



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Licensee: Newton Investments Ltd.
dba Hildon Hotel
50 West Cordova Street
Vancouver, BC

Case: EH04-087

Appearances:

For the Licensee Ronnie Teti, Lessee

For the Branch Sonja Okada, Advocate

Enforcement Hearing Adjudicator Edward W. Owsianski

Date of Hearing February 22, 2005

Place of Hearing Vancouver, BC

Date of Decision April 6, 2005

Introduction

Newton Investments Ltd. (dba Hildon Hotel) holds Liquor Primary Licence No. 016141. The hours of sale are 10:00 a.m. – Midnight seven (7) days a week. The capacity is 302 persons. The establishment is located in Vancouver, BC and it is operated by a third party lessee.

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

The Branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated September 29, 2004. The branch alleges that

on June 24, 2004, the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The recommended enforcement action is a \$5000 monetary penalty.

The licensee disputes that this contravention took place.

Schedule 4 of the *Liquor Control and Licensing Regulation* provides a penalty for this type of contravention of a licence suspension for four to seven (4 – 7) days and/or a monetary penalty of five to seven thousand dollars (\$5,000.00 - \$7,000.00).

Section 43 of the *Act* states as follows:

Drunkness

- 43** (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.
(2) A licensee or the licensee's employee must not permit
(a) a person to become intoxicated, or
(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.
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Issues

1. Whether the licensee contravened Section 43(2)(b) of *the Act* on or about June 24, 2004?
2. If so, is the recommended penalty appropriate in the circumstances?

Exhibits

The following exhibit was presented:

1. Book of Documents;

Evidence - The Liquor Control and Licensing Branch

A **liquor inspector** testified that he is the inspector responsible for the area in which this establishment is located. His responsibilities require that he make inspections of licensed establishments within his area, focusing on public safety issues of overcrowding, minors, over-service and intoxication. He is familiar with the Hildon Hotel as a result of making inspections of the establishment. On June 24, 2004, he and another liquor inspector were making inspections of establishments within the area and attended at the hotel at approximately 3:40 p.m. It was not very busy. There were approximately 12 patrons in the licensed area with two staff on duty, a server and a bartender. He noted that one of the patrons appeared to be nodding off so he remained in the hotel to make further observations. The patron was seated at a table in close proximity to the main bar where the bartender was working. The patron had a mug of beer, $\frac{3}{4}$ full, on the table in front of him. He appeared to be nodding off, passing in and out of consciousness. The inspector saw the server twice walk by the patron during the course of his observations. He identified himself to the server and advised her of his concerns that the patron had been over-served and was intoxicated. He advised her that the establishment was not permitted to serve patrons to that point or to allow them to remain in the establishment. She agreed that it shouldn't happen but said that unfortunately he would just go somewhere else and be served. The inspector spoke briefly with the patron. He observed him to be sweaty and unkempt, his speech slurred, his eyes glassy, he smelled of liquor, had difficulty raising the beer mug to his mouth

and it appeared that his motor skills were impaired. The inspector advised the server that the patron could not remain in the establishment whereupon she obtained a refund for his beer, gave it to him and requested that he leave. The patron left and once outside began shouting and swearing. The inspector issued a Contravention Notice (exhibit 1, tab 3) to the server and left the establishment.

The inspector testified that he was contacted by the lessee of the establishment in July who advised him that the patron had physical impairments. The lessee said that he would try and arrange for a meeting with the inspector and the patron in order that he could observe the patron's condition. The meeting was held in October or November during which the inspector spoke with the patron. The patron advised that he suffered from a head injury that impeded his mobility and caused him to drag one of his feet. He takes medication but was told by his doctor that it wouldn't interfere with liquor consumption. He said that a few beer "makes him pretty drunk". When asked how much he had to drink on June 24, 2004, he first replied that he had one beer but later said that he had three or four. He said that he falls asleep in licensed establishments and as a result has been barred from entering some establishments.

The inspector testified that during the meeting he observed marked differences in the appearance and behaviour of the patron from those observed on June 24, 2004. The patron now acted fairly normal and was no longer sweaty or unkempt. He was satisfied that on June 24th his conclusion that the patron was intoxicated was correct. In forming his opinion the inspector relied on his experience and training as a liquor inspector and previous experience and training during employment with the Human Resources Ministry. As a liquor inspector for the past two years he has received training in recognizing the signs of intoxication. In ten years of employment with the Human Resources Ministry he assessed a person's eligibility for income assistance, worked with persons with physical impairments and personality disorders and received training in dealing with persons with mental and physical disabilities.

The inspector testified that he is responsible for maintaining branch files for each licensed establishment within his jurisdiction. He referred to excerpts from the branch

publication, "A Guide for Liquor Licensees" (exhibit 1, tab 6) which had been provided to all licensees. The Guide outlined the licensee's responsibilities, in particular those related to "Over-service and intoxicated patrons". The inspector referred to several Contravention Notices previously issued to this establishment (exhibit 1, tabs 10 – 13, 15 –17, 19, 20, & 22). These resulted in Compliance Meetings being held with the lessee at branch offices on October 28, 2003, (exhibit 1, tab 18) and February 6, 2004 (exhibit 1, tab 14). Both Compliance Meetings dealt with several issues including those of over-service and intoxication. The inspector advised that he took the Contravention Notices and Compliance Meetings into consideration in recommending a five thousand dollar (\$5,000.00) monetary penalty (exhibit 1, tab 2). He believed that there had been enough meetings held in the past and that there was no point in canvassing the issues again with the licensee. He believed that the minimum monetary penalty was sufficient to bring about voluntary compliance and that a license suspension would be a greater detriment to the licensee.

Evidence - The Licensee

The server working at the hotel at the time of the inspection on June 24, 2004, testified that she has been employed in the hospitality industry working at bars and restaurants for 14 years. She knows the patron in question as a regular who comes in two to three times a week. He does at times drift off at which time she tells him to sit up. If he does it a second time he is requested to leave. His motor skills have been affected as a result of a motor vehicle accident. Thus he is unsteady on his feet, has difficulty lifting up a mug of beer and has difficulty getting up from a table. In speaking he will start out coherent but will then begin to slur his words. She recalls the inspector's visit on June 24th. It was a hot day and the establishment is not air-conditioned thus patrons could have been damp from the heat. The patron was definitely not drunk. He was asked to leave because that is what the inspector wanted. She probably shouldn't have agreed with the inspector that the patron was over-served and intoxicated but felt intimidated by the inspectors' presence.

The server testified that she had not served the patron but spoke with the bartender who had. The bartender did not believe the patron was intoxicated and served him only one beer. The establishment has a policy of zero tolerance for drunks, drug trafficking and fighting. The establishment has a staff policy manual and all staff is made aware of the rules when they are hired. Regular staff meetings are held. An incident log is not maintained. She is aware that intoxicated persons are not permitted to remain in the establishment. She watches for signs of intoxication and requests them to leave and if necessary seeks the assistance of the doorman or manager.

SUBMISSIONS

The lessee submitted that the patron was not intoxicated. He suffers from brain damage thus has problems with his motor skills, has drop foot and slurs his words. He sometimes falls asleep in the establishment and as a result is requested to leave. The recommended five thousand-dollar (\$5,000.00) monetary penalty is high but is less onerous than a four (4) day suspension.

Findings and Decision

Having considered all of the evidence I find that on June 24, 2004, the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in the establishment.

In reaching this decision, I accept the evidence of the liquor inspector. He has considerable experience and training in dealing with persons with mental and physical disabilities and in identifying symptoms of intoxication. He had opportunity to observe and communicate with the patron on two separate occasions and observed a marked contrast between the patron's behaviour and appearance on the two occasions. He was satisfied that the difference was due to the patron being intoxicated at the time he observed him on June 24, 2005.

I find that the evidence of the server was largely self-serving. While she testified that she often requested the patron to leave when he fell asleep or put his head down on the

table, she did not intervene on June 24, 2004, although she twice passed by his table during the time that the liquor inspector observed him to be nodding off. At the time she agreed with the inspector's characterization that the patron was over-served and intoxicated. It is hard to believe that someone with 14 years experience working in licensed establishments would be intimidated by the presence of liquor inspectors.

The licensee is entitled to a defence to the allegations of the contravention if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. I am satisfied that that has not occurred in this instance. While there was some evidence that the establishment had a staff policy manual and a training plan neither were placed into evidence. The lessee attended two Compliance Meetings at branch offices that dealt with several issues including those of over-service and intoxication. There was no evidence of what follow-up, if any, was taken by the licensee following the meetings. The problems continued as noted by the evidence received at this hearing. In conclusion I am not satisfied that the licensee was duly diligent.

Penalty

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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; and
 - order a licensee to transfer a licence.
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Imposing any penalty is discretionary. If I decide that the contravention(s) did occur and that enforcement action is appropriate, I may accept the penalty recommended in the Notice of Enforcement Action, impose a higher penalty, impose a lesser penalty or impose no penalty. 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 to the Act.

There is no record of prior contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding ("compliance history"). Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions.

The purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage 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 public safety and the well being of the community.

There were several Contravention Notices issued to the licensee. The branch did not pursue enforcement action and while the Contravention Notices do not represent proven contraventions, they do indicate that the branch has attempted to assist the licensee in bringing the operation of the establishment into voluntary compliance. Additionally the licensee attended two Compliance Meetings designed to bring the seriousness of the issues to his attention and to assist in preventing recurrences.

Having considered the evidence, I am satisfied that a penalty for this contravention is necessary to ensure future voluntary compliance.

For this contravention I find that the recommended minimum monetary penalty of five thousand dollars (\$5,000.00) is appropriate.

Order

Pursuant to Section 20 (2) of the Act, concerning Liquor Primary Licence No. 016141 I impose a monetary penalty on the licensee of \$5,000.00 (five thousand dollars) to be paid no later than Friday, May 20, 2005.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: April 6, 2005

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Office
Attention: Lee Murphy, Regional Manager,

Liquor Control and Licensing Branch, Surrey Office
Attention: Sonja Okada, Advocate
