



**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: R 134 Enterprises Ltd.
dba Grey Sage Pub, O.K. Falls Hotel
1054 Main Street
Okanagan Falls, BC V0H 1R0

Case: EH08-065

For the Licensee: Dennis Coates, Q.C. & Greg Rhyason

For the Branch: Olubode (Bode) Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: November 6, 2008

Place of Hearing: Teleconference

Date of Decision: December 30, 2008

INTRODUCTION

The corporate licensee, R 134 Enterprises Ltd. operates Grey Sage Pub in the O.K. Falls Hotel in Okanagan Falls, BC. The licensee holds Liquor Primary Licence No. 024241 for the operation of the pub in the hotel. The hours of sale are 10 a.m. to Midnight Monday to Thursday, 11 a.m. to 1 a.m. Friday and Saturday, and 11 a.m. to midnight on Sunday. The capacity is 125 persons. 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.'

Alleged Contravention and Proposed Penalty

The branch alleges that on May 23, 2008, the licensee contravened section 12 of the *Liquor Control & Licensing Act* and the terms and conditions of the licence when it permitted patrons to take liquor from the red-lined area established for that licence. The proposed penalty is a one (1) day suspension of the liquor licence (item 46, Schedule 4 of the *Regulation*).

Item 46 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 to \$3000.

The licensee disputes the alleged contravention.

RELEVANT STATUTORY PROVISIONS***Liquor Control and Licensing Act, [RSBC 1996] chapter 267*****Licences**

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

(a) limit the type of liquor to be offered for sale,

(b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,

Action against a licensee

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;

(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:

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002**Consumption of liquor in licensed establishments**

42 (4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

- (a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;
- (b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

ISSUES

1. Did the contravention occur as alleged in the amended Notice of Enforcement Action (NOEA) dated September 29, 2008?
2. 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 – 16.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Counsel for the licensee admitted the **evidence of the police officers** as submitted by the branch. That evidence taken from Schedule 1 of the amended Notice of Enforcement Action dated September 29, 2008, is as follows:

On May 23, 2008, at 2200 hours, RCMP officers [A] and [B] approached the O.K. Falls Hotel liquor-primary establishment at 1054 Main Street, Okanagan Falls, BC. Both officers were in plainclothes and were on-duty in an undercover capacity. As the officers entered the licensed premises they observed a male and female outside the bar standing on the front porch area drinking alcoholic beverages. The male was drinking a Molson's Canadian beer and the female was drinking a mixed Clamato-looking drink.

O.K. Falls Hotel is currently issued a liquor-primary licence No. 024241. The red-line area of their licence does not include the boardwalk entry area where the officers observed the male and female drinking.

Cst. [A] entered the bar and ordered two beer (Corona and Coors Light). At 2228 hours Cst. [A] immediately left the premises with the beer in his hand in plain view of the staff member without being challenged. The bar is directly in front of the doors leading to the boardwalk. The bar staff have a clear and unobstructed view of the exit doors. There was no door control at that time.

At 2237 hours both officers re-entered the bar and observed a male, previously seen outside on the boardwalk, inside the bar drinking a bottle of Molson's Canadian. The male was unsteady on his feet and had slurred speech.

At 2240 hours both officers left the O.K. Falls Hotel to prepare their notes.

Liquor Inspector A testified that he has been employed as a liquor inspector since February 25, 2008, and is responsible for the geographical area in which the O.K. Falls Hotel is located. The hotel has a liquor primary licensed area and food primary licensed area. He referred to copies of documents from the branch file:

- Exhibit 1, tab 13; hand-written notes received from Constables A and B of the RCMP Penticton detachment referring to a police enforcement project involving licensed establishments including the O.K. Falls Hotel.
- Exhibit 1, tab 3; the liquor primary licence in effect at the time of the alleged contravention.
- Exhibit 1, tab 11; excerpts from a copy of the "Guide" in effect at the time of the alleged contravention. He referred to excerpts from the Guide dealing with: "Red-lined area" and "Terms and conditions of licence."
- Exhibit 1, tab 4(a); floor plan for the liquor primary area.
- Exhibit 1, tab 4(b); floor plan depicting police officers' route in/out of the liquor primary area.
- Exhibit 1, tab 5; Inspection/Interview sheet completed May 10, 2006, by the previous liquor inspector indicating that he met with the licensee Greg Rhyason and discussed and reviewed all licence requirements.
- Exhibit 1, tab 9(e-f); Letter of March 10, 2004, to the manager of the hotel granting "Approval in Principle" for a new outdoor patio.
- Exhibit 1, tab 9(c-d); Branch forms dated May 27 & 30, 2005, indicating that the previous liquor inspector "had spoken with owner who stated that they did not want to go through with patio endorsement anymore. Inspector A testified that this resulted in the licensee not having final approval of a licensed patio.
- Exhibit 1, tab 2; Contravention Notice issued to the hotel.

In determining whether to proceed to enforcement on the alleged contravention, the inspector considered that the circumstances indicated that the employee on duty made no effort to prevent patrons from removing liquor from the licensed area and did not exercise control over the acts of its patrons. The licensee did not submit to him any written policies or procedures regarding the sale and service of liquor at the pub nor did he submit any minutes of staff meetings. The inspector testified that allowing liquor to be removed from the licensed area could be a public safety concern as the hotel is located on the main thoroughfare in the community. He believed that a penalty was necessary and recommended the minimum one day suspension.

On cross-examination the inspector agreed that the licence allows for liquor to be sold for off-premises consumption and liquor sold as such can legally be removed from the premises. He did not believe that to be the case here, liquor sold for off-premises consumption is not sold in a glass as was indicated in the police officers' evidence. The outside area in which the liquor was removed to while not licensed formed part of the premises. He agreed that approval in principle was granted for a licensed patio area however the file indicated that the application had been terminated. He did not contact the previous inspector on the point. He did not believe that the boardwalk area could be licensed as a patio as it now stood, as changes would be needed to restrict access. He agreed that in his contravention notice he referenced section 42(4) of the *Regulations*, "Permit liquor to be removed" whereas in the Notice of Enforcement Action he referenced "Contravening a term and condition, s. 12 – liquor removed from red-lined area."

EVIDENCE - THE LICENSEE

No evidence was presented on behalf of the licensee.

SUBMISSIONS – LICENSEE

Counsel submitted that this matter came about as a result of a police undercover operation. In normal circumstances the police officer or liquor inspector tells the licensee or its employee at the time of occurrence. Here the occurrence took place on May 23, 2008, and the licensee was not notified until the contravention notice was received sometime later in mid-June. This is a small pub of 125 seats; it doesn't need staff meetings or written policies. The licensee has no idea what occurred and thus is at a disadvantage.

Counsel submitted that the branch has alleged the wrong contravention. Section 42(4) of the *Regulations* and item 29 of Schedule 4 of the *Regulations* specifically categorizes the type of contravention. Section 12 of the *Act* and item 46 of Schedule 4 of the *Regulations* do not apply. He submitted that this is a critical defect in the branch process similar to the circumstances found by the Supreme Court of British Columbia in *Plaza Cabaret*, 2004 BCSC 248.

Counsel submitted that the licence allows for liquor to be sold for off-premises consumption. Thus liquor could be purchased in a bottle or can and consumed on the porch or parking lot.

Counsel submitted that an application was made for a licensed patio in 2002 and received approval in principle in 2004. It is unknown why it didn't finalize. It would be unusual for a licensee to abandon an application without writing to the branch or the branch to the licensee that the application was being terminated. The new owner thought that the patio was approved thus the previous owner must have also thought so. The licensee has been prevented from making a new application by branch policy as a result of this ongoing enforcement action. He disagreed that there would be safety concerns arising from the incident, otherwise the branch would not have given approval in principle for a patio. He submitted that there is no evidence whether the activity was permitted or not. The licensee has signs in place but patrons want to go outside to smoke. The licensee may not be aware of the problem until this issue is raised with him. There is no evidence of prior or subsequent contraventions. He submitted that because the new owner thought he had approval and has now applied, that is justification that no penalty is necessary.

REASONS AND DECISION

The facts are uncontroverted. Two police officers attending at the establishment observed two persons standing on a front porch area outside of the licensed area consuming what appeared to be liquor. One officer entered the licensed area purchased two beers and exited with them. This was in clear view of the liquor service bar area and any employees working in the area. There was no door control or employee monitoring persons entering and exiting the licensed area.

The branch has alleged that this is a contravention of a term and condition of the licence, contrary to section 12 of the *Act* and has recommended a one day licence suspension pursuant to item 46 of Schedule 4 of the *Regulations*.

Counsel for the licensee has submitted that the branch has alleged the wrong contravention and penalty provision. Section 42(4) of the *Regulations* and item 29 of Schedule 4 of the *Regulations* are specific to the circumstances. Counsel submits that the mistake is fatal to the branch's case.

I cannot agree with counsel. Section 20 of the *Act* authorizes the general manager to take action against a licensee for the licensee's contravention of the *Act* or the *Regulations* or the licensee's failure to comply with a term or condition of the licence. In the circumstances of this case the general manager had the choice of proceeding with either the specific contravention found in section 42(4) of the *Regulations* or the more general contravention of failing to comply with a term or condition of the licence. The penalty provisions in Schedule 4 at items 29 and 46 are the same. The branch in the Notice of Enforcement Action made it clear the provisions on which it was relying. There was no prejudice or disadvantage to the licensee.

It is clear on the face of the licence that the provisions of the "Guide" form terms and conditions to the licence. It is clear within the provisions of the "Guide" that it is a term and condition of the licence that liquor may only be sold, served or consumed within the red-lined area. Patrons are not permitted to consume liquor outside of the red-lined area or take liquor outside of the red-lined area unless it is sold for off-premises consumption.

Counsel has suggested that the liquor sold in these circumstances may have been sold for off-premises consumption. That is not supported on the facts of the case.

Counsel has submitted that the licensee has been disadvantaged because the police investigation was by undercover officers and the licensee was not notified for some time later. I accept that undercover operations by police and/or liquor inspectors are a necessary and accepted part of overseeing the operation of licensed establishments. Here the observations of the officers were made on May 23rd. It appears that the liquor inspector completed and forwarded a contravention in mid-June, approximately three to four weeks later. The licensee knew or ought to have known which employee was working at the date and time in question. The police officers information was succinct. Counsel accepted it as providing the facts to the allegation. If he felt that there was a real disadvantage to the licensee that could have been overcome by calling evidence from the employee on duty and the officers. Counsel chose not to do so.

Counsel stated that the licensee believed that he had authorization for a licensed patio. Counsel did not provide evidence in support of the licensee's mistaken belief and further, agreed that it was not a defence.

On the whole of the evidence, I find on a balance of probabilities that on May 23, 2008, the licensee contravened section 12 of the *Liquor Control & Licensing Act* and the terms and conditions of the licence when it permitted patrons to take liquor from the red-lined area established for that licence.

Due Diligence

The licensee is entitled to a defence to the allegations 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, there is little evidence on which to find that the licensee has been duly diligent. We do not know what measures, if any, that the licensee has put in place to prevent this contravention from occurring. Counsel has submitted that there was a sign at the doorway. There is no evidence of such a sign or what it may have stated. Counsel has submitted that a small pub of 125 patrons need not have staff meetings or written policies. Counsel submitted that the licensee mistakenly believed that he had authorization for a licensed patio. No such evidence was submitted.

I find that the licensee did not put sufficient measures in place to prevent the contravention. I find that the licensee has not been 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 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 previous proven contravention of the same type for this licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegation as a first contravention. The range for a first contravention of this type is a licence suspension for 1 - 3 days and/or a monetary penalty of \$1000 to \$3000, (Schedule 4, item 46)

The branch's primary goal in bringing enforcement action is to achieve voluntary compliance.

In the circumstances of this case, I am satisfied that the licensee has not successfully or sufficiently stressed upon its employees the need to fully and conscientiously carry out their duties and a penalty is necessary to ensure future compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. In the circumstances here, I find that the minimum suspension penalty is necessary to encourage future voluntary compliance. A one day suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 024241 for a period of one (1) day, to commence as of the close of business on Thursday, January 29, 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*).

To ensure this Order is effective, I direct that the liquor licence be held by the branch or the RCMP Penticton Detachment from the close of business on Thursday, January 29, 2009 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: December 30, 2008

cc: RCMP Penticton Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Dave Deimling, A/Regional Manager

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