



**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:	614540 B.C. Ltd. dba Creekside Pub Restaurant & Cold Beer and Wine 3929 Lakeshore Road Kelowna, BC V1W 1V3
Case:	EH09-099
For the Licensee:	Richard Stotz
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	Written Submissions
Date of Decision	June 18, 2010

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, 614540 Ltd, operates the Creekside Pub Restaurant & Cold Beer & Wine Store located in Kelowna, BC. Richard Stotz (licensee principal) is a principal of the corporate licensee. The licensee holds Liquor Primary Licence No. 105111 for the operation of a pub at the establishment with liquor sales from 10 a.m. to Midnight Monday to Thursday, from 11 a.m. to 1 a.m. Friday and Saturday and from 11 a.m. to Midnight on Sunday. The licence is, as are all liquor licences 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 December 15, 2009.

The branch alleges that on September 10, 2009, the licensee contravened s. 43(1) of the *Liquor Control & Licensing Act (the Act)* by selling or giving liquor to an intoxicated person or a person apparently under the influence of liquor.

The proposed penalty is a seven day suspension of the liquor licence (item 9 of Schedule 4 of the *Liquor Control and Licensing Regulation (the Regulation)*).

Item 9 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 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

ISSUES

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

EXHIBITS

1. The branch registrar's letter of January 26, 2010.
2. The branch registrar's letter of April 26 and email of April 28, 2010.
3. The branch's package of disclosure to the licensee dated April 27, 2010.
4. The licensee's email of May 3, 2010.
5. The branch registrar's letter of May 3, 2010 with covering email.
6. The licensee's submission dated May 11, 2010.

EVIDENCE AND SUBMISSIONS

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

On September 10, 2009 at approximately 9:04 p.m. a police officer conducted an inspection of the liquor primary licensed area of the Creekside Pub. It is implicit within the officer's evidence that he was in plainclothes in an undercover capacity. There were no door control staff present and the officer entered through the front door. A male patron was standing on the stage area singing karaoke. The patron appeared to be

intoxicated. The patron made his way from the stage to the patio area which was occupied by other patrons and a female server. The patron was unstable on his feet, leaning onto a table or concrete pillar to maintain his balance. He walked into one of the patio tables, knocking over a partially full bottle of beer. Other patrons caught the table from falling over. The patron stated that he should go home. A male staff member said that he had known him for five years and would give him a ride home. The staff member escorted the patron back into the pub area. The officer asked the female server whether the patron had health issues or was he just drunk. She responded, "He's got a lymph node in his leg, but he's also had a few too many."

Upon re-entering the pub area the officer observed the patron seated at a high bar table. The patron spat when talking and slurred his words constantly. He was loud and profane, attracting the attention of other patrons in the pub. No action was taken by staff to deal with the patron's behaviour. A female server placed a mixed drink in front of the patron consisting of a double shot of tequila and juice. The patron regained the karaoke stage.

The officer departed the premises at approximately 9:30 p.m. He described the patron's condition as being such that he would have been arrested had a uniform police officer been present.

A Contravention Notice was completed on September 29, 2009, and mailed to the licensee. A NOEA was prepared with a recommendation for a seven day licence suspension as a result of the blatantly intoxicated condition of the patron and the continued service of liquor to him.

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

The patron has chronic knee instability and has been prescribed with two knee immobilizers. He is on a medication that may cause him to slur his words.

The pub has had only one contravention since 2003 when the current licensees undertook ownership.

The proposed penalty is too extreme. It is not fair to punish all staff for the actions of one. If a penalty is warranted, it is proposed that a fine be imposed. This would keep all staff employed.

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on September 10, 2009, the licensee contravened s. 43(1) of the *Act* by selling or giving liquor to an intoxicated person or a person apparently under the influence of liquor.

DUE DILIGENCE

The licensee is entitled to a defence to 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 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 for this licence within the year preceding this incident. I therefore find this to be a first contravention.

The compliance history for the establishment reveals that in November 2004 and in July 2006 Contravention Notices were issued and compliance meetings held for matters relating to intoxicated patrons. These did not proceed to enforcement. They are not here considered as previous contraventions, but only as instances where the branch brought their concerns with intoxication to the attention of the licensee. I am satisfied that it should have brought about increased vigilance on the part of the licensee and its staff.

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 the continued service of liquor to intoxicated persons can have an adverse effect on the operation of the establishment, the well being of the patron, and create problems within 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 an obviously intoxicated patron 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.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence No. 105111 for a period of seven (7) days, to commence as of the close of business on Wednesday, July 14, 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 Wednesday, July 14, 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: June 18, 2010

cc: RCMP Kelowna Department

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

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