



DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267

Licensee: 636608 B.C. Ltd.
dba Biltmore Motor Hotel
395 Kingsway
Vancouver, BC

Case: EH03-014

Appearances:

For the Licensee Dennis Coates, Q.C. Counsel

For the Branch Marc Matoul, Advocate

Enforcement Hearing Adjudicator Edward W. Owsianski

Date of Hearing June 16, 17 & 18, 2003

Place of Hearing Vancouver, B.C.

Date of Decision November 19, 2003

INTRODUCTION

The licensee, 636608 B.C. Ltd. operates the Biltmore Motor Hotel located at 395 Kingsway, Vancouver, BC. At the time of the alleged contravention the hotel contained several areas for which liquor licences were issued including the licensed pub area with "A" Pub Licence No. 9663 which is the subject of this hearing. The licence permitted the sale and consumption of liquor during the hours of sale from 12:00 Noon to 2:00 A.M. Monday through Saturday and from 11:00 A.M. to 12:00 Midnight on Sunday. The licence permitted 50 patrons in Area 1, 125 patrons in Area 2 and 125 patrons in Area 3.

Alleged Contraventions and Recommended Enforcement Action

The alleged contravention is outlined in the Notice of Enforcement Action (NOEA) dated March 7, 2003; operating contrary to the public interest during a period extending between January 1st to December 31st, 2002, contrary to Section 20(1)(c.1) of the Liquor Control and Licensing Act (the Act).

For this contravention the Liquor Control and Licensing Branch (the Branch, LCLB) is recommending a ten (10) day suspension penalty.

Pursuant to Schedule 4 of the Regulations to the Act (the Regulations) a first contravention of this type carries a suspension of ten to fifteen days, thus the recommended suspension represents the minimum for a first contravention.

ISSUES

1. Whether the provisions of Section 20(1)(c.1) of the Act are properly within provincial jurisdiction?
 2. Whether the current licensee was the "licensee" at the time of the contravention and as such subject to the provisions of Section 20(1)(c.1) of the Act?
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3. Whether the licensee contravened the Act by operating contrary to the public interest during the period extending between January to December, 2002?
4. If so, is the recommended penalty an appropriate penalty in the circumstances?

Section 20(1)(c.1) of the Act states as follows:

Action against a licensee

20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

(c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;

EXHIBITS

- A Book of Documents: Book 1 (Tabs 1 – 10)
 - B Book of Documents: Book 2 (Tabs 1 – 19)
 - C Ice Bar and Grill: Doormen Job Description
 - D Notices of Enforcement Action dated February 4, 2003 with attachments (these refer to the Waiver Notices found at exhibit A, tab 8)
 - E Liquor Licence 9663 issued to Lougheed Ventures Ltd. dated April 2, 2002
 - F Document titled 'Schedule 1' (this an attachment of the NOEA of March 7, 2003 found at exhibit A, tab 1)
 - G Letter of June 27, 2003, Coates to Owsianski
 - H Letter of June 23 with attachments, Matoul to Owsianski
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EVIDENCE - The Liquor Control and Licensing Branch

A constable (Cst. A) of the Vancouver Police Department (VPD) testified that as the VPD co-ordinator for liquor related matters and multi-agency inspections the problems occurring in and around the Biltmore Hotel were brought to her attention in early 2002. Problems had increased in number and seriousness since new owners had taken control of the establishment in November 2001 resulting in 57 calls for service from the VPD in the period November 19 to January 30, 2002. In two of the more serious incidents (see exhibit B, tab 13) police responded to incidents involving knives outside of the hotel at closing time during the late night/early morning hours January 18/19 and 19/20, 2002, which resulted in injuries to police officers and civilians. The incidents were the result of extremely intoxicated patrons leaving the hotel at closing time and fighting on the street outside of the hotel. Staff of the hotel took no action to prevent the problems or to disperse the patrons. This resulted in a meeting on February 5, 2002, between members of the VPD, LCLB and management of the hotel to make management aware of police concerns and to take steps to deal with the problem. Management of the hotel put forth their business plan for dealing with problems and the police made proposals which they felt were necessary (see exhibit B, tab 12). A further meeting was held on March 1, 2002, between hotel management, their lawyer and senior members of the VPD (see exhibit B, tab 4).

Constable A testified that the meetings did not result in a change to the situation. Problems were primarily related to overservice leading to patrons becoming highly intoxicated and the necessity for police attendance at the hotel continued at about the same frequency and severity, approximately 20 calls per month whereas other licensed establishments in the City averaged between 1 and 6.5 per month. (see exhibits B, tabs 1,2,3 and 6). The department had received a letter from a residential building located directly across the street from the hotel complaining that problems caused by intoxicated and unruly patrons of the hotel at closing time had greatly increased under the new ownership creating problems for tenants of the building (see exhibit B, tab 8).

The constable testified that as a result of the problems occurring at the hotel she requested that the City business licence be reviewed resulting in a meeting between city licensing officials and hotel management on December 10, 2002, and a subsequent recommendation of a three week suspension of the business licence (see exhibit B, tab 18). She attended a further meeting with City officials, hotel management and their security consultant on January 29, 2003, at which time she expressed her opinion that there had been no improvement, the same problems existed. She did not have statistics for the calls for service for 2003. She testified that some of the police proposals made during the February meeting (see exhibit B, tab 12) were implemented during 2003 but not before.

A Sergeant (Sgt. A) of the VPD testified that he is a field supervisor of the district in which the hotel is located. As a result of the number of calls to fights and problems occurring outside the hotel he regularly monitored the activities at the hotel at closing time and assigned police officers to make checks of the premises. In mid-February 2002 the premises were checked on three consecutive nights, on the first night a Thursday (early morning hours Friday) police officers reported a number of infractions occurring, marijuana being smoked in the women's washroom, feces on the wall in women's washroom, a minor in the establishment and intoxicated patrons being permitted to enter the establishment and being served liquor (see exhibit B, tab16). There were also infractions on the Friday night, however he could not recall the details. There were no infractions noted on the Saturday night. He spoke with the bar manager and one of the owners who requested a meeting with members of the department. A meeting was subsequently held on March 1, 2002, between hotel management, their lawyer and senior members of the VPD. Hotel management was concerned with the level of attention being received by the VPD. The hotel representatives were advised of the problems observed and that frequent checks would continue until the problems were dealt with. Management were requested to monitor patron's activities both inside and outside of the hotel and to contact police before problems got out of hand. A report was forwarded to the VPD liquor co-ordinator at her request in December 2002 (see exhibit B, tab 4). Following the meeting there was some

initial improvement, however some problems have continued with minors being permitted to enter the establishment. He has seen hotel staff outside the hotel at closing time on occasion. As long as there are marked police vehicles visible in the area there are no problems, if they are not present problems occur. This ties up police resources. The same problems do not occur outside of other establishments in the district.

The Sgt. agreed with counsel for the licensee that there are known criminals living in the area directly around the hotel and some drug abuse. There are however, a lot of normal working people living in the area. He agreed that there are homeless persons wandering in the area and the hotel parking lots and police consistently find persons consuming liquor from brown paper bags (see photos at exhibit B, tab 19).

A Sergeant (Sgt. B) of the VPD testified that he is a patrol sergeant in the district in which the Biltmore Hotel is located. During 2002 police officers under his supervision were often required to deal with problems occurring outside the hotel at closing time as a result of large groups of persons congregating beside the hotel on Prince Edward Street. These persons were boisterous, carrying on, fighting and disturbing the nearby residential neighbourhood.

Police were called to a large fight the late night/early morning of January 18/19, 2003, and to a more serious incident occurring late night/early morning of January 19/20, 2003 (see exhibit B, tab 13). As two plainclothes police officers were dealing with intoxicated patrons leaving the hotel a fight broke out amongst a nearby group resulting in one person being slashed across the face. The assailant was arrested by the officers who were then set upon by others in the crowd with the result that the handcuffed suspect fled the scene and was not further located. One officer was injured. The police officers called for assistance to quell the numerous fights which had broken out. Several police units attended from the neighbouring districts resulting in considerable police resources being tied up until after 3:00 A.M. In all it took 38 officers nearly 57 person-hours to resolve.

In the Sgt's. opinion the cause of the problems stemmed from overservice of patrons in the establishment leading to intoxicated persons leaving at closing time and no intervention by hotel staff to encourage persons to leave the area. As a result of problems occurring at the hotel a meeting took place between hotel management and police members a few weeks later. In his opinion little change resulted, police resources were still required at the hotel during the late night/early morning hours, particularly at closing time.

In November 2002 the Sgt. reported his concerns with the bar manager of the hotel (see exhibit B, tab 9). He had assigned officers under his supervision to pay closer attention to the hotel because of the continuing problems. This led to a less than harmonious relationship between the officers and the bar manager who was of the opinion that problems occurring outside the hotel were solely the responsibility of the police. Unless police officers were in attendance at closing time hotel staff took no action to deal with disturbance caused by unruly and intoxicated patrons spilling onto the street. A serious assault occurred in the hotel at 2:00 A.M. November 4, 2002, he was unable to provide any details of the incident, his knowledge came from a report submitted by one of the officers on his detail.

The Sgt. instituted a mini-project during mid-December 2002 involving undercover police officers attending and making observations inside the hotel. Incidents of suspected drug trafficking (see exhibit B, tab 2) and intoxicated patrons, patron leaving with liquor, patron with obvious fake ID and employee consuming liquor whilst on duty were observed (see exhibit B, tab 1).

The Sgt. testified that there had been recent improvements at the hotel under a new bar manager. The number of security staff had been increased and are more prominent in the hotel making it known that illegal activities are not permitted, tighter control is being exercised over persons in the line ups, persons are searched before entering and staff are a lot more cautious with the degree of liquor service to patrons. In his opinion this showed that problems can be resolved through management taking reasonable measures.

In response to a question from counsel for the licensee regarding the responsibilities outside the establishment the Sgt. testified that in his opinion it is a continuation of the patronage at the hotel. It begins with door staff supervising access by ensuring dress codes are met, identification is presented and intoxicated persons are not permitted entry. Inside, staff must ensure that patrons are not overserved with liquor. Responsibility does not end with the last call for liquor service. Because the business is located in a residential area hotel staff must ensure that persons disperse from the area.

A Constable (Cst. B) of the VPD testified that he is familiar with the Biltmore Hotel, it is located within his duty district and he makes regular checks of the establishment, parking lots and adjacent street particularly on Friday nights at closing time because that is when it is the busiest and most problems arise. Calls for service have been received to deal with fights, disturbances and stabbings originating either inside the hotel, the hotel parking lots or adjacent streets.

A major incident occurring in January 2002 during which a police officer was injured resulted in more attention being paid to the hotel. During that summer he spoke with the bar manager to advise him of police concerns. The bar manager at first said that he needed time to clean the place up but then became hostile with police presence and made accusations of harassment (see exhibit B, tab 9). Incidents continued to occur in and around the hotel (see exhibit B, tab 3). In late October additional officers were called to deal persons fighting with police officers on site. He was present on November 4, 2002, when a serious assault took place at 2:00 A.M. (see exhibit B, tab 9), the details of which he was now unable to recall.

In December the bar manager was gone and staff appeared more receptive to dealing with the problems. He recalls one conversation where he spoke with a staff member about the possibility of the hotel hiring three police officers on Friday nights (see exhibit B, tab 5). The change in management staff and the security

company hired by the hotel and the use of a security wand to check patrons for knives resulted in some improvement.

The Cst. agreed with counsel for the licensee that the area in which the hotel is located is a problem area for drug and other criminal activities. He identified the group of persons in the photo at Exhibit B, tab 19, page 3 as a group who purchase liquor at the nearby government liquor store then travels through the area consuming it.

The building manager of a residential apartment building located adjacent to the hotel approximately 50 to 60 metres distant testified that he was employed as the building manager from August 2002 to March 2003. His responsibilities included cleanliness inside and outside of the building and dealing with the tenants' complaints. Problems resulting from the hotel were worse on welfare paydays and Friday and Saturday nights. On welfare paydays the problems started during the day with people buying off-premises sales at the hotel then consuming it in the surrounding area. Problems continued during the day peaking between 1:00 A.M. and 3:00 A.M. related to noise, drunks and illicit drugs. The problems on Friday and Saturday nights occur between midnight and closing time with noise and intoxicated persons.

The doors of the building have been broken into by persons looking for places to sleep, tenant's vehicles have been broken into. The tenants in the corner of the building closest to the hotel suffer the most with persons going onto their patios to urinate. He testified that he went into the hotel approximately one month ago, there were no problems inside with lots of bouncers present but problems continue outside with drunks and noise. He agreed with counsel for the licensee that there are homeless people roaming the area and drug activities in the area.

EVIDENCE - The Licensee

A consultant testified that he has been a management consultant for almost 10 years assisting businesses operating in regulatory fields and performing a liaison role between business owners and police, regulatory agencies and municipal councils. Prior to this he was a police officer with the VPD for over 30 years retiring in a senior position.

He was contacted by the owners of the hotel in mid-January 2003 after they had received a letter from the Chief License Inspector for the City of Vancouver proposing a three week suspension of their business licence (see exhibit B, tab 18). The owners had taken over the operation of the hotel in November of 2001. They did not have a good understanding of the problems facing them, were inexperienced in the business and had lost many of the former employees, including the manager, who left with the previous owner. They had a relative of one of the business partners operate the pub and when that didn't work out had hired a bar manager with previous experience. They subsequently learned that this person did not have a good reputation in the industry, had a negative attitude towards the police and was not advising the owners of the problems at the hotel.

The consultant commenced communications with the VPD and City officials. He arranged a meeting of the owners with the City of Vancouver Deputy Chief Licence Inspector and members of the VPD on January 29, 2003, and discussed the possibility of having the 21 day suspension served concurrently with a suspension of the liquor licence. In early March he met with the Regional Manager of the LCLB to discuss the problems at the hotel and to negotiate the liquor licence suspension. The hotel contended that the proposed 10 day suspension for contravening Section 20(1)(c.1) of the Act be rolled into the 21 day suspension for individual contraventions as the evidence would be the same, Section 20(1)(c.1) represented a catch-all and thus would result in double jeopardy to the licensee. The Regional Manager gave no assurances but didn't argue that this was not a logical argument.

The consultant recommended that the owners engage the services of a lawyer experienced in liquor licensing matters to get the problems resolved and the business underway with different terms. The waivers for the individual contraventions adding up to a 21 day suspension were subsequently signed (see exhibit 1, tab 8).

To alleviate the problems of disturbances on Prince Edward Street he had the pub exit the patrons onto the main thoroughfare, Kingsway. A new Security firm having the experience and skills to deal with the problems at the hotel was recommended to the owners. He also recommended that because the owners lacked experience in the industry they lease out the pub to an experienced party. This was done and commenced April 1, 2003, following which his services were no longer necessary. He agreed with the branch advocate that it would be wise for new owners of liquor licensed establishments to research the problems facing the business and how to manage responsibly. He stated however that in his experience this does not always occur.

A representative of the corporate licensee (the licensee) testified that he and two partners purchased the hotel in November, 2001. One of the partners, having some previous experience became the managing partner and hired his son to run the licensed pub. In July 2002 it became known that the son was not doing the job, a bar manager having previous experience was hired. By the end of November 2002 the partnership was not working. The licensee and other partner bought out the managing partner and the licensee took over as the managing partner. He became more involved in the business, attending at the pub on Friday and Saturday nights. Prior to this time he had left the operation of the pub to the managing partner and was unaware of problems or of meetings with the VPD. He fired some of the security staff for not doing their job and he took charge of the liquor. On December 10, 2002, he, his partner and the bar manager met with City licensing officials regarding their concerns with the establishment. He became aware that the bar manager was not co-operating with the police. He started to closely observe the bar manager's behaviour and formed the opinion that they

would have to find someone else to manage the pub. A search for an experienced person commenced and his employment was terminated January 1, 2003. The licensee with the assistance of one of the employees took over the management of the pub.

In mid-January upon receiving a letter from the City of Vancouver Chief License Inspector proposing a 21 day suspension of the business, he hired a management consultant to assist in dealing with the situation. The consultant arranged a meeting with the City licensing officials and the VPD on January 29, 2003, and they learned of the problems occurring at the hotel during the past year. A 21 day suspension of the business license was recommended following which the establishment could get off to a fresh start.

The licensee testified that in early February 2003 he received five Notices of Enforcement Action (NOEAs) dated February 4, 2003, from the LCLB, he had not seen any contravention notices from the branch previously. This resulted in a meeting with the Regional Manager of the LCLB. He was then aware of an additional contravention, the subject of this hearing, and asked the Regional Manager about the additional 10 day suspension. He was advised by the Regional Manager to sign the waivers now, that most of the 10 day suspension deals with the same thing, get the 21 days done now. Thinking that they were talking about the same thing as the previous contraventions, police calls etc. the licensee on the advice of the consultant signed the waiver notices to serve the 21 day suspension to enable them to start over with the operation of the pub.

A new pub manager took over the operation of the pub on April 1, 2003, since that time the licensee has not received any notices or heard anything giving cause for concern.

The pub manager testified that he has been managing the pub at the hotel since April 1, 2003. A lease between himself and the owners of the hotel is currently being drawn up. He is present at the pub seven days a week. Police officers and

liquor inspectors have made many visits to the pub since his arrival without noting any problems. Friday nights are the busiest, 12 to 13 security staff are present and a staff meeting is held at the end of the night.

Since his arrival a Job Description for doormen and an Incident Log have been developed (see exhibit C). There has been no need to complete an incident report since his arrival. Patrons are exited onto Kingsway after 1:30 A.M. to prevent crowds mingling on Prince Edward. To prevent minors from entering the establishment patrons must produce two pieces of identification. They have intentionally reduced the number of persons coming into the establishment. To prevent overservice staff are reminded weekly of the need to interact with patrons looking for signs of intoxication. Persons with liquor on their breath are not permitted entry. To prevent persons from leaving and drinking in their vehicles then re-entering they have a policy against leaving and returning and have built a smoking room so patrons do not need to go outside to smoke.

The pub manager discussed the police proposals made at a meeting in February 2002 (see exhibit B, tab 12). Video cameras are installed for viewing inside the pub and exits as well as the upstairs parking lot. There are no signs advising patrons of the video cameras however there are signs at the exits requesting patrons respect others by entering and leaving quietly. A security log has been developed and security staff greet patrons at the front door and check ID. Photographs are not taken of troublemakers but there is good communication between staff. Problem patrons are ejected through different doors. Security staff do not simply throw out the combatants but intercede to stop the fight and try to determine the cause.

SUBMISSIONS

Liquor Control and Licensing Branch

The branch advocate submitted that a Contravention Notice was written on January 15, 2003, (see exhibit A, tab 2) alleging the contravention as a result of a series of incidents occurring during the period January to December, 2002. Over the course of that period of time the licensee was to take reasonable measures as a result of police presence at the establishment on January 19, May 26, July 28 and November 4, 2002. These incidents were not part of the contraventions forming the 21 day suspension to which the licensee agreed and served, the NOEAs of February 8, 2003, with attachments (see exhibit A, tab 8 and exhibit D) provide the details of those contraventions.

He submitted that the evidence has been received that relates to the specific dates in question through witnesses and exhibits and has established that the licensee failed to take reasonable measures to ensure that the operation of the establishment did not operate contrary to the public interest resulting in disturbances to its neighbours. He argued that this represents a type of market failure, spill over effects negatively impacting individuals and communities, which liquor regulation is designed to prevent.

The advocate submitted that the branch policy outlined in the Compliance and Enforcement Policy and Procedures Manual at Section 4.7.1(1)(b) provides a three fold test:

- “the licensee is operating the establishment in a manner that is contrary to the public interest”; He argued that this has been shown through the police evidence of the number, types and seriousness of calls to the establishment.
 - “the operation of the establishment has resulted in disturbance to persons in the vicinity of the establishment”; This has been established through evidence of the police and complaints by residents.
 - “the licensee has not taken reasonable measures to prevent the disturbance”; The police and the branch met with the licensee during February and March
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2002, discussed the problems occurring and made proposals to assist the licensee to curb the problems. The measures proposed were not implemented during the year 2002 resulting in continued disturbances and police service calls to deal with the problems leading to the conclusion the licensee failed to meet its obligations under the Act.

He submitted that the evidence showed that the major cause of the problems was overservice. The evidence of the pub manager operating the pub since April 1, 2003, that through communicating with patrons, monitoring their behaviour and taking a personal interest by staff the majority of the problems were solved. These measures are part of the basic responsibility of holding a liquor licence.

He submitted that public interest is defined in Black's Law dictionary (see exhibit A, tab 10); "Something in which the public, the community at large has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." The public interest applied to licensed establishments extends beyond their licensed area because it ties directly to the conduct of patrons and the manner in which they are served inside the premises. Factors that negatively impact the public interest or cause disturbances within the community are the responsibility of the licensee to prevent by promptly implementing reasonable measures concerning patron behaviour if such incidents are related to the service of liquor within the establishment. He submitted that this contravention falls within the jurisdiction of the provincial legislature to authorize the LCLB to supervise the conduct of liquor licensees.

He submitted that the licensee knew of the existence of the problems and, while problems are expected of patrons from time to time, it is incumbent upon the licensee to heed the warnings of the police and the branch and to take reasonable steps aimed at reducing the number of instances of disturbances and police calls. Here the licensee distanced itself from the effects of its patrons on the surrounding community. The licensee representative testified that he was not aware of the

extent of the problems and made no attempt to familiarize himself with his legal responsibilities.

The advocate submitted that the current licensee took over the operation of the hotel business in November 2001. Branch policy permitted it to use the liquor licence of the previous owner while the licence transfer was being processed, with that comes the legal responsibilities of a licensee (see exhibit H).

In speaking to the recommended penalty the branch advocate submitted that the recent improvement resulting from changes introduced by the new pub manager do not excuse the seriousness of the problems occurring in 2002. The public interest is paramount to that of the licensee. The recommended penalty of a 10 day suspension is the minimum for this contravention and is appropriate and necessary to prevent recurrences. The penalty for this contravention is not part of the 21 day suspension for the contraventions identified in the NOEAs of February 4, 2003, (see exhibit F), this a separate contravention and Section 66(3) of the Regulations to the Act prohibit concurrent suspensions for separate contraventions.

The Branch Advocate in his submission referred us to the following case:

Whistler Ski Corp. (Dusty's), decision of the Liquor Appeal Board, October 6, 2000

The Licensee

Counsel for the licensee submitted that the evidence received does not support a contravention and does not provide sufficient details of the incidents occurring on the specific dates cited by the branch, namely January 19, May 26, July 28 and November 4, 2002.

Cst. A had no direct knowledge of what occurred January 19, 2002. The incident led to a meeting with the hotel management February 5, 2002, the purpose of which was to give notice that incidents of violence, overservice and minors were

going to be addressed by the VPD and the LCLB. Counsel submitted that the issue of violence and minors inside the establishment were both part of the three week suspension by the City and the LCLB. He referred to the report made following the meeting (see exhibit B, tab 12 at page 3) wherein it states, "To date there are no police reports or LPCs that document contraventions inside the premises that can be forwarded for enforcement." He argued that the hearing requires details of the specifics of the offence. The only evidence of community disruption was to the residents of two or three suites in the building adjacent to the parking lot of the hotel. There is no evidence of disruptions to other residents in the area.

Counsel referred to the evidence of Sgt. B and the meeting of March 1, 2002, as described in his report of December 13, 2002 (see exhibit B, tab 3). The report does not provide evidence of LPCs or formal complaints but deals with issues of overservice and minors, both of which were part of the penalties for which waivers were signed and suspensions served.

Counsel referred to the evidence of Sgt. B, his evidence regarding the incident of January 19, 2002, is all that relates to any of the four specific dates. The problem of patrons carrying weapons has been solved by the hotel using a security wand and patting down patrons at the door. The adversarial attitude of the bar manager resulted in him being fired.

Cst. B commented on problem of patrons leaving the establishment, drinking and then returning and confirms the nature of the neighbourhood which the licensee has no controls over. He confirmed the use of the security wand. Counsel argued that the officer's notes do not refer to the four specific dates.

Counsel submitted that the building manager had only been on the job since August 2002 and thus did not have information concerning the specific dates in question. He was unable to provide dates of disturbances or the identity of the persons disrupted. Further his assertion that all problems at the building were the

result of patrons of the hotel was simply not realistic, it is more likely that the problems were due to homeless persons wandering the area looking for a place to stay. The residential building is located across the street from the hotel and parking lot thus there will always be some noise from persons coming and going. Counsel argued that the complaint letter of November 19, 2002, to the VPD from the property manager of the residential building was never provided to the licensee until a Freedom of Information request was made. It does not provide details or evidence to support the allegations. There have been no other complaints from residents in the area.

Counsel submitted that the witnesses presented on behalf of the licensee provided evidence that the licensee took steps to deal with the problems identified at the hotel. The three partners purchased the hotel and commenced operation in November 2001. One partner became the managing partner and hired his son to manage the hotel. When it became known that he was not performing well a new pub manager having previous experience in the industry was hired and remained in place until the concerns of the City became known in November 2002. The owners immediately advertised for a replacement and the bar manager was fired on January 1, 2003. Upon receiving the letter from the Chief License Inspector for the City of Vancouver a management consultant is hired leading to a meeting on January 29, 2003, that is proactive and productive in dealing with the issues of concern to the city and the branch. A new pub manager is hired on April 1, 2003, and immediately puts effective measures in place with the result that there are no further problems.

Counsel submitted that although there were incidents early in the year 2002, the real focus on the problems commenced in December with the meeting with the City licensing officials and continuing into February and March with the NOEAs for the contraventions.

Counsel submitted that the records show that the current licensee, 636608 B.C. Ltd. did not become the licensee until the liquor licence was issued in

its name on June 10, 2002 (see exhibit A, tab 4 and exhibit G). The previous licensee held the liquor license prior to the that date (see exhibit E). LPCs were issued to the previous licensee for alleged contraventions occurring on January 22, 2002, (see exhibit B, tab 15) and May 26, 2002 (see exhibit B, tab 14). Thus pursuant to the definition of licensee at Section 1 of the Act the current licensee was not subject to action by the general manager for contraventions preceding June 10, 2002.

Counsel submitted that the provisions of Section 20(1)(c.1) of the Act are not properly within the jurisdiction of the LCLB. The City of Vancouver has jurisdiction over noise in the area through noise bylaws and the police have jurisdiction over criminal matters such as such as drunkenness, theft and damage to property. The LCLB is attempting to enter into the areas of jurisdiction that are either that of federal or local government.

Counsel submitted that offences under the Act are strict liability offences and persons should not be punished twice for the same offence. That is what the branch is attempting to do here.

Counsel submitted that the licensee is entitled to the defence of due diligence. Here the licensee dealt with the problems associated to the son of the partner, the partner and the bar manager. Once it was brought to their attention they removed them from the their positions. Counsel argues, reasonable actions taken in a reasonable time.

Counsel submitted that the contravention in Section 20(1)(c.1) of the Act was brought into effect in January 2001 and has not been previously used by the branch. The Compliance and Enforcement Policy and Procedures Manual which provides guidance in the use of the Section did not publish the policy and procedures until March 2003 and only recently distributed them In June of this year. The policy at Section 4.7.1(1)(a) of the Manual outlines the three elements necessary to prove the contravention:

- “the licensee is operating the establishment in a manner that is contrary to the public interest”; counsel questioned the meaning of this element, are there specific offences contrary to the public interest? He submitted that this contravention is intended as a catch-all for circumstances where specific offences cannot be proven. In this case there is duplication with other offences for which there has been an admission and a penalty taken. Further, the policy at (2)(b) list incidents such as urinating, vomiting, littering and nuisance that are beyond the authority of the LCLB and beyond the responsibility of the establishment.
- “the operation of the establishment has resulted in disturbance to persons in the vicinity”; counsel submitted that the disturbances in the neighbourhood are not attributable to the hotel, the only evidence was that of the building manager who was only present for part of the time. There is a higher standard required by the branch to bring specific evidence of disturbances.
- “the licensee has not taken reasonable measures to prevent this disturbance”; counsel submitted that in this case the licensee has taken reasonable measures, the issue is not the action taken by the licensee but the timing.

Counsel submitted the Manual identifies procedures to be taken by the liquor inspector which include at 2(b) providing sufficient detail in the contravention to enable the licensee to understand the key evidence of the alleged contravention, he argues that this was not done (see exhibit A, tab 2).

Counsel for the licensee in his submission referred us to the following cases:

- Ed Bulley Ventures, decision of the Liquor Appeal Board, June 28, 2001;
 - Whistler Mountain Ski Corp., decision of the BC Court of Appeal, July 12, 2002;
 - The Side Door Cabaret, decision of the Liquor Appeal Board, May 2, 1990.
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REASONS AND DECISION

- 1. Jurisdiction** – Counsel has argued that the provisions of Section 20(1)(c.1) go beyond the jurisdiction of the province and into areas within federal and municipal jurisdiction. He cites examples from the branch policy of types of incidents and contraventions that may indicate that an establishment is operating contrary to the public interest, namely, noise, urinating, vomiting, littering, indecent or illegal behaviour. I do not agree. Legislation that regulates the sale and service of liquor is clearly within provincial jurisdiction. Included is the authority to prescribe and administer a provincial licensing and control scheme allowing for a provincial official, in this case the general manager of the LCLB, to issue licenses and to supervise the conduct and operation of those establishments licensed under the provincial scheme, and to take action against the holders of the licenses who contravene the prescribed provisions. The incidents provided in the examples by counsel do not form contraventions for which a licensee may be penalized, but are simply indicia that indicate that an establishment is operating contrary to the public interest and of which reasonable measures taken by the licensee may prevent.
 - 2. Licensee ‘qua’ licensee** - Counsel has argued that because the current licensee had not been issued the liquor license until June 10, 2002, the current licensee did not become the “licensee” as defined by the Act and thus not subject to action by the general manager for contraventions preceding that date. I agree. There is no authority in the *Liquor Control and Licensing Act* for the General Manager to take action under Section 20 against a person who is not a licensee. While the current licensee had explicit approval from the General Manager to use the previous licensee’s license for six weeks following the sale of the hotel in November 2002 and implicit approval to continue to use the license until June 10, 2002, the previous licensee remained the licensee until June 10, 2002, and is responsible for any contraventions that occurred prior to that date.
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3. Has the contravention, “Fail to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment.”, been proven?

The branch advocate submitted that the contravention occurred as a result of a series of incidents during the period of January to December, 2002. Over the course of that period of time the licensee was to take reasonable measures as a result of police presence at the establishment on January 19, May 26, July 28 and November 4, 2002. Counsel for the licensee submitted that the evidence received does not support a contravention and does not provide sufficient details of the incidents occurring on the specific dates cited by the branch, namely January 19, May 26, July 28 and November 4, 2002.

This contravention is based on a relatively new (January 2001) provision of the Act at Section 20 (c.1). It recognizes that the operation of a licensed establishment can have a negative impact on a community and that there is a responsibility on a licensee to prevent or minimize that impact.

This case represents the first alleged contravention of the Section that has been proceeded with by the branch. Branch policies and procedures regarding this contravention are outlined in the Compliance and Enforcement Policy and Procedures Manual (the Manual) at Section 4.7.1. These provisions, while shown as issued in March 2003, were not distributed until June 2003, just days prior to the this hearing commencing.

The contravention is identified in the Manual as containing 3 elements:

- *“the licensee is operating the establishment in a manner that is contrary to the public interest”*
 - *“the operation of the establishment has resulted in disturbance to persons in the vicinity of the establishment”*
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- *“the licensee has not taken reasonable measures to prevent the disturbance”*

There must be sufficient evidence to prove each of the elements.

- *“the licensee is operating the establishment in a manner that is contrary to the public interest”* The Manual (see Section 4.7.1 at 2(a)) states that this will be determined by considering the number and severity of incidents and/or contraventions occurring both inside and outside of the establishment.

Giving consideration to the evidence presented of the incidents occurring on the four dates on which the branch is making its case and bearing in mind that for the reasons noted above, I can only consider those incidents occurring after June 10, 2002. I find that there is some evidence of the following incidents or contraventions taking place inside or outside of the hotel; the evidence provided in exhibit B, tab 17 is that on **July 28, 2002**, at 12:10 A.M. a patron was drinking outside the front door of the hotel and issued with a violation ticket. Exhibit B, tab 3 at page 2 in the narrative related to **July 28, 2002**, at 12:10 A.M. states “patrons drinking outside front door”. There was no *viva voce* evidence presented to describe the incident with greater specificity. Sgt. B testified that through a report submitted by one of his constables he was aware of a serious assault occurring in the hotel at 2:00 A.M. **November 4, 2002**, (see exhibit B, tab 9) he was unable to provide any details of the incident. Cst. B provided evidence that he was present on **November 4, 2002**, when a serious assault took place at 2:00 A.M. the details of which he was now unable to recall. No further evidence was provided concerning this incident.

Looking first at the incident of July 28, 2002, it is unclear whether there were one or more persons found drinking outside the front door of the establishment. It is unknown how it was established that they were patrons of the hotel and not part of the peripatetic homeless in the area. The evidence of the November 4, 2002, incident is minimal. We are told that a serious assault took place. There are no details of the assault, why it was considered serious, the nature of the combatants or whether any action was taken by the hotel staff.

Having considered the evidence submitted I am not satisfied that it is sufficient to prove that the licensee is operating the establishment in a manner that is contrary to the public interest. The evidence lacks detail. Further, the purpose of this contravention is not to deal with what may be seen as isolated or occasional incidents.

Given that the branch has failed to prove this element there is no purpose in proceeding to consider the remaining two elements.

In the result I find that the licensee has not contravened Section 20(1)(c.1) of the Act.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: November 19, 2003

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Wendy Jones, Regional Manager

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