



**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***

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| Licensee: | Beruschi Enterprises Ltd. dba Regent Motor Inn 112 First Street East Revelstoke, BC V0E 2S0 |
| Case: | EH10-181 |
| For the Licensee: | Fred Beruschi |
| For the Branch: | Peter Mior |
| Enforcement Hearing Adjudicator | George C.E. Fuller |
| Date of Hearing: | August 25, 2011 |
| Place of Hearing: | Vancouver, BC |
| Date of Decision: | October 14, 2011 |

INTRODUCTION

The Corporate Licensee, Beruschi Enterprises Ltd. (the "the Licensee"), owns and operates an establishment known as the Regent Motor Inn in Revelstoke, BC. The establishment operates under Liquor Primary Licence Number 026941. The authorized representative of the Licensee is Fred Beruschi.

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" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated February 10, 2011.

The Branch alleges that on December 11, 2010, the Licensee contravened Section 43(2)(b) of the *Liquor Control and Licensing Act* (the "Act"), by permitting an intoxicated patron to remain in the establishment. The proposed penalty is a four-day licence suspension. The penalty range for a first contravention of Section 43(2)(b) is a four to seven day license suspension and/or a \$5,000 to \$7,000 penalty (item 11 of Schedule 4, of the Regulation).

The Licensee denies that the contravention occurred, but if it did, then the Licensee says that it is entitled to assert a defense of due diligence. The Licensee further submits that, if the defense of due diligence is not available to it, then the penalty of a four day license suspension is unwarranted.

RELEVANT STATUTORY PROVISIONS**Liquor Control and Licensing Act [RSBC 1996] Chapter 267****Drunkenness**

43(2)(b) 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. Was the Licensee duly diligent?
3. If the Licensee was not duly diligent, are penalties warranted under the circumstances?
4. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

The following documents were submitted for consideration:

Exhibit 1: The Branch's book of documents, Tabs 1 to 13.

Exhibit 2: (a) a copy of the publication "Liquor Line" dated March 2011.

(b) a copy of an excerpt from the Branch's web site entitled "Compliance and Enforcement".

(c) a copy of an excerpt from the Branch's web site with regard to employment with the Branch.

Exhibit 3: A copy of the Licensee's River City policy/operations manual.

EVIDENCE

The Branch called one witness, a liquor inspector, who had been in that position since February of 2007. Prior to that the inspector had been a member of the Vancouver Police Department for 30 years and had also been on the Vancouver Police Reserve for a period of two years prior to that time. He has received formal training in identifying the signs of intoxication. As a liquor inspector, he has conducted more than 400 inspections involving issues such as intoxication, service to minors, overcrowding, criminal activity, and lesser issues.

In the ordinary course of inspections, if he detects the commission of a contravention he will discuss the matter with the Licensee. If, however, he is conducting a covert operation he will not alert the Licensee to his presence. In this latter scenario, he explained that if a Licensee is aware that a liquor inspector is in the vicinity, a licensee will conduct its business in a different manner. Carrying out covert inspections is one of the duties of inspectors, as set out in the Guide.

With regard to the events of December 11, 2010, he stated that he was asked to perform a number of covert inspections as the usual liquor inspector was well known by the licensees in the area.

He conducted two covert inspections of the Licensees' premises on December 11, 2010. On the first occasion he arrived at approximately 10:25 pm and entered through the main doors. He walked through the establishment to get an overall view. He had been in the establishment for approximately ten minutes when he noticed a female patron ("Patron A") dancing by herself on the dance floor. This dancing was not to the beat of the music and was more of a free style thrashing about. There was no rhythm to the actions and he only referred to it as "dancing", because of the fact that she was on the dance floor. He observed Patron A having to catch herself from falling down a

number of times. He did not necessarily conclude that she was intoxicated at that time, but her movements certainly brought her to his attention.

Eventually, Patron A left the dance floor and headed in the inspector's direction. She came into his personal space, approximately six inches away, and stated "You look cold" and then she proceeded to attempt to take his coat off. When she said "cold" it was in a slurred fashion and he could easily smell liquor on her breath. After he refused to take his coat off she proceeded toward the coat check at the front of the establishment. She was unsteady on her feet and bumped into other patrons and chairs. It was at this point that the inspector formed the opinion that she was intoxicated. She had a short conversation with a staff member at the coat check, and, again she was about six inches from the staff member's face. After a short conversation with this employee, she went into the washroom.

When Patron A left the washroom, she went to the bar area and began hugging patrons. She was again unsteady on her feet and was walking in a non-specific direction. She continued hugging patrons, some of which were accepting and others appeared to be uncomfortable. The bartender was approximately six feet away from her at one point.

There were two males at the end of the bar. She took a mug of beer out of the hand of one of them and took three long drinks. She then proceeded back down to the dance floor and, again, danced by herself. She was joined by another female patron. They almost fell, a number of times, and, it was only through the efforts of the other female that Patron A did not fall down. Eventually the other female left the dance floor and Patron A stayed on. She then proceeded to an area near the front door, and approached another staff member and, once again, she was very close to him when she spoke.

Throughout these observations, the inspector had a clear and unobstructed view of the entire establishment. After Patron A spoke to the staff member she then returned to the dance floor. At that time the inspector decided that he would continue his covert inspections at other establishments and left the Licensee's establishment at 10:55 pm.

He stated that, notwithstanding Patron A's close conversations and interactions with several employees of the Licensee, none of those staff members attempted to remove Patron A from the establishment.

In his opinion, her intoxicated state was obvious. He gauged this upon the smell of liquor on her breath, her stumbling, and her lack of inhibitions.

The inspector returned to the Licensee's premises at 12:25 pm, on December 12, being the end of the business day of December 11. At this time he did not see Patron A. He did, however, notice another patron (Patron "B") trip on a small step-up, which was directly across from the bar. When the inspector looked at him, he observed that Patron B had glassy eyes, which were one-half shut. He had a far away gaze and could not focus. He was unsteady on his feet as he approached the washroom. He then ran over and grabbed and hugged another patron. Patron B went into the washroom and when he came out he had a "five-hundred yard stare" and could not focus. At this time Patron B was approximately ten to fifteen steps away from the inspector. He then went over and launched himself into the arms of another patron, and in the inspector's view, the force would have bowled this other patron over if he had not been against a rail.

In the inspector's opinion, Patron B was intoxicated. He observed him stumble and noted his glassy eyes, drooping eyelids and unfocused stare. The inspector left the Licensee's premises at 12:35 am, went to one more establishment and then went to his truck to make his notes.

He did not bring his observations to the attention of the Licensee because if he had identified himself he may have put his safety in jeopardy and Revelstoke is a small town where news travels quickly, so it would have been impossible to continue his covert inspections after he had been identified. It is his practice to notify Licensees when he has left the area.

In view of the fact that the Licensee had met with another liquor inspector only a few months earlier, with regard to compliance issues, he believed that a suspension, versus a monetary penalty, was a fair way of getting voluntary compliance in this case. Furthermore, a suspension would signal to the community that the commission of this contravention was not acceptable to the Branch. Intoxication is a concern as it can lead to assaults, late night difficulties, mischief and criminal activity.

He was unable to identify Patron A by name and estimated that she was in her late thirties or early forties and Patron B was in his thirties.

LICENSEE EVIDENCE

The Licensee called its Liquor Manager as a witness. She had worked in the liquor industry for approximately ten years and, prior to being employed by the Licensee, had worked in two bars and a pub. At the time of the alleged contravention, the Liquor Manager had been in that position for approximately six years. She advised that she has weekly meetings with the staff to talk over any concerns.

She was on shift on the evening of December 11, 2010, and confirmed that the Licensee provided patrons with transport home, at no cost, and also had a shuttle service available. She did not witness any obvious problems in the bar and was unaware that the inspector had been in the bar that evening. She confirmed that all staff of the Licensee had Serving it Right certificates.

She did not know Patron A, however, she did know of a certain patron ("Patron C") who usually danced by herself on Saturday nights and was in her early fifties. Patron C only drank water, was a good dancer and other women danced with her on occasion. The Licensee did not call Patron C as a witness in these proceedings.

The Liquor Manager said that the Licensee had a good relationship with the Revelstoke RCMP and that the RCMP are called when problems develop. She did not permit intoxicated patrons to remain in the establishment and that if she noticed someone who might be intoxicated she would give them either water or coffee, as a way to start a conversation, in order to assess their level of intoxication. If she determined that the patron was intoxicated, she would ask the patron to leave. If the patron was accompanied by someone, she would ask that friend to drive him, or her, home, but if the patron was alone, she would arrange for a ride home, either by way of shuttle or cab. While they were waiting for the shuttle, or cab, the Liquor Manager would escort them outside to wait, but if it was not safe to do so, she would seat them in the lobby and notify the staff that he, or she, was not allowed back into the bar.

Finally, she said that staff had to read the Licensee's training manual before starting work for the Licensee. She testified that the signs of intoxication do not appear anywhere in the Licensee's training manual. In her view the manual talked about the Serving it Right program and this meant that employees would know the signs of intoxication.

SUBMISSIONS OF THE BRANCH

The Branch submits that it has demonstrated on the evidence that on the evening of December 11, 2010, at approximately 10:25 pm, the inspector observed Patron A and noted that she had liquor on her breath, was stumbling and was behaving in a manner that should have drawn someone's attention to her. During this time, however, he did not observe any staff member attempt to remove Patron A from the Licensee's establishment.

When the inspector returned to the Licensee's premises at approximately 12:25 pm, he observed Patron B for approximately ten minutes. This male was exhibiting signs of intoxication, such as stumbling, glassy eyes, a far-away gaze and general difficulty in focusing. He was unsteady on his feet. Once again, this patron should have come to the attention of the Licensee, or its staff, however, the inspector did not observe any staff members deal with, or attempt to deal with, this patron, by having him removed from this establishment.

Accordingly, the elements of the contraventions have been made out.

With regard to penalty, the Branch has recommended a licence suspension of four days, which is the minimum licence suspension in the penalty schedule for a contravention of section 43(2)(b) of the Act.

SUBMISSIONS OF THE LICENSEE

The Licensee submits that the characterization of the manual as being flawed is inaccurate, due to the fact that staff members are required to take the Serving it Right program which includes a segment regarding the signs of intoxication.

With regard to the defense of due diligence, the Licensee submits that when it knows that there is an intoxicated person in its premises, it is dealt with immediately. Furthermore the Licensee takes great care in not allowing patrons to become intoxicated and in the event that they do, the Licensee looks after its patrons by providing either a ride home in a cab, or a shuttle vehicle, which was purchased for that purpose. These measures demonstrate that the Licensee is very concerned with regard to public safety issues. The Licensee submits that it does not shut its eyes to problems but acknowledges that, on the night in question, "Perhaps we missed that, perhaps we missed that and obviously we did", and in relation to the liquor inspector's observations, he conceded that, "He did his job. He saw what he saw".

Finally the Licensee submits that there is a lack of evidence to demonstrate that the Licensee, failed to do its job.

ANALYSIS AND DECISION

Having reviewed and considered all of the evidence, both oral and documentary, the submissions of the parties, as well as the applicable law, I have, on a balance of probabilities, concluded that on December 11, 2010 at approximately 10:25 pm and again at approximately 12:25 am, the Licensee contravened Section 43(2)(b) of the Act, by permitting intoxicated Patrons A and B to remain in that part of the licensed establishment where liquor is sold, served or otherwise supplied. In the course of reaching this conclusion, I am satisfied that: 1) the patrons were showing the signs of intoxication; 2) the Licensee knew or ought to have known that the patrons were showing the signs of intoxication; 3) the patrons remained in that part of the establishment where liquor is sold, served and supplied; 4) the Licensee did not take steps to remove the patrons.

In my view, there was no serious challenge to the evidence of the inspector and his description of the actions of Patrons A and B, which clearly indicated their respective states of intoxication. The Licensee failed to call any evidence from a witness who was present at the time that the inspector observed the actions of Patron A or Patron B, in order to counter his evidence. Although it normally immediately acts upon contraventions when they are apparent, the Licensee says staff may have missed these signs exhibited by Patrons A and B on this occasion.

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 the existence of procedures to identify and deal

with problems, but it must ensure that those procedures are consistently acted upon and problems are dealt with in a timely fashion.

In the instant case, the Licensee has stated it is a good operator and takes its responsibilities for lawful liquor service seriously. As an example of that principle, it points to the fact that it has created a comprehensive manual for the guidance of employees in serving liquor. Unfortunately, that document does not contain any reference whatsoever to the signs of intoxication which are set out in the Guide. The Licensee argues that, due to the fact that these signs of intoxication are dealt with in the Serving it Right program, it is not necessary to repeat that topic in the Licensee's manual.

I cannot agree with the position of the Licensee with regard to this critical issue. It is the Licensee who is in control of its establishment and, accordingly, the Licensee must ensure that its' staff are acutely aware of the requirements of the Act and the Regulations. In my view, it is simply not good enough for a Licensee to leave training regarding the signs of intoxication up to a reading of the materials published by the Serving it Right program. I conclude, therefore, that the Licensee in this case is not entitled to the benefit of the defense of due diligence.

PENALTY

Pursuant to Section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation 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 by the minimum 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. 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 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.

There are no proven contraventions of the same type for this Licensee within the year preceding this incident. Schedule 4, Item 11 of the Regulation, sets out penalties for first contraventions section 43(2)(b) of the Act, a licence suspension of four to seven days and/or a monetary penalty of between \$5,000 to \$7,000. The Branch has recommended a four day suspension of the Licence, which is the minimum suspension for this particular contravention.

There can be no doubt but that contraventions of Section 43(2)(b) of the Act are at the high end of the seriousness scale. Intoxicated patrons are often associated with violence, be it as a victim, or as an initiator. Accordingly, the Licensee must ensure that its staff are compliant with the Act and the Regulations at all times. A licence suspension sends a clear message throughout the community that noncompliance regarding public safety issues will not be tolerated by the Branch.

On the other hand, I was impressed with the forthright manner in which the Licensee approached this serious issue and am confident that the sanction will be instructive for the future operation of the Licensee's establishment.

Taking into consideration all of the above, I am satisfied that no additional penalty beyond the four day minimum suspension recommended by the Branch is necessary to bring the Licensee in this case into compliance.

ORDER

Pursuant to Section 20 of the Act, I order a suspension of Liquor Primary License No. 026941 for the period of four days, to commence at the closing of business on Friday, November 11, 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 the Liquor Licence be held by the Branch or the Revelstoke RCMP detachment, from the close of business on Friday, November 11, 2011, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: October 14, 2011

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

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