



**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: Naramata Pub (2002) Ltd.
dba Camp Creek Station
985 Robinson Avenue
Naramata, BC V0H 1N0

Case: EH08-061

For the Licensee: Larry & Esther Knight

For the Branch: Tania Cogan

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: November 13, 2008

Place of Hearing: Penticton, BC

Date of Decision: December 2, 2008

**Ministry of Housing
and Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

Naramata Pub (2000) Inc. dba Camp Creek Station is located in Naramata, BC. The licensee holds Liquor Primary Licence No. 107762. The hours of sale are 10 a.m. to Midnight Monday thru Thursday, 11 a.m. to 1 a.m. Friday and Saturday, and 11 a.m. to midnight on Sunday. The patron capacity is 65 in area 1 and 20 on the patio. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication 'Guide for Liquor Licensees in British Columbia.'

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated August 1, 2008. The branch alleges that on April 20, 2008, the licensee contravened section 42(3) of the *Liquor Control and Licensing Regulation* when its employee consumed liquor while working in the licensed establishment. The proposed penalty is a six (6) day suspension of the liquor licence (item 27, Schedule 4 of the *Regulation*).

On October 22, 2008, the licensee served a one day suspension for the same contravention, section 42(3) of the *Liquor Control and Licensing Regulation*, occurring on September 6, 2008. In light of that, the branch is treating this April 20, 2008, allegation as a second contravention for the purposes of the penalty schedule.

Item 27 of Schedule 4 of *the Regulation* provides a range of penalties for a second contravention of this type of a licence suspension for 3 - 6 days.

The licensee disputes the alleged contravention.

RELEVANT REGULATORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Consumption of liquor in licensed establishments

42 (3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

- | | |
|----------------------|---|
| Exhibit No. 1 | Branch Book of Documents #1, tabs 1 – 20. |
| Exhibit No. 2 | Letter dated October 2, 2008, written on behalf of the licensee. |
| Exhibit No. 3 | Undated letter written on behalf of the licensee. |
| Exhibit No. 4 | Undated letter written on behalf of the licensee. |
| Exhibit No. 5 | Undated letter written on behalf of the licensee. |
| Exhibit No. 6 | Letter dated October 28, 2008, written on behalf of the licensee. |
| Exhibit No. 7 | Undated letter with several signatures written on behalf of the licensee. |

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Two RCM Police officers, A and B testified that on April 20, 2008, they were working the night shift in uniform performing general duties in the Penticton detachment area. They were dispatched to the Camp Creek Station pub (the pub) in Naramata to investigate a complaint that the pub was operating beyond its authorized liquor licence hours. They arrived at approximately 2:15 a.m., parked outside and made observations. The lights were on inside, persons remained inside and loud music was emanating from inside. Two males exited the pub; they were loud and boisterous and had obviously been consuming liquor. They were cautioned about attempting to drive a motor vehicle. A female came outside and upon noticing the presence of the officers shouted, "It's the cops," and ran to the door attempting to close it behind her. She was prevented from doing so and the officers entered the pub. There were approximately 12 persons inside and there were beer bottles and glasses on a table near the karaoke player. Constable A dealt with a party of three patrons. They were belligerent and appeared to be very intoxicated. One female patron in the group hastily consumed the contents in her glass. They made their way outside accompanied by the officer.

Corporal B dealt with the two persons, a male and a female who identified themselves as being employees at the pub. The officer testified that he has had considerable experience and training in dealing with intoxicated persons and impaired drivers. He is a certified breathalyser operator and supervisor. He is a certified operator and calibrator of approved roadside screening devices. He has attended a standardized field sobriety course with training to recognize and differentiate persons under the influence of alcohol and drugs. He has nine years experience as a police officer and has dealt with thousands of persons under the influence of liquor. He testified that the male (witness D) was co-operative and produced the liquor licence when requested to do so. He appeared to have consumed liquor, his eyes were bloodshot and watery and while not impaired he would have been issued a roadside suspension had he been found driving. The female employee was the same person who had attempted to close the door on the officers. She was uncooperative, argumentative and confrontational.

She had the odour of liquor on her breath, her eyes were bloodshot and watery, her speech slurred. The officer testified that based on his training and experience there was no doubt in his mind that she had consumed a significant quantity of liquor and was legally impaired. The officer completed a report of his investigation and forwarded it to the local liquor inspector (Exhibit 1, tab 8).

A branch liquor inspector testified that he is responsible for the geographical area in which the pub is located. He received an email from Corporal B outlining the incident occurring during the early morning hours of April 20th at the pub. He subsequently issued a contravention notice to the pub on May 7th (Exhibit 1, tab 3). He held a compliance meeting with the principals of the corporate licensee on May 21st during which he showed them a 20 minute video outlining the responsibilities of a licensee and discussed how to operate the pub in compliance with the legal requirements (Exhibit 1, tab 4).

The inspector reviewed the branch file for the establishment. In his testimony he referred to copies of documents from the branch file:

- Exhibit 1, tab 13; floor plan for the establishment.
- Exhibit 1, tab 12; the liquor primary licence in effect at the time of the alleged contravention.
- Exhibit 1, tab 19; a copy of the "Guide" in effect at the time of the alleged contravention. He referred to excerpts from the Guide dealing with: "liquor consumption" (p 14).
- Exhibit 1, tab 14; application for a liquor licence dated July 18, 2002, signed by the principals of the corporate licensee.
- Exhibit 1, tab 11; Inspection Interview Information sheet dated July 31, 2002, completed by the area liquor inspector indicating that he discussed the licensee's responsibilities with the two principals and provided copies of the *Act, Regulations* and the "Guide".

- Exhibit 1, tab 6; CN issued for failing to clear patrons and allowing liquor consumption beyond ½ hour after closing on August 31, 2007. Compliance meeting held September 5th, with daughter of the licensee principals. No enforcement action taken (Exhibit 1, tab 9).
- Exhibit 1, tab 5; CN issued for failing to clear patrons and allowing liquor consumption beyond ½ hour after closing and employee consuming liquor on duty on Sept 6, 2007. This proceeded to enforcement action with a four day licence suspension for allowing after-hours consumption and a one day suspension for employee consuming (Exhibit 1, tab 10).
- Exhibit 1, tabs 8, 16, 18 & 18; police occurrence report and emails received regarding the incident of April 20, 2008.

In determining whether to proceed to enforcement on the April 20th incident, he considered that this was the second contravention involving employees consuming liquor within a six month period. He completed a NOEA on August 1, 2008, outlining the alleged contravention and recommending a penalty be imposed (Exhibit 1, tab 2). He was satisfied that a significant penalty was necessary to ensure future voluntary compliance by this licensee. He testified that since he assumed responsibility for the area in February 2008 he has received at least four complaints on how the pub is being operated. The contraventions are serious and are adversely affecting the community.

EVIDENCE - THE LICENSEE

Licensee witness C testified that she has been employed at the pub as a bartender/server for approximately six and a half years and holds a S.I.R. certificate. She was not working the night of April 20th but was present as a patron when the police officers entered the pub. It was a busy night with karaoke entertainment. There was one employee working as bartender/server, and with the pub as busy as it was, she would not have had time to be consuming liquor while working. The employee was confrontational with the police officers, but it was not the result of having consumed

liquor. She was a new employee and may have panicked with the officers' presence. She was having a difficult time in having patrons leave the pub on time with their licensing hours.

The witness testified that she saw the officer speaking with the employee on duty. He was not close enough to smell her breath as they were standing at least five feet apart with the liquor service bar between them. It is not uncommon for staff on duty in the pub to smell of liquor. During the course of their duties they have liquor spilled/sprayed on them from the automatic spirit dispensers and the draught beer dispensers. The employee on duty also operates her own business before coming to work at the pub and her bloodshot eyes may have been due to tiredness. She is a good employee and has never been seen drinking on the job.

Licensee witness D testified that he has been employed at the pub since August 2007 and has approximately 30 years experience as a bartender/server. He was working the afternoon/evening of April 20th until approximately 8 p.m. Upon completing his shift he commenced his karaoke entertainment which he does as an independent contractor under contract with the owner of the pub. He was present in that capacity at the time the police officers arrived. The officers said that they were investigating a noise complaint. He told them that he had allowed the karaoke entertainment to run too late. He co-operated with the officers. The employee on duty was being confrontational with the officers, he told her to settle down. One patron was being belligerent with them, he counselled her to be on her way. He stated that he had consumed a couple of beers while he was performing his karaoke entertainment, but it was as an independent contractor and not as an employee on duty. He was unaware of the provisions of the "Guide" which states at page 14; "Entertainers may not consume liquor during a performance or while on stage in view of patrons." (Exhibit 1, tab 19) He stated that this provision is not well known and it is common practice for entertainers to consume liquor during performances.

He testified that he did not see the employee on shift consuming liquor while she was on duty that night or any night. He disagreed that she was intoxicated. He knows her as a patron, she can't handle liquor and if she drinks she is not very functional. He saw the officer speaking with the employee on duty. They were standing approximately three feet apart on either side of the liquor service bar. It is not uncommon for staff on duty in the pub to smell of liquor. During the course of their duties they have liquor spilled/sprayed on them from the automatic spirit dispensers and the draught beer dispensers.

Larry Knight testified that he has been a principal of the corporate licensee for the past six years. The pub currently has a staff of 14 employees. New employees receive on the job training from witness C. The pub has an opening and closing manual for employees and they use the "Serving It Right" manual. If employees are not doing their jobs properly they are spoken to. Following the previous suspension for an employee consuming liquor while on duty in September of last year he told all employees it was not allowed. He was not present the night of April 20th. The employee on duty was new, having started employment on March 5th. He does not believe that she was drinking while working. She may have smelled of liquor from having liquor splashed on her. He knows from the cash receipts that she had a busy night. She was working by herself and was probably tired. She was probably scared with the police officers presence.

He presented into evidence a letter he had written dated October 2, 2008, outlining the history of the pub and measures they are taking to deal with problems (Exhibit 2). He also presented several statements he had received from persons with experience in the liquor service industry outlining how it is possible to smell of liquor at the end of a shift while not having consumed any liquor (Exhibits 3 - 6). He also presented a letter signed by several persons stating that they have not seen the employee on duty on the night of April 20, 2008, consuming liquor that night or any other time (Exhibit 7).

SUBMISSIONS – LICENSEE

The licensee submitted that on April 20, 2008, at the time of the alleged contravention the employee was scared with the police officers presence. He does not believe that she had been drinking on duty. The officer was not close enough to smell liquor on her breath and the smell of liquor could have come from her clothing. The establishment is a neighbourhood pub, family oriented and well liked within the community despite there being some complaints. It is a family operated business and people come to the pub as a result of that. They support and donate to community organizations. Patrons living within the community will be devastated if the pub is closed for six days, as there is no other place to eat in the area. Fourteen employees will be out of work during the period of suspension.

REASONS AND DECISION

The branch has presented evidence that on April 20, 2008, police officers responding to a noise complaint attended at the pub at approximately 2:15 a.m. That was well after the expiration of licensing hours at 1 a.m., and well after the time that all liquor consumption was to have ceased and patrons were to have been cleared from the establishment, 1:30 a.m. [I pause to note that separate proceedings dealt with a contravention of section 44(1)(b) of the *Regulations*, failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. This resulted in a three day licence suspension being served.] During the course of their investigation one of the officers spoke with the employee on duty and the person performing the karaoke entertainment. From his observations he noted that both exhibited signs of having consumed liquor during the course of the evening. The bartender/server particularly exhibited signs not only of liquor consumption, but also of legal impairment. This officer is specifically trained in looking for signs of intoxication and impairment and has considerable experience in dealing with persons who are intoxicated or impaired through the consumption of beverage alcohol, i.e. liquor.

The licensee has presented evidence that the employee on duty was not observed consuming liquor that evening and it would have been out of character for her to do so. The officer could not have smelled liquor on her breath and the smell of liquor could have come from her clothing.

It came to light during the course of the hearing that the entertainer performing the karaoke entertainment had consumed "a couple of beers" during the course of his performance. That is a clear breach of the terms and conditions of the liquor licence as found in the "Guide" at page 14.

I prefer the evidence of police officer B. He is well trained in looking for signs of liquor consumption, intoxication and impairment and has considerable experience in dealing with persons who are intoxicated or impaired through the consumption of beverage alcohol, i.e. liquor. He conducted a thorough investigation, noting the signs of liquor consumption by the two persons associated to the operation of the pub.

On the whole of the evidence I find on a balance of probabilities that the licensee contravened section 42(3) of the *Liquor Control and Licensing Regulation* when its employee consumed liquor while working in the licensed establishment.

Due Diligence

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions 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.

Here the licensee has hired a bartender/server and although she was a new employee, allowed her to operate the licensed establishment on her own without supervision on a busy night. She was the only employee working at the time of the alleged contravention. The licensee was well aware of the branch's concern with employees consuming liquor while working and had served a suspension for a previous contravention occurring approximately six months previous. The licensee did not put sufficient measure in place to prevent the recurrence of the contravention. I find that the licensee has not been duly diligent.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* 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 minimums set out in Schedule 4 of the *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

The branch's primary goal in bringing enforcement action and imposing penalties 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.

There is a previous proven contravention of the same type for this licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegation as a second contravention. The range for second contraventions of this type is a licence suspension for 3 - 6 days.

The branch's primary goal in bringing enforcement action is to achieve voluntary compliance. This contravention occurred approximately six months following the licensee serving a suspension for a previous contravention of the same type. The licensee did not put sufficient measures in place to prevent the recurrence of the contravention. The operation of the establishment has caused concern within the community resulting in complaints to the police and the liquor inspector.

In the circumstances of this case, I am satisfied that the licensee has not successfully or sufficiently stressed upon its employees the need to fully and conscientiously carry out their duties and a penalty is necessary to ensure future compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. For the previous contravention of this type the minimum penalty of a one day suspension was imposed. In the circumstances, I find that a significant penalty is necessary to encourage future voluntary compliance. A six day suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 107762 for a period of six (6) days, to commence as of the close of business on Friday, January 9, 2009, 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*).

To ensure this Order is effective, I direct that the liquor licence be held by the branch or the RCMP Penticton Detachment from the close of business on Friday, January 9, 2009, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: December 2, 2008

cc: RCMP Penticton Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Dave Deimling, A/Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Tania Cogan, Branch Advocate