



**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:	Black Swan Inn (1977) Ltd, dba Black Swan Inn 2890 Shawnigan Lake Road Shawnigan Lake, BC V0R 2P0
Case:	EH13-124
For the Licensee:	Mark Osmond
For the Branch:	Hugh Trenchard
General Manager's Delegate:	George C.E. Fuller
Date of Hearing:	Written Submissions
Date of Decision:	November 7, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, Black Swan Inn (1977) Ltd., (the "Licensee") owns and operates an establishment known as Black Swan Inn. The Licensee holds Food Liquor Licence Number 037072. The authorized representative of the Licensee is Mark Osmond.

According to the terms of its Licence, the Licensee may sell liquor from 10:00 a.m. to midnight, Monday through Thursday, 11:00 a.m. to 1:00 a.m. Friday and Saturday and 11:00 a.m. to midnight Sunday. The Licensee 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 CONTRAVENTIONS AND PROPOSED PENALTIES

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA"), dated July 20, 2013.

The Branch alleges that on May 25, 2013, the Licensee contravened Section 44(3) of the *Liquor Control and Licensing Regulation* (the "Regulation") by allowing consumption beyond the time permitted. The proposed enforcement action outlined in the NOEA is a four day suspension. This proposed suspension falls within the penalty range set out in item 26, Schedule 4, of the Regulation for a first contravention of this type.

The Branch further alleges that on May 25, 2013, the Licensee contravened Section 42(3) of the Regulation, by an employee consuming while working. The proposed enforcement action outlined in the NOEA is a \$1,000 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 27, Schedule 4, of the Regulation for a first contravention of this type.

The Branch further alleges that on May 25, 2013, the Licensee contravened Section 44(1)(a) of the Regulation, by failing to clear patrons by the time required. The proposed enforcement action outlined in the NOEA is \$1,000 monetary penalty. This proposed monetary penalty falls within the penalty range set out in item 24, Schedule 4 of the Regulation for a first contravention of this type.

In a letter received by the Branch on August 1, 2013, the Licensee's representative admitted the contraventions and advised that he was not making a due diligence defence. The Branch and the Licensee agreed that the hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Time

44(1) Unless otherwise authorized by the general manager,

- (a) liquor primary licensees must ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle wine that is sealed in accordance with section 42(4)(a).

44(3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond ½ hour after the time stated on the licence for the hours of liquor service.

Consumption of Liquor in Licensed Establishments

42(3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

ISSUES

1. Did the contraventions occur?
2. If so, has the Licensee established a defence to the contraventions?
3. If the contraventions are proven, what penalties, if any, are appropriate?

EXHIBITS

The following documents were submitted and were considered:

Exhibit No. 1: The Branch's book of documents, tabs 1 to 12 inclusive.

Exhibit No. 2: Undated letter received by the Branch on August 1, 2013, from the representative of the Licensee, Mark Osmond, to the Branch Registrar.

EVIDENCE—THE BRANCH

As previously noted, the Licensee does not dispute that the contraventions occurred as alleged, nor does it seek to claim the benefit of the defence of due diligence. It is deemed, therefore, to accept the facts as put forward by the Branch with respect to the issue of whether the contraventions occurred. The Licensee has, however, made submissions in respect to the appropriateness and fairness of the penalties which the Branch has recommended. Accordingly, the evidence may be summarized as follows.

At approximately 1:25 a.m. on Saturday, May 25, 2013, Liquor Inspectors A and B were conducting routine liquor licence inspections in Duncan, Chemainus, Mill Bay and Shawnigan Lake. In the course of those inspections, the two inspectors had been advised by the Shawnigan Lake RCMP that there were still approximately five cars in the Licensee's parking lot.

At approximately 1:32 a.m. the Inspectors attended at the Black Swan Inn whereupon they noticed that there were approximately five vehicles parked directly in front on the main entrance. Upon entering the establishment, the Inspectors noted that the business appeared to be operating as usual for a licensed establishment during normal hours of operation, that is with music playing, people seated at the bar, at tables and on the patio, all of which patrons were consuming liquor. There was a bar tender behind the bar and at least one waitress was attending to patrons. Many of the patrons' drinks were full or near the top of their glass and it did not appear that these patrons were finishing up their drinks and preparing to leave.

The Inspectors noted that the hours of operation for the business day for Friday were from 11:00 a.m. to closing at 1:00 a.m. At this time, it was now 1:34 a.m. and there was no mention by the Licensees' staff that the establishment was now closed. The Inspectors performed a count which resulted in a tally of 13 patrons inside the establishment, eight of those patrons with drinks, some of which were drinking beer poured from jugs. Furthermore, there were two patrons and two staff members on the patio, all of whom were also consuming beer.

At approximately 1:42 a.m. the bartender announced from behind the bar to the remaining patrons that they had, "2 more minutes to finish up". He then poured two shooters from a liquor bottle of Jagermeister into two shooter glasses. He slid one shooter across the end of the bar to a patron. The two made a cheer and then, in unison, swallowed the entire contents of their glasses in one gulp.

SUBMISSIONS—THE BRANCH

The Branch says that the contraventions have been proven and that the recommended penalties are appropriate and necessary in the circumstances, in order to ensure future compliance by this Licensee with respect to sections 44(3), section 42(3) and section 44(1)(a) of the Regulation.

SUBMISSIONS—THE LICENSEE

The Licensee acknowledges that the contraventions occurred and confirms that the Licensee does not wish to pursue a due diligence defence. The Licensee says that it has put in place new company guidelines that will eliminate any re-occurrence of these contraventions. It has instituted a new closing schedule which will give the staff ample time to clear the establishment on time. It has also instituted a code of conduct and is currently working on a broader "Retail Beverage Store" booklet for the staff to act upon. Furthermore, since the occurrence of the infractions, the staff has been overhauled with two bartenders being fired and two servers leaving on their own accord.

The Licensee does, however, have an issue with the reason for the penalty, namely that the penalties will make all staff think about liquor laws more in their daily routines. The Licensee agrees that it will have such an effect, but most of the staff who were working at the time of the infraction are no longer employed at the Licensee's establishment. That being said, the Licensee submits that there was no excuse for the contraventions to occur especially since the Licensee had conducted a staff meeting the previous Tuesday where one of the topics addressed was to make sure that when a band was engaged that they finish at 12:30 a.m. so this would give staff an hour to clear the building.

The Licensee concludes its submissions by pleading that any reduction of the penalty would be greatly appreciated, as most of the pub staff stand to lose 40 percent of their wages for that pay period. The Licensee also hopes that the establishments past 36 years without an infraction or contravention will be taken into consideration in determining an appropriate penalty.

ANALYSIS AND DECISION

Contravention

The Licensee has admitted to the contraventions and does not wish to pursue a defence of due diligence. Having considered all of the evidence and the submissions filed in these proceedings, I find that on Saturday, May 25, 2013, the Licensee contravened Section 44(3), Section 44(1)(a) and Section 42(3) of the Regulation.

Due Diligence

The Licensee is entitled to a defence to 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 the existence of procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with accordingly.

The Licensee has certainly made some efforts to attempt to ensure that its employees do not run afoul of the provisions of the Act, Regulation and the terms and conditions of its Licence. In this regard, the Licensee says it has put in place new company guidelines, a new closing schedule and is working on a code of conduct, all in the interests of reducing the potential for contraventions to occur. The Licensee has not, however, provided any details of those initiatives in order that I could find that it had been duly

diligent with respect to these contraventions. Accordingly, I am unable to find that this Licensee was 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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the Licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a 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.

The Branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history, 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.

Here, there is no record of proven contraventions, offences, or enforcement actions of the same type for this Licensee at his establishment, within the preceding twelve months of these incidents. Therefore, I find these to be first contraventions for the purpose of determining appropriate penalties.

The Licensee opines that any reduction in the penalty would be greatly appreciated as most of the pub staff stand to lose 40 percent of their pay for that particular pay period, if the proposed penalty is enforced. It is the Licensee, and not the employees, who is responsible for ensuring that the licensed establishment is compliant with the Act, Regulation and the terms and conditions of the Licence. I would point out that there would certainly be nothing preventing this Licensee from making its staff whole, for any losses incurred as a result of the contraventions.

The Licensee in this case has instituted several important measures for the purpose of reducing the potential for contraventions to occur. All of those initiatives, however, were put in place after the contraventions had occurred. In such circumstances, I am disinclined to give much, if any, weight to the Licensee's plea for leniency in this case.

In my view, therefore, a licence suspension of four days for the contravention of Section 44(3) of the Regulation, a monetary penalty of \$1,000 for the contravention of Section 42(3) of the Regulation, and a further monetary penalty of \$1,000 for the contravention of Section 44(1)(a), is necessary and appropriate in order to ensure voluntary compliance by the Licensee with the Act, the Regulation and the terms and conditions of the Licence.

ORDER

Pursuant to Section 20(2) of the Act, I order a suspension of Liquor Primary Licence Number 037072, for a period of four (4) consecutive days, to commence on the close of business on Thursday, December 12, 2013 and to continue each succeeding business day until the suspension is completed.

I further order that, pursuant to Section 20(2) of the Act, the payment of \$2,000 by the Licensee to the General Manager of the Liquor Control and Licensing Branch be made on or before December 12, 2013.

To further ensure that this order is effective, I direct that the Liquor License be held either by the Branch, or the Duncan, B.C. R.C.M.P. on December 12, 2013 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager showing that a monetary penalty and a License suspension has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch Inspector, or a police officer.

Original signed by

George C.E. Fuller
General Manager's Delegate

Date: November 7, 2013

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

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Hugh Trenchard, Branch Advocate