irrelevant consideration. It was fairly and appropriately concerned about the mismatch in the hours of the petitioner’s proposed food primary operation and its proposed off-sales operation.

CONCLUSION

[27] I have found that the Board erred in law by ignoring its discretion to set off-sales hours different from the hours of the liquor primary licence. While the Board is under no requirement to allow different hours, and indeed in the vast majority of cases may choose to require parallel hours, its failure to acknowledge that it has the discretion to differently regulate the petitioner’s off-sales hours requires that this decision be quashed.

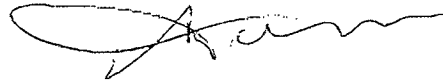
[28] At the hearing, counsel for the petitioner requested that, in the event that I quash the Board’s decision, I either direct the Board to impose certain terms or issue a liquor licence on terms that I deem appropriate. I agree with counsel for the Board that I cannot do either of these things. While the Court has jurisdiction to review the Board’s decisions pursuant to s. 118 of the *Liquor Act*, this jurisdiction is ‘to hear and determine

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an application to review and set aside a decision or order'. It does not give the court the jurisdiction to substitute its discretion for that of the Board's.

[29] In the result, the September 30, 2010 decision of the Yukon Liquor Board is set aside.

[30] Subject to any representations, I would award costs to the petitioner.



Foisy J.