



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: 685350 B.C. Ltd.
dba The Nelson
655 Nelson Street
Vancouver BC V6B 2E5

Case: EH07-033

For the Licensee: Scott H. Stephens, lawyer

For the Branch: Sonja Okada

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: July 17, 2007

Place of Hearing: Vancouver BC

Date of Decision: August 2, 2007

INTRODUCTION

685350 B.C. Ltd. (dba The Nelson) holds Food Primary Licence No. 200643. Food Primary Liquor Licences are issued to establishments with a primary focus on food, i.e. restaurants. The hours for the sale of liquor are 11:00 a.m. to 1:00 a.m. Monday to Saturday, and 11:00 a.m. to midnight on Sunday. The patron capacity is 46 in the main area, and 4 and 36 in two separate patio areas. The establishment is located in the downtown area of Vancouver, BC in what is known as the entertainment district. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia".

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated March 29, 2007. The branch alleges that on January 13, 2007, the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing Regulation* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. The proposed penalty is a four (4) day suspension of the liquor licence (item 25 of Schedule 4, *Liquor Control and Licensing Regulation*).

Item 25 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7000.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Regulations, B.C. Reg. 244/2002*****Time**

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

- (b) food primary licensees must ensure that liquor is taken from patrons within 1/2 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).

ISSUES

1. Did the contravention occur as alleged?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

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| Exhibit No. 1 | Branch Book of Documents #1, tabs 1 – 17 |
| Exhibit No. 2 | Copy of correspondence from the branch to licensee dated April 13, 2007 |
| Exhibit No. 3 | Copy of correspondence from the branch to licensee dated April 23, 2007 |
| Exhibit No. 4 | Copy of correspondence from the licensee to the branch dated April 23, 2007 |
| Exhibit No. 5 | Copy of correspondence from the branch to the licensee dated May 4, 2007 |
| Exhibit No. 6 | Copy of correspondence from the branch to licensee dated May 22, 2007 |
| Exhibit No. 7 | Copy of undated correspondence providing a witness list containing four names |

- Exhibit No. 8** Copy of undated correspondence providing a witness list containing six names
- Exhibit No. 9** Three page typewritten notarized statement
- Exhibit No. 10** One page typewritten notarized statement
- Exhibit No. 11** One page typewritten notarized statement

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Two Vancouver City **Police Officers, Constables A and B**, separately testified that they each have been police officers for approximately three years and are familiar with the operation of licensed establishments. On January 12/13, 2007, they were in uniform working the evening/early morning shift as part of the Liquor Call-out Squad. The squad works within the Vancouver downtown entertainment district and primarily deals with street disorders and the checking of liquor licensed establishments.

At approximately 2:40 a.m. they responded to a complaint of noise emanating from the establishment known as The Nelson. Upon arrival they noted three to four persons standing outside smoking, some of whom followed them inside. Inside, music was playing loudly and there were 12 to 15 patrons sitting at tables and standing at the bar socializing, several of whom were noted to be consuming from glasses containing what appeared to be beer. There were also glasses containing what appeared to be beer on the tables and the bar. The establishment had a "pub-style" atmosphere. A male, who looked as if he may have been a bartender, was observed behind the bar dispensing what appeared to be beer into a glass. Upon seeing the police officers he stopped and put the glass out of sight below the bar. The officers attempted to gain information from the male, however, he was uncooperative, would not identify himself, nor provide them any information. He disappeared into the back of the establishment. Constable B believed that the male might have been intoxicated. His eyes were glassy and he was unsteady on his feet as he walked away.

They spoke with a female server who had been observed removing glasses from tables. Although reluctant, she identified herself and responded to their questions. After some hesitation she stated she was in charge of the establishment at that time. She told them that she was not aware of the liquor licence requirements for the establishment and was not certain of the closing time. She provided the liquor licence to them (exhibit 1, tab 6). Upon noting that the hours for the sale of liquor expired at 1 a.m., they issued her a Licensed Premises Check form (LPC) (exhibit 1, tab 3) outlining contraventions of “fail to clear patrons, section 44(1)(a) *Regulations*”; “fail to clear liquor, section 44(1)(b) *Regulations*” and “allow to consume after hours, section 44(3) *Regulations*”. They spent approximately 15 – 20 minutes in the establishment. They then left the establishment and constable A made some brief notes (exhibit 1, tab 5) on their observations and completed a police occurrence report (exhibit 1, tab 4).

They testified that at the time of the incident they were unaware that the establishment as a Food Primary licensed establishment was not required to clear patrons within ½ hour following the expiration of its licensing hours. They did not ask the server or the patrons what was contained in the glasses, nor did they conduct any tests on the liquid. They testified that they were familiar with the operation of licensed establishments and formed the conclusion that the liquid was beer based upon their observations. The glassware was consistent with that used for pints of beer. The colour and texture of the liquid were consistent with beer and differed from that of wine, spirits or softdrinks. It had “suds” on top and did not contain any ice. Neither of the officers had previously been inside the establishment and were not familiar with the glassware used other than that it appeared to be similar to that of other licensed establishments.

The Branch did not present other witnesses. It was agreed between the branch advocate and counsel for the establishment that the Compliance History, as outlined in the NOEA (exhibit 1, tab 1), would be entered into evidence as would those documents found at exhibit 1, tabs 11 to 16 inclusive. The liquor Inspector’s “Reasons for Recommending Enforcement Action” found at exhibit 1, tab 1, page 3 were also entered into evidence.

EVIDENCE - THE LICENSEE

Counsel for the licensee tendered as evidence three notarized statements.

In an undated statement notarized on July 16, 2007 (exhibit 9) **Licensee witness C** deposed that she was the senior employee on duty at the time of the incident. She was intimidated and threatened by the behaviour of the police officers. They did not give her the opportunity to show them that the establishment was doing nothing wrong. They told her that they must stop serving liquor by 12:30 a.m. and have all patrons leave by 1:00 a.m. This was untrue as their licence allows liquor service until 1 a.m., with all liquor being removed by 1:30 a.m.

On that night a small group of patrons, six to eight in number had been allowed to remain after the 1:30 a.m. closing and to order food and non-alcoholic beverages. All liquor was cleared by 1:30 a.m. and the small group of patrons consumed food and ginger ale while she completed her cleaning duties. The police officers entered as the cook was bleeding the foam from the beer lines into a glass and then dumping the foam, which was the normal procedure.

She is familiar with the liquor laws. The licensee's policy and her training is to be in compliance.

Licensee witness D in an undated statement notarized on July 16, 2007 (exhibit 10) deposed that he was working in the kitchen of the establishment on January 13, 2007. A small group of patrons had come into the establishment for snacks and a few drinks before closing. He helped to clear all of their alcoholic drinks before 1:30 a.m. They were permitted to remain and order more food and non-alcoholic drinks and were served soft drinks including iced tea and ginger ale. When the police officers entered the establishment, he was in the process of changing a beer keg which involved bleeding the line of foam into a glass and dumping it out. When approached by the officers he directed them to the senior shift employee on duty.

Licensee witness E in an undated statement notarized on July 16, 2007 (exhibit 11) deposed that on January 13, 2007, he was part of a group of patrons who arrived at The Nelson at approximately 12:30 a.m. and ordered appetizers and drinks. By 1:20 or 1:25 a.m. all alcoholic drinks were finished and cleared. Some of the group remained while the staff cleaned up. They ordered soft drinks including ginger ale and iced tea. He noticed the police officers come into the establishment. The officers remained by the bar and did not speak to any of the patrons or examine the contents of their glasses.

SUBMISSIONS – LICENSEE

Counsel submitted that the police officers at the time of their attendance at the establishment were not familiar with the liquor licence requirements for food primary establishments. They were mistaken in their belief that the establishment could not remain open and continue selling food to its customers. They both believed that the liquid in the glasses was beer. They did not conduct any tests to confirm that it was an alcoholic beverage. Neither was familiar with the glassware used by the establishment. They did not advise the female employee that they believed that the glasses contained alcoholic beverages until they provided her a copy of the LPC.

He submitted that the statements of the licensee's witnesses were consistent, that all liquor had been cleared prior to 1:30 a.m. Their evidence was also consistent that a group of patrons had been allowed to remain after closing and had ordered non-alcoholic beverages. There is nothing incredible about a group of persons finishing the night with non-alcoholic beverages. There is no reason to doubt the veracity of the witnesses. Witness E was a patron with no interest in the matter. Witness D is now a former employee who no longer works there. There is no reason why less weight should be given to the statements provided. They were consistent on the contested issue. The police officers made an assumption and could have been mistaken.

On the matter of penalty, counsel submitted that the licensee was issued the liquor licence in September 2004. While the previous licensee had many breeches of the requirements there was only one contravention occurring after the licensee received the licence. The previous contravention was of a different type from the one at issue here.

REASONS AND DECISION

The evidence of the police officers is that on January 13, 2007, at approximately 2:40 a.m. they attended the establishment in response to a noise complaint. Inside they noted 10 - 15 patrons in possession of what appeared to be beer. One person who appeared to be an employee was noted behind the bar pouring what appeared to be beer into a glass. Both officers are experienced in making patrols of licensed establishments. As such, they are familiar with the appearance of alcoholic and non-alcoholic beverages. Their evidence was maintained on cross-examination.

The evidence of the two employees and the patron was by way of notarized statements. The statements were undated. We do not know when they were written, we know only that they were notarized on July 16, 2007, the day preceding the hearing. They did not appear as witnesses and were not subject to cross-examination. As such their evidence was untested.

I prefer the evidence of the police officers. It would be preferable that the officers enquired or made some tests of the liquid in the patron's glasses. I am however satisfied that there is sufficient difference between the appearance of beer and other drinks, and that persons familiar with the operation of licensed establishments are able to distinguish between them. There was no evidence that the beer may have been a non-alcoholic variety. Alcoholic beer is commonly served in licensed establishments and on the evidence, was available in this establishment.

The explanation that the liquid in the glasses was not alcoholic could have been provided by the two employees to the police officers at the time of the incident. It was not. The male employee was uncooperative and did not respond to the officers. The female employee was reluctantly co-operative. She was given a copy of the LPC and could have offered an explanation at the time, but did not do so.

The statements provided by the two employees explaining the reason why witness D was behind the bar pouring beer into a glass differed with the explanation provided by the licensee's representative during the pre-hearing conference held on April 23, 2007. It was recorded that the police officers may have seen "the cook getting himself a drink of beer after his shift was over because the practice in the establishment is to allow staff an alcoholic drink after their shift is over" (exhibit 3, page 2).

I find on a balance of probabilities the liquid contained in the glasses was alcoholic beer and as such was liquor as defined in the *Act*.

The licensee is entitled to a defence to the finding of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

Here the only evidence of due diligence is that contained in the statement of licensee witness C; "Our company policy and my training is to keep in compliance of the liquor laws, and that is how I conduct myself at my place of work period. And that is how I conducted myself on January 13, 2007." There is no evidence that the licensee has established a training program for employees, nor has written policies and procedures in place instructing employees on their duties. There is no evidence of the licensee having any systems in place to ensure that the employees operate the establishment in compliance with requirements. There was reluctance on the part of any employee to

identify themselves and to take responsibility for being in charge of the establishment at the time of the incident.

I find that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on January 13, 2007, the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing Regulation* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* 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 *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the NOEA.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty are: whether there is a past 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.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident. The range of penalties for a first contravention of 44 (1)(b) of the *Liquor Control and Licensing Regulation* pursuant to Schedule 4, section 2(2), is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

In the circumstances of this case I find that a penalty is necessary to ensure future compliance. The hours for the sale, service and consumption of liquor are the foundation of the liquor licence. The hours are normally set in conjunction with community standards. Non-compliance can have an adverse effect on the surrounding community.

The minimum penalty of a four day suspension is warranted and appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 200643 for a period of four (4) days, to commence as of the close of business on Thursday, September 6, 2007, 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 be held by the branch or the Vancouver Police Department from the close of business on Thursday, September 6, 2007 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: August 2, 2007

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Office
Attention: Regional Manager Donna Lister

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