



**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:	Tiffany's Cabaret Inc. dba Element Night Club 535 Main Street Penticton, BC V2A 5C6
Case:	EH10-056
For the Licensee:	John Vassilaki
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	August 10, 2010
Place of Hearing:	Conference Call
Date of Decision	August 23, 2010

INTRODUCTION

The licensee, Tiffany's Cabaret Ltd. dba Element Night Club in Penticton BC, holds Liquor Primary Licence No. 050287. The night club is operated by Midnight Entertainment Ltd. The Liquor Control and Licensing Branch (the branch) have approved Midnight Entertainment Ltd. as a Third Party Operator. The licensed hours for the sale of liquor are 7 p.m. to 2 a.m. seven day a week. The licence permits 378 persons in area 1, and 277 persons in area 2. 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's allegation and proposed penalty is set out in the Notice of Enforcement Action (the "NOEA") dated June 2, 2010.

The branch alleges that on March 13, 2010, 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 four day suspension of the liquor licence (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 teleconference.

RELEVANT STATUTORY PROVISIONS***LIQUOR CONTROL AND LICENSING ACT*****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.

LIQUOR CONTROL AND LICENSING REGULATION**When a suspension is to be served**

67 (1) In this section, "**business day**" means, in respect of a licensee, a day on which the licensee's establishment is normally open for business.

(2) If a licensee accepts a suspension under section 64 (3) (b) or if the enforcement actions referred to in section 65 (1) include a suspension, the suspension must

(a) unless the general manager considers that a different day of the week is more appropriate, take effect on the same day of the week as the day on which the contravention for which the suspension was imposed was committed, and

(b) continue in effect on each succeeding business day until the number of days on which the suspension has been in effect equals the number of days in the accepted or determined period of suspension.

(3) The general manager may, subject to subsection (2), determine the date on which the suspension begins.

ISSUES

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

EXHIBITS

1. Branch's Book of Documents.
2. Branch's letter of July 22, 2010.
3. Branch's email of August 9, 2010 with attachments.
4. Licensee's documents regarding employee hours of work and liquor sales for dates within May and June, 2010.

EVIDENCE - The Branch

Liquor Inspector A testified that on March 15, 2010, he received an email from the Penticton Detachment of the RCMP advising that plainclothes officers acting in an undercover capacity had observed a contravention of the *Act* at Element Night Club on the night of March 13th. He requested "will say" reports, i.e. statements of the observations of the officers involved. These were received on April 19, 2010. Following a review of the information received a contravention notice (CN) (exhibit 1, tab 3) was completed on April 27th and sent to the licensee via registered mail.

The inspector received a call from the principal of the third party operator (the operator) (witness B) on May 6th and discussed the alleged contravention, the regulatory penalty and the waiver of hearing process. The operator advised him that he wished to sign a waiver as soon as possible. The inspector subsequently completed a NOEA, which together with a waiver notice was approved by the branch Regional Manager on June 2, 2010. The proposed penalty was a four day suspension during business days from June 12th to 21st. The inspector believed that during this period of time the establishment operated on its winter schedule of being open for business only during Thursday, Friday and Saturday nights. He was uncertain when it changed to its summer schedule of opening for business six nights a week.

The inspector delivered the NOEA and the waiver notice to the operator on June 3, 2010. On June 8th he received a call from the operator that they would not agree to the waiver notice if the days of suspension included two Saturdays. On June 10th he received a call from the licensee principal (witness D) and discussed the dates for the proposed four day suspension. The inspector agreed to receive and review business records from the establishment showing the days of operation of the establishment, and if satisfied that it was normally open for business on more than the three days a week, he would change the proposed suspension dates. A record of staff hours of work for the period of Saturday May 15th to Friday May 28th was subsequently received (exhibit 3). The inspector reviewed this with the Regional Manager and concluded that the establishment had only increased the number of days of operation for the period of the May long weekend and not beyond. He left a message for the operator on June 15th. He received a return call on June 23rd advising that they had closed the night club and served the suspension during four business days consisting of June 12th, 13th, 15th and 16th. The inspector advised the operator that this was not acceptable as the period of suspension because it did not meet the "business days" requirement and had not been authorized by the branch. A pre-hearing conference (PHC) was subsequently held on June 30th to commence the hearing process (exhibit 2).

EVIDENCE - The Licensee

The operator, witness B testified that the establishment operates on a winter schedule of opening only on Thursday, Friday and Saturday nights until the May long weekend at which time it changes to the summer schedule of opening five nights a week, remaining closed on Sunday and Wednesday nights. During the slower nights they operate primarily with salaried management staff, utilizing hourly staff only when warranted by business volumes. They transition back to the three day winter schedule at some point following the September long weekend when the business volumes decrease to the point that a five day operation is not financially viable.

He testified that following receipt of the CN he had several conversations with the liquor inspector and business records were faxed to him outlining the operating schedules of the establishment. He believed that if he showed the branch the days of operation the penalty should be four consecutive days. Prior to closing the establishment on June 11th he tried without success to reach the liquor inspector. He spoke with the licensee principal prior to closing the establishment for the four day suspension. The licensee principal agreed with the four day closure if the dates were the same as outlined in the proposed waiver notice. The establishment was closed for the four days commencing June 11th and a sign posted on the door. They attempted to turn in the liquor license to the RCMP detachment on the first night of the closure as required by branch procedures; however the office was closed at the time.

He testified that in addition to the loss of business during the four day suspension, they have suffered other business losses arising out of the enforcement process. They had paid a fee to the branch to apply for extended hours during the summer months. As a result of the enforcement process, they have lost the fee and the request for extended hours has not been approved. This has resulted in a loss of potential sales and a loss of business to other establishments in the city.

Licensee witness C, a co-principal of the third party operator testified that because of the time elapsed in the notification from the branch regarding the contravention they have been unable to discipline any staff member that may have been responsible for the contravention. All staff have been financially punished by the four day closure and the loss of the extended hours of business.

Licensee witness D, a principal of the corporate licensee testified that because of the delay in notification by the police or the branch of the contravention it would be unfair for the establishment to be penalized. The delay has lead to the licensee being unable to defend the contravention, or allow the licensee to complete the waiver process and serve the suspension prior to the busy summer season. While he agreed that the establishment should not have closed without following the branch processes, the branch should have brought the matter on sooner. More punishment to the licensee by way of a suspension would be unfair.

SUBMISSIONS - the branch

The *Regulations* require that a suspension occur on a “business day”. It was not clear to the branch when the establishment transitioned from the winter schedule to the summer schedule. A waiver notice must be signed and agreed to by the branch prior to the licensee commencing a suspension. The branch determines the dates of suspension in accordance with the regulatory requirements. The licensee does not determine the dates.

SUBMISSIONS - the licensee

The actions of the police and/or the branch have resulted in the licensee not being notified of the contravention for approximately one and one-half months from the date of the occurrence. This has resulted in the licensee being unable to defend the contravention. The length of time to bring forward the enforcement process has lead to the establishment not being approved for extended hours and has resulted in a considerable financial loss.

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on March 13, 2010, 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.

Administrative Fairness

The licensee has argued that it has been unfairly prevented from defending the contravention because of the delay in the issuance of the CN and the NOEA and the delay in advising the licensee of the undercover investigation.

The evidence is that the police officers' observations of the contravention occurred the night of March 13, 2010. On March 15th the police sent an email to the liquor inspector advising of the contravention. [I pause to note that the email was not placed into evidence consequently I am not aware of its contents.] The inspector requested copies of the officers' "will say reports". Further information was received by the inspector from the police on April 19th. [These report(s) or statement(s) have not been placed into evidence thus their contents are unknown.] A CN was issued by the inspector and mailed to the licensee on April 27, 2010. The CN contains the barest of information (exhibit 1, tab 3). A NOEA providing full details of the contravention was completed and hand delivered to the licensee on June 3, 2010, together with waiver of hearing documents and the proposed dates of suspension.

Delay may be a factor to be considered in determining if there has been administrative fairness. Any delay should not be unreasonable in the circumstances and have caused prejudice to the licensee. Here the delay from the date of the alleged contravention to the issuance of the CN was considerable. The licensee was unaware of the alleged contravention, or the inspection by the police officers for a period of one and a half months. It did not receive any details of the alleged contravention for a further period of approximately five weeks. There is little evidence upon which I can find this to be a reasonable delay.

The licensee argued that the delay prevented it from defending the alleged contravention. The licensee however elected to admit the contravention. The licensee could have chosen to hear the evidence of the police officers and other branch witnesses and could have presented its own witnesses and their recollection of the events of the night tested. It chose not to do so. In the result, there is little evidence upon which I can find the licensee to have been unduly prejudiced.

On the evidence, I do not find that the process has resulted in administrative unfairness to the licensee. That said it is incumbent upon the branch to ensure that its processes are in keeping with the public interest. In my view, that requires that alleged contraventions are brought to the attention of licensee or its employees at the earliest practicable time. Ideally that would be at the time of occurrence. This would allow a licensee to take measures to address the situation, particularly where it may affect public safety. It would also allow a licensee to collect its own evidence. It is not always possible however, to advise a licensee at the time of the alleged contravention. This may be particularly so in the case of covert inspections, or there may be safety concerns for the inspector. In such cases the licensee or its employees should be advised at the earliest practicable time.

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.

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 a first contravention.

On the evidence presented, I do not find that the voluntary closure of the establishment for a period of four days in June is consistent with the regulatory requirements for a suspension. The dates of the suspension are clearly within the authority of the branch and not the licensee. This is a longstanding licensee well familiar with branch practices and requirements.

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 the public safety and the well being of the community.

I have considered all of the evidence and the circumstances of this case. I have found that the branch's delay in notifying the licensee of the contravention and the details of the contravention is not supported as being a reasonable delay on the evidence presented to me. Further, the operator of the establishment upon learning of the contravention advised the branch on May 6th that they accepted the allegation and wished to serve the recommended penalty as soon as possible. The branch acted upon this on June 3rd, delivering the NOEA and bringing forward the waiver process and the dates for the suspension. The dates proposed by the branch were not acceptable to the operator as they included two weekends and overlooked early and mid-week days when the operator contended that the establishment would ordinarily be open for business. This brought into dispute the issue of when the establishment was ordinarily open for business during the period following the May long weekend. The dispute continued unresolved to the time of the hearing. On the evidence before me, I believe that better communication between the branch and the operator could have resolved the issue in a timely manner. During the interim period the establishment closed for a period of four

days when the operator contended that it would have been ordinarily open for business. This was a misguided attempt to serve the proposed penalty. Further, during the interim period the licensee was precluded from applying for extended hours of operation.

On the evidence before me and in all of the circumstances, I find that imposing a four day suspension is not necessary to achieve future voluntary compliance and would be punitive in nature.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: August 23, 2010

cc: RCMP Penticton Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate