



**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: Flashback's Entertainment Ltd.
dba Flashback's
1268 Ellis Street
Kelowna, BC V1Y 1Z4

Case: EH13-176

For the Licensee: Jason Weber

For the Branch: Hugh Trenchard

General Manager's Delegate: Edward Owsianski

Date of Hearing: June 3, 2014

Date of Decision: July 9, 2014

Ministry of Justice

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee, Flashback's Entertainment Ltd. (the "Licensee") operates an establishment known as Flashback's in Kelowna BC. The Licensee holds Liquor Primary Licence number 129435 (the "Licence"). The authorized representative of the Licensee is Jason Weber, a principal of the Licensee.

According to the terms of its Licence, the Licensee may sell liquor from 9:00 a.m. 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" (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 January 30, 2014.

The Branch alleges that on October 4, 2013, the Licensee contravened section 41(2)(b) of the *Liquor Control and Licensing Regulation* (the "Regulation") by using a sales strategy that is likely to encourage intoxication. The proposed enforcement action outlined in the NOEA is a four day Licence suspension.

The proposed Licence suspension falls within the penalty range set out in item 30, Schedule 4, of the Regulation for a first contravention of this type. The range of penalties for a first contravention of this type is a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

The Licensee disputes the alleged contravention.

RELEVANT REGULATORY PROVISIONS

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

41 (2) A licensee must not

(b) use a sales strategy that is likely to promote or encourage intoxication,

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

The following documents were submitted and were considered:

Exhibit 1: The Branch's book of documents, tabs 1 to 15 inclusive.

Exhibit 2: Typewritten statement of the security guard.

Exhibit 3: Typewritten statement of the bartender.

Exhibit 4: Document titled "Estimated Labour and Sales Report" (page 1).

Exhibit 5: Document titled "Estimated Labour and Sales Report" (page 2).

EVIDENCE—BRANCH

The Branch presented three liquor inspectors as witnesses.

The inspectors testified that on October 4, 2013 they were working in the Kelowna area making covert inspections of licensed establishments to observe whether the establishments were operating in compliance with the legal requirements of their liquor licences.

All of the inspectors have considerable experience in conducting inspections of licensed establishments, including the identification of intoxicated persons. Inspector A is the local inspector for the Kelowna area and as such provided inspectors B and C with background information about each establishment visited. Inspectors B and C entered the establishments posing as patrons without identifying themselves as liquor inspectors. They reported their observations to inspector A.

Inspectors B and C testified that they arrived at Flashback's at approximately 11:05 p.m. taking their place in a lineup of patrons awaiting entrance. Upon entering they had their identification scanned, there was no cover charge payable but they were offered the opportunity to purchase four drink tickets for \$5. They were told that the offer was only available upon their initial entry. They declined the offer but later observed other patrons with the drink tickets—some appeared to have more than four. They entered the establishment where they separately made their observations, recording them in their notes. They left the establishment at approximately 12:25 a.m. and reported their observations to inspector A.

Inspector B testified that during the time that she was in the establishment she observed four patrons, three males and a female, exhibiting obvious signs of intoxication. Each patron was observed by the inspector over a period of time. She concluded from her observations that each was intoxicated. Several security staff were observed in the establishment, but none took any action to deal with the intoxicated patrons. She became concerned with the rising level of intoxication among the patrons. Concerned about safety she sought out inspector C and suggested that they should leave the establishment. They departed at approximately 12:23 a.m.

The inspector testified that in her experience persons purchasing multiple drink tickets will consume their drinks more quickly, looking to get an early buzz on. An establishment that does not collect a cover charge and offers cheap drinks will encourage patrons to over-consume. It is common for young persons to have a set budget for their night's entertainment. Cheaper drinks allow for greater consumption and can lead to intoxication if there are not sufficient controls in place. While the number of tickets sold to each patron may be restricted to four, there is nothing to prevent some patrons from obtaining additional tickets from other patrons.

Inspector C testified that within 15 to 20 minutes of entering the establishment he began to observe some patrons exhibiting signs of intoxication. This increased as the night progressed with more patrons having difficulty with their balance and motor skills. One patron had to be physically held up by his girlfriend. Other obviously intoxicated patrons were observed. Security staff was present but were not taking any action. Bottles of water were being handed out to intoxicated patrons that should have been escorted from the premises. The inspector observed tickets being used to purchase either mixed drinks or shooters. He observed a group of four males at the liquor service bar, one had eight drink tickets, the others four each. The patron with the eight tickets was overheard telling his buddies that he was about to get drunk.

The inspector testified that in his experience cheap drinks increase the rate of intoxication. Increased intoxication leads to increased incidents of impaired driving. When the drinks are more expensive intoxication decreases.

Inspector A testified that he is the liquor inspector responsible for the Kelowna area. Flashback's was included in a list of licensed establishments to be inspected as a result of their Facebook page. It appeared to be targeting young college students and was advertising cheap drink specials on "Frat House Thursdays" and "Flashback Fridays". He was particularly concerned with the drink specials, ".99 beer" on Thursdays and the "4 highballs for \$5" on Fridays. It is his experience that the combination of young patrons and cheap drinks leads to intoxication.

On October 4, 2013, he briefed inspectors B and C on Flashback's operation and drove them to the establishment. They went inside to make their observations following which they briefed him on what they had observed. He then went into the establishment and spoke with the licensee representative advising him of the contraventions observed by inspectors B and C and requested that he begin removing all intoxicated patrons.

A Contravention Notice was later issued to the Licensee identifying two contraventions having occurred on October 4, 2014: permit intoxicated person to remain; and sales strategy likely to encourage intoxication. A NOEA was subsequently prepared and sent to the Licensee. The NOEA outlined the evidence of the alleged contraventions and the

recommended penalties, a four day licence suspension for each contravention, which is the minimum suspension penalty for each type of contravention under Schedule 4 of the Regulation.

The suspension penalties were recommended as permitting intoxicated persons to remain in the licensed area of an establishment is considered to be a public safety issue. Here there were multiple instances of intoxicated patrons in the establishment. Using sales strategies of offering cheap drink nights in most instances leads to higher rates of intoxication. The licensee subsequently signed a "waiver" admitting to the contravention of permitting intoxicated person to remain and agreeing to serve the four day Licence suspension.

In providing the background to the operation of the establishment by this Licensee the inspector testified that the Licensee attended an interview and education session at Branch offices on July 17, 2012, during which time he was made aware of a licensee's responsibilities under the Act and Regulation and was issued the Guide for licensees. The Guide is clear that licensees are not to use a sales strategy that is likely to promote or encourage over-consumption.

Responding to questions by the Licensee representative the inspector testified that he had recommended, and the Branch had imposed, similar penalties in similar circumstances to other licensed establishments in the Kelowna and Vernon areas. He recalled speaking with the Licensee on a previous occasion during an inspection of the establishment but could not recall if they discussed the four drinks for \$5 issue but agreed that they could have. He testified that while the four for \$5 may meet the requirement that licensees not sell liquor cheaper than their purchase price from the LDB it did not meet the sales strategy test because of other factors.

EVIDENCE – LICENSEE

The Licensee representative testified that the sales scheme of offering four drinks for \$5 on Thursday nights was developed as a result of hearing complaints from patrons that Flashback's always had a cover charge and never offered drink specials. Patrons were offered the special only upon their initial entry and were restricted to four tickets each.

(The statement of the security guard at Exhibit 3 refers.) Bartenders were instructed to sell patrons only two highball drinks at a time. (The statement of the bartender at Exhibit 2 refers.)

He had spoken to inspector A about the sales scheme in November 2012 who said that it was border line but was okay if handled right. The sales scheme was discontinued immediately following the night of October 4th and the Facebook ad removed. Live entertainment was introduced to increase patronage with some moderate drink specials in the \$3.50-\$4.00 range.

In response to questions from the Branch advocate, the Licensee representative testified that the demographics for the club's patrons were young people, 20 to 25 years in age on the average. He did not agree that persons with multiple drink tickets would drink more quickly, however, he agreed that it was possible that they may consume more drinks dependent upon how much money they had to spend.

SUBMISSIONS—BRANCH

The Branch submitted that, while the Licensee may not have intended that the sales strategy would encourage intoxication, the test is what a reasonable person would conclude in the circumstances of this case. The demographics of the clientele for this establishment are young people, 20 to 25 years of age. The evidence of the liquor inspectors is that cheap drinks appeal to young patrons who drink more and leads to intoxication.

On October 4th liquor inspectors observed several intoxicated patrons in the establishment. The Licensee subsequently admitted the contravention of permitting intoxicated patrons to remain in the establishment and accepted a four day Licence suspension. The reasonable conclusion to draw is that the selling of cheap drinks led to the high incidence of intoxication.

He submitted that the defence of due diligence is not available to this Licensee. The Licensee representative who is considered the directing mind of the corporate Licensee was responsible for the sales strategy. It was a management strategy. The recommended penalty of a four day Licence suspension is warranted to reinforce to the Licensee the need for compliance.

SUBMISSIONS—LICENSEE

The Licensee representative submitted that the Licensee is entitled to the defence of due diligence. He tried to voluntarily comply with the requirements of the Licence. The Guide does not prevent this type of sales scheme. He spoke with the liquor inspector about it in November 2012, he didn't say it was wrong. If selling cheap drinks is a contravention the Licensee should have been told. He believed that the sales scheme was all right as long as the selling price was above their LDB purchase price.

He requested that if a penalty is ordered he would prefer a monetary penalty. They have contracts with performers for this coming summer. A suspension would ruin the business. He submitted that the Branch had imposed monetary penalties in other cases where the promotions by the licensees were more likely to lead to intoxication than here. [See Raakel's Ridge Restaurant and Lounge, March 2, 2012 (EH10-177 and EH11-001) and O.K. Corral Cabaret, April 12, 2013 (EH12-226)]

ANALYSIS AND DECISION

Contravention

The evidence here is that the Licensee developed and implemented a sales strategy to appeal to prospective patrons and thus increase business. Drink tickets were sold in a multiple of four for \$5, a price marginally above the cost to the Licensee by the LDB and what can only be considered as a deep discount to the Licensee's regular pricing scheme.

The demographics of the Licensee's clientele are primarily young persons 20 to 25 years of age. The evidence of the liquor inspectors is that such a scheme with young patrons, who usually have a limited amount of money to spend, will increase their consumption and will lead to intoxication. The observations of the liquor inspectors during the night in question is that there were several intoxicated patrons allowed to remain within the licensed establishment.

I am satisfied that a reasonable person with some knowledge of the drinking habits of many young people would conclude that such a scheme would encourage intoxication.

Giving consideration to all of the evidence, I find that on October 4, 2013 the Licensee used a sales strategy that was likely to encourage intoxication.

Due Diligence

The Licensee is entitled to a defence if it can be shown that he 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, he 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 respondeat superior has no application. The due diligence 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.

Applying the reasoning of the Court to the circumstances in this case, it must first be considered whether the Licensee representative who devised and implemented the sales strategy was the directing mind and will of the corporate Licensee? I am satisfied, and so find that he was the directing mind and will of the corporate Licensee. He is a principal of the corporate Licensee, represents the corporate Licensee in issues related to the Branch, is actively engaged in its operations, and he devises strategies to increase patronage.

Did the Licensee representative as the directing mind and will of the Licensee exercise all reasonable care by establishing a proper system to prevent the contravention and by taking reasonable steps to ensure the effective operation of the system. 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.

Here, the Licensee representative is considered the directing mind of the Licensee. He is a principal of the corporate Licensee, he was responsible for drafting the sales strategy, and he was on-site when it was in force the night of October 4, 2013.

The Licensee representative submits that he was duly diligent. He believed that drink specials were permitted as long as the sales price was greater than the Licensee's purchase price from the LDB. The Guide does not prevent this type of sales scheme. If it is not permitted the Licensee should be told. He spoke to the liquor inspector about his proposed sales scheme prior to the night in question and was not told that it was wrong.

I accept that it is probable that the Licensee representative spoke with the inspector about the sales strategy. The inspector's response was that the scheme was border line but must be handled right. I find that it is reasonable to conclude from the inspector's comments that he was making the Licensee aware that the scheme was marginally acceptable and the Licensee must put in safeguards to prevent the sales strategy from encouraging patrons from getting intoxicated.

I accept the statements of the bartender and security guard that staff were told, and the rule enforced, that patrons could only buy the four tickets for \$5 upon their initial entry and that drink service was limited to two at a time. The evidence is that despite the tickets being restricted to a once-only purchase of four, at least one patron came into possession of more tickets. I am satisfied that it is foreseeable that patrons could obtain tickets from other patrons. On the evidence, the Licensee's system was not adequate to prevent this. Further, several patrons were observed to be intoxicated and permitted to remain in the licensed establishment. This occurred despite the presence of the Licensee's security staff.

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

Accordingly, I find that on October 4, 2013, the Licensee contravened section 41(2)(b) of the *Liquor Control and Licensing Regulation* by using a sales strategy that is likely to encourage intoxication.

PENALTY

Pursuant to Section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation or the terms and conditions of the Licence, I have discretion to order one or more of the following enforcement actions:

- Take no enforcement action
- 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 and/or a monetary penalty are 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 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 compliance with the Act, the Regulation, and the terms and conditions of the Licence. Among the factors that I have considered in determining the appropriate penalty in this case are: 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.

Licencees are obligated to comply with the Act, Regulations and the terms and conditions of their licences. Enforcement actions are intended to both address the licensee's non-compliance, and to encourage future compliance by way of deterrence.

Using a sales strategy that encourages intoxication can create a serious public safety issue. Intoxicated patrons may be a danger to themselves or others. It can be a factor in many crimes including domestic violence, assaults, and driving violations. It can have a negative impact on communities including noise, nuisance, and vandalism. Intoxicated persons may not be able to exercise sufficient judgment to stop consuming liquor. Providing liquor to a person who is already intoxicated increases their risk.

There is no record of a proven contravention of the same type for this Licensee at this establishment within the 12 months prior to this incident. I find, therefore, this to be a first contravention for the purposes of reviewing the range of applicable penalties under Schedule 4 of the Regulation. Item 30 in Schedule 4 of the Regulation provides that the penalties for a first contravention of this type are a four to seven day licence suspension and/or a \$5,000 to \$7,000 monetary penalty.

In the circumstances of this case, I find that a penalty is necessary to encourage future compliance for this and other licencees. This Licensee agreed to accept a four day suspension for permitting an intoxicated person to remain in the establishment. That suspension has either been served or will be in the near future. Normally in cases where multiple contraventions are found and suspension penalties ordered they are served consecutively in adjoining time periods. In this case that has not occurred. Ordering a further period of suspension shortly following the four day suspension may create a greater impact for the Licensee in this case than was intended. As such I find that a

monetary penalty is appropriate. The minimum \$5,000 monetary penalty is necessary, appropriate, and reasonable in these circumstances.

ORDER

Pursuant to Section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$5,000 to the General Manager of the Liquor Control and Licensing Branch on or before August 14, 2014.

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 time ordered by the General Manager.

Original signed by

Edward W. Owsianski
Hearing Delegate

Date: July 9, 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