



**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: 669502 B.C. Ltd.
dba The Warehouse Cafe
989 Granville Street
Vancouver, BC V6Z 1L3

Case: EH12-113

For the Licensee: Dan Wilson

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: May 8 & 9, 2013

Place of Hearing: Vancouver

Date of Decision: June 11, 2013

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The licensee, 669502 B.C. Ltd, holds Food Primary Licence No. 208637 for the operation of a restaurant known as The Warehouse Cafe located in Vancouver, BC. (the "Licence") Liquor sales are permitted from 9:30 a.m. to 2:00 a.m. seven days per week. The maximum capacity is 51 persons in area 1; 13 in the lounge and 10 persons 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 "Guide") Dan Wilson is a principal of 669502 B.C. Ltd. and appeared as the licensee's representative during the course of the hearing (the "Licensee").

Alleged Contravention and Proposed Penalty

The branch's allegations and proposed penalty are set out in the amended Notice of Enforcement Action (NOEA) dated October 3, 2012 (exhibit 3, tab 1).

The branch alleges that on February 7, 2012, the licensee contravened section 43(2)(a) of the *Liquor Control and Licensing Act* (the "Act") by permitting a person to become intoxicated. The proposed enforcement action outlined in the NOEA is a \$15,000 monetary penalty. For the reasons described in the NOEA, the proposed monetary penalty falls outside the penalty range set out in item 10, Schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation") for a first contravention of this type.

Item 10 provides a range of penalties for a first contravention of a licence suspension for four to seven days and/or a monetary penalty of \$5,000 - \$7,000.

The licensee disputes the contravention.

RELEVANT STATUTORY PROVISIONS

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

Action against a licensee

20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

(a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,

(a) impose a monetary penalty under subsection (2) (c) that is greater than the amount provided for in the prescribed schedule of penalties, or

(2.2) The general manager must, in taking action against a licensee under subsection (2.1), take into account

(a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), and

(b) the particular circumstances giving rise to the taking of action by the general manager.

(2.3) The general manager may not impose a monetary penalty referred to in subsection (2.1) (a) that is greater than the following amounts:

(a) \$50 000 for a contravention of section 38 (1), and

(b) \$25 000 for any other reason referred to in subsection (1) of this section for taking action against the licensee.

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.

ISSUES

1. Did the contravention occur?
2. If so, has the licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

1. Letter dated April 9, 2013 from branch Registrar to the Licensee.
2. Letter dated May 2, 2013 from branch Registrar to the Licensee.
3. Branch's book of documents, tabs 1 - 17.
4. Three page menu for the licensed establishment.
5. Gross Transaction Report for month of February 2012 for the licensed establishment.
6. Gross Transaction Report for quarterly period January to March 2012 for the licensed establishment.
7. Food Purchases Report for month of February 2012 for the licensed establishment.
8. Food Purchases Report for quarterly period January to March 2012 for the licensed establishment.

EVIDENCE – THE BRANCH

Witness A testified that February 7, 2012 was her birthday. She, her boyfriend and a male friend of hers (Witness B) went to The Warehouse Cafe restaurant (the "Cafe") in Vancouver to celebrate. Enroute to the Cafe her boyfriend consumed 1 ½ cans of Rock Star Vodka, an alcoholic beverage. They arrived at the cafe at approximately 4 p.m. The two males began ordering shots of vodka which they each consumed. She was pregnant at the time and thus was not drinking any alcohol. They were first seated at a table near the front of the restaurant but shortly moved to a table nearer to the rear and across from the bar. The males continued ordering and drinking shots of vodka. In addition, her boyfriend consumed four bottles of beer. All of them ordered and consumed food.

They were having a good time and were taking pictures of themselves. Her boyfriend was in a very jovial mood. They had seen a scan of the baby and he was celebrating that he was soon to become a father. Witness A testified that while not concerned with her boyfriend's behaviour she did observe that he was becoming louder, sloppier and tipsy as he was drinking the vodka shots very quickly. She was becoming concerned over the amount of liquor being consumed by the males and made a sign to the female server to cut-off further service. The server ignored her signal and continued liquor service to the males.

Witness A testified that after being in the Cafe for over two hours they decided that it was time to leave. She was shocked when she saw the bill. It totalled almost \$260.00 and showed 30 shots of vodka. Her male friend had only \$40 with him and her boyfriend had to use a cash machine to make the total payment. They left at approximately 6:30 p.m. at which time her boyfriend appeared to be quite drunk. She assisted him walking out of the Cafe. The three of them walked from the Cafe toward the Waterfront Skytrain station. Enroute she and her boyfriend began arguing and he punched a window, injuring his hand. They became separated near the station. She learned that he had been killed falling from a parkade. She contacted the branch the following day and gave a recorded statement on February 9, 2012 (transcribed at exhibit 3, tab 2).

Witness B testified that he is a long time friend of Witness A. On February 7, 2012 he was invited by Witness A to meet at the Warehouse Cafe to celebrate her birthday and to have the opportunity to meet her boyfriend. They met downtown and then proceeded to the Cafe. He and the boyfriend were consuming shots of vodka. The boyfriend was also drinking beer. They all had something to eat. As the time progressed the boyfriend was showing signs of being under the influence of alcohol and getting drunk. He was tipsy, eyes squinting, getting very touchy feely and becoming very emotional. He had changed dramatically from when they first met downtown. When the bill came it showed 30 shots of vodka. He did not agree with this. He felt that they had not consumed that amount. The bill was subsequently lowered somewhat.

Leaving the Cafe they began walking towards the Skytrain station. Witness A and her boyfriend began arguing. Witness B testified that he wanted to avoid being involved and needed to use a washroom so he parted company with them. He began receiving cell phone calls from Witness A which he ignored. He later that night received a text message from her that the boyfriend had died. He was contacted by a branch investigator and provided a verbal statement on April 3, 2012 (transcribed at exhibit 3, tab 3).

Witness C testified that she is employed as an investigator with the branch. She testified that on February 8, 2012 she received phone calls from the Vancouver City Police and from Witness A regarding the sudden death of a male who had been a patron of the Warehouse Cafe. She commenced an investigation. Her investigation log is found at exhibit 3, tab 11A. She spoke to the owner of the Cafe and requested the security video from the restaurant as well as internal documents related to its operation. Her notes are recorded at exhibit 3, tab 11A.

Interviews were conducted and statements were taken from:

- Witness A (exhibit 3, tab 2).
- Witness B (exhibit 3, tab 3).
- Warehouse Cafe staff and management on duty February 7, 2012 (exhibit 3, tabs 11A-F).

Records were obtained from the Warehouse Cafe:

- Video log for the period of 4:01 p.m. to 6:37 p.m. of February 7, 2012 (exhibit 3, tab 4). The witness testified that a log of the video was made by restaurant staff as the video itself was unable to be downloaded. She testified that although the log commences at 15:01 (3:01 p.m.) and runs until 17:37 (5:37 p.m.) she determined through her investigation that the log was out by one hour. Thus the notation at 15:01 (3:01 p.m.) should read 16:01 (4:01 p.m.) with all other notations adjusted accordingly.

- Receipts for the subject party of three and internal Cashout and Revenue reports from the Warehouse Cafe for February 7, 2012.

A toxicology report dated March 1, 2012 was received from the Provincial Toxicology Centre (exhibit 3, tab 7) revealing a heavy level of intoxication with alcohol for the boyfriend of Witness A at the time of his death on February 7, 2012 (.23% blood/alcohol concentration).

The witness testified that as a result of her investigation she formed the conclusion that the Warehouse Cafe had contravened Sec. 43(2)(a) of the *Act* by permitting a person to become intoxicated. She issued a Contravention Notice to the owner of the restaurant on April 10, 2012 (exhibit 3, tab 10). The Branch contracted the services of a Toxicology Consultant, Forensic Alcohol Drug Expert (Witness D). The expert consultant was provided with the information obtained during the investigation and issued his report dated May 30, 2012 (exhibit 3, tab 9). He concluded that given the level of the deceased's blood/alcohol concentration he would have been exhibiting signs of intoxication when leaving the Warehouse Cafe.

Witness C in her testimony referred to copies of documents from the Branch file:

- Exhibit 3, tab 12; the liquor primary licence in effect at the time of the alleged contravention.
- Exhibit 3, tab 13; a copy of the Guide in effect at the time of the alleged contravention. She referred to excerpts from the Guide dealing with: "Your role as a licensee", and "Over-service and intoxicated patrons".
- Exhibit 3, tab 15; Inspection Interview Sheet signed by the licensee on September 23, 2004.
- Exhibit 3, tab 16; Compliance meetings were held with the licensee and/or management staff in May and November 2005 and November 2007 to discuss problems with the operation of the restaurant.

Witness C testified that she prepared a NOEA with a recommendation for a \$15,000 monetary penalty which exceeds the range of penalties for a first contravention of this type at item 10 of Schedule 4 or the *Regulation*. She was concerned that an excessive amount of liquor was served to the two male patrons within a 2 ½ hour period. Serving staff should have known that the amount of liquor served would lead to intoxication.

Witness D testified that he has been qualified as an expert witness in court proceedings in the provinces of British Columbia, Alberta, the Yukon, and North West Territories on the effects of alcohol and drugs on the human body. He is the author of numerous published articles regarding drug and alcohol levels and impairment. His qualifications are shown in his *curriculum vitae* at exhibit 3, tab 9.

Witness D was qualified for these proceedings as an expert on the effects of alcohol and drugs on the human body.

The witness testified that he had been requested by the Branch to provide an opinion on the level of intoxication of the deceased male on the night of February 7, 2012. He was provided information from the Branch regarding the deceased's consumption of alcohol between 2:30 and 6:30 p.m. of that date which included the video log (exhibit 3, tab 4) and the toxicology report (exhibit 3, tab 7). The toxicology report shows that a blood sample extracted from the femoral artery contained a blood/alcohol concentration of .23% while a blood sample taken from vitreous fluid contained a blood/alcohol concentration of .28%. He testified that typically the blood taken from vitreous fluid will consistently read higher in concentration. The results here of .23% from the femoral artery and .28% from vitreous fluid provide confidence that the results are accurate. He testified that as cocaine was not detected in the blood samples the "Prior use of cocaine" noted in the report would not refer to cocaine use within 10 hours of the accident but to cocaine use up to five days previous.

Witness D testified that knowing the blood/alcohol concentration and the body weight of the deceased, using standard alcohol and elimination rates allows him to calculate the amount of alcohol consumed by the deceased and its effect on his behaviour. In this case the deceased would have been within the 3rd or 4th stage of intoxication, i.e. Confusion – Excitement stages (see report at exhibit 3, tab 9, pg. 4). An experienced drinker with greater alcohol tolerance would fall within the 3rd “excitement” stage whereas an inexperienced drinker with less tolerance would fall within the 4th “confusion” stage.

Witness D testified that in either case the deceased would have been exhibiting signs and symptoms of intoxication while at the Cafe on February 7, 2012. Symptoms would include a lack of muscular co-ordination and impaired balance. There would be a decrease in inhibitions which could lead to errors in judgement and emotional mood swings. He agreed that given the description of the deceased being able to drink a case of beer and show no signs of intoxication and still being able to function after drinking a 26 oz of hard liquor (see exhibit 3, tab 11A at pg 5) this would place him in the experienced drinker category. In his expert opinion however, given the amount of liquor consumed and a .23% blood/alcohol concentration the deceased would still have exhibited signs of intoxication.

EVIDENCE – the Licensee

The Licensee testified that he has owned the Warehouse Café since 2003. For the first few years it was operated more like a primary liquor licensed establishment than as a restaurant with a food primary licence. This got him into difficulty with the Branch resulting in two liquor suspensions of 10 and 20 days respectively. In 2009 he made a determined effort to work with the Branch. He called the local liquor inspector to meet with him and advise what was necessary to meet the Branch’s requirements. This resulted in a complete change of concept for the establishment. A new manager and a new chef were hired. They developed a focus on the sale of food. All food items are now priced at \$4.95 each (menu at exhibit 4). It has proved successful as the volume of

sales has made up for the decreased profit margins (see internal operation reports at exhibits 5 – 8). Liquor prices are set to match other establishments in the area.

The Licensee testified that they operate wholly as a restaurant offering pub style food and casual dining. Patrons come for the food. Liquor and non-alcoholic beverages are served. Intoxication has not been a problem at the establishment. Previous difficulties with the Branch were not related to intoxication but were due to them selling up to two drinks of liquor without requiring food service.

On February 7, 2012 all three of the subject patrons ordered and consumed food as shown on the bills at exhibit 3, tab 5 and the video log at exhibit 3, tab 4. It is uncertain how much liquor was served, the video log records 26 shots of vodka served and four beers served to the two male patrons. He believes that they may have been overcharged by their server for the number of drinks served. He was unable to explain the differing bills at exhibit 3, tab 5 or to determine how much the patrons paid. It appears that the server had the manager allow her to deduct some of the amounts from the bill in order to recover monies that she paid out to the preceding servers when they went off shift.

The Licensee disputed that the subject patron was exhibiting signs of intoxication while at the Cafe. This was not evident in the video log as the subject patron made his way to the cash machine and the last server responsible for their table stated that the patrons were not intoxicated (exhibit 3, tab 11F). This server was fired for matters unrelated to this incident.

SUBMISSIONS – the Branch

The branch advocate's submission is summarized as follows:

Witnesses A and B provided credible and candid testimony which was not contested by the Licensee. During the time spent at the Warehouse Café the subject patron was quiet at the beginning then became emotional and displaying signs of intoxication. He consumed between 14 or 15 shots of vodka in a little over two hours at the Café. The opinion of the expert witness was that given the amount of liquor consumed and the blood/alcohol level found even an experienced drinker would have displayed signs of intoxication. The Licensee bears the responsibility for the amount of liquor served to the two male patrons. The amount of liquor served to the patrons should have alerted staff to a problem yet liquor service continued.

The Licensee has not presented evidence of due diligence. There is no evidence of any training provided to staff or of policy and procedure manuals in place. There is no evidence that the manager on duty was monitoring staff performance.

The branch advocate submitted that the establishment has a record of previous contraventions. Schedule 4, item 10, penalty provisions for a first contravention of this type is a suspension of four to seven days and/or a \$5,000 to \$7,000 monetary penalty. The recommended penalty is a \$15,000 monetary penalty. Section 20(2.1) of the *Act* allows for a greater penalty where it would be in the public interest. In the circumstances here of the amount of liquor served to the subject patron and the failure of staff to monitor the condition of the patron, a greater penalty is necessary in the public interest. It would send a message to the community at large that public safety is a paramount consideration in the service of liquor.

SUBMISSIONS – the Licensee

The Licensee's submission is summarized as follows:

The Cafe changed its focus in 2009 to the service of food. It works within the community contributing to groups supporting mental health issues. Witness A is a much smaller person than the subject patron and it would be difficult for her to carry him out of the restaurant. Witness B testified that he and the subject patron walked out of the restaurant without difficulty. He never stated that the subject patron was drunk. The subject patron was in control of himself as he left the Cafe. He was an experienced drinker. He did not exhibit signs of intoxication.

Liquor inspectors have never expressed a concern for public safety at the restaurant. There has never been an issue with intoxication. The Branch has not suggested that the service of liquor to the subject patron lead to his death. This is a first incident of intoxication in 10 years of operation. If a contravention is found the minimum four day suspension is appropriate.

REASONS AND DECISION

I have considered all of the evidence and the submissions of the branch advocate and the Licensee.

The evidence is that the subject patron consumed approximately 1 ½ cans of Rock Star vodka around 2:30 p.m. of February 7, 2012. He entered the Warehouse Cafe in an apparently sober condition at approximately 4 p.m. of February 7, 2012 and left at approximately 6:37 p.m. after having consumed 13 to 15 shots of vodka and three to four beers. He met an untimely death at approximately 7 p.m. His blood/alcohol concentration level at the time of his death was .23%.

The Licensee has argued that the subject patron was not displaying signs of intoxication while in the Cafe. He bases this upon his reading of the video log (exhibit 3, tab 4) and the statement of the server last serving the party (exhibit 3, tab 11F). This is contrary to the evidence of Witnesses A and B who both provided evidence that the subject patron was exhibiting signs of intoxication prior to leaving the restaurant. The expert witness testified that even if the subject patron was an experienced drinker, given the amount of liquor consumed, the amount of time in which it was consumed and the blood/alcohol concentration level of .23% at the time of the accident the subject patron would have exhibited signs of intoxication while at the restaurant.

I prefer the evidence of Witnesses A and B. They were forthright and candid in their testimony. Their evidence was corroborated by the findings of the expert witness. The expert witness expressed no doubt that in his opinion the subject patron would have been intoxicated and exhibiting signs of intoxication while at the restaurant.

Giving consideration to all of the evidence I find on a balance of probabilities that on February 7, 2012, the subject patron was permitted to become intoxicated while at the Warehouse Cafe. That on its face is a contravention of 43(2)(a) of the *Liquor Control and Licensing Act*.

Due Diligence

The licensee is entitled to a defence to the allegations of 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.

The leading case is: *R v. Sault Ste. Marie* (1979) 2 SCR 1299, where at page 1331, Dickson, J. sets out the test of due diligence:

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, recently considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Liquor Control and Licensing Act* (see paragraphs 41 to 44).

In these circumstances, the defence of due diligence is to be considered in two stages:

1. Whether the employee who made the sale was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who made the sale was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether licensee had
 - a. implemented adequate training and other systems to prevent the contravention (the sale of liquor to minors), and

- b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

Both of these issues are factual, and will depend on the evidence presented. The onus is on a licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

The Licensee has not argued nor presented a defence of due diligence. I have not been presented with any evidence of policies and procedures to prevent the occurrence of a contravention, an adequate training system for staff, or a system to ensure that staff was carrying out their responsibilities.

For the aforementioned reasons I find that the Licensee is not entitled to the benefit of the defence of due diligence.

In conclusion I find on a balance of probabilities that on February 7, 2012, the licensee contravened section 43(2)(a) of the *Act* by permitting a person to become intoxicated.

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.

Intoxication is considered by the Branch to be a serious public safety issue. Intoxicated persons can be a danger to themselves or others. It is often a factor in crimes such as domestic violence, assaults, driving offences and public nuisance and vandalism. Intoxicated patrons may be unable to exercise sufficient judgment to stop consuming liquor. Providing liquor to an intoxicated person may increase the risk of harm to themselves or others.

All reasonable measures to ensure both general and specific deterrence within society at large should be undertaken. Giving consideration to all of the evidence and submissions and the seriousness of the contravention I find that a penalty is necessary to ensure future voluntary compliance.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this Licensee 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.

Any penalty imposed must be sufficient to ensure compliance in the future. Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type. The Branch has argued that it is in the public interest to exceed the range of monetary penalty and has proposed a \$15,000 penalty.

Here we have an experienced Licensee with 10 years experience. While there have been documented problems with the operation of the establishment in the past, those problems were taken in hand by the Licensee with the result that there have been no further contraventions since 2009. None of the previous problems involved intoxication. On the other hand we have circumstances in which a patron was served an obviously excessive amount of liquor, 13 to 15 ounces of vodka and three to four beers within a 2 to 2 1/2 hour period of time without regard to the effect of the alcohol on the patron. I am satisfied and I so find that in the circumstances the public interest requires a penalty greater than that of item 10 of Schedule 4 of the *Regulation*. The branch has proposed a \$15,000 monetary penalty. In the foregoing circumstances I find that to be necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a monetary penalty of Fifteen Thousand Dollars (\$15,000) be paid to the General Manager of the Liquor Control and Licensing Branch on or before Thursday, July 11, 2013.

Signs satisfactory to the general manager showing that a monetary penalty 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, and must remain in place during the period of suspension.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: June 11, 2013

cc: Liquor Control and Licensing Branch, Vancouver Office
Attention: Donna Lister, Regional Manager

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