



**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: | Licensee dba Dalat by Night Restaurant 1930 Powell Street Vancouver, BC |
| Case: | EH04-134 |
| For the Licensee | Dao Nguyen Chau M. Ho |
| For the Branch | Shahid Noorani, Advocate |
| Enforcement Hearing Adjudicator | Edward W. Owsianski |
| Date of Hearing | May 18, 2005 |
| Place of Hearing | Vancouver, BC |
| Date of Decision | June 23, 2005 |

Introduction

The licensee (dba Dalat by Night Restaurant) holds Food Primary Licence No. 300876. The hours of sale are 11:00 a.m. to Midnight seven days a week. The patron capacity is 102. 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 (NOEA) dated November 16, 2004.

The branch alleges that on October 24, 2004, the licensee contravened Section 44 (1)(b) of the *Liquor Control and Licensing Regulation* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

The recommended enforcement action is a \$5000 penalty.

Schedule 4 at Item 25 of the *Liquor Control and Licensing Regulation* provides a range of penalties for a first contravention of this type, a licence suspension for four (4) to seven (7) days and/or a monetary penalty of five thousand (\$5000) to seven thousand (\$7,000) dollars.

The relevant sections of *the Regulation to the Act (the Regulation)* are as follows:

- 44** (1) Unless otherwise authorized by the general manager,
- (b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with Section 42(4)(a).

Issue

1. Is the recommended penalty appropriate in the circumstances?
-

Exhibits

The following Exhibits were presented:

1. Book of Documents
2. Letter of April 5, 2005 from the branch to the licensee
3. Letter of December 10, 2004, from the licensee to the branch

Evidence - The Liquor Control and Licensing Branch

A **liquor inspector** testified that he is the inspector responsible for the area in which this establishment is located. On October 24, 2004, at approximately 12:55 a.m. he and other inspectors attended at the establishment for the purpose of conducting an inspection. Although there was obvious activity inside, the doors were locked and their entry was delayed for several minutes. Once inside, they noted approximately 20 patrons seated at four tables with pitchers and glasses of beer. The inspector spoke with the licensee who advised that she had stopped selling liquor at Midnight and that patrons were just finishing their drinks. The inspector issued a Contravention Notice (CN) to the licensee for three contraventions; failing to permit entry to liquor inspectors; fail to clear liquor after ½ hour after liquor service hours; and prohibited entertainment. This CN was later withdrawn and another CN substituted in which the allegation of failing to permit entry to liquor inspectors was substituted with contravening a term or condition. A NOEA was forwarded to the licensee on November 16, 2004, advising the licensee that they were proceeding with enforcement action on two of the alleged contraventions; fail to clear liquor within ½ hour after liquor service hours with a \$5000 monetary penalty recommended and contravening a term and condition of the licence with a three day suspension recommended. The licensee admitted the two contraventions and accepted the recommended penalty of a three day suspension for contravening a term and condition. The licensee disagreed with the recommended \$5000 monetary penalty for failing to clear liquor.

The inspector testified that he is responsible for keeping the branch files for the establishment. The licensee has been operating the establishment with approval from

the branch since March 25, 2004. Prior to the issuance of the liquor licence the licensee attended an information session at branch offices and she was informed of the requirements of the *Act, Regulation* and the terms and conditions of the licence. She was given a copy of the branch publication, "A Guide for Liquor Licensees in British Columbia: Terms and Conditions of a Liquor Licence", (the Guide) (Exhibit 1, tab 6).

The inspector referred to other Contravention Notices (CN) issued by the branch and Licensed Premises Checks (LPC) issued by the Vancouver Police Department to the licensee the result of inspections conducted at the establishment:

August 13, 2004 – LPC followed by a CN for failing to clear liquor within ½ hour after liquor service hours and allowing patrons to consume liquor beyond ½ hour after liquor service hours (Exhibit 1, tab 10). The branch did not proceed with enforcement action for these alleged contraventions.

November 7, 2004 – CN issued for failing to clear liquor within ½ hour after liquor service hours and allowing patrons to consume liquor beyond ½ hour after liquor service hours. (Exhibit 1, tab 13). The branch proceeded with enforcement action for the contravention of failing to clear liquor within ½ hour after liquor service hours that resulted in a six-day suspension of the liquor licence (Exhibit 1, tab 14).

The CNs and LPCs lead to two Compliance Meetings convened by the branch with the licensee. The first was held on September 20, 2004, and dealt with failing to clear liquor within ½ hour after liquor service hours and allowing patrons to consume liquor beyond ½ hour after liquor service hours. (Exhibit 1, tab 11). The second meeting was held on November 4, 2004, and dealt with the hours for the sale of liquor, clearing liquor and entertainment (Exhibit 1, tab 12).

The inspector testified, that in reaching his decision to recommend that enforcement action be taken, he took into account the number and type of Contravention Notices

issued and the fact that there had been a Compliance Meeting held with this licensee. He believed that the recommended \$5000 monetary penalty, which is the minimum for a first contravention of this type, was necessary to bring about compliance by the licensee. He is still of that belief, particularly because the establishment has not been operating since February 2005.

He testified that he spoke with the licensee about the recommended penalty. She was unhappy with the recommendation so he explained that she could write to the branch requesting the penalty be changed which she subsequently did in a letter dated December 10, 2004 (Exhibit 2). The branch denied the request because there were subsequent contraventions of the same type. He provided this information verbally to the licensee in conversations with her in December 2004 and again in January 2005. It was reiterated in writing in a letter from the branch to the licensee on April 5, 2005 (Exhibit 3).

Evidence - The Licensee

The licensee acknowledges that this contravention took place, but does not agree that a \$5000 monetary penalty is appropriate.

The licensee testified that the establishment has been closed because the building has changed ownership and the City of Vancouver has required a new certificate for environment and sewage. The new owner is currently doing renovations and the establishment is planning to re-open in June.

Submissions

The licensee submitted that the branch mishandled the request to substitute a suspension penalty for the recommended monetary penalty. The licensee said she should have been received a prompt written response rather than a verbal one through the inspector. It thus created a misunderstanding until the letter of April 5, 2005, was

received. She submitted that the proposed \$5000 monetary penalty would create a greater financial hardship than a suspension of between seven to ten days as the establishment could remain open for food service even though the liquor licence may be suspended. She submitted that once the establishment reopens she would try her best to operate in compliance with the rules. She has found that the control of the public is not as easy as she once thought.

Findings and Decision

Having considered all of the evidence I find that: on October 24, 2004, the licensee contravened Section 44 (1)(b) of the *Liquor Control and Licensing Regulation* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

Penalty

Pursuant to Section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulation* 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; and
- 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*.

There is no record of prior contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents (“compliance history”). Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegation as a first contravention.

There was, however, a previous Contravention Notice issued to the licensee for a similar contravention. The branch did not pursue enforcement action, however it did follow up with Compliance Meetings in an attempt to assist the licensee in bringing the operation of the establishment into compliance, to no avail. I have given weight to this Contravention Notice, not as proof of a previous contravention, but as proof that the branch has told the licensee in the past of concerns about the operation of the licensed establishment.

There was also a subsequent similar contravention for which a six-day licence suspension was imposed.

The purpose of the branch in bringing about enforcement action and in determining the appropriate penalty is to encourage voluntary compliance. Among the factors considered in determining the appropriate penalty is whether there is a 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.

Having considered the evidence, I am satisfied that a penalty for the contravention is necessary to ensure future voluntary compliance. The penalty must be sufficient to bring about a change in operating procedures by this licensee. Given the record, I am satisfied that a monetary penalty is necessary. In the circumstances of this establishment, a further suspension will not provide sufficient deterrence to bring about voluntary compliance. I find that the minimum monetary penalty of \$5000 as recommended by the branch is appropriate.

Order

Pursuant to Section 20 (2) of the Act, I order that the licensee pay a monetary penalty of \$5000 (five thousand dollars) to the general manager on or before August 5, 2005.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: June 23, 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: Shahid Noorani, Advocate
