



**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: 548495 B.C. Ltd.
dba National Hotel Pub & Restaurant
1201 1st Avenue
Prince George, BC V2L 2Y7

Case: EH08-068

For the Licensee: David E. Jones & Sam Manhas

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: Written Submissions

Date of Decision: October 16, 2008

INTRODUCTION

This hearing was conducted by way of written submissions by agreement of the licensee and the General Manager.

The licensee is the previous operator of an establishment with Liquor Primary Licence No. 025141 in the City of Prince George, British Columbia. The licensee sold its business, including the establishment, to a third party. The third party has applied to have the liquor licence transferred into his name and a decision on that application is pending. The third party was at all material times to this matter operating the licensed premises with the consent of the licensee. During the enforcement process, counsel for the licensee advised the branch that the licensee had no knowledge of the events in issue and that the third party would be speaking to the allegations on behalf of the licensee. The submissions are from the third party operator (operator)

As a result of allegations relating to activities at the licensed establishment on June 26, 2008, the liquor inspector issued a contravention notice (CN). In due course the branch issued a Notice of Enforcement Action (NOEA) to the licensee.

The operator replied to the allegations by acknowledging that two of the contraventions occurred, but disputing that the recommended penalties are appropriate. The operator denies that the third contravention occurred. The branch and the licensee provided evidence and submissions with respect to the alleged contraventions and recommended penalties.

CONTRAVENTIONS

The licensee allegedly contravened section 36 of the *Liquor Control and Licensing Regulation (Regulation)* by selling or providing liquor purchased under another licence when not authorized to do so by the general manager of the branch.

The licensee allegedly contravened section 43 of the *Regulation* when an employee who was working in the establishment failed to have her certification under the *Serving it Right: Responsible Beverage Service Program*.

The licensee allegedly contravened section 35(3) of the *Regulation* when it did not maintain a register of all of the liquor purchased and received by the licensee under its licence.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Sale of liquor purchased under licence

36 A licensee must not, under the authority of one licence, sell or provide liquor purchased under another licence, unless otherwise authorized by the general manager.

Beverage service training

43 (1) For the purposes of this regulation and section 13 of the Act, "**training program**" means the training program entitled "Serving It Right: The Responsible Beverage Service Program", delivered under the auspices of a person or organization approved by the general manager.

(2) For the purposes of section 13 (1) of the Act, the following licence categories are prescribed:

...

(c) liquor primary licences, liquor primary club licences, food primary licences, licensee retail store licences and special occasion licences.

...

(3) For the purposes of section 13 of the Act, the training program is prescribed.

...

(5) Successful completion of the training program by each person must be evidenced by a certificate of completion issued in the name of that person by an authority approved by the general manager.

...

(8) Subject to subsection (7) of this section, before allowing a person to manage or serve liquor in a licensed establishment to which section 13 of the Act applies, the licensee must verify that the person has successfully completed the training program.

...

(9) A person who claims to have successfully completed the training program must produce his or her certificate of completion when requested to do so by the general manager, an officer of the Liquor Control and Licensing Branch or a peace officer.

Purchase of liquor

35 (1) A licensee must not purchase liquor for the licensed establishment unless, at the time of the purchase, the licensee identifies himself or herself as a licensee and that purchase is made from

(a) a liquor store designated in writing by the general manager, or

(b) another person designated by the Liquor Distribution Branch.

...

(3) A licensee must maintain a register of all liquor purchased and received by the licensee under a licence.

ISSUES

1. For the conceded contraventions of section 36 and section 43 of the *Regulation*, is a penalty warranted and if so, what is the appropriate penalty?
2. Did the alleged contravention of section 35(3) of the Regulation occur? If it did, is a penalty warranted and if so, what is the appropriate penalty?

EXHIBITS

The materials provided for this determination include disclosure documents provided by the branch (Exhibit No. 1) dated September 2, 2008, consisting of the following:

- Notice of Enforcement Action (NOEA) dated August 27, 2008
- Contravention Notice (CN) No. 007720
- Liquor Primary Licence No. 025141
- Floor plan of the establishment
- Excerpts from the *Guide for Liquor Licensees in British Columbia*
- Reports of compliance meetings (2002, 2004, 2006, 2007, 2008)
- Liquor inspector's notes
- Memo re: telephone conversation between the branch and the operator
- Serving it right certificate of AW dated July 1, 2008
- Licensee's history and record of CNs
- Licensed retail store (LRS) inspection interview sheet
- Excerpts of the *Regulation*
- Reporting-out letter dated August 28, 2008

An unsigned letter with an institutional fax cover page identifying the sender as the operator to the general manager of the branch dated September 19, 2008 (Exhibit No. 2). This exhibit is being treated as though the letter is from the operator.

An undated *Response to the Licensee's Submissions* from the branch advocate (Exhibit No. 3).

A letter from counsel for the licensee regarding the sale of the business (Exhibit No. 4).

A letter from the branch registrar to the adjudicator dated October 1, 2008.

SUBMISSIONS

Counsel for the licensee submits that the clear target of the enforcement process is the purchaser and operator at the time of the allegations, not the licensee, and any contravention or penalty should be addressed to the purchaser and operator of the establishment.

Section 36

The branch submits that the operator of the licensed establishment kept it open in order to be entitled under branch requirements to operate the correlated Bon Voyage Liquor Store. The operator submits that the licensee sold him the business and vacated the premises with all of the liquor. In order to keep the establishment open, the operator brought in liquor purchased for another of its licensed premises. The branch proposes a monetary penalty of \$7,500 and notes that a suspension would not have any effect as a deterrent to non-compliance as the operation is only formally open in order to support the operation of the adjoining LRS.

Section 43

The branch submits that the establishment has a history of attracting violent conduct and was the site of a violent attack earlier in the year. The branch says the operator runs three other liquor primary establishments and is aware of the safety issues associated with the provision of liquor and liquor consumption. An employee who was obligated by the *Regulation* to have completed the *Responsible Beverage Service* program had not done so. The branch submits that the completion of this program imparts considerable safety information and the operator should be doing all that he can to improve the safety record of the establishment. The branch recommends a \$3,000 monetary penalty and again points out that a suspension would not have any value as a deterrent in light of the current status of the establishment as formally open, but not effectively operating.

The operator acknowledges that the contraventions of section 36 and section 43 occurred, but submits that the penalties are excessive and would lead to financial hardship, and those consequences would affect the employment of innocent staff members. The operator submits that it was desperate as it was unable to purchase liquor for the establishment from the approved liquor outlet because it was unable to prove that it was the licensee.

Section 35(3)

The branch submits that the operator knows well the requirements of keeping a liquor register on the premises due to his ownership of three other licensed premises. The branch says: "The liquor register did not exist as the liquor was not lawfully purchased." The branch recommends a \$1,000 penalty because notwithstanding meetings and inspections, the operator did not comply with known requirements. Once again, the branch submits that a suspension would not serve any purpose.

The operator interestingly makes the same submission as the branch, that there was no register because there was no liquor purchased. The operator says the legal entity that purchased the liquor is the entity that has the liquor listed in its register. The operator disputes the allegation that it contravened this section of the *Regulation*.

ANALYSIS AND DECISION

The licensee has suggested that enforcement action should be directed to the purchaser of the establishment, whom was at the relevant times in control of the establishment. I disagree. The licensee is responsible for the establishment until such time as it is no longer on record as the licensee. Although the establishment had been sold and an application made by the purchaser for a transfer of the licence, the transfer had not been completed at the relevant time. Therefore, the licensee was responsible for the operation of the licensed premises at all relevant times and any contractual rights or obligations as between the licensee and the operator are not concerns of the branch.

The operator acknowledges that the contraventions of section 36 and 43 occurred. For penalty purposes, I accept that they occurred and so find.

The operator states that he disputes that the alleged contravention of section 35(3) occurred. The branch says that the substance of the operator's submissions indicates an admission that the contravention occurred.

The branch alleged and proved that the operator had obtained liquor for sale by improper channels, and the liquor was therefore not purchased in accordance with the *Act* and *Regulation*. It is a contravention of the *Regulation* to fail to keep a register of alcohol received under a licence. The wording of the *Regulation* stipulates that the licensee receive alcohol purchased under a licence, not under

the licence. My interpretation of the wording of the *Regulation* is that even if the liquor was purchased under a different licence, it must be recorded as received in the register for the licence that is the subject of this enforcement action. The operator conceded that it had no register of liquor. I find that the contravention occurred.

The operator argues that the circumstances in which it found itself led to the contraventions notwithstanding its best efforts to comply with all of the applicable regulations. This is tantamount to a plea that the operator exercised due diligence. Due diligence would, if proven, be a complete defence to the allegation. It is clear to me that the operator (or its principle, SM the author of the submissions) was the directing mind of the establishment at the time of the allegation. The operator has not established on a balance of probabilities that it took all reasonable steps to prevent the contravention. The operator says that it tried to purchase liquor through the appropriate channels and was denied, resulting in an inability to keep a register of the liquor. The aforesaid interpretation of section 35(3) nullifies this argument. The operator could have kept a register of liquor obtained from the other licensee, though not obtained in accordance with other provisions of the *Regulation*. Further, I find that even with respect to the contraventions to which the operator admits, the evidence discloses insufficient effort on the part of the operator to comply with the *Regulation* such as to meet the burden of proof. The operator's sole employee on duty when the inspector arrived on June 26, 2008, had not been properly trained, and there is little evidence of systems in place in support of this defence.

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 *Regulations*. I am not bound to follow the maximums set out in that Schedule.

The first question I must consider is whether penalties are warranted in the circumstances. The operator itself is an experienced licensee. I am satisfied that the operator's knowledge and experience in the industry and its history of discussions and meetings with the branch confirm knowledge of the *Regulation* that it contravened. I find that the operator contravened the *Regulation* because it was inconvenient or difficult to comply with the *Regulation*. This is a blatant disregard for the obligation to comply with the rules of operation of a licensed establishment. I also find that the operator exposed the licensee to repercussions for its actions. I find the licensee did not take any reasonable steps to protect itself from exposure for the actions of the operator, and in that regard is accountable for the operator's transgressions.

The branch is interested in voluntary compliance with the *Act* and *Regulation*, and despite its efforts with respect to the operator, the branch has not obtained voluntary compliance. With respect to the contraventions of section 36 and section 43, I find penalties are warranted. The licensee's plea that the operator should be saddled with the results of the operator's actions is contrary to the requirements that the licensee be responsible for the licensed premise and accountable for contraventions committed with respect to the licensed premises.

With respect to the contravention of section 35(3) I find that no penalty is warranted. The contravention was a direct consequence of the contravention of section 36, for which I have assessed a penalty. To assess a penalty for both section 35(3) and 36 under these circumstances would be duplicitous.

The next question is what penalties are appropriate for the contraventions of section 36 and section 43. The branch recommends a monetary penalty of \$7,500 for the contravention of section 36. I note that one of the documents (NOEA) in Exhibit No.1 at one point describes a penalty of \$3,000 for the contravention of section 36. The conclusion on that page of the NOEA corrects this obvious error and recommends a penalty of \$7,500. The remainder of the Exhibit confirms the recommended penalty is \$7,500. I find that the error presents no notice issues and that the requirements of natural justice have been satisfied. The branch recommends a monetary penalty of \$3,000 for the contravention of section 43.

The range of penalty for the contravention of section 36 of the *Regulation* in accordance with Schedule 4 is ten (10) to fifteen (15) days suspension, and/or a \$7,500-\$10,000 monetary penalty.

I find a \$7,500 monetary penalty to be appropriate for the contravention of section 36.

The range of penalty for the contravention of section 43 of the *Regulation* in accordance with Schedule 4 is one (1) to three (3) days suspension, and/or a \$1,000-\$3,000 monetary penalty.

I find a \$3,000 monetary penalty to be appropriate for the contravention of section 43.

ORDER

Pursuant to Section 20(2) of the *Act*, I order that the licensee pay a monetary penalty of Ten Thousand Five Hundred Dollars (\$10,500) on or before November 15, 2008.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: October 16, 2008

cc: RCMP Prince George

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Michael Clark, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Olubode Fagbamiye, Branch Advocate