



**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:	Mollyhills Enterprises Ltd. dba Mollyhills Golf Course East Francois Lake Road Fraser Lake, BC V0J 1S0
Case:	EH08-092
For the Licensee:	Clint Scott
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	George Fuller
Date of Hearing:	Written Submissions
Date of Decision:	April 8, 2009

INTRODUCTION

The corporate Licensee operates a golf course at Fraser Lake, B.C. which includes a clubhouse that provides food and alcoholic beverage services. Those operations are regulated by Liquor Primary License No. 037004. This licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Liquor Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia*. Liquor Primary License No. 037004 does not include either an endorsement allowing removal of liquor from the premises, or an endorsement allowing sale of liquor for consumption off premises.

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The Branch alleges that on August 2, 2008, the Licensee contravened Section 47(2)(d) of the *Liquor Control and Licensing Regulation* (Regulation), BC Reg. 244/2002, by conducting off premise sales of liquor, without the required licence endorsement. The proposed penalty is a monetary fine of \$1,500.00, in accordance with item 46 of Schedule 4, of the Regulation.

The Branch further alleges that, on August 2, 2008, the Licensee contravened Section 42(4) of the Regulation, by allowing liquor sold in the licensed establishment to be taken from the establishment. The proposed penalty is a \$1,000.00 monetary fine, in accordance with item 29 of Schedule 4 of the Regulation.

The Branch had also initially alleged that, on August 2, 2008, the Licensee contravened Section 35 of the *Liquor Control and Licensing Act* (Act), by permitting minors within the licensed area when the licence was in effect. This allegation, however, was withdrawn by the Branch by way of written notice to the Licensee on January 12, 2009.

As a result of his observations and discussions following the events of August 2, 2008, the Liquor Inspector issued a Contravention Notice (CN). In due course, the Branch issued a Notice of Enforcement Action (NOEA), dated September 26, 2008, to the Licensee.

The Licensee responds to the allegations by admitting that the contraventions took place but disputing that the recommended monetary penalties are an appropriate penalty. The Branch and the Licensee have agreed to conduct these proceedings by way of written submissions and they have provided evidence and submissions with respect to the contraventions and the appropriateness of the penalty.

RELEVANT STATUTORY PROVISIONS

With respect to the allegations concerning contraventions of Sections 42(4) and 47(2) of the Regulation:

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.

Off premises sales

47 (2) If a licence is endorsed for off premises sales,

- (a) subject to paragraph (b), off premises sales are allowed only during hours of liquor service allowed on the licensee's licence,
- (b) no off premises sales may be made after 11 p.m.,
- (c) no liquor, other than coolers, beer, cider and wine, may be sold for off premises consumption, and
- (d) off premises sales must be made from the primary service bar area of the licensed establishment."

ISSUES

1. Did the licensee contravene s. 47(2)(d) of the *Liquor Control & Licensing Regulation*, and if so, what penalty, if any, is appropriate?
2. Did the licensee contravene s. 42(4) of the *Liquor Control & Licensing Regulation*, and if so, what penalty, if any, is appropriate?

EXHIBITS

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

Exhibit 1 – Branch’s book of disclosure documents, tabs 1-14, provided to the Licensee by the Branch.

Exhibit 2 – Licensee’s submissions, dated October 30, 2008.

Exhibit 3 – Branch January 12, 2009 letter withdrawing the Section 35 Act contravention.

Exhibit 4 – Branch January 12, 2009 response to the Licensee’s submission.

Exhibit 5 – Licensee’s January 20, 2009 final reply.

EVIDENCE

In acknowledging the alleged contraventions, the Licensee has, implicitly, also accepted the version of events set out in the Notice of Enforcement Action of September 26, 2008. Having said that, I am mindful that the written testimony proffered by the principal of the Licensee, although there may be some minor discrepancies, is not materially inconsistent with the summary of evidence attached to the NOEA and would not change the outcome of my decision in this matter. Accordingly, I will now turn to setting out the facts which I find have been proven.

On August 2, 2008, at approximately 1330 hours, Inspectors #1, #2, #3 and #4 attended the Molyhills Golf Course in a covert capacity. In the course of this inspection, it was noted that a minor left the red-lined area of the premises holding 5 unopened bottles of Corona beer. When the youth asked the female staff member if it was okay that he had taken the beer, the female responded, "I didn't see it, we got busted last year, and you never know where they are, so I did not see it". Furthermore, it was noted that a minor entered the licensed premises red-lined area.

At approximately 1420 hours, an adult male drove a golf cart up to the east door of the clubhouse. On board the golf cart the male had six children ages approximately 3 to 10 years of age. The male entered the licensed premises via the east door with all six children and crossed the floor of the licensed premises and stopped at the food service window to order drinks. The adult then exited the licensed premises with 4 coolers and one beer which he placed in a storage cooler on the golf cart. The cooler was full of Miller Genuine Draft beer. The adult said to the children, "We need to get these up to those guys", whereupon the adult drove the cart with the six children as passengers, leaving the clubhouse area and heading towards a putting green.

At approximately 1434 hours, Inspector #3 attended at the bar and asked the female bartender if he could purchase beer to take out. The bartender then sold Inspector #3 a 6-pack of Molson Canadian beer for \$25.00. The Licensee did not have an endorsement for off premises sales.

On August 8, 2008, Inspector #4 issued the Licensee with Contravention Notice B007870 alleging: the removal of liquor from the establishment, contravening a term and condition of the licence; no off premises sales endorsement, contravening a term and condition of the licence; no golf cart/kiosk endorsement; and minors on the premises. The Contravention Notice was sent to the principal of the Licensee via registered mail.

On August 11, 2008, Inspector #4 spoke with the principal of the Licensee via telephone and advised him that this matter would be dealt with via enforcement action. The principal of the Licensee stated to Inspector #4 that the Inspector's timing on entering his premises was phenomenal, in that the Inspectors had arrived when 40 patrons showed up for a golf tournament and that he had trouble keeping the minors out of the licensed premises.

SUBMISSIONS OF THE LICENSEE

The Licensee submits that the alleged contravention of Section 47(2)(d) of the Regulation, by selling a 6-pack of beer to an Inspector, arises out of his mistaken belief that his licence permitted the sale in circumstances where the purchasers of the beer proceeded to play a round of golf. He says that this belief arose out of a previous contravention in 2007 where a Liquor Inspector had requested the purchase of 24 beers and he was only sold 6. In other words, he says that if he was in the business of conducting off premises sales, the Liquor Inspector would have been sold 24 beers and not 6.

On August 2, 2008, the Licensee says that the Inspector asked if he could get two beers for himself and another Inspector. They wanted to walk around with the beer. Those beers were sold to him because the Licensee's wife assumed that they would be playing in the tournament on that date.

The Licensee challenges the statement by the Inspector that he had not attempted to acquire off premises sales licence as recommended by the Inspector following the same contravention in 2007. The Licensee states that, in fact, he did apply for an off premises sales endorsement, but that the same had been rejected by the Branch.

SUBMISSIONS OF THE BRANCH

The advocate for the Branch notes that the Licensee, in his written submission, has confirmed that an off premises sale did in fact take place at his establishment on August 2, 2008. He further notes that in this case the application for an off premise sales

endorsement was rejected, and neither a rejected application, nor an application in progress, is equivalent to the actual issuance of an off premises sales endorsement. The advocate for the Branch submitted that there is also nothing in the evidence to show that the steps taken by the Licensee prior to, or after, the alleged contravention which points to the Licensee's efforts to ensure that its employees and patrons do not remove liquor from his licensed establishment.

It is submitted, therefore, that the penalty proposed for the alleged contravention of Section 47(2)(d) of the Regulation, in the amount of \$1,500.00, and the penalty proposed for the alleged contravention of Section 42(4) of the Regulation, in the amount of \$1,000.00, are warranted in this case in order to reinforce the need for the Licensee to come into voluntary compliance with the terms and conditions of its licence.

DUE DILIGENCE

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

In this case, there is little evidence on which to find that the Licensee has been duly diligent. It is not known what measures, if any, that the Licensee has put in place to prevent this contravention from occurring. In my view, the Licensee did not put sufficient measures in place to prevent the contravention and I find, therefore, that the Licensee has not been duly diligent.

ANALYSIS AND DECISION

With regard to the allegation of the breach of Section 42(4) of the Regulation, as detailed above, on January 20, 2009 the Licensee wrote to the Branch and stated, at page 3 thereof, the following:

“I would ask that I be understood that it was not my intention at any time to sell off sales I would ask that this charge be dropped, however I do believe that I have failed to follow up on the legality of allowing product to be taken on the course, I should not have assumed that if funds were taken that it meant that the license was granted, I should also not have assumed that Inspector #4 would follow up or be aware that an application had not gone through, for this I feel the charge of 1000,00 is understandable, however the message has been sent and the first order of business following the decision of the adjudicator will be to meet face to face with Inspector #4 to set out policy, floor plan amendment and perhaps a new licence classification.”

(emphasis added)

In light of this inculpatory statement, I find that the alleged contravention of Section 42(4) of the Regulation is proven. Pursuant to the Regulation, Schedule 4, item 29, the range of penalties for a first contravention of this type is a one to three-day suspension and/or a monetary penalty of between \$1,000.00 and \$3,000.00.

The allegation of a contravention of Section 47(2)(d) of the Regulation, however, is more troubling. In this regard, I note that the lead-in phrase, to the prohibitions set out in items (a) to (d) of Section 47(2), specifically states:

Off premises sales

47 (2) I f a licence is endorsed for off premises sales (emphasis added)

Clearly then, in order to find a contravention of the stated prohibitions, the license would, necessarily, have to have had an off premises sales endorsement issued. In other words, any contravention would be predicated upon the existence of an off premises sales endorsement.

The licence, which is the subject of these proceedings, does not have an off premises sales endorsement. What occurred here may very well have been a contravention of another provision of the Regulation, or the *Act*, but the same is not a contravention of Section 47(2). Accordingly, I must find that a contravention of Section 47(2) of the Regulation has not occurred in this case.

PENALTY

Pursuant to Section 20(2) of the *Liquor Control and Licensing Act*, having found that the Licensee has contravened Section 42(4) of the Regulation, I have discretion to order one or more of the following enforcement actions:

- Impose a suspension of a 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 Regulation. 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.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve 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.

Any penalty imposed must be sufficient to ensure compliance in the future. In the circumstances here, I find that a monetary penalty of \$1,000.00, with respect to the contravention of Section 42(4) of the Regulation, to be both reasonable and required in order to bring about voluntary compliance in the future.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the Licensee to pay the sum of \$1,000.00 in relation to the contravention pursuant to Section 42(4) of the Regulation. The monetary penalty must be paid no later than the close of business on Thursday, May 8, 2009.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: April 8, 2009

cc: Fraser Lake R.C.M.P

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

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