



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: 0985028 B.C. Ltd.
dba Sessions
c/o Brad Powell
PO Box 45029 Stn Rutland
Kelowna, BC V1P 1P3

Case: EH16-042

For the Licensee: Brad Powell

For the Branch: Hugh Trenchard

General Manager's Delegate: Daniel M. Graham

Date of Hearing: Written Submissions

Date of Decision: September 27, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The corporate licensee 0985028 B.C. Ltd. (the "Licensee") operates Sessions (the "Establishment") under Food Primary Licence #121022 (the "Licence"). The Establishment is located at Whiskey Jack Road, Big White, BC.

The Licence specifies hours of liquor sales from 9:00 a.m. to 1:00 a.m. Monday till Saturday and from 9:00 a.m. to midnight on Sunday. The Licence is, as are all liquor licences in the province, subject to the terms and conditions contained in the publication A Guide for Liquor Licensees in British Columbia (the "Guide").

Mr. Brad Powell, principal of the corporate Licensee, represented the Licensee for the purposes of this hearing. Throughout these reasons for decision, the principal and the corporate Licensee - individually or collectively - may be referred to as "the Licensee" as the context requires.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in a Notice of Enforcement Action dated May 2, 2016 (the "NOEA"). The Branch alleges that on Saturday, April 9, 2016 the Licensee contravened section 42(4) of the Liquor Control and Licensing Regulation (the "Regulation") by allowing liquor to be removed from the Establishment.

The proposed sanction is a \$3,000 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 29, schedule 4 of the Regulation. The range of penalties for a first contravention of this type is a 1 to 3 day licence suspension and/or a \$1,000 to \$3,000 monetary penalty.

On June 16, 2016 the Licensee advised the Branch that it opted to proceed by way of written submission. By agreeing to proceed with a hearing in writing, the Licensee admits that it contravened as alleged in the NOEA and chooses not to make out a due diligence defence to the contravention. The Licensee is disputing the proposed enforcement action of a \$3,000 monetary penalty.

For the purposes of this hearing, and in accordance with section 6.1 of the *Liquor Control and Licensing Act* (the "Act"), the general manager has delegated to me the powers, duties and functions provided to the general manager by section 20 of the Act and sections 65-69 of the Regulation.

RELEVANT STATUTORY PROVISIONS

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

Consumption of liquor in licensed establishments

42 (4) Subject to subsection (4.1), all liquor sold or served in a licensed establishment, other than liquor sold by charitable auction, must be consumed in the licensed establishment, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence;

(c) liquor that is brought for sale, or sold, by charitable auction.

(4.1) Liquor sold or served by a licensee in a licensed establishment may be taken to and consumed in an adjoining licensed establishment that is licensed to the same licensee.

*Liquor Control and Licensing Regulation, B.C. Reg. 244/2002**Schedule 4**Enforcement Actions**Liquor Service*

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
29	A breach of section 42(4) of this regulation by permitting liquor sold in the licensed establishment to be taken from the establishment	1-3	3-6	6-9	\$1,000- \$3,000

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1: The Branch's book of documents, tabs 1 to 10 inclusive.
- Exhibit 2: The Licensee's written submission of July 27, 2016.
- Exhibit 3: The Branch's written submission of August 2, 2016.

FACTS

The Licensee does not dispute the contravention and, therefore, accepts the facts as laid out in the NOEA (Exhibit 1, tab 1). The following is a summary of the facts from the NOEA.

The Establishment is located at a popular ski hill. On Saturday, April 9, 2016 a liquor inspector inspected the Establishment. A number of persons had come to the ski hill to watch a season ender rail jam that was taking place on a ski run adjacent to the Establishment's patio. The liquor inspector observed that numerous patrons were leaving the Establishment's licensed outdoor patio with their drinks in hopes of getting a better view of the event as the patio was extremely full. He saw patrons carrying various types of liquor, walking from the licensed outdoor patio to the unlicensed area to the north. He also observed a number of people in the unlicensed area drinking from pitchers of beer and many empty pitchers littering the hill. The liquor inspector noted that there was an insufficient barrier and no staff stopping patrons from leaving the outdoor patio.

At 5:30 p.m. the liquor inspector spoke to the manager of the Establishment and to the Licensee and advised them of the contravention. The Licensee stated that the event had gotten out of hand just prior to the liquor inspector's arrival. At that point the manager left to attempt to regain control of the situation. The manager returned and stated that he had walked around and told everyone to return to the patio and that he now had staff monitoring the patio so patrons would not leave with liquor.

At 6:25 p.m. the liquor inspector observed a male patron walk out of the patio carrying a can of beer. The patron made no effort to hide the can of beer, and a female employee of the Licensee made no attempt to stop the patron or to inspect the can, despite the fact that she was not distracted and should have seen the patron leaving. A few minutes later the liquor inspector saw the Licensee picking up a number of pitchers from the unlicensed area.

The liquor inspector left the Establishment at about 6:39 p.m.

SUBMISSIONS – BRANCH

The Branch submitted that the Licensee had admitted that the contravention occurred, and that the elements of the contravention had been established.

The Branch also submitted that while it may be a legitimate question as to whether the Licensee's staff had jurisdiction to order patrons to return to the patio from "off-site", it side-steps the issue that it is the Licensee's obligation to prevent patrons from leaving the red-lined areas with liquor in the first place.

The Branch deferred to the NOEA with respect to the recommended penalty.

SUBMISSIONS – LICENSEE

The Licensee admitted that the contravention occurred and acknowledged that some enforcement action is warranted. He stated that staffing levels had been informed by the size of the event from previous years, and that though he had called upon the entire staff (including extra help from family) the Establishment was understaffed and not ready for the extraordinary volume of persons who attended at the time of the contravention. The Licensee submitted that improvements to the event are implemented by the Establishment over time and will continue to be made. As an example, the Licensee stated that in previous years people had sat on the railings of a nearby condominium but that this year the Establishment used ropes and DO NOT ENTER tape to prevent the same from reoccurring. The Licensee stated that he had gone over with his staff what was included in the licensed area, and that flags and ropes had been used to mark this boundary.

The Licensee submitted that he and his staff had not simply ignored the patrons leaving the patio prior to the liquor inspector speaking to them. He stated that on many occasions he and staff had asked patrons to move back into the red-lined area and had been met by negative and "somewhat threatening" responses by some patrons. Security staff was also unsure of its jurisdiction "off-site." The Licensee submitted that the liquor inspector agreed that the best course of action was to "back down" from threatening situations, and that to try to regain control by shutting the event down could create a potentially hostile situation. The Licensee argued that it would be unfair to conclude that the Licensee and staff did not care about the contravention prior to the liquor inspector's attendance.

The Licensee argued that a contributing factor to the contravention is that there are many out of country visitors to the ski hill and there are no full-time RCMP on the hill to police and educate these visitors. He stated that on an average day open liquor is everywhere and is the norm on the hill, making the Licensee's event seem no different. The Licensee also submitted that regarding the incident with the male patron who took a can of beer from the patio without being challenged by the female staff member, she was possibly focused on maintaining the satisfaction of the numerous other customers, and that previous attempts to keep alcohol on the premises had been completely disregarded by other customers. The Licensee stated that it is the responsibility of security staff to remove "these types of people", and that they had been tied up with similar matters throughout the entire day.

The Licensee disagreed with the amount of the proposed monetary penalty being at the "maximum," calling it "harsh." He argued that "sending a message to the community" is not an appropriate consideration for determining the penalty, and that it would be unfair to penalize the Licensee for the actions of "the rest of the hill" rather than for the actions of the Licensee and staff. He also argued that as a seasonal business, the Establishment relies on income made in just four months compared to other establishments that operate year-round. Since four months is one third of a year and in the context of the multiple contributing factors, the Licensee submitted that an appropriate monetary penalty would be one-third of the proposed penalty, or \$1,000.

REASONS AND DECISION

Contravention

The Licensee admits that the contravention occurred.

Based on the evidence and the Licensee's admission, I find that on April 9, 2016 the Licensee contravened section 42(4) of the Regulation by allowing liquor to be unlawfully removed from the Establishment.

Due Diligence

The Licensee is entitled to a defence 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 are dealt with.

In requesting the hearing by written submission, the Licensee agreed that the contravention occurred and that the Licensee was not pursuing a due diligence defence. The Licensee has not presented evidence to demonstrate due diligence. I therefore find that the Licensee has not established due diligence and I turn to the question of penalty.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the Licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the Licensee
- Suspend all or any part of the Licence
- Cancel all or any part of the Licence
- Order the Licensee to transfer the Licence

In this case the facts are that numerous patrons removed liquor from the Establishment over a prolonged period of time. In these circumstances, I find that a penalty is warranted.

The factors that I considered in this case in determining the appropriate penalty include: consideration of whether there is a proven compliance history, 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 a proven contravention of the same type for the Licensee at the Establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty.

There is no evidence before me to indicate any previous enforcement history against the Licensee. There are previous compliance meetings indicated regarding noise complaints, unauthorized advertising, and unauthorized structural alterations. Considering the inconsistencies regarding dates and particulars in the compliance history as detailed in the NOEA (Exhibit 1, tab 1) and at Exhibit 1, tab 6, along with the subject matters of the compliance meetings, I view the Licensee's enforcement and compliance histories as mitigating factors.

The contravention itself is a serious one. The evidence indicates that numerous persons, over a prolonged period of time, were freely leaving the Establishment with alcoholic beverages. This raises a public safety concern in that once the patrons leave the premises the Licensee has no control over consumption.

Efforts made by the Licensee to maintain compliance were almost completely ineffectual. The Licensee argued that it was taken by surprise this year by a turnout that was larger than previous events. I note that the Licensee had had experience in previous years with patrons leaving the licensed area to sit on railings in the adjacent condominium building. The Licensee erected barriers to prevent that from occurring in 2016. Considering this history of previous problems, and the general environment of open alcohol use as described by the Licensee, it is reasonable to expect that the Licensee would have staff assigned on an ongoing basis to prevent patrons leaving the patio with alcohol. While the Licensee indicated that staff had made some attempts to prevent patrons from exiting the patio with liquor, the evidence indicates that the manager did not assign a continuous staff presence on the patio until after the contravention was identified to him by the liquor inspector.

The Licensee argued that it was better for staff to back down from threatening situations. However, the risk of encountering these situations would be reduced by maintaining control of the patrons' movements from the start rather than by trying to re-establish control after it had been lost.

The Licensee is correct in arguing that it should not be penalized for the actions of others. However, both specific and general deterrence are valid factors for consideration in assessing a penalty. In coming to a decision on the appropriate penalty in this case I have had the principals of deterrence in mind and have not attached any blame to the Licensee for the conduct of "the rest of the hill."

With respect to the Licensee's argument about the seasonality of its business, the size of a Licensee's operations and its financial situation are factors which may be considered in determination of a penalty in case-specific circumstances. However, these factors have to be weighed in context with all the relevant circumstances. It is inappropriate to simply apply the "one third year" formula proposed by the Licensee.

Finally, with respect to the Licensee's argument that the "maximum" monetary penalty is unduly harsh in the circumstances, I note that sections 20(2) and 20(2.1) of the Act authorize the general manager to take a number of enforcement actions concurrently, and to impose a monetary penalty greater than the amount provided for in the Regulation when satisfied that it is in the public interest to do so. In that respect, the amount proposed by the Branch is not the "maximum" contemplated by the legislative regime.

In consideration of all the relevant circumstances and for the foregoing reasons, I find the proposed \$3,000 monetary penalty to be reasonable and appropriate to achieve the Branch's objectives with respect to general and specific deterrence.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$3,000 to the general manager of the Branch on or before October 27, 2016.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the Establishment by a Branch inspector or a police officer.

Original signed by

Daniel M. Graham
General Manager's Delegate

Date: September 27, 2016

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Stephen Hitchcock, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate