



****REVISED COPY**

**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: U-Lounge Hospitality Inc.
dba U Lounge
16051 24th Avenue
Surrey, BC V3S 0C8

Case: EH10-066

For the Licensee: Paul & Terry Uppal

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: August 25, 2010

Place of Hearing: Surrey, BC

Date of Decision: September 10, 2010

**Ministry of Housing
& Social
Development**

Liquor Control and
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INTRODUCTION

The licensee, U-Lounge Hospitality Inc., operates the U Lounge located in Surrey, BC. Terry and Paul Uppal (licensee principal) are principals of the corporate licensee. The licensee holds Liquor Primary Licence No. 303226 for the operation of the establishment with liquor sales from 11 a.m. to 1 a.m. Sunday thru Thursday and to 2:00 a.m. on Friday and Saturday. 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 May 4, 2010.

The branch alleges that on April 17, 2010, at 12:15 a.m. 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 \$5,000 monetary penalty (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 disputes the contravention.

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 book of documents, tabs 1 – 11.

EVIDENCE – THE BRANCH

The branch called two witnesses, **a liquor inspector**, and **an RCMP officer**.

The witnesses testified that during the early late night/early morning hours of April 16/17, 2010, they and another RCMP officer were conducting routine inspections of licensed establishments located in the Surrey area. **The inspector (witness A)** has nine years of experience as a liquor inspector and the **officer (witness B)** has five years experience as a uniformed police officer. Both have received training in identifying the symptoms of intoxication. During their respective careers, both have had extensive experience dealing with intoxicated people.

They arrived at and entered the U Lounge at approximately midnight. A staff member was located at the front door with a line-up of persons waiting to be allowed entry. Inside the establishment was busy but not overcrowded, the lighting was sufficient to allow them to have a clear vision throughout. Their attention was drawn to a male patron. He was standing holding a glass container of an amber coloured liquid with a foam head, it appeared to be beer. The officer recalled the container as being a pitcher, the inspector described it as a typical beer glass. The patron was loud and boisterous. He was exhibiting socially inappropriate behaviour by trying to put his arms around a female patron at the bar. Both the officer and the inspector formed the opinion that the patron was intoxicated. The officer described him as standing in the aisleway by himself going through dance motions. He was swaying back and forth while standing. His eyes were watery. He offered the officer a drink from his beer. The inspector described him as having a red flushed face, eyes glassy with an unfocused stare, his speech slurred. The inspector testified that they observed the patron for about 15 minutes whereas the officer testified that it was about five to six minutes. During the time of their observations the patron was not approached by any staff member. He was within a few feet and within clear view of the bartender but no action was taken to deal with him. He was within the red-lined area of the establishment, i.e. the area where liquor is sold and served.

The inspector spoke with the bartender who told her that the patron was "drunk" and had been cut-off from further liquor service about one-half hour earlier. The manager of the establishment (witness C) joined them in their conversation. The inspector told them that intoxicated persons were not permitted to remain in a licensed establishment. In the ensuing discussion, the bartender said that he was not aware that intoxicated persons had to be removed from the licensed area. The manager said that he was not in agreement that intoxicated persons must be immediately removed from a licensed establishment. Security staff was summoned and the patron was escorted outside and put into a taxi. He began shouting loud expletives at and making rude gestures to the inspector and police officer.

Outside the inspector spoke with the manager and advised him that it was a contravention to permit an intoxicated person to remain in a licensed establishment. She requested that he contact her and arrange to meet at her office. The inspector and the officers left the establishment at approximately 12:35 a.m. The inspector then made notes of her observations (exhibit 1, tab 6).

The inspector and manager subsequently met on April 26, 2010. The manager provided sales receipts for the patron for the night of April 16/17 (Exhibit 1, tab 10e). He advised that the patron had purchased a round of shooters for a group of patrons at the bar and beer for himself. The inspector issued the manager a contravention notice for permitting an intoxicated person to remain in a licensed establishment (exhibit 1, tab 2).

The inspector testified that she recommended enforcement action be taken. The contravention presents public safety issues. Intoxicated persons can be a risk to themselves and others. A licensee and its staff must ensure that intoxicated people do not have access to liquor and are removed from the licensed establishment. She prepared the NOEA (exhibit 1, tab 1) on May 4, 2010, recommending the minimum \$5000 monetary penalty. In her view a monetary penalty rather than a suspension penalty would allow the licensee to continue to build its new business.

EVIDENCE - The licensee

The licensee called two witnesses, **one of the licensee's principals, and the licensee's head of security.**

The licensee principal (witness C) testified that he was the manager in charge of the establishment the night of April 16/17, 2010. He was off the floor monitoring the security video system at the time the inspector and police officer arrived.

He testified that all employees must have a "Serving It Right" (SIR) certificate prior to being hired. The establishment has a training manual for its employees (exhibit 1, tab 10a). All employees are given a copy of the manual and the opportunity to ask any questions that they may have. Instructions are provided in the manual for identifying the signs of intoxication and dealing with intoxicated guests (exhibit 1, tab 10a, pages 8 and 26). The establishment also has a security manual that is given to all employees. The establishment maintains a logbook which was completed for the night of April 16/17 (exhibit 1, tab i, page 1).

On the night of April 16/17 the patron in question had purchased a round of shooters for other patrons and a beer for himself. It is not possible that he would have been intoxicated on one beer. He would not have been allowed entry had he been intoxicated. He may have been taking drugs or have consumed other liquor elsewhere. The patron was not intoxicated, but had been asked to leave by the head of security for his own safety. A taxi was called for him and he was awaiting its arrival. The manager completed a summary of events of the night in July after he had met with all staff and pieced the story together (exhibit 1, tab i, page 2). The bartender on that night provided a typewritten summary of events for the night (exhibit 1, tab h) in which he states that the patron was cut-off from further liquor service because he was irritating a group of patrons, which if he continued, could have placed him in harm's way. Security was notified and the hostess called him a taxi.

On cross-examination the licensee principal was asked about the statement in the branch pre-hearing conference letter of June 21, 2010, wherein it states that he explained that the patron was intoxicated and that he disagreed with the rule requiring that an intoxicated person be immediately removed. The licensee responded that this statement was made with the information that he had at the time and was what he had seen.

Licensee witness D testified that he owns a security consulting company that has been contracted to provide security at the U Lounge on Fridays and Saturdays. He has been in the security business for about 10 years. He has developed a security manual for the establishment (exhibit 1, tab c). He was present the night of April 16/17, 2010. There were five security personnel on duty, two at the door, three inside. He recalls the interaction with the patron in question. The patron arrived in a taxi about 11:30 p.m. He checked the patron's identification and ensured that he was not intoxicated. The patron was very animated and jolly while waiting in line to enter the establishment. He entered at 11:35 p.m. Just before midnight the bartender told him (witness D) that the patron seemed agitated and was interacting with a young group of male and female patrons. He seemed to be getting on their nerves. The security consultant advised the bartender not to serve the patron and he told the hostess to call him a taxi. He took the patron aside in the foyer and told him that they were calling him a taxi. The patron said, "OK", he would finish his drink and go when the taxi arrived. The patron then walked away. A short time later the inspector and police officer arrived. He accompanied them inside. He noticed that the patron was sitting at the bar with a beer. At this time he (the witness) was called away to deal with an intoxicated patron in another area of the establishment. He saw the patron again when the taxi arrived at 12:20 a.m. The patron was belligerent, swearing and making rude gestures to the inspector and police officer. The licensee principal said that he was barred from the premises.

The witness testified that the patron returned to the establishment about a month later. He was told that as a result of his behaviour with the liquor inspector and the police officer he was barred for a period of two months. The patron said that he had been depressed that night (April 16/17). His wife had him kicked out of the house by the police. That caused him to be upset by the police officer on that night. The patron has since returned to the establishment. He has not caused any problems, he leaves without incident if requested to do so.

The witness wrote up an incident report at the end of the night (exhibit 1, tab 11f). Incident reports are kept in his file folder. The incident was discussed with the licensee principal in July when it became known that the establishment was facing a fine by the branch.

He testified that he meets with management weekly to discuss what is anticipated. Following any incident his staff de-brief at the end of the night. He uses common sense to deal with situations that arise. If a patron is creating a problem with his behaviour the patron is escorted to the foyer and the situation discussed. If the patron becomes angry he/she is immediately escorted outside. If a patron is co-operative there is no reason to kick him/her out if not intoxicated.

BRANCH SUBMISSIONS

The branch advocate's submission is summarized as follows:

The evidence of the liquor inspector and the police officer is that the subject patron displayed signs of intoxication. The patron was clearly within that area of the establishment where liquor is sold and served. The licensee knew or ought to have known that the patron was intoxicated. The patron was not removed from the premises. That is the contravention as alleged.

The licensee was not duly diligent. The licensee had policy but did not follow through on the policy. The patron was displaying signs of intoxication but the licensee failed to recognize them. The licensee did not take decisive action until told to do so by the liquor inspector. The licensee principal was the person in charge of the establishment at the time and was the directing mind of the corporate licensee.

The proposed penalty is necessary to reinforce to the licensee the need to comply with the requirements of its liquor licence.

LICENSEE SUBMISSIONS

The licensee principal's submission is summarized as follows:

The subject patron was not intoxicated. The head of security (witness D) was the only person who actually spoke with the patron. He is experienced in identifying and dealing with intoxicated persons. He testified that the patron was not intoxicated. He was requested to leave the establishment because he was agitated and was irritating other patrons. He was cut-off from further liquor service but was allowed to remain in the establishment until his taxi arrived.

The licensee principal when first speaking to the liquor inspector was unaware of what was expected or what the enforcement process entailed. At the time he agreed that the patron was intoxicated. He later gathered all of the information from the employees working that night and determined what had occurred.

The licensee was duly diligent. Manuals and logbooks are maintained. Procedures are in place for serving large groups, which include having dedicated servers. This allows them to monitor liquor service. Steps are taken to ensure patrons have a safe ride home. Security personnel are hired to provide a safe environment for patrons.

The licensee does not have a history of non-compliance. One of the licensee principals has been a licensee in the Surrey area for many years and has not had compliance problems with his establishments.

REASONS AND DECISION

The evidence of the liquor inspector and the police officer is that during the late night/early morning hours of April 16/17, 2010, shortly upon entering the U Lounge their attention was drawn to a male patron with a beer in his hand and displaying symptoms of intoxication. Observing the patron for a period of time they concluded that the patron was intoxicated. The liquor inspector brought the patron to the attention of the bartender. The bartender told her that the patron was “drunk” and had been cut-off from further liquor service. The bartender said that he was unaware that the patron must be required to leave the establishment. The inspector discussed the situation with the licensee principal. He did not dispute the characterization that the patron was intoxicated but said that he did not agree that he must be immediately required to leave the establishment. This position was maintained during a meeting with the liquor inspector on April 26th and during a pre-hearing teleconference on June 16th. The licensee principal testified that he changed his position after meeting with his staff and the security consultant in July. He determined at that time that the patron was not intoxicated and not cut-off for intoxication. He was cut-off because he was becoming agitated and was irritating other patrons. He was allowed to remain in the establishment while awaiting a taxi.

In considering all of the evidence, I accept that of the liquor inspector and the police officer. Although there were some discrepancies in their evidence those discrepancies were minor and did not detract from the veracity of the evidence. The inspector recorded her observations in her notes immediately following the incident. Her notes and her *viva voce* testimony are consistent. I have difficulty with the evidence put forth by the licensee. That the licensee principal waited until sometime in July to fully investigate the matter is hard to accept. He knew following the receipt of the NOEA dated May 4th that the branch was pursuing enforcement action and was recommending a \$5000 monetary penalty. His version of the events is corroborated by undated statements of two employees. One of those statements; that of the bartender, contradicts the evidence of the inspector which she recorded at the time in her

notebook. There is also the report of the head of security ostensibly made at the end of the night on April 16/17 which appears to have gone unnoticed until the meeting with the licensee principal in July. Further, I have difficulty with the evidence of the head of security that the subject patron was requested to leave because he was becoming agitated and irritating other patrons thus putting his well-being at risk. Despite this, the patron was permitted to remain in the establishment, unsupervised while waiting for a taxi. During this time the patron returned to the bar area where the inspector and officer observed him putting his arms around a female patron, the type of behaviour for which he was purportedly requested to leave.

On the evidence, I find that during the late night/early morning hours of April 16/17, 2010 an intoxicated person was permitted to remain in the licensed area, i.e. the area when liquor is sold and served, of the establishment. That on its face is a contravention.

DUE DILIGENCE

The defence of due diligence is a complete defence to contraventions under the *Act* and *Regulations*. The onus is on the licensee to demonstrate, on a balance of probabilities, that it implemented adequate systems to prevent the contravention and took all reasonable steps to ensure the effective operation of the system. The licensee must also establish that the employee connected to the contravention was not the directing mind of the licensee. The existence of policies is not sufficient to demonstrate due diligence if the directing mind on site at the relevant time ignores them, or makes no effort to see that they are enforced.

Here the licensee has employee handbooks in place to guide staff in the performance of their duties. The bartender and the licensee principal were unaware of or disagreed with the requirement that intoxicated persons must not be permitted to remain in the licensed establishment. The licensee principal was the operating mind of the licensee at the time of the alleged contravention. He did not ensure that staff were performing their duties as required.

In conclusion, I find that the licensee has not been duly diligent.

On the whole of the evidence I find that on April 17, 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.

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 license 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. Intoxicated persons may be a danger to themselves or the public. Intoxication can be a factor in criminal offences. It can result in late night noise, vandalism and unsanitary behaviour.

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 minimum \$5000 monetary penalty 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 consume liquor, I find that a penalty is necessary to encourage future voluntary compliance. The \$5000 monetary penalty as recommended by the branch is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20 (2) of the *Act*, I order the payment of a Five Thousand Dollar (\$5000) monetary penalty by the licensee to the general manager on or before Wednesday, October 13, 2010.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: September 10, 2010

cc: Surrey RCMP

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

Liquor Control and Licensing Branch, Victoria office
Attn: Olubode Fagbamiye, Branch Advocate