

AMENDED June 27, 2011



**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: Kicking Horse River House Cafe Ltd.
dba River House Tavern
506 8th Avenue North
Golden, BC V0A 1H0

Case: EH10-092

For the Licensee: Bruce McKenzie
Ewan & McKenzie, Barristers & Solicitors
Chris Soper

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: May 3, 2011

Place of Hearing: Golden, BC

Date of Decision: May 25, 2011

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 952-5787
Facsimile: 250 952-7066

Location:
Fourth Floor, 3350 Douglas Street
Victoria BC

<http://www.pssg.gov.bc.ca/lclb/>

INTRODUCTION

The licensee, Kicking Horse River House Cafe Ltd, operates the River House Tavern located in Golden, BC. Chris Soper (licensee principal) is principal of the corporate licensee. The licensee holds Liquor Primary Licence 302828 for the operation of a liquor primary establishment with liquor sales from noon to 2:00 a.m. seven days a week. 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 September 16, 2010. The branch alleges that on July 23, 2010, the licensee contravened section 73(2)(b) of the *Liquor Control & Licensing Act* by failing to immediately allow the establishment to be inspected. The proposed penalty is a 30 day suspension of the liquor licence (item 45 of Schedule 4, *Liquor Control & Licensing Regulation*).

Item 45 under the heading "Period of Suspension" states, "If the licence is not cancelled or transferred in accordance with section 69 of this *Regulation*, at least 15 days."

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS

LIQUOR CONTROL AND LICENSING ACT RSBC c 267

Section 73 (2) Without limiting any other provision of this section, a licensee must

(b) allow the licensed establishment to be inspected under this section, immediately upon being requested to do so by a person acting under the authority of this section,

- (i) at any time provided for in the terms and conditions of the licence, and
- (ii) without limiting subparagraph (i), at all reasonable times.

ISSUES

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

EXHIBITS

1. Branch's Book of Documents, tabs 1-13.
2. Licensee's Book of Authorities and Documents, tabs 1-6.

EVIDENCE – THE BRANCH

The branch presented three witnesses, two police officers and a liquor inspector.

Two RCMP constables, A and B, testified that they were on duty in uniform conducting routine patrols in the community of Golden BC during the late night/early morning hours of July 22/23, 2010. Shortly before 3:00 am they were in the vicinity of the River House Tavern when their attention was drawn to the establishment. It was well after closing time yet the lights were still on. Looking through a side window (exhibit 1, tab 4, photo 3) they noted a female and two males seated at the bar with glasses and a bottle of liquor on the bar, recorded music was playing loudly with some of the patrons singing

along. A person known to them as being a bartender at the establishment was standing behind the bar.

The officers walked from the side of the building to the front entrance where they attempted to gain entry. The door was locked. They announced their presence by banging and kicking on the door and shouting, "police, open up." There are two long narrow windows to the side of the door (exhibit 1, tab 4, photos 1 & 2). Officer A, who was standing in front of one of the windows, shone his flashlight into the interior of the premises and then onto his uniform in order to get the attention of the persons inside and identify himself as a police officer. Officer A testified that at one point the bartender looked at him through the window then looked away and began clearing the glasses and cleaning the bar. The officer testified that from the look on the bartender's face it was apparent to him that the bartender recognized him as being a police officer. The officer was shocked that the bartender wouldn't come to the door. The bartender then appeared to have a brief conversation with the persons at the bar and then proceeded to the front door where he stood with the door partially open. The bartender said something to the effect, "what's up?" Officer A estimated that the time lapse from the time the bartender looked toward the window and saw him as a police officer, looked away and began cleaning up before proceeding to the door and opening it, was "a minimum of a couple of minutes." When it was suggested to him that the patrons inside would testify that it was less than a minute, the officer testified that he disagreed and testified that the time lapse was, "more than one minute." Officer B testified that it was "several minutes" before the door was opened. When advised that officer A had testified that it was a "couple of minutes", he testified that he "agreed" with that statement. Both officers agreed that the loud music and singing by the patrons may have prevented them from hearing the banging on the door.

As the bartender stood at the partially open front door Officer B pulled the door open and pushed by him into the establishment followed by officer A. Officer B testified that the bartender did not attempt to block his entry. Inside the bartender became agitated, telling the officers, "You guys can't just come in here." Officer B advised him that as police officers they wore different hats on different occasions and this was a liquor inspection. The bartender was confrontational for a short period of time, shouting that the police were picking on the establishment and that if the officers reported this incident it would financially ruin him as he had just purchased a new truck. The officers noted that the glasses and bottle of liquor seen on the bar earlier had been moved to below the bar. The officers ascertained the identity of the persons at the bar and sent them on their way. The bartender remained cleaning up the establishment. The officers departed at approximately 3:48 am. The officers made brief handwritten notes at the time of the incident and later completed narrative reports (exhibit 1, tabs 2 and 3). A Licensed Premises Check form (LPC) was completed and delivered to the bartender the following day (exhibit 1, tab 2). Officer A testified that he received a voice message on his home phone the following day from the bartender apologizing for his behaviour.

A branch liquor inspector testified that at the time of the alleged contraventions he was the inspector responsible for the Golden area and maintained the branch files for the establishments located in his area. He referred to copies of documents from the Branch file:

- Exhibit 1, tab 1: NOEA letter of September 16, 2010.
- Exhibit 1, tab 5: Contravention Notice (CN) issued to the licensee.
- Exhibit 1, tab 6: The liquor primary licence issued to the licensee and in effect at the time of the alleged contravention.
- Exhibit 1, tab 7: Floor plan outlining the licensed area of the establishment.

- Exhibit 1, tab 8: A copy of the Liquor Primary Guide in effect at the time of the alleged contravention. The Guide outlines the statutory and regulatory requirements for the operation of the establishment and sets out the terms and conditions of the liquor licence. The guide deals specifically with the, “Entry of Liquor Inspectors and Police Officers” at p. 37.
- Exhibit 1, tab 10: Inspection and Interview information documents outlining the issuance of the licence. The licensee principal had signed the documents acknowledging the terms and conditions of the licence and agreeing to abide by them.
- Exhibit 1, tab 11: Compliance meeting documents completed by the previous area inspector on February 15, 2010, after meetings with the licensee principal, representatives of other nearby licensed establishments, members of the RCMP detachment and the area inspector to discuss issues of concern occurring within the vicinity of the establishments.
- Exhibit 1, tab 12: Waiver document for contravention fail to clear patrons by time required.

The inspector testified that he was notified by the Golden Detachment of the RCMP of the incident of July 23, 2010. He received the officers' notes and reports and spoke with the officers on the telephone. He contacted the licensee principal and advised him of the seriousness of the alleged contraventions. The licensee principal agreed with the seriousness of the matter and advised him that the bartender on duty knew better. The inspector completed a CN (exhibit 1, tab 5) and mailed it to the licensee principal, four separate contraventions were identified. Following discussion with his regional manager a decision was reached to proceed with enforcement on two of the alleged contraventions. The inspector completed a NOEA (exhibit 1, tab 1) for the two alleged contraventions; fail to immediately allow inspection; and fail to clear patrons by time required. A \$1,000 monetary penalty was recommended for the latter alleged contravention which was accepted by the licensee principal and a waiver to their opportunity for a hearing was completed (exhibit 1, tab 12).

The recommended penalty for the alleged contravention of fail to immediately allow inspection was a 30 day liquor licence suspension. The inspector testified that the contravention is considered serious and the minimum penalty is a 15 day suspension. He considered that the actions of the bartender were such as to delay entry by the police and to remove evidence followed by an attempt to block their access by putting his arm across the door. The bartender was angry and uncooperative with the officers. If the officers were not insistent on making their way into the establishment, they could have been turned away from the door and not completed the inspection.

EVIDENCE - THE LICENSEE

The licensee presented five witnesses, the licensee principal, the bartender on duty at the time of the alleged contravention, and three patrons present at the time.

The licensee principal testified that he is the sole shareholder of the corporate licensee and has operated the establishment for approximately five to six years. He does not consume alcohol or use drugs. He previously managed a bar in Lake Louise, Alberta for several years without incurring any violations. He is aware that the liquor licence prohibits the sale and service of liquor after 2:00 am and patrons must leave the premises by 2:30 am. All employees are aware that police officers must be permitted access to the establishment at all times. Since the incident of July 23rd they have been told to leave the front door unlocked. The establishment is relatively small with an interior capacity of 46 persons. The windows are not covered with curtains or shutters allowing police officers a clear view inside the establishment.

The bartender on duty the night of the incident was in charge of the establishment. The bartender has many years of experience and has worked with the licensee principal previously at Lake Louise and knows the rules. He received a call from the bartender that night after the officers had left. The bartender told him that the officers had come to the establishment and admitted that he had allowed some people to drink in the establishment after hours. The bartender was not aware at that time that a

contravention of failing to immediately allow entry to the officers was being alleged. The licensee principal reacted angrily and told the bartender to apologize to the officers for his conduct. The bartender was subsequently suspended from his duties for 30 days.

He received a phone call from the liquor inspector about the incident and was advised that the branch was proceeding with the two alleged contraventions. He accepted the contravention for failing to clear patrons and the \$1,000 penalty has since been paid. He does not agree with the contravention of failing to immediately allow entry to the police officers. He believes that the officers were allowed inside as quickly as possible and does not believe that they were delayed. A 30 day licence suspension could have the effect of putting him out of business.

He testified that he believes that his establishment is unfairly singled out for being responsible for all the problems occurring within that area of the community because of its proximity to a public square and footbridge used by persons entering/leaving the downtown area. Two other establishments are located within close proximity. Police officers are concerned that patrons are walking out of his establishment with their liquor and into public areas where it is consumed. He has locked the rear exit and has a doorman on duty seven days per week to prevent this, but they do not have authority to search patrons' clothing. If the police were to issue tickets to those with the liquor it may curtail the activity. Police officers have said that they suspect drug activity is occurring within his establishment. He has told them that he would welcome an investigation and charges for those responsible if that were the case. He and the proprietors of the other establishments have met with police officers and developed a Bar Watch Committee and a code of conduct (exhibit 2, tabs 5 & 6) which has been sent to the police but they have yet to receive any comment.

The bartender on duty July 22/23, 2010, testified that he has been a bartender for eight years working at Lake Louise and then Golden. He knows the requirement that all patrons must be out of the establishment by 2:30 am. He was working the early morning hours of July 23rd. He had permitted several friends to wait in the establishment while he was cashing out. They were all going to a party to which he was providing the transportation. The music was playing fairly loudly in the establishment and he didn't hear anyone knocking on the door. One of the people present told him that a police officer was shining his flashlight through a front window. He looked at the window and saw the officer shining his flashlight onto his uniform. He finished cleaning the cups at the bar then went to the door. He believed that it took him no longer than 45 seconds from the time he observed the officer until he walked to the door. In a later re-enactment he timed it at 38 seconds. He opened the door and said to the officers, "Hey guys, what's up." Constable B entered first. He did not block their entry. He agreed that he was upset and acted unprofessionally. He was disappointed with himself and was concerned that he could lose his job and create a problem for his boss who is also his friend. He later phoned his boss and told him that the police had arrived and that there were people in the establishment after hours. His boss was angry and told him to apologize to the police, which he did by leaving a phone message for one of the officers and making a personal apology when they arrived the next day. He agreed that he cleaned the cups on the bar because the police were at the door. He testified that he believed that he had allowed them entry; he went to the door and held it open. He didn't tell them that they couldn't come in. He knew that they were allowed in and he denied the conversation about whether the police officers were allowed in and being told that they wear many hats and that this was a liquor inspection.

Three patrons of the establishment testified that they were at the establishment after hours during the early morning hours of July 23rd, prior to going to a party, waiting for their friend, the bartender on duty. Their attention was drawn to a police officer shining a flashlight through a front window into the establishment. It was brought to the attention of the bartender who cleared the drink glasses from the bar into the washer then went to the door. The officers entered and spoke with the bartender.

The conversation was not overheard. Their estimates of how much time it took for the bartender to clear the glasses and go to the door ranged from, "30 - 45 seconds", to "one-half minute", to "less than one minute."

SUBMISSIONS – Branch

The branch's submission is summarized as follows:

The evidence is clear that the police officers saw people inside the establishment after hours with liquor present. The door was locked. They knocked and shone their flashlight in an attempt to get the bartender's attention. It appears that the bartender acknowledged the officers' presence but wanted to clear the bar of drinks before opening the door. The bartender did not allow the officers immediate entry as required. During the time of the incident the bartender was responsible for the establishment and was the directing mind of the licensee. The contravention is a serious one with a 15 day minimum suspension penalty. In circumstances of this case, the branch recommends a 30 day liquor licence suspension.

SUBMISSIONS – Licensee

The licensee's submission is summarized as follows:

Here there is no evidence of any delay for the purpose of preventing the police officers from performing their duty. The windows were left un-shuttered allowing a view into the establishment. The officers' entry was not blocked and there was no attempt to stop them from entering. The evidence regarding the time elapsed from the moment the bartender became aware of the officers' presence and the opening of the door ranges from less than a minute by the witnesses inside the establishment to a couple of minutes by the officers. "Immediate" does not mean that a person must drop what they are doing and attend to allowing entry. The interpretation of immediate should be

considered by what was reasonable in the circumstances. It should be as soon as practicable in the circumstances. In a previous case where this contravention was found to have occurred the delay was 25 minutes.

In this case the bartender erred, he allowed people to remain in the establishment after hours. He didn't realize that it was a contravention to not immediately open the door. He was angry with himself, acted badly with the officers and apologized the next day. He was subsequently disciplined.

If a contravention is found there is no need to impose a penalty. The licensee has taken the matter seriously and gone to the expense of retaining counsel. A 30 day licence suspension is incredibly severe and will adversely affect the licensee and its employees. Other cases with more egregious circumstances have resulted in lesser suspensions. Any penalty imposed should be proportional to the circumstances of the contravention.

REASONS AND DECISION

Having considered all of the evidence, I find on a balance of probabilities that the bartender delayed in allowing immediate access to the police officers after having notice of their presence outside. The delay was brief, somewhere between 45 seconds and two minutes. The bartender used the time to clear evidence of liquor service in the establishment. Glasses were cleared from the bar counter. A liquor bottle observed by the officers had been removed from the bar counter and placed below. "Immediate" in my view requires a response without undue delay. Here the delay was deliberate and inappropriate to the circumstances.

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 or of policies and procedures in place to guide staff in performing their duties. The licensee principal hired knowledgeable staff and expected them to carry out their duties properly without providing adequate oversight. The employee on duty and in charge of the operation of the establishment at the time, who in the strict legal sense was the directing mind of the licensee, was responsible for the conduct leading to the contravention.

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

Having considered all of the evidence, I find that on July 23, 2010, the licensee contravened section 73(2)(b) of the *Liquor Control & Licensing Act* by failing to immediately allow the establishment to be inspected.

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 for the purposes of Schedule 4 and calculating a penalty.

In the circumstances of this case, I am satisfied that the licensee principal has not successfully or sufficiently stressed, upon the employee that he has placed in charge of the establishment, the need to fully and conscientiously carry out his duties, and a penalty is necessary to ensure future compliance. Here, the employee in charge of the establishment believed that he could delay the entry of police officers or at the very least was unaware that he must allow them immediate entry. His actions and

demeanour at the door and inside, while not such as to prevent entry by the officers, was in my view, meant to dissuade them from entering and acting on their authority. The contravention is serious. The general manager of the branch has a duty to oversee the conduct of all establishments within the province. That duty is carried out through inspections by liquor inspectors and police officers and requires that inspectors and officers be immediately allowed entry into a licensed establishment.

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 liquor inspector, based on his belief through the information available to him at the time, has proposed a 30 day licence suspension. In the circumstances here, of a brief but deliberate delay and where the employee did not attempt to block or prevent entry, I find that the minimum suspension is sufficient to encourage future voluntary compliance. A 15 day suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Liquor Primary Licence 302828 for a period of fifteen (15) days, to commence as of the close of business on Wednesday, July 6, 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 *Regulation*).

To ensure this order is effective, I direct that the liquor licence be held by the branch or the RCMP Golden Detachment from the close of business on Wednesday, July 6, 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.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: May 25, 2011

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

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