



**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:	Victoria Phoenix Bar & Grill Ltd. dba Phoenix Bar & Grill 3944 Quadra Street Victoria, BC V8X 1J6
Case:	EH11-072
For the Licensee:	Mike Turner
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	Written Submissions
Date of Decision	October 27, 2011

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Victoria Phoenix Bar & Grill Ltd, operates the Phoenix Bar & Grill located in Victoria, BC. Mike Turner (licensee principal) is a principal of the corporate licensee. The licensee holds Liquor Primary Licence No. 033607 for the operation of a liquor primary establishment with liquor sales from 11 a.m. to 1 a.m. Monday thru Saturday and to Midnight on Sunday. 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 allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated July 6, 2011. The branch alleges that on May 6, 2011, the licensee contravened section 43(2)(b) of the *Liquor Control & Licensing Act (the Act)* by permitting an intoxicated person to remain in the part of the licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a seven day suspension of the liquor licence (item 11 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*). Item 11 provides a range of penalties for a first contravention of a licence suspension for four to seven days and/or a monetary penalty of \$5000 - \$7000.

The licensee does not dispute that the contravention took place, just the penalty proposed. It was agreed that this hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act [RSBC 1996] chapter 267*****Drunkenness**

43 (2) A licensee or the licensee's employee must not permit

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

ISSUES

1. Did the contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

1. Branch's July 29, 2011 letter summarizing the pre-hearing conference.
2. Branch's disclosure package to the licensee dated August 17, 2011, tabs 1 - 8.
3. Licensee's submission dated August 25, 2011.

EVIDENCE & SUBMISSIONS

The branch's evidence and submissions are summarized as follows:

On May 6, 2011, at approximately 10:20 p.m. two liquor inspectors conducted a covert inspection, i.e. did not identify themselves as liquor inspectors, at the Phoenix Bar & Grill in Victoria. Taking seats inside the establishment they noted there to be two staff members working with approximately 20 patrons present.

Their attention was drawn to three patrons who appeared to be very intoxicated. One, a female exhibited signs of intoxication, fumbling, glassy eyed, slurred speech, loss of balance while sitting, falling while standing beside her bar stool, her clothes in disarray and having difficulty putting on and keeping her shoes on. The second, a male was

observed staggering and displaying a loss of balance while standing, slurred speech, exaggerated emotions, swaying and stumbling and exaggerated arm movements. The third, a male was observed staggering, swaying, loss of balance, slurred speech and difficulty speaking coherently.

The three patrons were part of a larger group seated at the liquor service bar, within plain sight and a short distance from the two staff members on duty. The staff members conversed with the patrons and continued liquor service to them. The inspectors remained in the establishment for approximately 40 minutes making their observations and departing at 11:00 p.m. One of the inspectors contacted the licensee principal on May 9, 2011, informing him of their observations and that a contravention notice (CN) would be forthcoming.

A CN was completed by the inspector and provided to the licensee. A NOEA was prepared with a recommendation for a seven day licence suspension, the maximum suspension for a first contravention. The recommended penalty was considered proportionate to the seriousness of the circumstances and as being necessary to impress upon the licensee, staff and the public that such behavior is not permitted.

The licensee's evidence and submissions are summarized as follows:

The establishment is a family owned and operated neighbourhood pub catering to people living in the community. Management and staff take their jobs seriously particularly when it comes to the safety of the customers. Staff and regular patrons are well known to each other. In three years there has never been a fight or major problem with a regular patron.

The three patrons identified by the inspectors are regular patrons and well known to staff. The female is a bit of a character, does not walk well and has difficulty getting up and sitting down due to a hip replacement. Her boyfriend, one of the males identified by the inspectors is known to be loud and boisterous. They were in the establishment for

less than an hour and only had a couple of drinks each. The third patron has a slight mental handicap and is never served more than three to four beer.

A seven day license suspension at the end of a slow period could threaten the business

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on May 6, 2011, the licensee contravened section 43(2)(b) of the *Liquor Control & Licensing Act (the Act)* by permitting an intoxicated person to remain in the part of the licensed establishment where liquor is sold, served or otherwise supplied.

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, there is little evidence upon which I can find that the licensee was duly diligent. There is no evidence of what training the employees received. There is no evidence of what policies and procedures were in place to guide staff in performing their duties. The employees on duty did not take any action to prevent the contravention from occurring or continuing.

In conclusion, 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 *Regulation*. 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 Notice of Enforcement Action.

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 no record of prior proven contraventions of the same type for this licensee for this licence within the year preceding this incident. I therefore find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

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. Here three obviously intoxicated persons were permitted to remain in the licensed area of the establishment. Despite their obviously intoxicated condition they continued to be served additional liquor. Staff members on duty should have been aware of their condition, discontinued liquor service and requested that the intoxicated patrons leave the premises. None of which was done.

Permitting intoxicated people to remain in a licensed establishment can have an adverse effect on the operation of the establishment and on the surrounding community. It is considered by the branch to be a public safety issue.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulations* provides a range of penalties for a first contravention of this type. The branch has proposed the maximum seven-day licence suspension for a first contravention of this type. In the circumstances here of three obviously intoxicated persons knowingly being permitted to remain within the establishment and to continue to be served liquor, I find that a seven day suspension is necessary to encourage future voluntary compliance. In the circumstances a seven-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. 033607 for a period of seven (7) days, to commence as of the close of business on Thursday, November 24, 2011, 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 Victoria Police Department from the close of business on Thursday, November 24, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager showing that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: October 27, 2011

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate