



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
*The Liquor Control and Licensing Act RSBC c. 267***

Licensee:	L & E Budnick Holdings Ltd. dba Condill Hotel 10119-100 th Avenue Fort St. John, BC V1J 1Y7
Case:	EH10-150
For the Licensee:	Dennis Coates, QC
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing:	March 24, 2011
Place of Hearing:	Conference Call
Date of Decision:	April 1, 2011

INTRODUCTION

The Condill Hotel holds a Liquor Primary Licence No. 013340 and operates in Fort St. John, B.C. The licence stipulates that the hours of liquor sales are from 11:00 a.m. to 2:00 a.m. Monday through Saturday, and 11:00 a.m. to Midnight Sunday. The licensed capacity is 65 patrons in area 1 and 35 patrons in area 2. The licence is subject to terms and conditions on its face of the licence as well as those contained in the *Guide for Liquor Licensees in British Columbia (Guide)*.

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

By Notice of Enforcement Action (NOEA), dated December 13, 2010, the Liquor Control and Licensing Branch ("Branch") alleged that on October 23, 2010 at 10:25 p.m. the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act (Act)* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied. The proposed penalty is a four-day suspension of the liquor licence in accordance with item 11 of Schedule 4, of the *Liquor Control and Licensing Regulation (Regulation)*.

The licensee acknowledges that the contravention occurred, but argues that a penalty is not appropriate and if a penalty is determined to be so, that a four-day suspension is not warranted. The licensee says a monetary penalty would be more appropriate.

RELEVANT STATUTORY PROVISIONS

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

Drunkennes

43(2) A licensee or the licensee's employee must not permit

- (a) a person to become intoxicated, or
- (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, is a penalty warranted under the circumstances?
3. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

Exhibit No. 1: Branch's Book of Documents

EVIDENCE AND SUBMISSIONS

By agreement of the branch and the licensee, the hearing was held by telephone conference. The only witness was a liquor inspector. As the inspector was present at the commencement of the teleconference call, her testimony was obtained prior to any statements or submissions being made by the licensee or the branch in order that the witness could be efficiently excluded during the remainder of the hearing.

The inspector identified all of the relevant documents in the branch's book of documents.

The inspector testified that she entered the Condill Hotel on October 23, 2010, accompanied by another liquor inspector and that neither she nor the other inspector are the inspector normally responsible for the establishment. They had been asked by the branch to attend in a covert capacity in order to observe the licensee operating that evening. When she arrived, at approximately 10:25 p.m., she immediately observed exotic dancers performing and two patrons at the bar that were loud and commanding attention. She and the other inspector went to the bar near where the two patrons were standing and observed the following:

- One of the patrons was male and one female.

- Each of the patrons was exhibiting obvious signs of gross intoxication.
- The male gave off a strong odor of liquor, staggered and swayed, had glassy eyes, and was loud and uncoordinated. He introduced himself by name and said he had been in the bar for three hours and spent “a ton of money.” He said he was partying. He was consuming what appeared to be whisky, and told the inspector that it was Jack Daniels and ice. He ordered another similar drink, was served, and consumed the drink while in the presence of the undercover inspectors. At one point he hugged the inspector. At one point he attempted to drink his beverage, missed his mouth, and spilled the drink.
- The female also smelled of liquor. She spoke to the inspector. The female slurred her words and spoke to a security person several times. The inspector said the female patron was “being friendly” with the security person and told the inspector that the security man “was hot” and she was trying to pick him up. The female told the inspector her name and that she also spent a ton of money in the bar that night and they were going to have a party. She identified her drink as a tequila sunrise in a short glass. She was served another such drink by the bartender in the presence of the inspectors.

The inspector testified that both of the patrons were very intoxicated and it did not take an expert to make that observation.

The inspector said that she was there for more than a half hour and at all times the male and female patrons were in plain sight of the bartender and a security/door person with whom the two patrons conversed. She said the bartender continued to serve the two patrons. The inspector testified that no staff members attempted to cut the patrons off from liquor service or remove them from the redlined area.

The inspector also testified that the reason that intoxicated patrons are not permitted to remain in an area in which liquor is sold or served, is to avoid harm to themselves as well as other patrons and staff. She said that the branch takes contraventions of this type seriously as an intoxicated patron puts herself in harms way and endangers others.

She added that the reason a four-day suspension is recommended in a case like this is that a monetary penalty can be seen by some licensees as the cost of doing business, but a suspension sends a message to the licensee and its patrons that this is a serious contravention.

SUBMISSIONS

The branch submits the recommended penalty is within the range specified by the *Regulation* for a first contravention of s. 43(2)(b) of the *Act*, and is appropriate.

The licensee submits that there should not be a penalty and in the alternative, if a penalty is assessed it should be a monetary penalty as the licensee has a decent track record for a stripper bar in downtown Fort St. John. The licensee also submits that by admitting the contravention they should be allowed some credit for saving expenses that would otherwise be incurred by the branch administration.

The licensee submits that the reference to the bartender continuing to serve the patrons is not relevant as the alleged contravention is for permitting the patrons to remain, and there is a specific allegation of serving intoxicated patrons - which contravention was not alleged in this proceeding.

The licensee submits that as this was a covert operation, the inspectors did not bring the allegation to the attention of the establishment when they had an opportunity as it occurred. As the documentation and effective notice of the contravention did not arrive until some days later, the licensee was unable to effectively dispute the allegations. This, argues the licensee, should also be considered a factor favouring a smaller penalty.

Finally, the licensee submits that the *Compliance and Enforcement Policy and Procedures Manual – Field Reference* for liquor inspectors, which document is available online, indicates at section 8.3 that liquor inspectors are to gather documents and information relating to whether or not the licensee is duly diligent. In this case, says the licensee, the branch did not do that sort of research or present any evidence relating to due diligence on the part of the licensee, and that works against the interests of this licensee.

DECISION

I find that two patrons were intoxicated and demonstrating indicia of intoxication at the relevant time. The intoxicated patrons could be observed and were observed by two of the licensee's staff working at the time of the contravention. I find that the two patrons were served by the bartender, notwithstanding that they were demonstrating indicia of intoxication at the relevant time. The licensee has a positive obligation to ensure that intoxicated patrons are not allowed to remain in the redlined area of a licensed establishment. I find that by failing to see, through its management and staff, that which was there to be seen, the licensee permitted two intoxicated persons to remain in the establishment contrary to s. 43(2)(b) of the *Act*. I find that the licensee contravened the aforesaid section of the *Act* on October 23, 2010.

DUE DILIGENCE

The licensee is entitled to a defense 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.

The provision in the inspectors' field guide instructing the inspectors to gather evidence in that respect is clearly for the purpose of being able to counter any argument of due diligence made by a licensee in a particular instance. The onus of establishing the defense lies solely with a licensee claiming it. The inspectors have no positive obligation to prove or disprove due diligence on the part of the licensee.

The licensee did not lead evidence or produce documentation that satisfies me that such procedures, policies, or staff training, were in place at the time of the contravention. 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 license 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 by the minimums set out in Schedule 4 of the *Regulations*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the NOEA.

There is no record of prior contraventions, offences or enforcement action of the same type for this establishment within the year prior to this contravention. Accordingly, pursuant to the *Regulation*, the contravention is a first contravention for the purpose of assessing penalty.

Schedule 4, Item 11, stipulates the range of penalties for a first contravention of s. 43(2)(b) of the *Act* is a four (4) to seven (7) day suspension and/or a monetary penalty of \$5,000-\$7,000.

The licensee argued that its track record of contraventions was not egregious in light of the nature of the establishment and its location. There was no evidence put forth with respect to the location of the establishment other than its address as described in Exhibit 1. I have no authority to take the equivalent of judicial notice of the nature of Fort St. John in my role as Enforcement Hearing Adjudicator. The licensee's history of contraventions is not remarkable. I make no findings with respect to penalty based on this submission.

The licensee argued that as the contravention notice was not delivered to the licensee until some days after the contravention occurred, the Licensee was denied the opportunity to amass evidence in its defense. The licensee appeared to understand the necessity of the covert operators remaining so and not delivering the contravention notice on the spot, but submitted that the necessity of waiting until a later date to do so should result in a smaller penalty. I am not moved by this argument. The need to protect the identity of covert operators working in the public interest is certainly significant to the continuation of such operations. The delivery of a contravention notice within days of the allegation is neither unusual nor the cause of hardship. A reasonably well-run establishment should allow for accountability of staff from several days before the delivery of a contravention notice. I cannot envision the licensee not knowing the identity of the employees on duty at the relevant time. I accept that the licensee may under these circumstances have difficulty producing evidence that the patrons were intoxicated, but the onus is still on the branch to establish that the patrons were indeed

intoxicated. I have no difficulty in this case accepting that they were so and that the patrons were clearly visible to the licensee's staff.

The licensee argues that the continued service of the intoxicated patrons is not relevant. I disagree. It is a contravention to serve intoxicated patrons and it is a contravention to permit intoxicated patrons to remain. When evaluating the need and extent of a penalty I must take into account all relevant facts. I have found that the bartender served the two intoxicated patrons notwithstanding that they were demonstrating indicia of intoxication, and I have found that the contravention of permitting an intoxicated patron to remain occurred. I find that the former is relevant to the penalty of the latter.

The Regulation provides a range of penalties for this type of contravention and there is a range of activities that constitute a contravention of this type. Permitting two intoxicated patrons to remain is clearly a more egregious contravention than permitting only one to remain, and continuing to serve the intoxicated patrons who are permitted to remain is in my view a relevant factor in determining what penalty is appropriate for the contravention of permitting (an) intoxicated patron(s) to remain. I emphasize that in determining the scope of the penalty I did not assess a penalty for serving the patrons, but rather have determined that serving the patrons exacerbated the contravention of permitting two patrons to remain.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Liquor Primary Licence No. 013340 for a period of four (4) days to commence at the close of business on Friday, April 29, 2011, 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 *Regulations*). I direct that liquor licence 013340 be held by the branch or the Fort St. John Detachment of the RCMP from the close of business on Friday, April 29, 2011, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for four (4) days.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: April 1, 2011

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

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