



**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: 0717522 B.C. Ltd.
dba Royal Towers Hotel
140 – 6 Street
New Westminster, BC V3M 1J4

Case: EH06-058

For the Licensee: J. Barry Carter

For the Branch: Shahid Noorani

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: September 28, 2006

Place of Hearing: Surrey

Date of Decision: October 6, 2006

INTRODUCTION

The licensee operates Liquor Primary Licence No. 129037, an establishment in a hotel in New Westminster. The establishment is known as "The Standard" in the Royal Towers Hotel.

In the early morning of Sunday, April 2, 2006 (the business day of Saturday, April 1, 2006), members of the Delta Police Department Anti-Violence Bar Initiative and a Compliance and Enforcement officer (C & E officer) with the Liquor Control and Licensing Branch (the branch) attended at establishment to do a licensed premise check.

As a result of the inspection, the branch issued a Notice of Enforcement Action (NOEA) to the licensee, citing two alleged contraventions of the *Liquor Control and Licensing Act*, and *Regulation*.

ALLEGED CONTRAVENTIONS

The branch alleged that on April 2, 2006, the licensee contravened Section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in the establishment, and Section 42(4) of the *Regulation* by permitting liquor to be removed from an establishment.

PRELIMINARY MATTERS

The principal of the licensee attended with counsel.

Counsel had on September 25, 2006, made written application for an adjournment of this hearing to the Registrar, Enforcement Hearings.

By written decision dated and delivered September 26, 2006, the Registrar denied the request and advised that the hearing would take place as scheduled. In the decision, the Registrar reviewed counsel's grounds for the application and the history of this particular enforcement process to date and concluded:

The Branch's Enforcement Hearing Rules state that a request for a postponement will only be granted when there are exceptional circumstances justifying the postponement. In my opinion the information that you provide to support the licensee's request does not amount to such exceptional circumstances. The Licensee has been aware of the date of this hearing since July 21, 2006. In my opinion, that is ample time for a licensee, located in the Vancouver area, to find a solicitor to assist with a hearing in late September. There has been no indication until today, that the Licensee was contemplating seeking a postponement.

In conclusion, I am denying the licensee's request for a postponement.

At the commencement of the hearing, counsel for the licensee made a further application for adjournment. Counsel argued the same three grounds as those submitted to the Registrar in the earlier application and added a fourth ground (key witness unavailable).

Decision

The licensee has only days ago retained counsel. Not surprisingly, counsel has a different view of how to proceed in this matter than did the unrepresented licensee.

Counsel indicated that he made application for adjournment not because of his late retention, but because he feels he does not have the evidence available to him to adequately present the licensee's case.

I sit here by statutory authority as the general manager of the branch. As such, I have an obligation to act in the best interest of the public and to fairly administer the enforcement process. "Fair" in this context is to some degree qualified by the *Liquor Control and Licensing Act*, which authorizes the general manager to consider allegations of contravention of the *Act* and *Regulation* and mete out penalty in appropriate circumstances. There is no obligation to provide a licensee with a hearing. There is, however, some degree of procedural fairness, which must be accorded to the licensee.

I will answer counsel's specific issues in the order in which they were presented:

1. Counsel argued that he might wish to call witnesses and present documentary evidence that the licensee, when not represented, did not anticipate and, therefore, did not disclose to the branch.

In an administrative tribunal, the adjudicator has a degree of flexibility with respect to the submission of evidence, not enjoyed by the courts which are bound by the rules of court. Absent further information as to the identity of the witnesses or documents which the licensee would call or submit, I find that this is a matter which could be dealt with in the course of the hearing. The branch advocate would be entitled to object to the introduction of a specific witness or pieces of evidence and I would at that time evaluate the interests of the branch and the licensee and any prejudice that might be caused, and make a decision at that time. This ground, in itself is not sufficient cause for an adjournment.

2. The licensee has in its possession a DVD of data recorded by a security camera. I understand that there were two copies of this disc. One was
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sent to the branch by the licensee and has been in the possession of the branch for some time, and the other was recently stolen from the licensee's premises. I have been led to believe that this evidence may be critical to the determination of significant aspects of the allegations. The source camera is said to be aimed at the outside of the front door- where allegedly intoxicated patrons were interviewed and where liquor was allegedly removed from the establishment. These facts are the basis for both of the allegations in this enforcement action.

I have considered that this disc is part of the licensee's defence and should, therefore, be entirely within the licensee's control. However, this data is potentially so critical to the determination of this matter that I am reluctant to precede without it. A copy of the disc is here at the proceeding, and in the licensee's possession but I understand there is some issue with converging the data to a useful form for use in the hearing. I believe that counsel has the time and resources available to him to work to solve the technical difficulties and convert this data to a useable format in time for the second scheduled day of hearings. I find, therefore, that this ground is not sufficient cause for an adjournment.

3. Counsel has indicated that the names of the patrons who were allegedly involved in the contraventions were blacked out in the police information. Therefore, counsel has not had an opportunity to interview them, to assist in cross-examination of the police officers scheduled to be called by the branch. Further, counsel has indicated that the evidence of the police officers in some respects will be hearsay evidence without those blacked out individuals present.

As an administrative adjudicator, I am entitled to consider hearsay evidence, keeping in mind the weight to be given that evidence. I find that the absence of the information expunged from the police notes and records for purposes of

public safety does not unduly prejudice the licensee. This ground is therefore not sufficient cause for an adjournment.

4. The licensee has indicated that a critical witness is not available to testify because he is out of the province.

The licensee has had reasonable opportunity to marshal his witnesses during the notice period. This is not sufficient reason to adjourn this process.

Counsel for the licensee has submitted that it is not because of his late involvement in this matter that he seeks an adjournment on behalf of the licensee. I disagree. I find that had the licensee sought legal advice in a timely fashion, many if not all of these issues would not have arisen.

I am charged with weighing the prejudice of the licensee with that of the administration of the branch and its statutory obligations in a quest for procedural fairness. I note that the branch has several members of the police waiting in the next room to testify and I understand that scheduling them was challenging.

I find that granting an adjournment would prejudice the branch, given the expenditure of resources made to accommodate this hearing, and the obligation to protect the public by acting promptly on alleged contraventions of the regulatory scheme. I find that the prejudice to the licensee in proceeding at this time would be minimal. Further, any prejudice suffered by the licensee could have been averted by its own actions.

The licensee is not entitled by law to a hearing. The licensee is entitled to a hearing by virtue of branch policy and the aspects of procedural fairness that require that the licensee be in the same manner as other licensees involved in a similar process. Branch policy also indicates a reluctance to adjourn

proceedings without exceptional reasons. I find the reasons not exceptional in this case, and order that the hearing proceed as scheduled.

Following the denial of the application to adjourn, the licensee and his counsel advised that they would not be participating in the hearing, and they departed.

I note that the licensee was served with a notice dated June 22, 2006, which advises of the date and place of the hearing, and states in part:

Failure to attend

If the Licensee fails to appear at the hearing, the delegate of the branch's general manager (the "adjudicator" may adjourn the hearing or conduct the hearing without the licensee. When the hearing proceeds without the licensee, the adjudicator will make findings, and may impose enforcement action, based on the evidence presented by the branch advocate without the benefit of the licensee's evidence and argument.

The hearing will continue *ex parte*.

ISSUES(S)

1. Did the licensee contravene Section 42(4) of the *Regulation* on April 2, 2006, by allowing liquor to be removed from the licensed premises?
 2. Did the licensee contravene Section 43(2)(b) of the *Act* on April 2, 2006, by permitting an intoxicated person to remain in the licensed establishment?
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3. If contraventions are found, is a penalty warranted and if so, what is the appropriate penalty to be imposed?

EXHIBITS

Exhibit No. 1 Branch's Book of Documents

Exhibit No. 2 Three pages containing copies of six photographs

EVIDENCE

The branch called four police officers and a C & E officer. Each of the witnesses had been present at the establishment during the relevant events. Each of the police officers testified to having considerable training and experience in identifying varying levels of impairment and intoxication in individuals.

The following is a summary of the testimony that was corroborated by at least two witnesses:

- The inspection team attended Royal Towers Hotel between 1:15 and 1:20 a.m. on April 2, 2006.
 - The manager was located and joined two of the team on a "walk through" of the establishment.
 - A young white male was located inside the establishment. He was staggering, bumping into people, and slurring his speech. He was brought outside and seated on a bench. There he was identified. His face was flushed and he was almost passing out. He was determined to be intoxicated.
 - A young Asian female was escorted out of the establishment by a bar staff member. She could barely stand. The staff member was holding her up. She was taken outside to a bus stop where she sat down and began to
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vomit. She was not able to take care of herself and she may have briefly passed out at the bus stop. She was determined to be intoxicated.

- A male patron with a beer bottle in his hand walked out of a "fire door" which was not the main entrance/exit of the establishment. He was unbalanced and unstable on his feet, smelled of liquor, had glassy eyes, and his speech was slurred. He approached a police officer and was non-compliant when given instructions by the officer. An officer took him to the doorman and advised the doorman that the patron was too intoxicated to be in the bar. The doorman was advised to deny entrance to the patron, who appeared to be interested in regaining entry. The patron was later observed being allowed entry by the doorman. Police removed the patron from the bar and took him into custody. He was determined to be intoxicated.

One police officer testified as follows:

- The patron who exited the "fire door" stood in the doorway for some time before exiting.
- The officer observed the door fully open for ten to fifteen seconds before the patron exited to the sidewalk with a beer bottle in his hand. There were no staff members visible through the door into the bar. The officer was approximately six feet away.
- The patron gestured to the officer and the officer told him to go back into the bar- but the patron "pulled out his cell-phone and exited the doorway."
- No staff followed him out. No staff was visible anywhere near the doorway.

The C & E officer testified as follows:

- She had training in identifying intoxication in individuals in an R.C.M.Police training facility.
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- When she attended with the inspection team on April 2, 2006, a staff member escorted a male patron outside of the club and put him on a bench near where an officer was interviewing another patron that was brought out.
- The patron was vomiting and could not sit up on the bench.
- She tried to interview the patron but got only incoherent answers. He said his birthday was in the year "May twenty-thousand". He was able to remove his identification from his wallet but then dropped it on the ground.
- She determined that he was intoxicated.

ANALYSIS AND DECISION

I find that multiple patrons were found intoxicated on the licensed premises as alleged by the branch. The evidence is corroborated and uncontroverted.

I find the alleged contravention of Section 43(2)(b) of the *Act* to have been proven.

I find that liquor was removed from the licensed establishment by the patron who exited the "fire door" with a beer in his hand. The evidence is again corroborated and uncontroverted. I note that in Exhibit No 1, the licensee acknowledged the brand of beer that this patron was carrying.

I find the alleged contravention of Section 42(4) of the *Regulation* to have been proven.

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 the 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*.

I find a penalty is warranted by the actions of the licensee.

The range of penalty for a first contravention of Section 43(2)(b) of the *Act* in accordance with item 11 of Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

The branch has recommended a seven (7) day suspension.

In light of the extreme level of intoxication and the number of patrons found intoxicated at the time of the inspection, I find that a seven (7) day suspension is reasonable.

The range of penalty for a first contravention of Section 42(4) of the *Regulation* in accordance with item 29 of Schedule 4 of the *Regulation* is one (1) to three (3) days suspension and/or a monetary penalty of \$1,000-\$3,000.

The branch has recommended a two (2) day suspension.

I find that a suspension is warranted as there was no evidence that the licensee had control of the "fire door".

However, the evidence discloses a single patron exiting the "fire door", which was only confirmed to have been open for a matter of seconds. The patron had a single bottle of beer. The licensee has no past history of allegations of this type of contravention. The penalty schedule of the *Regulation* provides for a range of penalties for this contravention. As I cannot envision a circumstance where a lesser penalty would properly flow, I find the minimum suspension appropriate. I find that a one (1) day suspension is reasonable for this contravention.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 129037 for a period of eight (8) days, to commence as of the close of business on October 27, 2006, 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 67 of the *Regulation*).

To ensure this Order is effective, I direct that the Liquor Licence No. 129037, be held by the branch or the New Westminster Police Department from the close of business on October 27, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

[Original Signed]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: October 6, 2006

cc: New Westminster Police Department

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Mike Clark, Regional Manager

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