



**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:	Empress Towers Ltd. dba Royal Towers Hotel 140 - 6 Street New Westminster, BC
Third Party Operator	Barswest Holdings Ltd. dba The Standard Nightclub
Case:	EH04-173
For the Licensee	Kirsten Tonge Cass McLeod
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	M. G. Taylor
Date of Hearing	May 5, 2005
Place of Hearing	Surrey
Date of Decision	June 27, 2005

INTRODUCTION

Empress Towers Ltd. (“the licensee”) operates the Royal Towers Hotel, which includes a nightclub holding a Liquor Primary Licence (LPL) No. 129037. The licensee leases the LPL to a third party operator. At the time of the incident that gave rise to these proceedings, the third party operator was Barswest Holdings Ltd. (“Barswest”) who operated a nightclub called “The Standard”. The licensee was represented at the hearing by Barswest’s counsel and a director.

Primary Liquor Licence No.129037 was first issued in April 1989. There have been a number of third party operators over the years. Barswest has been the operator, and noted on the Liquor Primary Licence since November 2004.

The hours of sale permitted by the licence are 7:00 p.m. to 2:00 a.m., Monday through Saturday and until Midnight on Sunday. The licensed capacity is 350 patrons.

ALLEGED CONTRAVENTIONS

By Notices of Enforcement Action (“NOEA”) dated December 22, 2004, the Liquor Control and Licensing Branch (“the Branch”) alleged that on November 24, 2004, the licensee contravened as follows:

- a) contravened Section 44(3) of the *Liquor Control and Licensing Regulation* B.C. Reg. 244/2002, (the “*Regulation*”), by allowing a person to consume liquor beyond one half hour after liquor service hours; and
- b) contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* R.S.B.C. 1996, c. 267 (the “*Act*”), by permitting intoxicated person to remain in the establishment.

Schedule 4 of the *Regulation* provides a range of licence suspensions and monetary penalties for contraventions. For the first contravention of Section

44(3) of the *Regulation*, Item 26 of the Schedule, the penalty range is a four (4) to seven (7) day licence suspension or a five thousand dollar (\$5,000.00) to seven thousand dollar (\$7,000.00) monetary penalty. For the first contravention of Section 43(2)(b) of the *Act*, Item 11 of the Schedule, the penalty range is a four (4) to seven (7) day licence suspension or a five thousand dollar (\$5,000.00) to seven thousand dollar (\$7,000.00) monetary penalty.

The branch recommended a licence suspension of seven (7) days for each contravention, for a total suspension of fourteen (14) days to be served starting on a Thursday and continuing on successive business days until completed.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation

Time

44 (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.

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Drunkenness

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

(a) a person to become intoxicated, or

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

ISSUES(S)

1. Does the evidence demonstrate that the people inside The Standard were consuming liquor?
 2. Does the evidence demonstrate that there were any intoxicated persons inside The Standard?
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3. If the evidence establishes the contraventions as alleged, are the recommended penalties appropriate?

EXHIBITS

Exhibit No. 1	Book of Documents of the branch
Exhibit No. 2	Book of Documents of the licensee
Exhibit No. 3	Employee statement
Exhibit No. 4	Correspondence dated November 29, 2004, from the branch, attaching current LPL 129037 and floor plan
Exhibit No. 5	Correspondence date stamped December 15, 2004, from the manager of The Standard

EVIDENCE

The branch called as witnesses, two police officers and a liquor inspector. Barswest's witnesses were two employees and three corporate partners.

On Tuesday, November 23, 2004, there was a party for the staff of The Standard, which started with the staff gathering at The Standard for a few drinks. Approximately 25 to 30 employees went by limousine to a restaurant in downtown Vancouver, and then to a nightclub also in downtown. A short while after that nightclub closed, the staff who were still present were transported by limousine back to The Standard. Some 20 staff members went into The Standard; others went home.

The New Westminster Police Department received a call about an incident in the vicinity at approximately 3:45 a.m. When they arrived there was no sign of that incident, but they saw a man sitting on a curb in front of The Standard. The police knew The Standard was not normally open on Tuesday nights. As a result of approaching him, four officers entered the Standard and found a number of people who appeared to them to be drinking alcohol and one person who was 'passed out'. There was music playing, they smelled marijuana, and some people were playing pool. The officers described seeing a bartender behind the bar, with open bottles on the bar and the railing, and glasses and bottles on

tables. They testified that they saw people drinking from bottles that appeared to be beer bottles and cooler bottles and from glasses.

There is no issue about the fact that there were staff members inside The Standard when the police arrived and that it was beyond the licensed hours of operation. Barswest's witnesses testified that the people inside were just waiting for taxicabs or other rides to go home. They also testified that any bottles or glasses the police saw were empty, left over from the earlier gathering, that some of the staff were cleaning up and disposing of the empties, and that the only liquid staff would have been consuming was water.

One of the owners who had been downtown with the party went directly home. Two owners returned to The Standard with the staff and went inside. One of them went into his office where he watched a DVD that another staff had made. The owners testified that it was their decision to invite the employees inside to wait for rides to avoid having employees drive their own vehicles, keep the employees safe and warm, and to avoid noise complaints from having them outside. They testified that the employees would not have been permitted to wait inside the hotel lobby or in the Casino, because of the rules of those establishments.

The officer in charge testified that when he entered he had to yell a couple of times before the people inside recognized the police were present. Once the officer got their attention, he noticed that the bartender started putting bottles away. The officer had conversations with both owners and expressed concerns about the late hour, drinking and smell of marijuana. He acknowledged that The Standard had just opened for business and told them they were not permitted to use it as an extension of someone's basement. He testified that the owners at no time denied that staff had been drinking alcohol.

Another police officer was involved in asking the people for identification. At first, they were reluctant to produce their identification. One employee was particularly hostile and became embroiled in a heated argument with the officer. The officer described that employee as belligerent, argumentative and intoxicated, with an odour of alcohol, slight slurring of his speech and glassy eyes. The officer in charge became involved and yelled at the employee to shut up. He described this person as intoxicated, shaky on his feet, loud, aggressive, his eyes were difficult to focus and his movements were not under control. The employee was restrained by other staff who tried to calm him down. He ceased arguing with the police but he remained agitated. After this incident, the other employees were more cooperative.

Barswest submitted that the officer who was involved in the heated exchange was aggressive, confrontational and unprofessional. However, the general manager also testified that he fired that employee because of his conduct, and pointed to Exhibit No. 2, tab 9, p. 3 in which the management tells employees that they are expected to cooperate with the police in any way possible. Exhibit No. 2, tab 4 contains the employment termination letter in which this requirement is emphasized.

The officer in charge testified that it was his decision to write a Licensed Premises Check (LPC) for the alleged contraventions. He testified that he rarely does liquor inspections, that he use to be personally involved in the industry, and he only issues LPCs when the situation is "way over the top." His report, written in the car immediately following, notes his observation that several people were drinking from bottles and glasses and that he told the owners he was not impressed with the late service nor with the smell of marijuana. He testified that "it was a given" to him that this establishment was involved in after hours service on this occasion.

The allegation of intoxication also pertained to the individual who was asleep. Barswest's evidence was that the sleeping person had arisen at 6:00 a.m. on November 23, 2004, and had worked a shift on a construction job before the party. Further, he provided an email of apology to Barswest, noting that he was tired and dozed off. The police did not provide evidence that this person was intoxicated, other than being passed out and having a glass, containing liquid that smelled like alcohol, on the table beside him.

The Barswest owners who testified stated that they provided free beer and wine at the beginning of the evening, that it was consumed before they went downtown and that the coolers were locked and not reopened when they returned. They contended that people were inside only to wait for taxis and rides. They acknowledged that people were playing pool; that one person had fallen asleep and that one owner was in his office watching a DVD. One of the employees testified that he gone inside after returning from downtown to be social, not because he was waiting for ride. He drove himself home later.

The liquor inspector testified that The Standard is located in a mixed area of commercial and residential, with some multi-family condominiums and apartment blocks in the vicinity. He reviewed the branch's file concerning past enforcement actions contained in Exhibit No. 1, as set out later in this decision.

SUBMISSIONS

Contraventions

Barswest submitted that the evidence disclosed that there was no liquor available after the staff returned to The Standard. The purpose of going inside was to wait for taxis and other rides. Additionally, there was no evidence that any of the staff were intoxicated.

Barswest also submitted that the fact that management was so concerned about staff safety speaks to a level of due diligence. The management provided a safe environment while staff waited for their rides.

Penalty

Barswest submitted that I should take into consideration that this is the first compliance issue with this operator. The past contraventions were committed by other third party operators. The management of The Standard has been cooperative with the police and the branch. They have implemented proactive practices that the liquor inspector has asked about to assist other licensees. In light of its good record of cooperation and proactive practices, Barwest submitted that a monetary penalty would be sufficient.

ANALYSIS AND DECISION

I find that the Barswest's evidence is consistent with people having gone back into The Standard to continue to party. There was no evidence about taxis having been called or other evidence to support the contention that the primary purpose of being inside was to wait for rides home. Rather, I find that the music was loud, some people were playing pool, others were talking and visiting, and the police officer had to raise his voice a couple of times just to be noticed. I find that it was a party atmosphere. The police arrived at approximately 3:45 a.m. and the establishment was not empty until 4:30 a.m. Overall, I find the evidence consistent with a party in progress.

That does not necessarily mean that people were consuming liquor. The Barswest's evidence, from all the witnesses, was the management did not provide any additional liquor and the previous liquor had been consumed. The police were of the view that people were drinking from beer bottles, cooler bottles and glasses. They also noted that there were glasses on tables. Some of their

observations are consistent with the staff not having cleaned up from the previous party. However, I also find that the conduct is consistent with an ongoing party and ongoing consumption of liquor. I note that the owners did not deny to the police that staff were consuming. On a balance of probabilities, I find the police evidence substantiates that people were consuming liquor. It is an accepted fact that according to the terms of the licence, it was more than one half hour after the permitted hours for liquor service. I find the evidence demonstrates that Barswest allowed people to consume liquor as alleged.

Regarding whether there was an intoxicated person in the establishment, I find that the employee who argued with the police officer was intoxicated. I base that on the evidence of the Barswest's witnesses and the police officers concerning the appearance, conduct and demeanour of that man. I find that the management had not taken any steps to require people to leave. I find that the management was aware that this person was present and permitted him to remain. I find that the branch has made out the contravention as alleged.

Due diligence

It is well accepted that the defence of due diligence applies to contraventions under the *Act*. I find that the Barswest's argument on due diligence is unique. Usually, the defence of due diligence involves consideration of what steps the licensee may have taken to ensure that the particular contravention would not occur. In this case, the submission was directed at the third party operator's efforts to ensure that other contraventions did not occur, such as drinking and driving, disturbing neighbours, and to ensure staff safety. I find those considerations do not pertain to raising a defence to whether the unlawful conduct occurred, or whether the licensee can be excused for it. However, I have considered whether it is a factor of mitigation, in the penalty considerations.

The B.C. Supreme Court addressed due diligence in *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248, a case involving alleged illegal conduct:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

Notably, there were two owners of The Standard present when the unlawful conduct occurred, and I am satisfied that they constituted 'directing minds' of the corporate Barswest. There were no representatives of Empress Towers Ltd. present and there were no submissions made, or evidence presented, on any steps the licensee may have taken to prevent this type of conduct. Accordingly, I find the defence of due diligence is not available either to Barswest or to the licensee.

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
- order a licensee to transfer a licence

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted I am bound to follow the minimums set out in Schedule 4 of the *Regulation*.

The branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a 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. Although Barswest has operated The Standard only since November 2004, shortly before this incident, the compliance history considerations apply to the licensee, Empress Towers Ltd., who is responsible for the operation of the LPL establishment.

Compliance History

For this licensee, the branch's records show that since April 2001, there have been five contraventions that resulted in total licence suspensions of 19 days, and a monetary penalty of \$3,000, as follows:

The branch conducted a hearing into an allegation of overcrowding which occurred on April 13, 2001. The adjudicator imposed a four (4) day licence suspension. In August 2002, the licensee signed a waiver admitting overcrowding on April 28, 2002, and accepting a monetary penalty of \$3,000. The licensee signed additional waivers for overcrowding in December 2003 and January 2004, resulting in licence suspensions of seven (7) days for each. In January 2004, the licensee signed a waiver admitting to minors in the premises and accepting a licence suspension of one (1) day.

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 the *Regulation*, Schedule 4, noted above, the branch has treated the allegations as first contraventions. However, because of the number of previous contraventions, the branch recommended penalties at the top of the range for first contraventions.

As indicated above, I have considered Barswest's submissions about concern for the staff and the community, as factors affecting mitigation of the penalty. I accept that there was a degree of consideration for safety in the decision to allow staff back into The Standard in the early morning hours. I accept that the management had in mind that they did not want to be responsible for any staff member who had been drinking to drive home. However, I find that the stated objective was not the primary focus when they reopened The Standard. I have already stated my finding that the occasion was a continuation of the party.

The primary consideration is voluntary compliance. One difficulty here is that any penalty will be visited upon the operator, with no consequence to the licensee who bears the overall responsibility for the operation of this LPL establishment. According to the terms of the third party agreement, Barswest is required to indemnify the licensee for any losses, costs, liabilities, etc. arising from Barswest's contravention. The compliance history indicates a continuing failure of the third party operators to comply with the *Act* and *Regulation* and a continuing disregard for safety and community standards. Although this is a first occasion for Barswest, I cannot ignore the past contraventions for the licensee and this LPL.

It may be that the branch will have to take some further measures to cause the licensee to take a more active role in supervising the conduct of the third party in order to achieve voluntary compliance.

I find that the continuing contraventions by the operators of this licence warrant imposition of a licence suspension. Further, I agree with the branch's recommendation that a suspension at the high end of the range is appropriate. Accordingly, I order a licence suspension of seven (7) days for each of the contraventions, for a total of fourteen (14) days.

ORDER

Pursuant to Section 20(2) of the *Act*, I suspend the Liquor Primary Licence No. 129037 for a total of fourteen (14) days, as follows:

- a) for the contravention on November 24, 2004, of permitting an intoxicated person to remain in the establishment, I impose a licence suspension of seven (7) days; and
- b) for the contravention on November 24, 2004, of allowing a person to consume liquor beyond one half hour after liquor service hours, I impose a licence suspension of seven (7) days.

I order the licence suspension of fourteen (14) days to commence as of the close of business on Thursday, August 4, 2005, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 54(1) of the *Regulation*).

Since I do not know what days the establishment would normally be open as of August 4, 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 by the New Westminster Police Department from the close of business Wednesday, August 3, 2005, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for fourteen (14) full 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

M. G. Taylor
Enforcement Hearing Adjudicator

Date: June 27, 2005

cc: New Westminster Police Department

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

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