



**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:	Borrachos Enterprises Ltd. dba Savoy Inn 198 Baker Street Nelson, BC V1L 4H2
Case:	EH07-164
For the Licensee:	Blair F. Suffredine
For the Branch:	Tania Cogan
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	June 4, 2008
Place of Hearing:	Nelson, BC
Date of Decision:	June 23, 2008

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 387-1254
Facsimile: 250 387-9184

Location:
Second Floor, 1019 Wharf Street
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

Corporate licensee Borrachos Enterprises Ltd. dba Savoy Inn holds Liquor Primary Licence No. 050780 for the operation of a hotel nightclub, Club 198 located at 198 Baker St., Nelson BC. The hours of sale are 7 p.m. to 2 p.m. Monday to Saturday and to Midnight on Sunday. The capacity is 276 persons in the main area, with a designated smoking area of 24 persons. The nightclub is leased to a third party. The licensee remains responsible for the proper operation of the nightclub. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia" ("Guide").

The Savoy Inn also holds a further liquor primary licence for the operation of a hotel pub, the Rezevoir, and a food primary licence for the operation of a hotel restaurant, the Mazatlan.

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the amended Notice of Enforcement Action (the "NOEA") dated March 25, 2008.

The branch alleges that on October 7, 2007, the licensee contravened section 44 (3) of the *Liquor Control & Licensing Regulation* by allowing consumption of liquor in the licensed establishment beyond ½ hour after the time stated on the licence for the hours of liquor service. The proposed penalty is \$5000 (item 26 of Schedule 4 of the *Regulation*).

Item 26 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.

If the above contravention is not found, the branch will ask the general manager to find the **alternative contravention** listed in the NOEA:

On October 7, 2007, the licensee contravened section 44(1)(a) of the *Liquor Control & Licensing Regulation* by failing to clear patrons within 1/2 hours after liquor service hours. The proposed penalty is \$1000 (item 24 of Schedule 4 of the *Regulation*).

Item 24 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 1 - 3 days and/or a monetary penalty of \$1000 - \$3000.

The licensee disputes the contraventions.

RELEVANT REGULATORY PROVISIONS

Liquor Control and Licensing Regulations (the Regulations)

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

(a) liquor primary licensees and liquor primary club licensees must ensure that patrons are cleared from the licensed establishment within 1/2 hour after the time stated on the licence for the hours of liquor service, and

(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).

(2) Unless otherwise authorized by the general manager, if a licensee has been issued a licence, other than a food primary licence, in respect of an establishment, the licensee must not allow patrons to enter the licensed establishment during the hours when liquor service is not allowed by the licence.

(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.

(4) A person must not consume liquor in a licensed establishment beyond the time allowed for consumption under subsection (3) in that licensed establishment.

(5) A reference to time in this regulation or in a licence is a reference to the local time observed at the place of the licensed establishment.

ISSUES

1. Preliminary Issue
2. Did the contravention(s) occur?
3. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

Exhibit No. 1: Branch Book of Documents #1, tabs 1 – 24

Exhibit No. 2: Branch Book of Documents #2, tabs 1 – 28

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

A police officer testified that he is a member of the Nelson City Police. He has been a police officer for approximately 13 years and is experienced in doing walk-thru inspections of licensed establishments and identifying and dealing with intoxicated patrons. He was in uniform working general duties during the early morning hours of October 7, 2007. At approximately 2:25 a.m. whilst on patrol he heard loud music emanating from inside the nightclub area of the Savoy hotel and observed a large group of people gathered outside. Many appeared to be intoxicated to some degree. There was no hotel door staff visible. He attempted to enter the establishment, but was delayed by a belligerent and “very intoxicated” young male. He made his way past this person after a couple of minutes. A number of persons were slowly making their way up the stairs towards the exterior doors. Several appeared to be intoxicated, some

needing assistance to climb the stairs. Inside there were approximately 50 to 100 persons standing around consuming from bottles of beer and what appeared to be alcoholic beverages. Many appeared to be intoxicated, exhibiting usual signs of intoxication, unsteady on their feet, speaking loudly and slurring their words. They were "High Fiving" the officer and trying to hug him, which he found unusual for sober behaviour. They were not in the process of leaving. The DJ continued playing music. Staff appeared unable to control the situation and there was no effort being made to have persons leave.

He asked to speak to the person in charge and was directed to the female bartender. He learned later that the manager of the nightclub had taken the day off without prior notice. The bartender was pouring what appeared to be non-alcoholic beverages for patrons. He requested to see the liquor licence in order to determine the licensing hours for the establishment. She was unable to locate it. He asked why patrons were being permitted to remain inside with the music still playing. She said that she was trying to get the music stopped and to get persons to leave, but they weren't listening to her.

He requested the attendance of other police officers to assist in having the premises vacated. This was accomplished sometime after 2:40 a.m. He testified that he was uncertain whether patrons continued to consume liquor beyond 2:30 a.m., as he was more focused on his own safety. He did recall seeing persons holding bottles of beer at a time that would have been after 2:30 a.m. He issued a Licensed Premises Check form (LPC) (exhibit 1, tab 17) to the bartender and asked for her "Serving It Right" certificate. She was unable to produce it.

Upon leaving the establishment there was still a crowd of persons on the street in front of the nightclub, some of whom appeared intoxicated. He recognized having seen some of the persons earlier inside the nightclub. He felt that the licensee should have taken action to have the crowd dispersed.

Later that night he wrote an occurrence report (exhibit 2, tab 15) which was forwarded to the liquor inspector together with a copy of the LPC.

He testified that as a police officer he would prefer that patrons be given longer than one-half hour to consume their liquor or non-alcoholic beverages and leave a licensed establishment. He also has a preference for limited hours for the sale of liquor.

A branch liquor inspector, testified that he is responsible for the geographical area in which the establishment, the Savoy Inn is located. He is familiar with the establishment. It contains three licensed premises within the structure. One, a nightclub known as Club 198 is located downstairs, holds a liquor primary licence, and is the subject of this hearing. A third party lessee operates it on behalf of the licensee. A pub known as the Rezevoir is located on the main floor and also holds a liquor primary licence. A principal of the corporate licensee operates it. The third, a restaurant located on the main floor has a food primary licence.

He referred to copies of documents from branch files:

- Exhibit 2, tab 14; the Liquor Primary Licence in effect for Club 198 at the time of the alleged contravention. It is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees."
- Exhibit 2, tab 27; a copy of the "Guide" in effect at the time of the alleged contravention.
- Exhibit 2, tab 13; the approved floor plan for Club 198.
- Exhibit 1, tab 12; Interview Report signed by the principals of the corporate licensee on February 7, 2003, that they are aware of the terms and conditions of the liquor licenses and agree to abide by them.

He testified that he first learned about a possible contravention occurring at the establishment on October 7, 2007, when he received an LPC and a police occurrence report from the police officer that had attended at the establishment during the early morning hours of that date. On October 29th the inspector conducted a compliance meeting with principals of the corporate licensee, a third party lessee of the nightclub and the police officer who had attended at the establishment. They discussed the incident of October 7th and the licensee's responsibilities. He received a commitment that the establishment would be operated in compliance with the liquor licence requirements (exhibit 1, tab 22).

He reviewed the branch file for the establishment prior to making a determination of whether to recommend enforcement action be taken. He testified that the file contains copies of a number of Contravention Notices (CNs) issued to each of the three licensed premises located in the Savoy Inn. Several of the CNs resulted in compliance meetings being held with the principals of the corporate licensee. He referred to the following documents from the file:

- Compliance meeting held with a principal of the corporate licensee on May 2, 2007, held to discuss allegations of illegal activities occurring outside the Rezevoir Pub at closing time on March 29, 2007. A commitment was made to take necessary action to discourage the illegal activities and contact the police, if necessary (exhibit 1, tab 23)
- CN - Intoxication and operate contrary to public interest, Rezevoir Pub, March 20, 2007 (exhibit 1, tab 4). Compliance meeting held March 20, 2007, with a principal of the corporate licensee. A commitment was made to ensure that reasonable measures are taken to reduce problems (exhibit 1, tab 24).
- CN - After hour's service of liquor, Rezevoir Pub, June 17, 2006 (exhibit 1, tab 5). Compliance meeting held September 27, 2006, with a principal of the corporate licensee. Commitment made to operate only within the licensed hours and to co-operate with police officers and liquor inspector (exhibit 2, tab 2).
- CN - Intoxication, Rezevoir Pub, September 18, 2005 (exhibit 1, 6).

- CN - Minor on premises; fail to request identification, Club 198, November 17, 2004 (exhibit 1, tab 7). Compliance meeting held December 7, 2004, with a principal of the corporate licensee. Commitment to ensure diligent security of the establishment (exhibit 2, tab 4). This matter proceeded to enforcement action. Waiver signed by a principal of the corporate licensee agreeing to a monetary penalty of \$1,000 (exhibit 2, tab 26).
- Compliance meeting held with a principal of the corporate licensee on October 5, 2004, to discuss allegation of overcrowding of Rezevoir Pub. Commitment made to operate within permitted capacity (exhibit 2, tab 5).
- Compliance meeting held with a principal of the corporate licensee on September 13, 2004, to discuss allegation of intoxicated persons permitted in Rezevoir Pub. Commitment to prevent persons becoming intoxicated and not to allow intoxicated persons to remain in the establishment (exhibit 2, tab 6).
- CN - Exotic dancer prohibited acts, Club 198, June 15, 2004 (exhibit 1, tab 8). Compliance meeting held August 24, 2004 (exhibit 2, tab 7).
- CN - Liquor removed from establishment; Mazatlan restaurant, fail to produce floor plan, July 31, 2004 (1, 9).
- CN - Fail to request identification, Rezevoir Pub, July 2, 2004 (1, 10). Compliance meeting held August 24, 2004, with a principal of the corporate licensee. Commitment to have staff check two pieces of identification of all persons appearing under 25 years old (exhibit 2, tab 7).
- CN - fail to request identification, Club 198, July 3, 2004 (exhibit 1, tab 11). Compliance meeting held August 24, 2004, with a principal of the corporate licensee. Commitment to have staff check two pieces of identification of all persons appearing under 25 years old (exhibit 2, tab 7).
- CN - Liquor removed from establishment, Club 198, May 1, 2004 (1, 2). Compliance meeting held with principal of the corporate licensee and third party lessee. Commitment made for better door control (exhibit 2, tab 8).

- CN - Liquor removed from establishment, Rezevoir Pub, February 15, 2003 (1, 13).
- CN - Fail to request identification, Club 198, February 1, 2003 (1, 14). Compliance meeting held March 31, 2003 with third party lessee (exhibit 2, tab 9).
- CN - Fail to produce liquor license, floor plan and staff S.I.R., Club 198, February 1, 2003 (1, 15). Compliance meeting held March 31, 2003, with third party lessee (exhibit 2, tab 9).
- Compliance meeting held July 2, 2003, for liquor primary licensees in the Nelson area to discuss statutory and regulatory requirements for operating licensed establishments (exhibit 2, tab 10).
- CN - Minors consuming liquor, Mazatlan Restaurant, February 16, 2002 (exhibit 1, tab 16). Compliance meeting held February 18, 2002. Commitments made for more diligence (exhibit 2, tab 11).
- Warning letter to licensee concerning allegation of after hour's liquor service and unlawful activities occurring in the Mazatlan restaurant on February 27, 2000 (exhibit 2. Tab 23).
- Warning letter to the licensee concerning permitting liquor to be removed from the restaurant on January 1, 2000 (exhibit 2, tab 24).
- Warning letter to the licensee concerning failing to clear patrons of the nightclub within ½ hour after closing on February 28, 1998 (exhibit 2, tab 25).

The inspector testified that the decision whether to proceed with enforcement action is made by the liquor inspector in consultation with the regional manager. Enforcement action is not taken in instances where co-operation is achieved with the licensee, or where there is considered to be insufficient evidence to proceed. In the latest incident, (October 7, 2007) it was considered that enforcement action was warranted to ensure future compliance.

He testified that licensees must consider the public interest in operating their establishment. They must put reasonable measures in place to deal with problems occurring outside their establishment if those problems are due to the operation of the establishment. The *Regulations* require that a licensee must clear all patrons within one-half hour after the hours of liquor service. In his experience, not all police officers would agree that patrons should be allowed to remain for a longer period of time in a licensed establishment. If that is necessary to prevent impaired driving by persons leaving an establishment, perhaps liquor sales should cease earlier. Some establishments practise this. In his meeting with the lessee of Club 198 he was told that most of its liquor sales occur near the end of the night.

EVIDENCE - THE LICENSEE

No evidence was presented on behalf of the licensee.

LICENSEE SUBMISSIONS

Counsel submitted that the evidence does not support a contravention of allowing persons to consume beyond one-half hour after closing. The police officer was not certain of the time when he observed persons consuming, nor was he certain that they were consuming liquor. The officer's evidence regarding persons being intoxicated was that some persons were described as holding onto each other and were in a party mood, not that they were so intoxicated that they needed help to walk.

Counsel agreed that the establishment was not cleared of patrons within one-half hour after closing. The delay was minimal and they had cleared all patrons by 2:40 a.m. There is evidence that persons were trying to leave as the police officer entered. The individual trying to prevent the officer's entry impeded them. Thus, there is evidence that staff were trying to clear the establishment and some progress was being made.

He submitted that there is no basis on which to impose a monetary penalty. The key person responsible for operating the establishment failed to show up for work and that put the operation out of order for the night. There is no history of non-compliance in the operation of Club 198. The compliance meetings related to different licences located in the hotel.

REASONS AND DECISION

Preliminary Issue

Counsel submitted that it was not appropriate to hear evidence on penalty until after the decision was made on whether a contravention had occurred. The evidence of the licensee's compliance history should only be tendered after a decision is reached on whether a contravention has occurred. To do otherwise is prejudicial to the licensee.

I disagree. It has consistently been held that the hearing process allows for penalty submissions to be made during the course of the hearing prior to a determination on the alleged contravention and that that process does not prejudice the licensee. The licensee knows the contravention(s) alleged at the time he is making his submissions on penalty. The range of penalty is set by *Regulation*. The licensee is able to lead evidence on, and speak to, penalty factors including the degree of culpability, the nature of the contraventions and mitigating circumstances or conduct. It is open to the licensee to make alternative submissions on penalty. The licensee can argue there should be no penalty or if the adjudicator finds a penalty is appropriate, it should be other than what the branch has recommended.

Counsel has argued that the evidence of the licensee's compliance history should only be tendered after a decision is reached on whether a contravention has occurred. To do otherwise is prejudicial to the licensee. I disagree that this is prejudicial to the licensee. It is incumbent upon the adjudicator to ensure that in considering the elements necessary to a finding of a contravention that he/she does not take into consideration evidence respecting the compliance history of the licensee. I accept that responsibility.

Alleged Contraventions

1. The licensee contravened section 44 (3) of the *Regulation* by allowing consumption of liquor in the licensed establishment beyond ½ hour after the time stated on the licence for the hours of liquor service.

I find that on the evidence presented the evidentiary burden has not been satisfied.

2. The licensee contravened section 44(1)(a) of the *Regulation* by failing to clear patrons within 1/2 hours after liquor service hours.

The evidence of the police officer is uncontroverted. The establishment was not cleared of patrons until sometime after 2:40 a.m. That is a contravention of section 44(1)(a) of the *Liquor Control & Licensing Regulation*.

Due Diligence

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.

There is no evidence upon which I can find that the licensee was duly diligent.

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 is: 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. There were, however, previous Contravention Notices issued to the licensee during the time it held the licence for each of the separately licensed premises.

One concerned the operation of Club 198 and lead to enforcement action resulting in a minimum \$1,000 monetary penalty being imposed in 2005. The branch did not pursue enforcement action on other alleged contraventions. It did however follow up with a number of compliance meetings in an attempt to assist the licensee in bringing the operation of the establishment into compliance. 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 its concerns and has attempted to assist the licensee in achieving compliance. The branch has dealt with this licensee in the past with great forbearance, perhaps too much so.

The range of penalties for a first contravention of section 44(1)(a) of the *Regulation*, is a licence suspension for 1 - 3 days and/or a monetary penalty of \$1000 - \$3000, Item 24 of Schedule 4 of *the Regulation*.

The public expects that a licensed establishment will operate within the law and requires regulatory agencies responsible for overseeing their operation to act within their authority to ensure that licensees are held to high standards of legality and responsibility. In the circumstances of this case, the licensee permitted a third party lessee to operate the licensed premises under the licensee's liquor licence. The licensee bears the ultimate responsibility to ensure that the premises are operated in compliance with the legal requirements. We do not know what arrangements have been made between the licensee and the third party. We do not know what steps the lessee takes to ensure that the establishment operates in compliance with the legal requirements. We do know that the person who was the manager of the premises did not appear for work on the night of the contravention. The person left in charge of the premises at the time of the contravention was admittedly unable to control the behaviour of the patrons when closing time arrived. I am satisfied that it was only through the appearance of the police officer that the consumption of liquor by patrons did not continue past the required one-half hour period. It was only through his efforts that all of the patrons left the establishment when they did, albeit at least 10 minutes beyond the requirements.

I am concerned that there is, within the operation of the licensed premises, a greater sense of entitlement than of responsibility. A decision could have been made not to open for business when the manager failed to arrive for work. Or a decision could have been made to cease the sale of liquor at an earlier time than the maximum time permitted, i.e. 2 a.m. Neither choice was made or, on the evidence, even considered. The inspector's evidence and his notes to the compliance meeting held October 29, 2007, to discuss the incident of October 7th reveals that he urged the principal of the licensee and the lessee to reduce the quantity of liquor sold near closing time. In his view, this would reduce problems in and outside of the establishment. This was not agreeable to the lessee, as it would affect his profits. There is evidence from the police officer present at the time of the contravention of intoxicated patrons inside and outside of the establishment. I am satisfied that this occurred as a result of the operation of Club 198 and that the intoxication was due to the consumption of liquor by patrons at the nightclub.

I find that a penalty is necessary to ensure future voluntary compliance and to protect the public interest. In the circumstances, I do not believe that the minimum \$1,000 monetary penalty is sufficient to encourage voluntary compliance or is appropriate to the circumstance of the contravention. The range of penalties for a first contravention of this type is a licence suspension for 1 - 3 days and/or a monetary penalty of \$1000 - \$3000. I find that a monetary penalty of \$3,000 is necessary and appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order that the licensee pay a monetary penalty of Three Thousand Dollars (\$3,000) to the general manager of the Liquor Control and Licensing Branch on or before Monday, July 21, 2008.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: June 23, 2008

cc: Nelson City Police

Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Tania Cogan, Branch Advocate