



DECISION OF THE

GENERAL MANAGER

LIQUOR CONTROL AND LICENSING 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: Royal Drake Investments Ltd.
dba Drake Hotel
606 Powell Street
Vancouver, BC

Case Number: EH04-118

For the Licensee: Kenneth J. Wong, Agent

For the Branch: Shahid Noorani, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: February 24, 2005

Place of Hearing: Vancouver, BC

Date of Decision: April 13, 2005

INTRODUCTION

The licensee, Royal Drake Investments Ltd., doing business as Drake Hotel, operates a pub (“the pub”) at 606 Powell Street, Vancouver, BC. It holds Liquor Primary Licence (“LPL”) No. 025361 with hours of operation Monday to Saturday from 11:00 a.m. until 1:00 a.m. and on Sunday from 11:00 a.m. to Midnight.

The maximum licensed capacity is 220 patrons in Area 1 plus 30 patrons on the patio (Area 2). The licence has an endorsement for off-premises sales. As with all liquor primary licenses, it is subject to the terms and conditions contained in the publication ‘Guide for Liquor Licensees in British Columbia’ (“the Guide”).

The licensee provides adult entertainment, exotic dancers or strippers, in the pub and has been granted permission by the Liquor Control Licensing Branch (the branch) to have three small private rooms or booths (“VIP booths”) where patrons may view a private performance. Under the terms and conditions set out in the Guide, exotic dancers or strippers may not have physical contact with members of the audience.

ALLEGED CONTRAVENTION AND RECOMMENDED PENALTIES

By Notice of Enforcement Action (NOEA) dated October 28, 2004, the Liquor Control and Licensing Branch alleged that on the business day of Saturday, September 25, 2004, an exotic dancer or stripper was sitting on the lap of a patron in a VIP room, contrary to Section 50 of the *Liquor Control and Licensing Act*.

Schedule 4 of the *Liquor Control and Licensing Regulation*, provides a range of licence suspensions and monetary penalties for contraventions. For the contravention of Section 50, the penalty range is a four (4) to seven (7) day suspension or a five thousand (\$5,000.00) to seven thousand (\$7,000.00) dollar

monetary penalty for the first contravention, and ten (10) to fourteen (14) day suspension for a second contravention. The branch treated this occurrence as a second contravention and recommended a mid-range suspension of the liquor licence for twelve (12) days, to be served starting on a Saturday and continuing on successive business days until completed.

The branch also recommended a change to the terms and conditions of the LPL to restrict the performances by exotic dancers/strippers to the approved main stage area only.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act

50 Entertainment

- (1) If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.
- (2) Without limiting section 12, the general manager may, at the time of the issue of a licence or any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed or carried on in the establishment for which the licence is issued.

12 Licences

- (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
 - (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
 - (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).
 - (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
 - (e) approve, prohibit or restrict games and entertainment in an establishment,
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GUIDE FOR LIQUOR LICENSEES IN BRITISH COLUMBIA
Entertainment, page 16 – 17

Exotic dancers/strippers may not:

- touch, share food and beverages, or pass objects to members of the audience

ISSUES

1. Whether the licensee contravened Section 50 of the Act and the terms and conditions of its licence.
2. If so, whether the recommended 12 (twelve) day licence suspension penalty appropriate.

The licensee did not object to the proposed change to the Liquor Primary Licence.

EXHIBITS

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| Exhibit No. 1 | Book of Documents |
| Exhibit No. 2 | Handwritten, un-sworn, statement by exotic dancer/stripper |
| Exhibit No. 3 | Handwritten, un-sworn, statement by disk jockey |

WITNESSES

The licensee indicated at the commencement of the hearing that he was not taking issue with the statements made by the liquor inspector and the police officer in the Notice of Enforcement Action (NOEA). He specifically stated that he did not require the attendance of either witness for cross-examination. However, he presented written statements from two witnesses which contained some evidence at odds with the statements of the branch witnesses in the NOEA.

The branch called the liquor inspector and the licensee presented evidence and submissions through the secretary/general manager ("the manager") and written statements from two witnesses.

EVIDENCE AND SUBMISSIONS

The three VIP booths are approximately 3 feet by 6 feet, have one chair, one mirrored wall and a brass bar across the room designed to separate the exotic dancer/stripper from the patron who is seated. The walls are thin dividers and there are no ceilings. The music in the booths is the general house music.

Evidence of the Branch

A multi-agency inspection team entered the pub on a routine inspection at approximately 11:00 p.m. on Saturday, September 25, 2004. There was dancing occurring on the stage. The liquor inspector and police officer went to the VIP booths and pulled aside the curtained entrance to one of the booths. The liquor inspector testified that a nude female dancer was sitting on a male patron, moving from side to side on his groin area. The inspector testified that the only article of clothing the dancer was wearing was high heel shoes. When instructed to put on her clothes the dancer stood up and did so.

The liquor inspector spoke to the bartender who informed him that the general manager was not in the pub, so that left the bartender in charge. The bartender did not know if the disk jockey was monitoring the activity in the VIP booths. During the inspection, the general manager telephoned and spoke with the liquor inspector. The general manager told him that they were doing everything they could to stop the dancers having contact with the patrons; they had a video surveillance camera in the disk jockey booth to monitor the VIP booths.

The inspector testified that he did not notice, but did not look for, signs posted in or around the VIP booths relating to conduct of dancers and patrons.

The inspector issued a Contravention Notice (CN).

The liquor inspector reviewed the branch's file concerning contravention and compliance issues with this licensee, as reflected in documents at tabs 9 – 17 of Exhibit No. 1. Since 2002, there have been occasions when the branch has issued CNs for alleged contraventions of the entertainment terms and conditions. Recently, the branch issued CNs for alleged contraventions on January 16, 2004, January 21, 2004 and February 21, 2004. The branch proceeded to enforcement action for the January 16th incident only; that resulted in a decision by Adjudicator Beattie dated October 21, 2004, in which she determined that a contravention of Section 50 had occurred and she imposed a penalty of five (5) days.

Evidence of the Licensee

The handwritten statement from the dancer is dated September 25, 2004. She recalled that the police officer and liquor inspector attended at approximately 11:35 p.m., that she was in the VIP room, was topless, was about to remove her underwear, and was startled when they pulled the curtain back so that her first instinct was to sit down. This dancer is no longer working at the pub.

The handwritten statement from the disk jockey is dated September 25, 2004. He recalled that the multi-agency team attended at approximately 11:30 p.m. He states that two dancers were in VIP booths and that nothing was going on in the VIP rooms, that is, there was no touching. This disk jockey is no longer working at the pub.

The manager testified that he is very strict with the employees and that he fires people for failing to comply with the rules. Since he cannot be there all the time the pub is open, he has installed a surveillance monitor at the disk jockey booth.

He testified that in hiring the dancers, he is very careful to ensure they are 19 years old, that they provide picture identification and that they are not drug users. He has a one page contract but he did not bring a copy to the hearing. As part of the contract, the dancers agree to dance on the main stage and in the VIP booths. The contract states that they may not touch the patrons. Prospective dancers approach the management – they walk in off the street, wanting to make some money. The licensee does not ask for references and expects that most dancers would not be truthful in any event. He stated that some dancers only stay there for a week. The licensee has meetings for the dancers, once per week, but frequently they do not attend. The licensee does not pay the dancers; they rely on the patrons for payment. The licensee provides a change room, showers, security, soda pop, and a safe place for the dancers to make some money.

The manager testified that about one and half years ago he put signs on every wall in the VIP booths advising that physical contact between the dancers and patrons is not permitted. The dancers are required to stay behind the brass bar so that there is no contact with the patron. The surveillance camera is just a monitor, not a video tape.

In summary, the manager submitted that he has done everything according to the Guide. The liquor inspector approved the VIP booths. The booths had been in a corner of the room but the manager moved them to an area close to the bar so that he could supervise them. He acknowledged that closing down the VIP booths seems the only way to ensure that this type of prohibited contact does not occur.

The manager testified that he holds monthly staff meetings, but if problems arise he holds a meeting immediately.

Regarding penalty, the manager submitted that he would prefer a monetary penalty. He noted that he just completed the licence suspension for the last contravention and that it was extremely costly to his business.

Findings of Fact and Due Diligence

The licensee effectively accepted the branch's statements of facts although he submitted the witness statements. It is implicit in the dancer's statement that she was on the patron's side of the brass rail. Her statement is un-sworn and not capable of being tested through questioning.

To the extent that the licensee's witness statements contradict the inspector's testimony and the evidence contained in the NOEA, I accept the inspector's testimony.

I find, on a balance of probabilities, that the exotic dancer/stripper was engaged in prohibited conduct of being in physical contact with a patron, as alleged in the NOEA.

Due Diligence

The licensee submitted that he has done everything he can to ensure that this conduct does not occur but that he cannot control what occurs behind the curtains in the VIP booths. He stated that he tells the dancers that contact is not permitted, that they will be fired if they engage in prohibited acts, he has a monitor and he has signs posted.

I find the licensee has not demonstrated a defence of due diligence through policies, procedures, training, or the actions of its staff, for the reasons that follow. One test of whether a licensee has established a defence of due diligence is whether there is anything further the licensee could have done to guard against the commission of the contravention. In my view, the licensee could have screened prospective dancers, asked where they had danced before, and checked their references, to see whether there had been any problems with their previous engagements. The licensee could also have provided initiation/orientation sessions with the dancers to ensure they understood the expectations and could have followed up by requiring attendance at meetings. In my mind, there is also a question of payment for service. The dancers might be more inclined to follow the licensee's rules if the licensee was paying them some remuneration.

The licensee could have ensured that the other employees understood the expectations for the dancers. The evidence of this evening suggests that the bartender, who was left in charge of the pub, did not know whether the disk jockey was monitoring the VIP rooms. The licensee testified that he has regular staff meetings, but he did not provide any evidence of these meetings, or any evidence of policy, procedures or training manuals.

The licensee acknowledged that the only way to effectively address the problem is to shut down the VIP rooms because there is no way to control what goes on behind the curtains.

The licensee submitted that he could not afford another lengthy licence suspension.

PENALTY SUBMISSIONS AND DECISION

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
- 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 minimum set out in Schedule 4 of the *Regulation*.

Schedule 4 of the *Liquor Control and Licensing Regulation* provides for a graduated scale of penalties for contraventions of the *Act*. The graduated nature of the penalties is necessary for the consistent and vigorous enforcement of the provisions in the *Act* and *Regulation*. As noted above, for the contravention of Section 50, the penalty range is a four (4) to seven (7) day suspension or a five thousand (\$5,000.00) to seven thousand (\$7,000.00) dollar monetary penalty for the first contravention, and ten (10) to fourteen (14) day suspension for a second contravention.

The branch treated this as a second contravention due to the decision by Adjudicator Beattie dated October 21, 2004, in which she determined that a contravention of Section 50 had occurred on January 16, 2004, and for which she imposed a penalty of five (5) days. Since this hearing, the British Columbia

Supreme Court has issued a decision which bears on this issue: *Skybar Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2005 BCSC 235. The court determined that Lord Coke's Rule applies to proceedings before the branch. This means that the operative date for a first contravention is the date the waiver is signed or the date the decision is rendered.

The effect on this case is that the date of the first contravention is deemed to be October 21, 2004. The contravention that is the subject of this decision occurred on September 25, 2004. Since the previous contravention had not yet been determined, it follows from the reasoning in the *Skybar* case that this is to be considered as a first contravention.

The branch's primary goal in determining the appropriate penalty 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.

The licensee acknowledged that a change to the terms and conditions at this pub is warranted to close down the use of VIP rooms. However, I am also of the view that a licence suspension is warranted. I can appreciate the licensee's position that it is difficult to control what goes on behind the curtains and that these rooms were approved by the branch. However, I note that the branch only approved them because the licensee requested them and, regardless of the branch's approval, the licensee bears the legal obligation of ensuring that licence terms and conditions are met.

The branch has given the licensee numerous warnings about the concern of prohibited conduct by the exotic dancers/strippers but the licensee has not taken steps to more firmly address the problem, or shut down the VIP rooms. In my view, it is important at this juncture for the branch to send a strong message to

the licensee and its staff that the terms and conditions relating to entertainment must be strenuously enforced.

Given that there will be a change to the terms and conditions resulting from this contravention, I find that the appropriate penalty is the minimum licence suspension for a first contravention. Accordingly, I impose a liquor licence suspension of four (4) days and a change to the terms and conditions of the Liquor Primary Licence to restrict the performances by exotic dancers/strippers to the approved main stage area only.

ORDER

1. Pursuant to Section 20(2) of the *Act*, I order a change to the terms and conditions of the Liquor Primary Licence No. 025361 to provide that performances by exotic dancers/strippers are restricted to the approved main stage area only, effective Saturday, April 30, 2005.

 2. Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 025361, for a period of four (4) days to commence as of the close of business on Friday, April 29, 2005, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*).
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Since I do not know whether the establishment would normally be open five (5) days per week as of April 8, 2005, I do not know what the "business days" will be. To ensure that this Order is effective, I direct that Liquor Primary Licence No. 025361 be held by the branch or the Vancouver Police Department from the close of business on Friday, April 29, 2005, until the licensee has demonstrated to the branch's satisfaction that it has been closed for four (4) business days.

Original signed by

M. G. Taylor
Enforcement Hearing Adjudicator

Date: April 13, 2005

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Shahid Noorani, Branch Advocate
