



**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:	Brown Fuels Ltd. dba Waverley Hotel PO Box 550 Cumberland, BC V0R 1S0
Case:	EH10-005
For the Licensee:	Harvey Brown
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Edward Owsianski
Place of Hearing:	Written Submissions
Date of Decision	May 12, 2010

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Brown Fuels Ltd, operates the Waverley Hotel located in Cumberland, BC. Harvey Brown (licensee principal) is president of the corporate licensee. The licensee holds Liquor Primary Licence No. 001858 for the operation of a pub at the hotel with liquor sales from 9:00 a.m. to 2:00 a.m., Sunday thru Thursday, and to 2:30 a.m. on Friday and Saturday. The license 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's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated March 9, 2010.

The branch alleges that on December 18, 2009, the licensee contravened s. 43(2)(b) of the *Liquor Control & Licensing Act (the Act)* by permitting an intoxicated person to remain in the part of the licensed establishment where liquor is sold, served or otherwise supplied.

The proposed penalty is a seven day suspension of the liquor license (item 11 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*).

Item 11 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of a licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7000.

The licensee does not dispute that the contravention took place, just the penalty proposed. It was agreed that this hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

Drunkenness

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 supplied.

ISSUES

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

EXHIBITS

1. Branch's package of disclosure to the licensee dated April 8, 2010.
2. Licensee's submission dated September 1- 3, 2009.

EVIDENCE & SUBMISSIONS

The branch's evidence and submissions are summarized as follows:

On December 18, 2009, two liquor inspectors and four plainclothes police officers were conducting covert inspections of licensed establishments located in the Comox, Courtenay and Cumberland areas of Vancouver Island. They divided into two teams A and B, each consisting of a liquor inspector and two police officers.

At approximately 9:45 p.m. team A entered the Waverley Hotel and seated themselves at a table with an overview of the dance floor and service bar areas. Within a short time their attention was drawn to an older patron wearing a gray coat (patron #1). The patron was slowly staggering through the premises, appeared to be unsteady on his feet, and swayed lightly from side to side.

At approximately 10:20 p.m. a second male (patron #2) wearing a black baseball cap was observed sitting at a table on the upper level with several other patrons. He occasionally closed his eyes, dropped his head to his chest and appeared to lose consciousness for short periods of time. The table held several glasses of draft beer. The server dropped off several shot glasses which were consumed by the patrons at the table. A further glass of draft beer was served to the patron. At approximately 10:30 p.m. the patron got up from the table and left the premises. He was unsteady on his feet and had to support himself by holding onto a column as he went down the stairs. At the lower level, he lost his balance on three occasions as he left the premises. He later returned to his seat at the table.

At approximately 11:55 p.m. team B entered the premises and took a seat in the upper area. They observed patron #2 sitting at a table. He appeared to fall asleep on several occasions and was wakened by a female server who called him by name and shook him vigorously. Standing to dance with a female patron he was unsteady on his feet and had to be supported by her.

Another patron, dressed in a black T-shirt and jeans (patron #3) was observed sitting with several other patrons at a table. Liquor was on the table and the server provided further liquor service. The patron was very loud, and his speech was slurred. He staggered unsteadily around the table supporting himself by holding onto chairs or other patrons.

At approximately 12:50 a.m. team A re-entered the establishment. Patron #2 was observed still seated at his table. A female server served the patron and his companion what was identified as a rum and schnapps based drink. The server consumed one of the drinks herself. [I pause to note that this resulted in a contravention proceeding that resulted in a waiver and a \$1000 monetary penalty.]

Patron #1 was observed seated at the main service bar. He had just been served a full glass of beer. His speech was slurred and he appeared to be intoxicated.

The inspection teams left the establishment without revealing their identity.

A contravention notice was completed on December 22, 2009, and mailed to the licensee. A NOEA was prepared with a recommendation for a seven day licence suspension as a result of the number and condition of apparently intoxicated patrons and the length of time they were permitted to remain in the establishment.

The licensee's evidence and submissions are summarized as follows:

The licensee principal has operated the Waverley Hotel since 1985. At the outset, changes were made regarding the behaviour of patrons and an extensive renovation was undertaken. Further renovations were made in 2005 and 2008. Aggressive behaviour, bad language, rowdiness or drunkenness is not tolerated. Over-consumption of liquor is discouraged by not providing shooter trays and avoiding the "last call" drink build-up. They provide a venue for live entertainment for which they have received awards and accolades. They cater to a broad demographic range of patrons with their food and entertainment. They employ 22 people and contribute significant amounts to provincial revenue. They sponsor and contribute too many charities and causes. The licensee's principal has served for many years on local council.

The person identified as patron #1 is a local resident who lives a short distance from the hotel. As an older person, he can be a little unsteady on his feet. While he may on occasion be somewhat impaired, he has never been intoxicated. The identities of the other patrons are unknown.

During the 25 years of ownership the licensee has had few occasions to call for police attendance. They have always co-operated with the police and liquor inspectors. It is not known why the establishment was selected for a covert inspection when other establishments require police attendance at closing times, underage patrons are common and illicit drugs ignored. Since this matter arose, the licensee principal has on three occasions requested meetings with the liquor inspectors and been refused. No details were received from the liquor inspectors from December 18 until the NOEA of March 9, a delay of 81 days. It is difficult, if not impossible, for employees to recall specific instances for the night in question. It was a very busy night and staff may have missed some of the instances observed by the inspection teams.

Everything is done to ensure patrons get home safely. Cabs are called and an 18-passenger bus is contracted for busy nights. Since this instance the operation has been tightened and more vigilance is expected from staff. More training and better record keeping have been implemented. An infraction free future is the goal.

Following receipt of the contravention notice a voluntary five day closure from January 1 to 6 was instituted on the basis that after a 25 year excellent record the minimum penalties would be imposed. It was unknown that they had to wait for the process to unfold. A seven day closure on top of this is extreme given the record of the establishment. This will result in a week without pay for the 16 staff members.

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on December 18, 2009, the licensee contravened s. 43(2)(b) of the *Liquor Control & Licensing Act (the Act)* by permitting an intoxicated person to remain in the part of the licensed establishment where liquor is sold, served or otherwise supplied.

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 upon which I can find that the licensee was duly diligent. There is no evidence of what training the employees received. There is no evidence of what policies and procedures were in place to guide staff in performing their duties. The employees on duty did not take sufficient action to prevent the contravention from occurring or continuing.

In conclusion, 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 *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 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 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 or for this licence within the year preceding this incident. I therefore find this to be a first contravention.

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. Permitting intoxicated persons to remain in a licensed establishment can have an adverse effect on the operation of the establishment and on the surrounding community.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulations* provides a range of penalties for a first contravention of this type. The branch has proposed the maximum seven day licence suspension for a first contravention of this type. In the circumstances here of several obviously intoxicated patrons being permitted to remain within the establishment, and to continue to be served liquor, I find that a penalty greater than the minimum penalty is necessary to encourage future voluntary compliance. A seven day suspension is necessary, appropriate and reasonable. I do not accept the licensee principal's argument that the establishment has already served a five day penalty with the voluntary closure.

To consider that the licensee principal believed that he was permitted to choose the length and timing of the penalty belies his experience as a successful businessman and prominent citizen.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 001858 for a period of seven (7) days, to commence as of the close of business on Thursday, June 10, 2010, 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 Detachment from the close of business on Thursday, June 10, 2010, 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: May 12, 2010

cc: RCMP Courtenay Detachment

Liquor Control and Licensing Branch, Victoria office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver office
Attn: Peter Mior, Branch Advocate