



September 27, 2011

Tally Ho Motor Hotel Victoria Ltd.
c/o John N. Asfar
3020 Douglas Street
Victoria, BC V8T 4N4

Dear Licensee:

**Re: Tally Ho Motor Hotel Victoria Ltd., dba Tally Ho Motor Inn (Murph's Pub), Victoria BC
Liquor Primary No. 111522 Case: EH11-070**

This letter constitutes a decision by the General Manager of the Liquor Control and Licensing Branch pursuant to Section 20 of the *Liquor Control and Licensing Act*, regarding Notice of Enforcement Action #11-070 (the "NOEA") issued to the above named licensee.

Alleged Contravention and Proposed Penalty

The Branch alleges on April 16, 2011 the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* (the "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 (item 11 of Schedule 4, *Liquor Control and Licensing Regulation* (the "Regulation").

Issues

1. Did the licensee contravene section 43(2)(b) of the Act?
2. If so, what enforcement action, if any, is appropriate?

Applicable Statutory Provision

***Liquor Control and Licensing Act* [RSBC 1996] Chapter 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.
(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.

Exhibits

For the purpose of making this decision, I have considered the following information, copies of which have previously been provided to the licensee:

1. Liquor licence #111522.
2. The red lined floor plan for the establishment.
3. The NOEA dated July 6, 2011 (8 pages).
4. Contravention notice #B009672.
5. The compliance history for the licence and the licensee.
6. The July 27 2011 letter inviting the licensee to the pre-hearing conference.
7. Email communication with Ms. Kobe confirming that she provided branch documentation to Mr. Asfar.
8. A copy of the Registrar's August 18, 2011, registered letter.

Background

The Branch's attempts to communicate directly with John Asfar, the licensee's corporate director, have been unsuccessful. The liquor inspector delivered a copy of the NOEA to the establishment where the third party operator acknowledged receipt. The inspector also spoke with John Asfar's assistant and emailed her a copy of the NOEA.

The branch registrar spoke with both the receiver-manager and the trustee in bankruptcy for of the corporate licensee in an effort to reach Mr. Asfar. The trustee in bankruptcy provided a recent address for Mr. Asfar as well as the name of Mr. Asfar's assistant.

In a letter dated July 27 (copy enclosed), which was mailed to the establishment and emailed to John Asfar's assistant, the branch informed the licensee that there would be a telephone pre-hearing conference on August 16, 2011. The letter advised that should he fail to participate in the pre-hearing process, the licensee may lose the opportunity for an oral hearing if the allegation is in dispute. The pre-hearing conference could not proceed because the licensee failed to participate.

On August 16, John Asfar's assistant confirmed that she had passed on to Mr. Asfar the documentation and email sent to her.

On August 18, 2011 a registered letter was sent to the establishment address advising Mr. Asfar that due to his failure to participate in the pre-hearing conference, a decision regarding the alleged contravention and the proposed penalty would be made without an oral hearing. The letter provided the licensee with an opportunity to provide a written submission by August 31. Canada Post records indicate that this letter was received on August 22.

Particulars of Allegation

The licensee operated Murph's Pub in the Tally Ho Motor Hotel at 3020 Douglas Street, Victoria, BC. The licensee holds liquor primary licence 111522 which allows liquor service from 11:00am to 1:00am Monday through Thursday, 11:30am to 1:30 am Friday and Saturday and 11:00am to midnight on Sunday. The licensed capacity of the establishment is 311 patrons in the interior area and 52 patrons on the patio. 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*.

The Branch's particulars of the alleged contravention are contained in the NOEA as follows:

On April 16, 2011 at approximately 10:00 pm, two branch liquor inspectors entered the establishment in a covert capacity. They observed a male patron who was seated at a table in the central section with a glass of draft beer in front of him. His eyes were closed and he had his head resting on his hands, supported by his forearms. He was in direct view of the service bar and the server making rounds of the establishment. As the server made her rounds, she ranged 3 -15 feet away from the patron and he would have been in full view.

The inspectors sat at a table approximately 12 feet from the patron. They observed the patron wake, get up and stumble into a table and several chairs as he moved to the dance floor. While dancing he swayed from side to side and lost his balance, stumbling into other patrons. His movements were jerky and uncontrolled. His face appeared flushed. He spoke occasionally to other patrons and he engaged in a verbal altercation with one woman seated across the floor. He returned to his seat, consumed from his glass of beer and then resumed dancing.

At approximately 10:20pm the patron went to the washroom and the male inspector followed him. He observed the patron wiping down his pants with a paper towel. The inspector asked how he was doing and he replied, "How do you think I'm doing? I just pissed myself." When the inspector asked if he was serious he confirmed that he was. The inspector saw signs that this is indeed what had taken place. The inspector observed that the patron had bloodshot and watery eyes, his speech was very slurred, he had difficulty speaking and he was leaning heavily on the counter for support. The patron told the inspector that he was "polluted."

The male inspector rejoined the other inspector and they both identified themselves to the bartender. The manager was not present and the bartender was in charge of the pub. The inspectors explained that there was an intoxicated patron in the male washroom and that the licensee needed to make sure that he was safely removed from the establishment as soon as possible.

The inspectors went into the games room and when they returned they saw the bartender gesturing at the intoxicated male patron who was back at his table. The patron rose, finished his drink and left via the main door. The inspectors followed a short distance behind as the patron walked across the parking lot and off the property, swaying from side to side.

At 10:30pm, as the inspectors prepared to leave, they saw that the intoxicated male patron was back and loitering outside near the entrance. They informed two nearby Victoria police officers about the intoxicated patron and then left.

On April 18, 2011, the branch issued contravention notice B0092672 for permitting an intoxicated person to remain in the establishment contrary to s. 43(2)(b) of the *Act*. On April 27, the inspector met with the third party operator of the establishment, who told him that the staff that evening had all worked at the establishment for a number of years and were highly experienced. The inspector's request for documentation from the licensee revealed that both staff on duty the evening in question had their Serving it Right certification, and that the liquor sales for the evening revealed that it had been a slower sales day compared to other days that week.

The licensee has not contacted the Branch or responded to the allegation regarding the events of April 16, 2011.

Decision

I have reviewed the branch's means of communicating with the licensee and I am satisfied that all correspondence from the branch has been sent to the licensee's mailing address as set out on the face of its liquor licence. This address is also the location of the restaurant. I am satisfied that the licensee is aware of the branch's allegations, has had the opportunity to provide a submission but has chosen not to do so.

I find based on the information contained in the NOEA and absent any response from the licensee, that on April 16, 2011 the licensee contravened section 43(2) (b) of the *Act* by permitting an intoxicated person to remain in that part of the establishment where liquor is sold, severed or otherwise supplied.

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 are dealt with. There is no information before me which would establish a defence of due diligence for the licensee.

Penalty

Having found that the contravention is proven, section 20(2) of the *Act* gives me the 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 minimum set out in Schedule 4 of the *Regulation*. I am not bound by the maximum 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.

For contraventions of this nature, item 11 of Schedule 4 of the *Regulation* provides for a four to seven day licence suspension and/or a \$5000-\$7000 penalty. This is a first proven contravention of this type and there is no related compliance history for the licensee or the establishment.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the Act, the Regulation, and the terms and conditions of the licence. 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 public safety and the well-being of the community.

In his reasons for proposing a four day licence suspension, the liquor inspector has written in the NOEA that he recommends a four day licence suspension for the following reasons

A liquor licence suspension will visibly impress to the Licensee, to staff and the public that allowing such behaviour is not permitted and will result in penalty. A suspension penalty is proportionate to the seriousness of this circumstance of permitting patron intoxication. A monetary penalty is not recommended as differing sizes and volumes of businesses may experience a dissimilar level of impact whereas, in addition to visibility, a liquor licence suspension is equitable regardless of size or sales volume of the licensed establishment. A licence suspension creates the consistent effect of closing all suspended establishments for the duration of the suspension.

I find that a four (4) day licence suspension is warranted and suitable to the circumstances.

Generally, a licence suspension begins on the same day as the contravention occurred and approximately 30 days from the date of the determination. This 30 days is to provide consistency in the application of suspensions and to provide the licensee and the licensee's staff reasonable time to arrange their affairs. This particular circumstance is unique in that the present licensee has taken over the establishment after a drawn out receivership process and is twice removed from the licensee who the finding of a contravention is against. The present licensee, through no fault of its own, is negatively impacted by any delay in the service of the suspension. In the circumstances a more timely service of the suspension is warranted.

Order

Pursuant to Section 20 of the Act, I order a suspension of Liquor Primary Licence 111522 for a period of four (4) days, to commence at the closing of business on Friday, October 7, 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. In order to ensure that this order is effective, I direct that Liquor Primary Licence 111522 is to be held by the Branch or the Victoria City police department from the close of business on Friday, October 7, 2011, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension.

Yours truly,

Original signed by

Bruce Edmundson
Deputy General Manager
Compliance and Enforcement Division

cc Victoria Police 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

Attachment:

- July 27, 2011, pre-hearing conference letter