



**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

Licensee:	Galaxy Gardens Restaurant Inc. 844 West 3 Avenue Prince Rupert, BC V8J 1M6
Case:	EH04-042
Appearances:	
For the Licensee	Alain Chan, Licensee
For the Branch	Peter Mior, Branch Advocate
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	June 10, 2004
Place of Hearing	Prince Rupert, B.C.
Date of Decision	July 12, 2004

INTRODUCTION

Galaxy Gardens Restaurant Inc., holds a Food Primary Licence No. 040593, originally granted in 1986 and with an expiry date of March 31, 2005. It operates as Galaxy Gardens Restaurant, a Chinese Family Restaurant in the town of Prince Rupert.

ALLEGED CONTRAVENTIONS

The Branch's allegations and recommended enforcement action are set out in the Notices of Enforcement Action (NOEA), dated April 27, 2004.

The Liquor Control and Licensing Branch alleges that on March 16, 2004, the licensee contravened section 38 of the *Liquor Control and Licensing Act* by having in its liquor storage room, illicit liquor contrary to the *Liquor Control and Licensing Act* (the *Act*), cited as "unlawful sale of illicit liquor, section 38" contrary to the *Act*.

Schedule 4 of the Liquor Control and Licensing Regulations, provides a range of licence suspensions and monetary penalties for each contravention. For the contravention of section 38, the penalty range is a ten (10) to fifteen (15) day licence suspension and/or a \$7,500 to \$10,000 monetary penalty for the first contravention. In this case, the branch is recommending a monetary penalty of \$7,500.

RELEVANT STATUTORY PROVISIONS

Section 38 of the *Act* states:

Unlawful sale of liquor

38 (1) Except as provided in this Act, the Liquor Distribution Act or the regulations made under those Acts, a person must not, personally or by his or her clerk, employee or agent, keep for sale, sell or, in consideration of the purchase or transfer of property or for other consideration, give liquor to another person.

(2) Despite subsection (1), a delivery service may purchase liquor on behalf of a customer during the days and hours for sale of liquor prescribed in that area and deliver the liquor to the customer, if the charge for the liquor is no more than the liquor store price plus the delivery service charge.

(3) A licensee must not sell liquor except

- (a) liquor purchased from the Liquor Distribution Branch, and
- (b) in accordance with this Act, the regulations and the terms and conditions of the licence.

Section 12 of the *act* states in part:

Licences

12(1) The General manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

- (2) The General Manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
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- (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a)
- (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
- (a) limit the type of liquor to be offered for sale,

Section 20 of the *Act* states in part:

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's contravention of the 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:
 - (b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;
 - (c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
 - (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
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ISSUES(S)

1. Did the licensee contravene section 38 of the *Act*?
2. May the general manager take action against the licensee by the workings of section 12, and 20 of the *Act* for contravention of the Terms and Conditions of the licence?
3. Is the recommended penalty appropriate under the circumstances?

EXHIBITS

The following exhibits were presented:

Exhibit No 1:	Book of Documents (Branch) including:
Tab 1	NOEA letter, April 28 2004
Tab 2	Enforcement Action Recommended Report
Tab 3	Contravention Notice B000090, March 17, 2004
Tab 4	Handwritten notes of Inspector (Tryon), March 12, 16, 2004
Tab 5	Liquor Licence 040593
Tab 6	Pg. 3-9 Food Primary Licence Terms and Conditions Guide
Tab 7	Red Line floor plan for establishment
Tab 8	Corporate records letter from lawyer July 8, 1996
Tab 9	Share transfer- notification, August 2, 1996
Tab 10	LCLB exhibit receipt, March 16, 2004
Tab 11	LDB receipts, Sales and Adjustment Query, March 12, 2004
Tab 12	LDB Periodic Report of Sales to Licensee
Tab 13	Photographs of establishment storage room, March 16, 2004

One case, sealed, (12) Johnnie Walker Black Label (1.14 l)

One case, sealed, (12) Johnnie Walker Black Label (750 ml)

EVIDENCE

The Liquor Control and Licensing Branch

Lynn Tryon, the area Liquor Licensing Inspector testified that she as been the inspector in the licensee's area for many years. She has carried out six annual administrative inspections at Galaxy Gardens. She reported no history of contraventions at Galaxy Gardens. She identified the relevant Food Primary Liquor Licence, issued March 2, 2004, (tab 5, exhibit 1) and indicated that she was the author of the NOEA (Tab 1, exhibit 1). She recommended a ten (10) day suspension in accordance with the penalty provisions of the *Regulations*. She identified the Terms and Conditions of a Food Primary Licence (the Guide) (Excerpts at Tab 6, exhibit 1). She indicated that the Guide was in effect at all relevant times to this licence and that it would have been available to the licensee on-line and provided at the time the licence was originally granted. She identified the layout of Galaxy Gardens and the location of the liquor storage room (Tab 7 exhibit 1).

On March 12, 2004, the inspector attended at Galaxy Gardens for an administrative inspection. She identified herself to an employee and described the purpose of the inspection. She inspected the licence, the floor plans, the liquor stock etc, and then asked for access to the liquor storage area. She was escorted to the liquor storage room in the basement by the manager, Minnie Wong. On a shelf she located some bottles of liquor and two cases of Johnny Walker Black Label Scotch. There was an unfamiliar yellow packing label on one of the cases.

She left Galaxy Gardens and went to the Licensee's approved Liquor Distribution Branch (LDB). She confirmed that the Licensee had no listed purchases of cases of Scotch within the last three months and that the LDB had no record of any liquor case sales of any kind to the licensee in the last year. The Inspector identified documentary confirmation of these searches (Tab 11 and 12 of exhibit 1 respectively).

The Inspector returned to Galaxy Gardens on March 16, 2004. She asked Ms. Wong for receipts for the cases of Scotch and also for receipts for some bottles of Hennessey Cognac. Ms. Wong produced the receipts for the Cognac but not for the Scotch. Ms. Wong advised that the Scotch was a gift from a friend of Alain Chan, and that Mr. Chan is her father. The Inspector took photos of the cases of Scotch in place (Tab 13, exhibit 1) and began to seize the cases of Scotch. During the process, Mr. Chan arrived and assisted in the transfer of the liquor. He told the inspector that he was given the Scotch by a friend who had purchased too much for a wedding party in Alberta.

The Licence

Mr. Chan provided evidence on behalf of the corporate licence holder. He acknowledged that he is the President and primary shareholder of the corporation and the effective Licensee. He also confirmed that Ms. Wong is the manager of Galaxy Gardens, and his daughter. He took no issue with the evidence of the inspector.

Mr. Chan testified that his friend, Mr. Trudeau, lives in Prince Rupert, but had put on a wedding for a family member in Alberta. Mr. Trudeau purchased too much liquor and returned to Prince Rupert with the two cases of Scotch. Mr. Trudeau called Mr. Chan and asked if Mr. Chan wanted the Scotch. Mr. Chan accepted the gift. It was understood that the Scotch would be dropped off at The Number 1 Restaurant sometime in December of 2003.

Mr. Chan owns and operates The Number 1 Restaurant. He manages that restaurant on a daily basis. It is not licenced, but serves fast food. It is in a mall and keeps only regular daytime hours, those of the mall. Mr. Chan does not regularly work at Galaxy Gardens. His active involvement is restricted to administrative matters, bill paying, and informal management meetings, which occur irregularly. Mr. Trudeau is familiar with Galaxy Gardens and Mr. Chan believes that Mr. Trudeau dropped the Scotch off there after finding The Number 1 Restaurant closed, sometime in December 2003.

Mr. Chan testified that he never inspects the storage room, that he had not thought about the Scotch since Mr. Trudeau's phone call and that he has no reason to be in the storage room as his daughter runs Galaxy Gardens. He further indicated that his son-in-law, who works with Ms. Wong at Galaxy Gardens advised at some point that a friend of Mr. Chan's dropped off some Scotch for him and it was put away in storage.

On cross examination, Mr. Chan testified that he had no experience with liquor licences prior to buying Galaxy Gardens in 1996, that he had never read the *Act* or the *Regulations*, that he had not read the terms on his licence, and that he had never seen the Guide before the hearing. He also acknowledged that he understood the language of the Guide as it had been presented to him at the hearing and he understood that as the licensee, he is responsible for compliance with the rules and regulations.

He identified the photographs (Tab 13, exhibit 1) of the liquor storage room, the shelves containing the cases of Scotch and the other miscellaneous bottles of liquor. He confirmed under questioning that the shelves also contain superfluous plastic plants in hanging baskets, several hockey trophies left there by the previous owner, some candle holders and something which may be a calendar. There is also bottled water, metal shelving and extra chairs in the immediate area.

SUBMISSIONS

The Liquor Control and Licensing Branch

The Branch Advocate submitted that any contravention of section 38 of the *Act* is a serious infraction. He proposed that the evidence clearly supports the finding of a contravention. The Scotch was unmarked as for personal use and not separated from the stock available for sale in the restaurant.

The Advocate also pointed to the terms of the Guide (Tab 6, exhibit 1) as determinative of the offence. Those provisions indicate that a licensee may not, among other things, keep "illicit liquor" and defines "illicit liquor" as;

...liquor purchased "over the counter" from a source other than your designated liquor outlet.

The Guide also indicates at page 9:

You are accountable for any illicit alcohol found anywhere on your premises (service or storage area). It is not acceptable to say that illicit liquor made its way into your stock by accident, that it was a gift for personal use, or that an employee left it there.

The advocate submitted that section 2 of the *Act* authorized the general manager of the Branch to impose terms and conditions on a licence, and that the licensee of Galaxy Gardens was clearly in breach of those terms and conditions.

As to penalty, the Branch Advocate confirmed that this was a first contravention, and that schedule 4 of the *Regulations* calls for a penalty of a 10-15 day

suspension and/or a fine of \$7,500-\$10,000. The Branch recommended a ten (10) day suspension as reasonable.

The Licensee

Mr. Chan said that a ten (10) day suspension is very large. Business has not been good for the past few years, as the population of Prince Rupert has declined from 17,000 persons to less than 10,000. Galaxy Gardens is barely able to continue in business.

He said the placement of the Scotch was an unfortunate mistake, that he was remorseful, and that he would ensure that this sort of thing did not occur again. He strongly pled that the Scotch was not opened, was not sold or served to anyone and would not have been offered up to customers. Mr. Chan indicated that he did not know of the terms and conditions in the Guide and said that the day of the hearing was the first time he had ever seen the Guide. He acknowledged that as he read the Guide at the hearing, it seemed clear that he had contravened the provisions. He said that if he was indeed given a copy of the Guide with his licence, he certainly had not read it.

He acknowledged responsibility for the goings on at Galaxy Gardens as he is the licensee, but he feels it unfortunate that he was not better educated about his responsibilities. He did not know how to otherwise answer the plain language of the Guide.

ANALYSIS AND DECISION

The Licensee was served with a contravention notice alleging a contravention of the *Act*, and that contravention was described on the face of the notice as “Unlawful Sale of Liquor section 38(3)”. Thereafter, the licensee received a NOEA which identified the alleged contravention as “Unlawful sale of illicit liquor, section 38”.

The relevant portions of section 38 stipulate that a licensee must not “keep for sale” or “sell” liquor except in accordance with the *Act*. There was no evidence presented that the licensee did actually sell any of the liquor.

The licensee had many items on the shelves in the storage area which held the Scotch. Clearly they were not all for sale or for consumption by the customers of Galaxy Gardens. Indeed some of them were there for nothing other than long-term personal storage. I accept Mr. Chan’s evidence that the Scotch was being stored there for personal purposes. I accept Mr. Chan’s evidence that the liquor was not being kept for sale. Accordingly, I find that the Licensee has not contravened section 38 of the *Act*.

The relevant portions of section 12 of the *Act* stipulate that the general manager may impose terms and conditions on a licence including those that limit the type of liquor to be offered for sale. The general manager has imposed such terms in the form of the Guide.

The Guide goes further than section 38 of the *Act* by requiring that the licensee may not “keep” liquor purchase “over the counter” from a source other than the licensee’s designated liquor outlet. By his own evidence the licensee did indeed “keep” such liquor. The Guide also makes a licensee accountable for any such liquor that is found in his storage area despite that it “made its way into [his] stock by accident, that it was a gift for personal use, or that an employee left it there.”

Section 20 of the *Act*, empowers the general manager to take action against a licensee for contravention of the terms and conditions of a licence and by inclusion, the provisions of the Guide. I find, however, that the general manager did not take such action. The notices provided to the licensee spoke to contravention of section 38 of the *Act* and only contravention of section 38 of the *Act*. The licensee was not given proper or any notice of the general manager's intention to hold him accountable for contravening the terms and conditions as stipulated in the Guide.

The basic principles of Natural Justice require that in an administrative setting, the party be allowed to know the case against him and be allowed opportunity to prepare to answer that case. Mr. Chan attended at his hearing with an understandable expectation that he would have to answer to an alleged contravention of section 38. He knew he had not sold any of the Scotch in question at Galaxy Gardens and he was prepared to testify that it was not being kept for sale.

The Branch has not established a contravention of the provisions of the *Act* pursuant to their notices and the Licensee may not be penalized for contraventions of the Guide for which he had not reasonable notice and opportunity to present an informed reply.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: July 12, 2004

cc: R.C.M.Police Prince Rupert Detachment

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Mike Clark, Regional Manager,

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