



**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

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| Licensee: | 629649 B.C. Ltd. dba P.A. Squash & Fitness 3123 - 3 Avenue Port Alberni, BC |
| Case: | EH04-155 |
| For the Licensee: | Randy Brown |
| For the Branch: | Sonja Okada, Advocate |
| Enforcement Hearing Adjudicator: | Edward W. Owsianski |
| Date of Hearing: | March 3, 2005 |
| Place of Hearing: | Port Alberni, BC |
| Date of Decision: | May 25, 2005 |

Introduction

629649 B.C. Ltd. (dba P.A. Squash & Fitness) holds Liquor Primary Licence No. 034988. The hours of sale are Noon to 2:00 a.m. seven days a week. The patron capacity is 25. The establishment is located in Port Alberni, BC and is part of a squash & fitness centre.

Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated November 23, 2004. The branch alleges that

1. On September 4, 2004, the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The recommended enforcement action is a seven (7) day suspension of the liquor licence.

Schedule 4 of the *Liquor Control and Licensing Regulation* provides a range of penalties for a first contravention of this type, a licence suspension for four (4) to seven (7) days and/or a monetary penalty of five thousand (\$5000) to seven thousand (\$7,000) dollars.

2. On September 4, 2004, the licensee contravened Section 42 (3) of the *Liquor Control and Licensing Regulation* by licensee or employee consuming liquor while working in the licensed establishment. The recommended enforcement action is a three (3) day suspension of the liquor licence.

Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type, a licence suspension for one (1) – three (3) days and/or a monetary penalty of one thousand (\$1000) to three thousand (\$3000) dollars.

The relevant sections of the *Liquor Control and Licensing Act (the Act)* are as follows:

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

The relevant sections of *the Regulation to the Act (the Regulation)* are as follows:

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

Issues

1. Whether the licensee contravened Section 43(2) of *the Act* and/or Section 42(3) of the *Regulation* on or about September 4, 2004?
2. If so, are the recommended penalties appropriate in the circumstances?

Exhibits

The following exhibits were presented:

1. Book of Documents

Evidence - The Liquor Control and Licensing Branch

A **liquor inspector** testified that he is the inspector responsible for the area in which this establishment is located. On September 4, 2004, during the late night/early morning hours he was in Port Alberni making inspections of licensed establishments. It was Salmon Festival Week and he anticipated that licensed establishments would be busy, particularly those in close proximity to the festival activities. Although the establishment is not located near the festival activities he decided to make an inspection of P.A. Squash and Fitness arriving at approximately 1:26 a.m. There were six patrons inside and two persons behind the bar, a male and a female. The female he knew to be employed there as a bartender and occasional manager. The male identified himself and said that he was working that night as the bartender. [This person will be later identified by witnesses for the licensee as "the doorman" on duty at the time of the inspection.] When the inspector asked who else was working the bartender identified two males who he said were working as doormen. The inspector turned his attention to the female as she appeared to be intoxicated. In speaking with her he noticed that her eyes were red-rimmed, her speech slurred and disjointed. Her breath smelled slightly of liquor. She had difficulty standing in one spot and was continually moving her feet to maintain balance. He asked her how much that she had to drink she said, that she had three drinks that she had been with several girlfriends at

a local hotel. When asked if she was intoxicated, she did not reply. He formed the opinion that she was intoxicated and asked the bartender if she had been drinking in the establishment. The bartender replied that yes, she had been served one drink at 9:00 p.m. by the manager and she then left for a stag being held at another establishment. She returned at approximately 1:00 a.m. to assist him because he was unfamiliar with the cash system. The inspector asked the bartender if she appeared to him to be intoxicated. He replied, "Yes". The inspector asked him why she was still there. He replied, "It's difficult to tell your boss what to do, I'm in an awkward position." The inspector told the bartender that as the woman was intoxicated she could not be permitted to remain in the establishment. The bartender asked the two people identified as doormen to assist her to leave. The inspector noted that as the woman proceeded to leave she had difficulty walking and stumbled on a chair. She was helped to her feet by one of the doormen who then assisted her to leave via the rear exit. Shortly after the inspector heard a commotion and saw that the woman had returned through the front entrance.

The inspector testified that at approximately 1:35 a.m. he was seated at the bar, making notes of the aforementioned incident, when he observed one of the persons identified as a doorman drinking from a bottle of beer. He asked the person if he had purchased and paid for the beer, the individual responded that he had had only one beer and that he paid for it. The bartender confirmed that the person had paid for the beer. The inspector asked the person when he finished working, he replied, "Two a.m." A contravention notice for the two contraventions (Exhibit 1. tab 3) was mailed to the licensee the following week.

The inspector testified that he is responsible for keeping the branch files for the establishment and that the current licensee had been operating the establishment with approval from the branch since February 2002 (Transfer of Liquor Licence documents at Exhibit 1. tab 9). The inspector completed an interview with the licensee and the manager of the establishment on February 20, 2002, (Exhibit 1. tab 10) during which they were acquainted with the *Act* and *Regulation* and given a copy of the branch

publication, "A Guide for Liquor Licensees in British Columbia: Terms and Conditions of a Liquor Licence" (The Guide).

The inspector referred to a number of Contravention Notices (CN) issued by the branch and Licensed Premises Checks (LPC) issued by the R.C.M. Police Port Alberni Detachment to the licensee as a result of inspections conducted at the establishment:

- May 4, 2002 – LPC followed by a CN for overcrowding (Exhibit 1. tab 11)
- January 17, 2003 – CN issued as a result of the bartender/manager being unable to produce a "Serving it Right": Responsible Beverage Service certificate (Exhibit 1. tab 12)
- May 10, 2003 – LPC issued for permitting intoxicated person to remain in the establishment and for overcrowding (Exhibit 1. tab 13)
- January 16, 2004 – LPC followed by CN issued for overcrowding (Exhibit 1. tab 14)
- January 23, 2004 - LPC followed by CN issued for overcrowding (Exhibit 1. tab 15)
- January 27, 2004 – LPC followed by CN issued for supplying liquor to a minor. This resulted in a five day suspension of the liquor licence (Exhibit 1. tab 16).
- March 24, 2004 – LPC followed by CN for overcrowding. This resulted in a one day suspension of the liquor licence (Exhibit 1. tab 17).
- June 23, 2004 – CN issued as a result of an employee (female bartender) consuming liquor (Exhibit 1. tab 18).

The CNs and LPCs lead to three Compliance Meetings convened by the inspector with the licensee or manager. The first was held on February 6, 2004, and dealt with a number of issues including intoxication (Exhibit 1. tab 19). The second meeting was held on April 2, 2004, and dealt with a number of issues including the consumption of liquor by employees whilst on duty (Exhibit 1. tab 20). A third Compliance Meeting was held on June 23, 2004, and again dealt with the consumption of liquor by employees whilst on duty (Exhibit 1. tab 21).

The inspector testified that in reaching his decision to recommend that enforcement action be taken he took into account the number and type of Contravention Notices issued, the proven contraventions which resulted in recent liquor licence suspensions and the fact that there had been three Compliance Meetings held with this licensee or his manager. He was satisfied that the branch had done everything possible to bring about compliance, but was not successful. The recommended penalty of a seven day licence suspension was the maximum for a first contravention of permitting an intoxicated person to remain in a licensed establishment, took into account the establishment's history and the fact that the intoxicated person was an occasional manager of the establishment. The recommended monetary penalty of a three day suspension was the maximum for a first contravention for an employee consuming liquor and took into account the establishment's history. He testified that the history for this establishment between the period dealt with by this hearing, February 2002 – September 2004, is the worst for any establishment within his area of responsibility.

Evidence - The Licensee

Witness A testified on a speakerphone, as she no longer resides in Port Alberni. She testified that at the time of the alleged contraventions she had been employed at the establishment for approximately two months as a bartender and was hoping to be promoted to manager. She had met several times with the liquor inspector to become better acquainted with the requirements of the *Act* and *Regulations* and to discuss how to overcome the poor reputation of the establishment and the possibility of increasing the seating capacity. She was not scheduled to work on September 4, 2004, however sometime before Noon she was contacted by the manager and requested to work from 9:00 p.m. to closing time, as the scheduled bartender was not available.

She arrived at approximately 8:30 p.m. The manager left the bar at 9:00 p.m. and went to his apartment that is located in the same premises. She took inventory of the stock at the beginning of her shift whilst having dinner which she had ordered in. The manager came in briefly at 11:30 p.m. to say that he was going out and left a number

where he could be reached. The manager told her that the liquor inspector was in town checking the bars so be sure that everything was above board and to consume only soft drinks.

A doorman commenced work at midnight. [The doorman is the same person identified as "the bartender" on duty at the time of the inspection in the evidence of the liquor inspector.] Business was slow at the start but picked up sometime between 12:30 a.m. and 1:00 a.m. Sometime thereafter she fainted behind the bar and cut her foot on glass from a broken beer bottle. The flowergirl [a woman who goes from bar to bar selling flowers to patrons] was in the establishment at the time and advised the doorman that she needed assistance. The witness testified that she was upset and disoriented and vaguely recalls the liquor inspector arriving but has no recollection talking to him, certainly not telling him that she had earlier been out with girlfriends consuming liquor at another establishment. She recalls the doorman telling her that she couldn't work in her condition and him asking someone to assist her to leave. She recalls falling down and going back into the bar two to three times. She then remained outside, sitting on the curb with one of the patrons who had been inside earlier. Sometime after the bar closed, between 2-2:30 a.m. the bartender came out and told her to go to the hospital. The patron and one of her girlfriends accompanied her to the hospital. At the hospital she had her foot bandaged and was given gravol to settle her stomach as she had been throwing up. She was kept for observation until being released at approximately 5:00 a.m. The nurse told her that she might have been given a rape drug in the softdrink that she was drinking while working, which would account for her symptoms. She went to the R.C.M. Police office the following day to make a complaint, but was told that the matter could not be pursued as there were no toxicology samples taken whilst she was at the hospital. The witness testified that she has subsequently heard that the person who assisted her to the hospital was suspected of illegally administering rape drugs.

The witness testified that she knows the two persons identified by the inspector as the doormen who assisted the bartender on that night. Neither has ever been employed at

the establishment. The person who assisted her to leave is a regular patron and the other is friend of hers who was at the establishment hanging out with her while she was working.

She testified that she was aware that there had been contravention notices issued shortly before the incident of September 4, 2004. Staff was told "pull up their socks". A logbook is maintained and kept at the cash register with a copy of the Liquor Control Branch manual. The establishment maintains an incident log, however she is unaware whether the incident of September 4, 2004, was entered.

Witness B testified that he is the manager of the squash and fitness complex of which the licensed establishment is part. The licensed establishment normally opens at 4:00 p.m. Only members and guests of the squash and fitness complex are allowed into the licensed establishment prior to 10:00 p.m., following which it is open for all persons. On slow nights a bartender is the only person on duty. When busier nights are anticipated a doorman is scheduled to commence sometime between 10:00 p.m. and Midnight. The overcrowding incidents have occurred because the establishment was originally licensed for only members and guests of the squash and fitness centre with a licensed capacity of 25 patrons while it has a building occupancy capacity of 125 persons. Following the introduction of the new liquor licensing rules an application was made to increase the capacity to that of the building occupancy. In the meantime they try to maintain the number of patrons at 25 with a doorman employed on some nights. The presence of the minor in the establishment was treated as a serious matter that should not have occurred. The bartender on duty was fired and the licensee agreed to sign a waiver accepting the five day suspension. The June 2004 CN resulted in the law being laid down to staff. A policy manual was put together sometime during July and August and an incident log is maintained. It was not completed for the September 4, 2004, incident as it is the job of the bartender and she was incapacitated.

The witness testified that on September 3rd/4, 2004, the bartender scheduled was unable to work, consequently he, the manager, worked the early shift to 9:00 p.m. and

witness A worked from 9:00 p.m. to closing. The person described by the inspector as the bartender works as a doorman and was scheduled to commence work at Midnight. The manager testified that he resides on site and was in his apartment until sometime between 11:30 p.m. and Midnight when he left for the night. Just prior to leaving he spoke with witness A and told her that he had been phoned and told by the flower girl that the liquor inspector was in town so be certain that everything was being properly done. At that time the bar was quiet with approximately six patrons present. Witness A, the bartender, seemed fine and he left her a phone number where he could be reached. He was comfortable leaving her in charge as he expected that it would not be a busy night as the Salmon Festival was occurring on the other side of town. Also, he felt that she was a capable employee, professional in carrying out her responsibilities and got along well with the liquor inspector.

He didn't hear about the problems occurring during the inspector's visit until speaking with the doorman the afternoon of the following day. He tried to contact both witness A and the liquor inspector, however was unable to do so. He described the incident as unbelievable. Witness A does not drink on the job and it is just not possible for a person to become intoxicated in the short period of time between his last contact with her and the time of the inspector's visit. The only reasonable explanation was that she was given a date-rape drug that is known to act quickly and produce symptoms similar to intoxication. Subsequent to the incident he suspended witness A until the matter was straightened out and he fired the doorman. Although the doorman stepped in for witness A when necessary he created a problem by saying that the two patrons were employed as doormen when they are not. The manager testified that he does not know either of the two persons who were identified as doorman. They may be regulars of the establishment at night when he does not work. They are certainly not employees. The manager testified that he had tried on several occasions to contact the doorman and have him appear at the hearing as a witness, however, was unsuccessful.

SUBMISSIONS

The manager submitted that in the past when the branch proceeded with enforcement action the establishment admitted the proposed penalties. In the present circumstances they do not agree that they should be facing enforcement action. What occurred was due to an unfortunate set of circumstances. The doorman stepped in and did his best. He was hired as a doorman and forced into the situation when his boss appeared to have been drinking. It is unknown why he said that the two patrons were doormen, perhaps he thought that having a doorman on duty was required by the liquor inspector. Effects of the date-rape drug may have caused witness A's comments to the inspector that she had been out drinking with friends.

Findings and Decision

Having considered all of the evidence I find that:

- on September 4, 2004, the licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied;
- on September 4, 2004, the licensee contravened Section 42 (3) of the *Liquor Control and Licensing Regulation* by licensee or employee consuming liquor while working in the licensed establishment.

In reaching this decision I accept the evidence of the liquor inspector. The evidence of the two witnesses presented on behalf of the licensee is inconsistent with the observations of the liquor inspector and the information provided to him by the bartender and the female employee (witness A) at the time of his inspection and is not credible. I find that at the time of the inspection, the person who identified himself to the inspector as the bartender was in charge of and operating the establishment and that witness A was in a state of intoxication due to the consumption of liquor. Further, I find that at the time of the inspection, the persons identified as doormen to the inspector by the bartender were acting as employees of the establishment.

Due Diligence

The licensee is entitled to a defence to the allegations of the contravention if it can be shown that he 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, he must ensure that those procedures are consistently acted upon and problems dealt with. I am satisfied that that has not occurred in this instance. The licensee attended Compliance Meetings at branch offices that dealt with several issues including intoxication and employees consuming liquor whilst working. The problems continued as noted by the evidence received at this hearing. The bartender, who had been put in charge of the establishment, was insufficiently instructed and trained in dealing with intoxicated persons and employees consuming liquor. In conclusion, I am satisfied that the licensee was not duly diligent.

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 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; and
- order a licensee to transfer a licence.

Imposing any penalty is discretionary. If I decide that the contravention(s) did occur and that enforcement action is appropriate, I may accept the penalty recommended in the Notice of Enforcement Action, impose a higher penalty, impose a lesser penalty or impose no penalty. 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 to the Act*.

There is no record of prior contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions.

There were, however, previous Contravention Notices issued to the licensee. The branch did not pursue enforcement action, however, it did follow up with Compliance Meetings in an attempt to assist the licensee in bringing the operation of the establishment into compliance, to no avail. I have given weight to this compliance history not as proof of previous contraventions, but as proof that the branch has told the licensee in the past of concerns about the operation of the licensed establishment.

The purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage 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 public safety and the well being of the community.

Having considered the evidence, I am satisfied that a penalty for each contravention is necessary to ensure future voluntary compliance. I am not satisfied that the circumstances out of which the contraventions arose require the maximum penalties as recommended by the branch.

For permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied, I find that the mid-range penalty of a five (5) day suspension is appropriate.

For permitting an employee to consume liquor while working in the licensed establishment, I find that the mid-range penalty of a two (2) day suspension is appropriate.

Order

Pursuant to Section 20 (2) of the *Act*, I order the suspension of liquor licence No. 034988 for seven (7) business days starting as of the close of business Friday, June 24, 2005, and continuing on successive business days until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (Section 67 (1) of the *Regulation to the Liquor Control and Licensing Act*)

Since I do not know whether the establishment would normally be open seven (7) days per week as of June 24, 2005, I do not know what the "business day" will be. To ensure that this order is effective, I direct that the liquor licence be held by the branch or the R.C.M. Police Port Alberni Detachment from the close of business Friday, June 24, 2005, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for seven (7) business days. A suspension sign notifying the public shall be placed in a prominent location by a liquor inspector or police officer.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: May 25, 2005

cc: R.C.M. Police Port Alberni Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager,
Vancouver Island/Okanagan/Kootenays

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Sonja Okada, Advocate
