



**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 R.S.B.C. 1996, c. 267

Licensee: Vien Dong Restaurant Ltd.
dba Vien Dong Vietnamese Hot Pot
Restaurant
1242 Kingsway
Vancouver, BC

Case: EH04-111

Appearances:

For the Licensee	Nghia Hoc Chung, Licensee
For the Branch	Peter Mior, Advocate
Enforcement Hearing Adjudicator	Edward W. Owsianski

Date of Hearing November 23, 2005

Place of Hearing Vancouver, BC

Date of Decision January 25, 2005

Introduction

Vien Dong Restaurant Ltd. (dba Vien Dong Vietnamese Hot Pot Restaurant) holds Food Primary Licence No. 300525. The hours of sale are 9:00 A.M. to Midnight, Monday – Sunday. The capacity is 75 persons. The establishment is located in Vancouver, BC.

Alleged Contravention and Recommended Enforcement Action

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action dated September 30, 2004.

The branch alleges that on September 4, 2004, the Licensee contravened section 42(2) of the *Liquor Control and Licensing Regulation*, which states

“A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.”

The recommended enforcement action is a \$5000 penalty.

Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type, a license suspension for 4 – 7 days and/or a monetary penalty of five thousand (\$5000) to seven thousand (\$7000) dollars.

The licensee disputes that this contravention took place.

Issues

1. Whether the Licensee contravened Section 42(2) of the *Regulation* on or about September 4, 2004?
2. If so, is the recommended penalty appropriate in the circumstances?

Exhibits

The following exhibits were presented:

1. Book of Documents;
2. Liquor Purchase Records for Vien Dong Restaurant (6 pages);
3. Sales Receipts of Vien Dong Restaurant for September 4, 2004 (13 pages).

Evidence - The Liquor Control and Licensing Branch

Liquor inspector A testified that on September 4, 2004, at approximately 11:05 P.M. he and another Liquor Inspector attended at the establishment for the purpose of conducting a routine inspection. Three male patrons were seated at a table that held the remnants of a meal and two open cans of Budweiser beer. Also on the table were four unopened cans of Budweiser beer, bound together with a plastic retainer and contained in a white plastic bag.

As these beers appeared to have been brought into, rather than purchased from the establishment the Inspector approached the Server standing nearby for an explanation. The Server said that the patrons had brought the beer into the restaurant with them. The Inspector testified that the Server did not offer to show him the bill for the table. The Inspector also spoke with the Manager who offered the same explanation. The Inspector advised the Manager that this was not permitted whereupon the Manager proceeded to the table and commenced opening the four beer. The Inspector interceded and advised the Manager that the beer could not be served to the patrons and must be disposed of by pouring it down the sink, which was done. The Inspector checked the beer being kept for sale at the establishment. While there were cans of Budweiser beer in the stock, none were bound together with a plastic retainer. The Inspector later obtained the liquor purchase records (exhibit 2) for the establishment from the Liquor Distribution Branch. The records revealed that the cans of Budweiser beer purchased prior to the September 4, 2004, inspection were purchased in 30 can cases in which the cans are not bound by plastic retainers.

The Inspector testified that he is responsible for maintaining branch files for each licensed establishment within his jurisdiction. He referred to excerpts from the branch publication, "A Guide for Liquor Licensees" (exhibit 1, tab 6) which has been provided to all licensees. The Guide outlined the requirement of holding a liquor licence including the prohibition for customers bringing their own liquor into an establishment. The Inspector referred to a Contravention Notice previously issued to this establishment. The Contravention Notice (exhibit 1, tab 10) was issued on February 14, 2004, for failing to clear liquor within ½ hour, allowing liquor not purchased in the establishment to be consumed there and selling liquor to an intoxicated person. The Inspector testified that he provided a copy of the Contravention Notice to the same Manager at the time of the incident and advised him of the terms and conditions of the liquor licence and that these activities were not permitted. The branch took no further action on the Contravention Notice. The Inspector testified that although it was clear that the Manager's first language was not English he was satisfied that the Manager understood the conversations between them.

Liquor Inspector B testified that on September 4, 2004, he and Liquor Inspector "A" entered the establishment at approximately 11:08 P.M. He noted a table of four persons with several cans and glasses of beer on the table as well as three or four unopened cans of beer in a white plastic bag. Inspector "A" spoke with the Waitress and the Manager who had been summoned from the kitchen. Inspector B observed the Manager proceed to the table, open the cans of beer from the plastic bag and pour them into the customers' glasses. He testified that there appeared to be a language barrier between the Waitress and Inspector A and that while the Manager does not speak English well does appear to comprehend when spoken with.

Evidence - The Licensee

Witness C testified that on September 4, 2004, he and two friends were at the restaurant seated at a table and had consumed a shared hot pot with seafood and six beers. An additional three beers were served to them unopened by the Waitress.

These beers had been purchased for him and his friends by another friend seated at another table. When the bill arrived one of his friends at the table became argumentative with the Waitress with the result that the Witness wished to leave and asked the Waitress for a plastic bag in which he placed the three cans of beer to take with him. At this point the Liquor Inspectors arrived. The Manager came to the table, removed the beer from the bag and opened one of the cans. The cans were not joined together by a plastic retainer. Shortly thereafter the Witness left with his friends. He testified that neither he nor his friends brought any beer into the restaurant.

Witness D testified with the assistance of an interpreter. He works as the night cook at the restaurant and because he is the only male employee present at the time is considered to be the on-site Manager. He does not hold a Responsible Beverage Service Certificate and is not familiar with the branch publication "A Guide to Licensees". He was working in the kitchen during the evening of September 4, 2004. A Waitress told him that the Liquor Inspector wished to see him because some customers had put three beers into a bag. Upon coming out of the kitchen the Inspector asked him why there were three unopened beer in the bag so he proceeded to open the cans of beer and placed them before the customers at which time the Inspector told him to pour the beer down the sink, which he did. He asked the Customer why the beer was in a bag and was told that the Customer's friend was acting badly and the Customer wanted to leave with his friend and take the beer with them. The Witness testified that the Inspector asked him whether the customers brought the beer into the restaurant, he told him that he didn't know because he was in the kitchen. Later, the Waitress told the Witness that the beer was from the restaurant and was not brought in by the customers. The Witness didn't question this because the beer felt cold when he picked it up. He described the beer as being three or four cans of Budweiser, not held together with a plastic retainer. He did not know whether the beer was purchased by the persons at the table or by another customer. The Waitress showed him the bill later (exhibit 2, pg.1) which showed that the table ordered and paid for two orders of three beer and a third order of four beer. The customers paid for the bill before leaving the restaurant. The

Waitress told him that the Liquor Inspector had requested to see the bill and she had shown it to him.

The Witness recalled that he was working February 14, 2004, and that the Inspector spoke to him about a customer bringing a bottle of liquor into the restaurant. He does know that customers are not permitted to bring liquor into the restaurant and they are prohibited from doing so when the liquor is observed. He testified that he does not know much of the English language. He doesn't understand all that the Inspector tells him and just answers, "yes, yes" or "no, no" when being spoken to by the Liquor Inspector.

SUBMISSIONS

The Licensee submitted that Manager and Waitress do not have a good understanding of English and did not understand the question being asked of them by the Liquor Inspector when they said that the beer had been brought into the restaurant by the Customer. The Inspector did not communicate well with them. He submitted that the recommended penalty of \$5000.00 was not fair in the circumstances.

Findings and Decision

Having considered all of the evidence I am satisfied that the evidence does not support a finding that on September 4, 2004, the Licensee contravened 42(2) of the *Liquor Control and Licensing Regulation* by allowing consumption in the licensed establishment of liquor that was not purchased from the licensee.

In reaching this decision, I find that the evidence taken as a whole is equivocal on the salient points.

The evidence of Liquor Inspector "A" was that there were three patrons seated at a table in the restaurant on which there were two opened and four unopened cans of Budweiser beer and that the unopened cans were in a white plastic bag and were joined together with a plastic retainer.

The evidence of Liquor Inspector "B" was that there were four patrons seated at the table on which there were several cans and glasses of beer and three or four cans of Budweiser beer in a white plastic bag. He did not provide any evidence as to whether the cans of beer in the plastic bag were held together with a plastic retainer.

The evidence of the Customer (Witness "C") was that he and two friends were seated at a table on which there were three unopened cans of beer. A friend seated at another table in the restaurant had purchased the beer. The cans of beer were not held together with a plastic retainer. The Witness placed the three cans of beer in a white plastic bag for the purpose of taking them with him when leaving the restaurant.

The evidence of the Cook/Manager (Witness "D") was that he was summoned from the kitchen by a Waitress and advised that the Liquor Inspector wished to see him. He spoke with the Liquor Inspector who told him that there were three patrons at a table on which there was a plastic bag containing unopened cans of beer. He went to the table, took the three or four cans of unopened Budweiser beer from the plastic bag, opened them and placed them before the customers. The Inspector told him that the customers could not have the beer and he must pour it out, which he did. The cans of beer were not held together by a plastic retainer.

The receipt for the table in question (exhibit 3, pg.1) supports the Manager's testimony that the final four beers purchased by the customers at the table were charged to and paid for by the customers.

It is my view that had I been able to conclude, on a balance of probabilities, that the cans of Budweiser beer in the plastic bag were bound together by a plastic retainer that would have provided sufficient evidence to meet the test that the beer had been brought into the restaurant and not purchased there. Having considered all of the evidence I am unable to so conclude.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: January 25, 2005

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Lee Murphy, Regional Manager,

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