



**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: 0781342 B.C. Ltd.
dba Soho Bar & Grill
960 15355 24th Avenue
Surrey, BC V4A 2H9

Case: EH08-086

For the Licensee: Randy Siekham

For the Branch: Olubode (Bode) Fagbamiye

Enforcement Hearing Adjudicator: George C.E. Fuller

Place of Hearing: Written Submissions

Date of Decision: January 13, 2009

**Ministry of Housing
and Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee, 0781342 BC Ltd., operates an establishment known as the Soho Bar & Grill and holds Food Primary Licence No. 302608.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The licensee and the General Manager agreed to conduct this hearing by way of written submissions. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Food Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia*. The Liquor Control and Licensing Branch (the "Branch") by Notice of Enforcement Action (NOEA) dated August 11, 2008, alleges that on July 4, 2008, the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* by permitting an intoxicated person to remain in that part of the licensed establishment where liquor was sold, served or otherwise applied. The branch proposes a penalty of a four (4) day suspension of the liquor licence.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, Section 43(2)(b), which provides as follows:

- 43(2) A licensee or the licensee's employee must not permit
- (b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise applied.

ISSUES

1. Did the contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

The following Exhibits were considered in the course of this adjudication:

Exhibit 1

The branch's letter to the licensee dated September 24, 2008, with its attachments:

- Notice of Enforcement Action Letter (the NOEA) dated August 11, 2008
- Contravention Notice No. B008059
- Food Primary Licence No. 302608
- Floor plan for Soho Bar & Grill
- Final inspection interview sheets for Soho Bar & Grill
- Notes of Liquor Inspector
- Correspondence and newspaper advertisement sent to Liquor Inspector
- Pages 1, 2, 3, 4, 5, 11, 12, 13, 14, 27 & 28 of the *Food Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia*
- Section 14.3 of the *Compliance and Enforcement Desk Reference Manual* on permitting an intoxicated person to remain
- Section 43(2)(b) of the *Liquor Control & Licensing Act*
- Branch Registrar's September 18, 2008, letter summarizing the pre-hearing conference.

Exhibit 2

The licensee's one-page letter of submission, received by the branch on October 15, 2008.

Exhibit 3

The branch's one-page response to the licensee's submission dated October 27, 2008.

Exhibit 4

The licensee's one-page further submission in response to the branch's submission of October 27, 2008, received by the branch on October 29, 2008.

EVIDENCE

In admitting to the alleged contravention, the licensee has, implicitly, also accepted the version of events set out in the Notice of Enforcement Action of August 11, 2008, in the attachment headed "Summary of Evidence". Accordingly, I will now turn to setting out the facts which I find to have been proven in relation to the licensee's contravention.

The Inspector, while conducting a routine investigation at the licensee's establishment between 11:20 p.m. and 11:45 p.m. on July 4, 2008, was approached by an Indo Canadian male patron (the "Patron"), who had previously been seated at the bar, and who proceeded to try and talk to the liquor inspector. His words were slurred, his eyes appeared unfocused and he was swaying as he was standing. The server also noted the patron's intoxicated state and advised him to go back to the bar where the bartender would give him some coffee, as she was also of the view that the patron was not to have any more to drink. The inspector observed the patron return to the bar and when the inspector subsequently followed; she noted that the patron was seated at the bar again, with what appeared to be a coffee. This was approximately 10 minutes after the

patron had originally approached the inspector. The inspector says that she saw no efforts being undertaken to remove this intoxicated patron from the premises. The inspector then proceeded to complete her inspection. She again talked to the server about the situation. At that time, the inspector noted that the intoxicated patron was still in the premises.

The inspector issued Contravention Notice No. B008059 and at that time also talked to the manager over the phone. The inspector advised the manager of the contravention and he agreed that a meeting with the inspector at the Surrey Regional Office of the branch would be in order. The inspector made another attempt to set up a meeting with the manager on July 8 and, again, the manager advised that he would contact the inspector with his availability. However, the inspector indicates that she received no further contact from the manager.

As the licensee admits to the contravention of section 43(2)(b) of the *Liquor Control and Licensing Act*, I find the contravention to have occurred.

SUBMISSIONS

Branch

The branch submits the following:

The issue of liquor service, or intoxication, is a serious contravention which can constitute a significant risk to public safety. Persons showing signs of intoxication need to be denied, or prohibited from, being able to access further alcohol. It is for this reason that there is a responsibility on the part of licensees, or their staff, to ensure that patrons who are intoxicated are removed from the licensed area of the establishment where liquor service is taking place. In the current situation, the signs of intoxication being displayed by the patron in question were significant and very clearly visible. In fact, the Inspector noted that the server decided independently that the individual

should be denied further alcohol service. Despite this, however, the staff person took no steps to follow through with the removal of the patron from the establishment.

In addition, the inspector noted that he had made a number of attempts to meet with the manager to discuss the matter further. However, the manager did not follow through on any of these requests. In the inspector's submission, therefore, enforcement action is warranted to enforce the seriousness of the contravention which took place.

Licensee

In Exhibit 2 in these proceedings, the licensee states that it did not dispute that an intoxicated person was allowed to remain on the premises and, therefore, admits that the contravention took place as alleged. The licensee further states that, as previously noted, since this contravention the licensee had made it clear to his staff that intoxicated patrons must be escorted off the premises.

The licensee states that it understands that a penalty is to be imposed for the contravention, but asks that no penalty be imposed for its first and last offence under the *Liquor Control and Licensing Regulation*. The licensee further submits that if a penalty is to be imposed, then it requests that it be a monetary penalty and that payment of any fine be satisfied by way of monthly installments. The licensee specifically requests that a suspension not be imposed, as the establishment is attempting to build its business and work with the community and that a suspension would negatively affect the business and reputation.

ANALYSIS AND DECISION

The contravention has been admitted and, therefore, I find that it occurred as alleged. The licensee admits that the contravention occurred as alleged, but disputes the branch's recommended four (4) day suspension. The only issue remaining, therefore, is the determination of what penalty, if any, should be imposed.

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 prior to this contravention having occurred.

Pursuant to the *Regulation*, Schedule 4, item 11, the range of penalties for a first contravention of this type is a 4 to 7 day suspension and/or a monetary penalty of between \$5,000.00 to \$7,000.00.

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 public safety and the well being of the community.

In my view, an appropriate penalty should be fashioned so that it is severe enough to cause a licensee to have sober second thoughts about ever repeating the contravention.

While I acknowledge that the contravention committed here was a first offence, there are a number of factors present in this case which justify the recommended minimum penalty being imposed. To begin with, the contravention took place in an establishment which was governed by a Food Primary Licence. Accordingly, there is the real potential here that, if the contravention is repeated, the disturbing spectacle of an intoxicated person could very well be visited upon impressionable, young children.

Secondly, employees of the licensee took no actions to remove the patron from the licensed premises, in a timely fashion, even after the inspector spoke to the server regarding the situation and she acknowledged that the patron was intoxicated and should not be served any further alcohol.

Finally, notwithstanding the attempts by the inspector to meet with the manager to discuss the situation, the manager either refused or neglected to cooperate. It may very well be that, had the manager met with the inspector, these current proceedings may not have been necessary.

In light of all of the above, I am satisfied that the licensee had not effectively stressed upon its employees the need to fully and conscientiously carry out their duties, in accordance with the requirements of the *Act* and *Regulation* and, therefore, a penalty is necessary to ensure future compliance. It is the sole responsibility of the licensee to ensure compliance with the terms of its licence, while operating the establishment. In the circumstances, I find that the minimum penalty of four (4) days is sufficient to encourage future voluntary compliance. A penalty of such magnitude will underscore the seriousness of the contravention.

DUE DILIGENCE

The licensee asserts that it had “taken every step possible to be in compliance” with the *Act* and/or *Regulation*. This is, essentially, a claim of the defense of due diligence. In order for that argument to succeed, the licensee would need to clearly demonstrate that it took all reasonable measures in order to avoid the contravention. In the liquor licensing context, this would require the licensee to establish that, firstly, the licensee had implemented adequate training and other systems to prevent the contravention and, secondly, that the licensee had actually taken reasonable steps to ensure the effective operation of the system. There was a paucity of evidence in the licensee’s written submissions to clearly indicate that the licensee, in this case, had provided

adequate training to prevent the contravention or, if it did, was vigilant with respect to employees' familiarity and utilization of the system. To the contrary, there is a clear admission against interest contained within the third paragraph of the licensee's letter to the ranch (Exhibit 2), wherein the licensee states: "Since this Contravention we have made clear to our staff that we are not to allow this practice anymore and must escort the customer (out of) the premises." (emphasis added). The inescapable conclusion, therefore, is that the required practice, contemplated by section 43(2)(b) of the *Act*, was not in place at the time of the contravention. Accordingly, I find that the defense of due diligence has not been successfully established by the licensee in this case.

PENALTY

Pursuant to section 20(2) of the *Liquor Control and Licensing Act*, having found that the licensee has contravened the *Act*, I have discretion to order one or more of the following enforcement actions:

- Impose a suspension of liquor licence for a period of time;
- Cancel the 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 a monetary penalty is warranted, I am bound to follow the minimum 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. I am not bound to order the penalty imposed in the Notice of Enforcement Action.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 302608 for a period of four (4) days, to commence as of the close of business on Thursday, February 12, 2009, 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*).

In order to ensure enforcement of this Order, I direct that the liquor licence be held by the branch or the RCMP Surrey Detachment, from the close of business on Thursday, February 12, 2009, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: January 13, 2009

cc: RCMP Surrey Detachment

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

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