



**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:	Executive House Ltd. dba Executive House 777 Douglas Street Victoria, BC V8W 2B5
Case:	EH09-126
For the Licensee:	Andrea Phillips
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	George C.E. Fuller
Place of Hearing:	Written Submissions
Date of Decision	March 30, 2010

INTRODUCTION

The licensee, Executive House Ltd., owns and operates a Victoria, BC establishment, known as the Executive House and holds Liquor Primary Licence Number 064730. The licensee operates three separate patron areas within the Executive House, consisting of Bartholomews, a lounge, and Doubles, as well as a patio off Bartholomews. According to the terms of the licence, the licensee may sell liquor from 11:00 a.m. to 1:00 a.m. on Monday to Saturday, and from 11:00 a.m. to midnight on Sunday. The licence is, as are all liquor licenses 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*".

ALLEGED CONTRAVENTION(S) AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated December 17, 2009.

The branch alleges that on October 31, 2009 the licensee contravened Section 42(4) of the *Liquor Control and Licensing Regulation*, by allowing liquor to be removed from the licensed areas of the establishment. The proposed penalty is a one-day suspension of the liquor licence (item 29, Schedule 4 of the *Regulation*). The licensee does not dispute that the contravention occurred as alleged, but disputes the proposed penalty. The licensee agreed that this matter could proceed by way of written submissions.

RELEVANT STATUTORY PROVISIONS

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

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?
2. If so, what penalty, if any, is warranted?

EXHIBITS

- Exhibit 1 – branch’s disclosure documents as outlined in a letter dated January 25, 2010, to the licensee, including a Notice of Enforcement Action, dated December 17, 2009, and which includes the liquor inspector’s and the branch’s reasons for recommended enforcement action and penalty.
- Exhibit 2 – letter dated December 30, 2009, from the licensee to the branch setting out submissions in support of its position with regard to the recommended penalty.
- Exhibit 3 – letter dated February 4, 2010, from the licensee to the branch setting out further submissions in support of its position with regard to the recommended penalty.

EVIDENCE and SUBMISSIONS

As previously indicated, the licensee does not dispute that the contravention occurred as alleged and is, therefore, deemed to accept the facts alleged by the branch. Accordingly, in view of the fact that the facts alleged are unchallenged, the evidence can be summarized as set out below.

The Branch's Evidence and Submissions are summarized as follows:

At approximately 10:15 p.m. on October 31, 2009, the liquor inspector was travelling with the Victoria City Police Liquor Task Force and was conducting routine inspections at downtown liquor establishments. Near the intersection of Douglas and Humboldt Streets, a lone male was observed exiting the main entranceway of the Executive House Hotel. He then turned north directly toward the inspector and members of the task force.

As the patron was only 20 feet away and the lighting conditions were very good at this location, the liquor inspector was able to clearly observe that the patron was holding a clear glass bottle of beer. As the group approached the patron, it was determined from the label that the bottle that the patron was carrying was Miller Genuine Draft beer, which was approximately one-half full of beer. The identity of the patron was obtained by a member of the task force and the beer was then poured out onto the ground. The inspector then ascertained that the beer had been purchased in Bartholomews.

The liquor inspector went inside Bartholomews and summoned the night manager, who then accompanied the liquor inspector outside where the patron and task force members had assembled. The night manager confirmed that the patron had, in fact, purchased the beer from Bartholomews and that he had observed the patron walk outside with the beer in his hand. The liquor inspector then advised the night manager that he would be following up this event with a contravention notice the following Monday. Patron counts were then conducted indicating that the occupancy was well within the allowed limits.

The liquor inspector states that the branch policy restricting the area of liquor consumption within the red line has been established to protect public safety, maintain community standards and reduce the taxing of police resources. For example, minors could be exposed to the consumption of alcohol or an empty beer bottle could be used as a weapon. Accordingly, it is critical that the licensee be cognizant of their particular service area. The inspector also observed that the absence of door staff at exit and entry points made it easy for this particular patron to remove liquor from the premises.

The liquor inspector, in recognition of the fact that this contravention constituted a first offence of this licensee, recommends the levying of a one day suspension of the establishment's licence as an appropriate penalty in this case. This period of suspension falls within the penalty range set out in Schedule 4 of the *Regulation* and, in fact, represents the minimum suspension penalty under that Schedule.

The Licensee's Evidence and Submissions are summarized as follows:

In its letter to the branch of December 30, 2009, the licensee, while acknowledging that the contravention occurred, requests that the branch consider issuing a monetary penalty, instead of a suspension. The licensee submits that Bartholomews has a trouble-free history concerning liquor licensing infractions and, furthermore, that substantial remedial steps have been taken to avoid this particular offence ever occurring again. The licensee says that the penalty of a suspension would visit economic hardship on the licensee and, therefore, a monetary penalty is more appropriate in the circumstances.

This theme is followed through in the licensee's letter to the branch of February 4, 2010, emphasizing that over the last 35 years of its operation; the establishment has been a good corporate citizen and, therefore, asks that the branch take this into account when considering an appropriate penalty. The licensee requests that only a warning be issued by the branch without a monetary penalty. Finally, the licensee again states that it has instituted substantial remedial steps under the *Security Services Act*, as required by the Ministry of Public Safety and Solicitor General.

DECISION AND REASONS

The licensee has admitted the contravention. Having considered all of the evidence, I find that on October 31, 2009 the licensee contravened Section 42(4) of the *Liquor Control and Licensing Regulation* by allowing liquor to be taken from the licensed establishment.

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 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 upon which I can find that the licensee was duly diligent. Although the licensee claims that it has instituted “substantial remedial steps” in order to prevent this contravention from reoccurring, these measures have been limited to hiring trained and licensed door persons. Although this may be laudatory, it has clearly occurred after the fact and confirms that, at the time of the contravention, no such systems were in place.

Importantly, there is no evidence of what training employees received with regard to this type of contravention and there is no evidence of what policies and procedures were in place to guide staff in performing their duties. In conclusion, I find that the licensee had 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, or both, is warranted, I am bound to follow the minimums 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, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is the achievement of 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 for this licence within the year preceding this incident. I, therefore, find this to be first contravention.

Any penalty imposed must be sufficient to ensure compliance in the future. Section 4 of the *Regulations* provides a range of penalties for first contraventions of this type. For contraventions regarding Section 42(4) of the *Regulation*, the range of suspension is one to three days, and/or the monetary penalty range of \$1,000 to \$3,000. The branch has recommended a one-day suspension regarding the contravention of Section 42(4), which is a minimal penalty for that contravention.

The exercise that remains, therefore, is to determine the appropriate penalty which is required in order to best ensure that the licensee will be compliant with the *Act* and *Regulations* in the future. The branch says a one-day suspension is required for this purpose. The licensee, on the other hand, says only a warning is necessary, although in its initial submission it conceded that a monetary penalty was required.

Certainly this transgression is deserving of more than just a simple warning. In any event, a warning is not a penalty available under the legislation. I am inclined to the view that a suspension is appropriate unless mitigating circumstances exist, which would alleviate the stigma of such a penalty.

In my opinion, such mitigating factors exist in this case. To begin with, and most importantly, is the fact that this licensee has managed to conduct its liquor licensing affairs over the lengthy period of 35 years so as to avoid any contraventions of the *Act* or *Regulations*. This is clearly an unusual and enviable record for this industry and cannot be ignored in determining an appropriate penalty.

Secondly, although any breach of the *Act* or *Regulations* could be considered serious, I find that this offence, involving a single patron and no members of the public, falls at the lower end of the seriousness scale.

Thirdly, the licensee, to its credit, made a full, frank and forthright admission with respect to the allegations made against it, thus avoiding the inconvenience and expense of an oral hearing for all concerned.

Finally, the licensee has committed to introducing into its operations trained and licensed door personnel in order to significantly reduce the potential for similar contraventions in the future.

In light of all of the above, I find that a monetary penalty of \$1,000 is appropriate in this case.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the licensee to pay the sum of One Thousand Dollars (\$1,000) in relation to the contravention pursuant to Section 42(4) of the *Regulation*. The monetary penalty must be paid to the Branch no later than the close of business on Friday, April 30, 2010.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: March 30, 2010

cc: Victoria Police Department
Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Victoria Office
Attn: Olubode Fagbamiye, Branch Advocate