



**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 RSBC c. 267

Licensee: Ohyama & Roche Inc.
dba La Bocca, La Brasserie &
The Amsterdam
4232 Sunrise Alley
Whistler, BC

Case Number: EH02-122

APPEARANCES

For the Licensee: Alistair Knox, General Manager

For the Branch: Peter Jones, Advocate

Enforcement Hearing Adjudicator: M. G. Taylor

Date of Hearing: March 27, 2003

Place of Hearing: Vancouver, B.C.

Date of Decision: April 16, 2003

Introduction

Ohyama & Roche Inc. operate three licensed establishments in Whistler, La Bocca, La Brasserie & The Amsterdam. The subject of this hearing is The Amsterdam ("Amsterdam") which operates under an "A" lounge liquor licence #90136. The licence permits hours of operation from 11:00 A.M. to 1:00 A.M. seven days a week. It is open every day of the year.

The maximum licenced capacity is 40 patrons inside and 25 patrons on the patio. The interior of the Amsterdam is a small room, fronted with large glass windows which, from the outside, afford a view of the entire lounge.

Alleged Contraventions and Recommended Enforcement Action

The branch's allegations are set out in Notice of Enforcement Actions (NOEA) dated December 30, 2002. The branch has alleged that on December 18, 2002, the licensee permitted liquor consumption ½ hour after the licensed hours contrary to Regulation s. 44(3) and failed to clear patrons within ½ hour of the licensed hours, contrary to Regulation s. 44(1)(a). The alleged contravention occurred in the early morning hours of December 18 and will be referred to in this decision as December 17/18, reflecting that it was the business day of December 17, 2002.

The branch has recommended licence suspensions of 4 days and 1 day, respectively, commencing on a Tuesday and continuing on successive business days.

The prescribed penalties for these contraventions are contained in the *Regulations*, Schedule 4, Items 26 and 24. For first contraventions, the Schedule provides, respectively, for a licence suspension of 4 to 7 days or a monetary penalty of \$5,000 to \$7,000, and a licence suspension of 1 to 3 days or a monetary penalty of \$1,000 to \$3,000.

Compliance History and Enforcement History

This is no record of prior contraventions, offences or enforcement actions of this type for this licensee or this establishment within the year preceding this incident (“compliance history”). Therefore, these contraventions, if proved, would be considered first contraventions for the purposes of the Penalty Schedule.

However, the branch has issued 10 Contravention Notices for alleged contraventions at The Amsterdam between January 19, 2001, and May 29, 2002. The alleged contraventions included exceeding the building occupancy load, exceeding the licensed capacity, liquor removed from the premises, contravening a term and condition of the licence and operating contrary to the public interest. The branch took enforcement action for one contravention of exceeding the liquor licence which occurred on November 9, 2001, and imposed a one day licence suspension. For the remainder of the contravention notices, the branch did not pursue enforcement action.

Issue

The licensee concedes the contravention of permitting to consume ½ hour after the licensed hours, but takes issue with the recommended penalty. The licensee disputes the ‘failing to clear’ contravention.

1. If the people in the establishment were employees, would that negate the “failing to clear” contravention (s. 44(1)(a))?
 2. Are the alleged contraventions separate, or is “failing to clear” included in the “permitting to consume” contravention (ss. 44(1)(a) and 44(3))?
 3. Are the branch’s recommended penalties appropriate?
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Applicable Statutory Provisions

B.C. Reg. 244/2002

Time

- 44** (1) Unless otherwise authorized by the general manager,
- (a) liquor primary licensees and liquor primary club licensees must ensure that patrons are cleared from the licensed establishment within 1/2 hour after the time stated on the licence for the hours of liquor service, and
 - (b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a).

(2) Unless otherwise authorized by the general manager, if a licensee has been issued a licence, other than a food primary licence, in respect of an establishment, the licensee must not allow patrons to enter the licensed establishment during the hours when liquor service is not allowed by the licence.

(3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

(4) A person must not consume liquor in a licensed establishment beyond the time allowed for consumption under subsection (3) in that licensed establishment.

(5) A reference to time in this regulation or in a licence is a reference to the local time observed at the place of the licensed establishment.

Exhibits

Exhibit No. 1 Book of Documents, tabs 1 to 7

Evidence:

The witnesses for the branch were the Regional Manager and Liquor Inspector.

The witness for the licensee was the General Manager.

At approximately 1:40 A.M. on December 17/18, 2002, the branch's Regional Manager, Deputy General Manager, and a Liquor Inspector were conducting routine inspections in Whistler. They noticed that there were people inside The Amsterdam who were consuming alcohol. They observed that the bar stools were turned upside down and that the lounge appeared to be closed and cleaned up for the night.

There is no dispute that people were drinking beer and that it was later than ½ hour past closing time. It is also not disputed that the bar manager was one of the people. The branch witnesses did not know who the remaining people were. The licensee did not dispute the branch's witness testimony of the overall occurrence.

Some of the evidence and the submissions were directed to whether the people inside drinking were employees. Because of my decision, set out below, I have found it unnecessary to answer that issue and, accordingly, I am not detailing the evidence or submissions.

The Manager of The Amsterdam testified that he has been the General Manager for 2 years. He submitted that the people in the lounge that night were the bar manager, a bartender who was waiting for the cashier to finish the cash and accompany her from the lounge, and two men from Whistler who have a music business. The two men had been providing "open mic" entertainment, as they had each Tuesday for the previous year. For the purposes of this decision, I will refer to them as the 'musicians'.

The licensee's evidence, in the form of witness statements and the General Manager's testimony, was that when the lounge closed, the musicians each got a bottle or glass of beer, as did the Bar Manager and the Bartender. The musicians took some of their equipment back to their premises and returned for the remainder. When the liquor branch officials saw them, they were finishing

their drinks. They left the lounge when the branch officials entered and began their enforcement investigation.

The bar manager was fired as a result of this incident. He wrote a contrite letter to the branch acknowledging that he knew drinking at that hour was illegal and apologizing for causing trouble for the branch personnel.

The General Manager discontinued the Tuesday night entertainment following this incident.

The General Manager testified that this is a small 40 seat lounge/pub that is at capacity most evenings throughout the week. Therefore, there is very little alteration in the gross receipts of any night. He provided statements of the gross receipts which supported his evidence of the consistency of the sales.

Submissions

The Branch Advocate and licensee's General Manager made submissions on the issue of "employee" which I will not detail here given that I have found it unnecessary to decide that issue.

The Branch Advocate noted that there are serious public policy concerns and community standards associated with after hours drinking. These include noise and unruly behaviour as well as the potential for more serious activities such as drunk driving and criminal activities. Although this incident may not have raised particular concerns, there is always a potential of public safety issues. Closing times affect the general community as well as considerations of police resources.

The licensee's General Manager submitted that the branch's recommended penalties of 5 days would constitute an excessively high financial penalty for what amounts to a contravention of 10 to 15 minutes beyond closing time. He also submitted that this conduct, while admittedly unlawful, was not a public menace. He differentiated between conduct of permitting patrons to remain versus employees who are cleaning up and closing. He did not suggest that would affect whether the contravention occurred, but could be considered as support for a lesser penalty.

The Manager was concerned about the amount of weight to be attached to unproven Contravention Notices served by the branch. He noted that he had not been provided with adequate information on how to have those Contravention Notices removed from the enforcement action record. (I understand that he had recently received some information relative to that issue.)

The Manager asked that I consider lesser penalties and indicated that he thought monetary penalties would be more appropriate than the lengthy suspensions.

Decision and Reasons

I have reviewed and considered all of the evidence, including witness statements and other evidence not specifically referred to in this decision. I have no reason to doubt the licensee's evidence, and I find as fact, that the people in the lounge were the manager, bartender and two musicians who provided music regularly on Tuesdays. I also find as fact that the musicians had packed up and removed most of their equipment. I have not found it necessary to decide whether they are "employees" as that word might be legally defined.

What became apparent to me at the conclusion of the hearing is that these are not separate contraventions. In the normal course of cleaning up and closing, it is expected that employees will remain past the ½ hour mark. However, when employees consume alcohol, at any time, they become 'patrons'. Therefore, both from a logical and legal view, regardless of the employment of these individuals, they were patrons and in order to be found consuming they had to be present. I find that being present – 'failing to clear' – is included in the more serious contravention of 'permitting to consume'. The contravention 'failing to clear' can also stand on its own so that if the branch had not alleged, or not proven, the contravention of 'permitting to consume' the licensee might have been found to have contravened s. 44(1)(a).

Accordingly, I find that the licensee contravened Regulation s. 44(3) but did not commit a separate contravention of Regulation s. 44(1)(a).

Penalty

Pursuant to s. 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 license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

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 have taken into consideration that these are the first proven contraventions. I have given weight to the compliance history only to the extent that it demonstrates the branch has had discussions with the licensee about the statutory requirements.

I find that there is justification for imposing a penalty. After hours drinking is a serious contravention, as indicated by the severity of the legislated penalty attaching to it. There are serious public safety and community standards issues associated with after hours drinking. The branch's main consideration in assessing penalties is the desirability for voluntary compliance. In this case, I find that it is necessary to impose a penalty to underscore for this licensee and others the importance of the closing hour legislation and to impress upon them the importance of voluntary compliance.

I have considered the penalties in section 20 and conclude that the only appropriate ones are license suspension or monetary penalty. And, as noted above, I am bound to apply Schedule 4 which provides for a 4 to 7 day licence suspension or \$5,000 to \$7,000 fine. I find that the licensee's submission for a monetary penalty is persuasive, although I do not accept all of his reasons. I accept that the people consuming were not general patrons from the evening and that the licensee had closed the lounge. The licensee was not attempting to extend the business hours by encouraging general patrons. I do not accept the suggestion, if it was intended, that this does not constitute a serious infraction. After hours drinking carries potential problems for the community regardless of whether it is by general patrons or employees. But, I am satisfied that the minimum monetary penalty of \$5,000 is a significant and appropriate penalty in these circumstances.

Order

Pursuant to section 20(2) of the *Act*, respecting the "A" liquor licence #90136, for the contravention on December 18, 2002 of permitting liquor consumption ½ hour after the licensed hours contrary to Regulation s. 44(3), I Order the licensee to pay a monetary penalty of \$5,000, to be paid no later than May 23, 2003.

Original signed by

M.G. Taylor

Date: April 16, 2003

Enforcement Hearing Adjudicator

cc: R.C.M. Police Whistler Detachment

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter K. Jones, Advocate
