



**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: C.P. White Holdings Inc.
dba Boutique Lounge
1318 Broad Street
Victoria, BC V8W 2A9

Case: EH13-174

For the Licensee: Christopher White

For the Branch: Hugh Trenchard

General Manager's Delegate: A. Paul Devine

Date of Hearing: Written Submissions

Date of Decision: July 15, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

C.P. White Holdings Ltd. (the "Licensee") operates a liquor primary establishment, formerly known as Boutique Lounge, under Licence number 113949 (the "Licence"). The authorized representative of the Licensee is Christopher White, a principal of the Licensee.

The Licence is, as are all such liquor licences issued in the province, subject to the terms and conditions explained in the publication "Liquor Primary Terms and Conditions – A Guide for Liquor Licensees in British Columbia" (the "Guide").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch ("Branch") specified its allegations and proposed penalties in a Notice of Enforcement Action (NOEA) letter dated March 28, 2014. The Branch alleges that on September 20, 2013 (business day beginning on September 19, 2013), four police officers attended to conduct a covert inspection of the business premises of the Licensee. While attending on the premises, the officers observed several employees consuming liquor while they were working in the licensed establishment contrary to the *Liquor Control and Licensing Regulation* ("Regulation").

The Branch proposes a penalty of a three day suspension of the Licence, which is within the range of penalties for a first contravention of this type under Schedule 4 of the *Regulation*.

The Licensee is represented by the owner of the licensed establishment. The Licensee does not dispute the contravention but instead disputes the proposed penalty. I was appointed as a Delegate of the General Manager to determine the issue in dispute. The Licensee provided a written submission in support of its position.

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

Exhibit 1: Branch's book of documents.

Exhibit 2: Copy of "Employee Handbook –2014" submitted by the Licensee.

RELEVANT STATUTORY PROVISIONS

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

Consumption of Liquor in Licensed Establishments

42(3) A licensee, and employees of the licensee, must not consume liquor while working in the licensed establishment or while working at the site of a residential event catered by the licensee.

EVIDENCE—BRANCH

The evidence relied upon by the Branch is contained in the NOEA dated March 28, 2014. It recounts that in the early morning of September 20, 2013, four police officers attended at the premises of the Licensee. The establishment is now known as the Publik, and is located at 1318 Broad Street in Victoria, BC. The officers were conducting a covert inspection.

At approximately 12:31 a.m., four of the officers stood at the front of the bar where three employees of the Licensee were working as bartenders in the bar area. Seven shots of an alcoholic drink known as a "Burt Reynolds" were ordered and lined up on the bar. Three of these were offered to the three bar staff employees, and those drinks were consumed in their entirety. Later, one of the three bar staff employees was asked to join the officers, and while there, he consumed part of another alcoholic drink.

On October 2, 2013 the Licensee was verbally notified of the contravention. On October 3, 2013, Contravention Notice B013256 was issued with details of the alleged contravention, and sent to the Licensee by registered mail.

SUBMISSIONS—LICENSEE

As noted, the Licensee does not dispute the contravention itself but instead, disputes the recommended penalty of a three day suspension of the Licence. The Licensee notes that this is the maximum penalty set out in the Schedule to the *Regulation* for a first contravention. The recommended penalty of a three day suspension would be detrimental to the business of the Licensee, and the livelihood of over 25 employees who were not involved in the contravention.

The Licensee submits that, after learning of the contravention, all three staff members who were involved in the contravention were terminated, and a new management team was employed. All of the bartenders and servers employed by the Licensee have their Serving It Right certification, and all of the security personnel have their “Basic Security Training” (BST) certification. As well, all staff have reviewed and signed copies of the Employee Handbook of the Licensee. The Licensee asserts that this policy will continue with future employees as well.

The Licensee provided a copy of its Employee Handbook as an Exhibit with its submission. It also enclosed the names and Serving It Right or BST certification numbers of its current employees. The Employee Handbook contains an Acknowledgment and Disclaimer attachment for employees to sign acknowledging that they have read and understood the contents of the material contained in the Handbook.

ANALYSIS AND DECISION

Contravention

The Branch has the onus of establishing the occurrence of the contravention as alleged in the NOEA. In view of the concession by the Licensee, I find that on September 20, 2013, the Licensee was in breach of section 42(3) of the *Regulation* when three of its employees consumed alcohol while working.

Due Diligence

The Licensee is entitled to a defence 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:

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, 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 the 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.

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

There is no evidence that the employees who were involved in the contravention on the night in question were involved in the development of policies or procedures for the operation of the business of the Licensee. There is also no evidence that any person who might be considered as a directing mind of the business of the Licensee was present on the evening in question. I, therefore, turn to the question of whether the Licensee established that it took reasonable steps to ensure the establishment of training and other systems for its employees, and that it ensured the effective application of them.

The only evidence adduced by the Licensee on this issue is focused on the steps it took after the contravention occurred. There was no evidence provided about systems and training that may have been in effect at the time of the contravention to prevent its occurrence. To the contrary, the evidence of the Licensee that it took steps after the contravention suggests these systems were not in place prior to its occurrence.

I find the Licensee did not meet the onus on it to establish that it acted with due diligence prior to the occurrence of the contravention.

PENALTY

I turn now to consider the issue of penalty. Under section 20(2) of the *Liquor Control and Licensing Act* ("Act"), after finding the Licensee has contravened the *Regulation*, 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 monetary penalty is warranted, I am bound by 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. 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.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this Licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 27 in Schedule 4 of the *Regulation* provides that the penalties for a first contravention of this type are a one to three day licence suspension and/or a \$1,000 to \$3,000 monetary penalty.

When considering where on the continuum for a first contravention the penalty should fall, the Branch can take into account the past compliance record of the Licensee. The record of the Licensee shows:

- A four day suspension for allowing consumption beyond the time permitted on February 19, 2006
- A four day suspension for being overcrowded beyond person capacity more than occupant load on July 2, 2006
- A four day suspension for the same contravention (overcrowding) on October 31, 2009

- A five day suspension for the same contravention (overcrowding) on October 31, 2010
- A 13 day suspension for selling, giving or supplying liquor to a minor on February 16, 2012

All of these contraventions taken together reveal a poor history of compliance with the obligations of operating a licensed establishment, and so support a penalty in the higher range instead of at the low end. I am satisfied that a three day suspension of the Licence is appropriate in all of the circumstances.

The Licensee argued that the proposed suspension should not fall on staff who were uninvolved in the current contravention. All employees have an obligation, however, to do their part to ensure that the Licensee maintains a culture of compliance. The history of past contraventions is evidence that the required culture is lacking. A three day suspension will help to encourage the future vigilance of the Licensee to maintain adherence to the liquor licensing obligations.

ORDER

Pursuant to section 20(2) of the *Act*, and item 27 of Schedule 4 of the *Regulation*, I order a suspension of Liquor Primary Licence number 113949 for a period of three days to commence at the close of business on Wednesday, August 20, 2014 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the liquor Licence be held by the Branch or the Victoria police department from the close of business on Wednesday, August 20, 2014 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager 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

A. Paul Devine
General Manager's Delegate

Date: July 15, 2014

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Jay Blackwell, A/Regional Manager

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