



**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:	Wet Restaurant and Lounge Inc., dba Wet Restaurant 165-8460 Alexandra Road Richmond BC V6X 3L4
Case:	EH06-141
For the Licensee:	Pyke Lambert Leathley Russell
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	Written Submissions
Date of Decision:	January 10, 2007

INTRODUCTION

The licensee operates a Food Primary licensed establishment in Richmond under Licence No. 300898. The establishment is known as Wet Restaurant and Lounge. The hours of service are 11:30 p.m. to midnight, seven days per week.

On September 9, 2006, liquor inspectors are alleged to have witnessed patrons drinking at the establishment beyond the time allowed for liquor to be cleared.

A notice of contravention was issued to the licensee.

The branch sought a pre-hearing conference. The licensee did not attend.

The branch chose to proceed with enforcement action by way of written submission, and invited submissions from the licensee.

The licensee retained counsel.

Both the branch and counsel for the licensee provided initial and reply submissions pursuant to a timetable provided by the General Manager.

ALLEGED CONTRAVENTIONS

The branch alleged that on September 9, 2006, the licensee contravened section 44 (1)(b) of the *Regulation* by failing to clear liquor within ½ hour after liquor service hours.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")

44 (1) Unless otherwise authorized by the general manager,

- (b) food primary licensees must ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42(4)(a).

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (the "Act")

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:

- (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

20 (2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

- (e) cancel all or any part of the licensee's licence;

ISSUES

1. Did the licensee contravene section 44 (1)(b) of the *Regulation* on September 9, 2006, by failing to clear liquor within ½ hour after liquor service hours?
2. If the licensee is found to have contravened section 44(1)(b), is a penalty warranted, and if warranted, what should the appropriate penalty be?

EVIDENCE and SUBMISSIONS

The licensee's counsel provided submissions dated October 30, 2006, and December 7, 2006.

Those submissions include the following:

- The principal of the licensee was absent on the day of the alleged contravention. He stated that the establishment does not serve the brand of beer that the inspectors allegedly witnessed patrons drinking. He suggested that perhaps liquor may have been "smuggled in" by patrons.
- The licensee's staff understands the rules for clearing liquor and would have "taken steps immediately to correct the contravention" had they been so advised.
- The principal of the licensee understands the obligations to clear liquor and takes this responsibility seriously.
- "The company is now well aware of its duty to be more stringent with the control and management of their business."

- That alternative measures be taken to restrict the operations of the licensee in order to ensure compliance with its obligations.

The branch, through its advocate provided submissions dated November 20, 2006.

Those submissions include the following:

- Liquor Distribution Branch records show that the licensee made seven purchases of the type of beer that the inspectors saw being consumed after hours. The most recent of those purchases was made on July 12, 2006.
- The licensee was made aware of its obligations to be more stringent with the control and management of its business through inspection interviews, compliance meetings, and multiple enforcement actions, which imposed a total of thirty-four (34) days suspension for failing to clear liquor within the stated hours.
- The licensee's proposed alternative measures are insufficient to bring about compliance.
- Licence cancellation is warranted.
- Provision of the branch record of the licensee's compliance history.

ANALYSIS AND DECISION

The branch appears to have proceeded with enforcement action on the basis that the licensee had acknowledged that the contravention took place. In correspondence to the adjudicator dated December 15, 2006, the Registrar of

Enforcement Hearings said: "The Licensee does not dispute that the contravention took place, but it does dispute that a cancellation of its liquor licence is warranted."

In correspondence to the licensee dated October 12, 2006, the Registrar advised that a written submissions determination would be made as to: "whether the contravention set out in the NOEA occurred, and if so, what enforcement action, if any, will be imposed."

In correspondence dated October 20, 2006, counsel for the licensee advised the branch that it had been retained and that it would provide written submissions on behalf of the licensee.

I have carefully reviewed the licensee's submissions, and find that the licensee did not acknowledge that the contravention occurred.

In the correspondence of October 30, 2006, counsel for the licensee stated that the principal of the licensee denied that the licensee sold the type of beer alleged to have been seen by the inspectors on September 9, 2006. The document also says: "It appears from the report...that there were two people holding beer...It is not inconceivable that these beers were smuggled in by the patrons and not noticed by staff."

I find that this is short of an acknowledgement of the occurrence of a contravention.

That correspondence also includes the following passage:

[The principal of the licensee] confirms that his staff has advised him that all alcohol must be cleared from the outside that night by 10:30 p.m. and all beer inside was cleared by 12:30 a.m.

Had [the inspectors] entered the restaurant premises and advised staff, they would have taken steps immediately to correct the contravention.

There is no further reference in the correspondences of licensee's counsel that is helpful in this regard.

The last phrase of the quoted passage refers to the event as a contravention. Absent further evidence, however, I find that this language is insufficient to constitute an acknowledgement of the occurrence of the requisite components of the contravention. I am not convinced that the choice of words utilized was intended to convey an acceptance of liability or the fact that liquor had not been cleared within the stipulated time.

The penalty recommended for this alleged contravention is cancellation of the licence. This has the potential to be a very significant event for the licensee. If an acknowledgement of a contravention is to be inferred from less than clear and unambiguous language, at risk is a significant penalty to the licensee without the finding of a contravention.

I find therefore that the licensee did not clearly and unambiguously acknowledge that a contravention had occurred.

I now turn to the evidence relating to the alleged contravention. The branch clearly proceeded with enforcement on the erroneous belief that the contravention had been acknowledged. Accordingly, there is no oral evidence or independent written statement from the inspectors who had witnessed the events of September 9, 2006.

The file does contain a photocopy of a contravention notice. The notice states the time and date of the alleged contravention, the section number of the

Regulation 44(1)(b) that had allegedly been contravened, and the name of the inspector who prepared the notice. The notice also contains the following handwritten detail:

"Patrons on patio at 01:05 hours consuming beer (2 male patrons identified consuming bottles of Stella Artois beer)."

There is no further evidence of the alleged contravention. It has been established that as general manager in an enforcement setting, I am entitled to accept hearsay evidence, or evidence which does not otherwise conform to the strict rules of evidence. I accept the contravention notice as a handwritten note of what the inspector believed he had witnessed, and in that regard his evidence of the contravention.

Had the licensee not contested that notation, I would find it sufficient to establish the occurrence of the facts of the contravention. However, the licensee did contest those observations. The licensee's counsel argued that the establishment did not sell Stella Artois beer on September 8/9, 2006 and that any Stella Artois beer that was purchased by the licensee was consumed well before the date in question.

The contravention notice specified that a patron was observed with a Stella Artois beer, beyond the time at which liquor must be cleared. The licensee submits that it sold no such beer on September 9, 2006. There is no further evidence available. I am therefore left with insufficient evidence to evaluate the credibility of each position, or test the evidence to establish that the contravention occurred.

I find it may be relevant to review the licensee's compliance history.

Typically, such reference is reserved for the purpose of establishing the appropriateness of imposing a penalty, and determining the nature and scope of any penalty to be imposed. In that context, the *Regulation* provides that

allegations of contravention may be considered, notwithstanding that a contravention was not found or that the branch chose not to pursue enforcement action.

In this case, I find the compliance history may be relevant to the issue of credibility and the determination of the facts requisite for a finding of contravention. In this context, only proven contraventions should properly be considered.

The licensee was found to have contravened section 44(1)(b) of the *Regulation* (failure to clear liquor within ½ hour after liquor service hours) three times:

- June 4, 2005 (EH05-082) 4 day suspension served
- August 26, 2005 (EH05-122) 10 day suspension served
- April 9, 2006 (EH06-059) 20 day suspension served

The file also indicates that a compliance meeting was held between the branch and the licensee on October 20, 2004 for the purpose of discussing section 44(1)(b) of the *Regulation* (failure to clear liquor within ½ hour after liquor service hours).

The licensee has served a total of 34 days suspension for contraventions of the same section of the *Regulations* to which this alleged contravention relates.

Though this information may lend an attractive prospect of consistency to the branch's allegations, it does not shed any light on the events of September 9, 2006.

On the evidence provided, I am unable to conclusively determine that the contravention occurred as alleged.

I note that the General Manager is authorized by section 20(1)(a) of the *Act* to take action against a licensee for failure to comply with a term or condition of the licence, and that by virtue of section 20(1)(2) may do so without a hearing. That matter has not here been adjudicated, and I have made no findings of fact relating to September 9, 2006 that would impede the General Manager from so doing.

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: January 10, 2007

cc: RCMP Richmond Detachment

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

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