



**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:	685350 B.C. Ltd. dba The Nelson 655 Nelson Street Vancouver, BC
Case:	EH05-066
For the Licensee	Mark Dobinson Jessie Burley
For the Branch	Sonja Okada, Advocate
Enforcement Hearing Adjudicator	M. G. Taylor
Date of Hearing	September 13, 2005
Place of Hearing	Vancouver, BC
Date of Decision	September 29, 2005

INTRODUCTION

The licensee, 658350 B.C. Ltd., operates The Nelson under a Food Primary Liquor Licence (FPL), No. 200643, issued September 24, 2004. The Nelson is located half a block off Granville Street, close to the centre of the Vancouver downtown entertainment district. The district has a mix of licensed establishments, hotels, businesses and residential accommodation.

In accordance with the terms of the licence the permitted hours of operation are 11:00 a.m. to 1:00 a.m., Monday to Saturday, and 11:00 a.m. to midnight on Sunday. The licensed capacity is 46 patrons inside and a total of 40 patrons on the two patios. The licence is subject to terms and conditions listed on the face of the Food Primary Liquor Licence and those contained in the branch's Guide for Liquor Licensees (the 'Guide').

ALLEGED CONTRAVENTIONS

By Notice of Enforcement Action (NOEA) dated May 25, 2005, the Liquor Control and Licensing Branch ("the Branch") alleged that on February 4, 2005, the licensee contravened Section 20(1)(d) of the *Liquor Control and Licensing Act* ("the Act") and Section 11(1) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the "*Regulation*") by operating the establishment contrary to the primary purpose.

The branch's recommended enforcement action is a ten (10) day suspension of the liquor licence, to commence on a Friday.

RELEVANT STATUTORY PROVISIONS

See Appendix A

ISSUE(S)

1. Does the evidence substantiate that the licensee was operating The Nelson contrary to the primary purpose of its liquor licence?
2. If yes, has the licensee substantiated a defence of due diligence?
3. If the contravention was committed, is the branch's recommended enforcement action appropriate?

EXHIBITS

Exhibit No. 1	Branch's Book of Documents
Exhibit No. 2	Licensee's Book of Documents

EVIDENCE

The branch's witnesses were three liquor inspectors, referred to here as liquor inspectors #1, #2 and #3. The licensee's witnesses were the corporate director and the accountant, both of whom also presented the case for the licensee.

During January and February 2005, the branch conducted undercover inspections of licensed establishments in the downtown core of the City of Vancouver. As part of these covert operations, liquor inspectors attended The Nelson on Friday, February 4, 2005.

The Nelson is a small establishment, maximum 1,200 sq. ft., with an interior licensed capacity of 46 patrons. The full room and the tables are visible from the front door. The kitchen is located in the middle of the room, with the bar in front

of it. The kitchen is fairly visible to patrons. The seating is a combination of benches along the walls and free standing chairs around tables.

Branch's Evidence

Inspector #1, in the company of another inspector, entered The Nelson at approximately 11:40 p.m., and sat at a table close to the live band and in view of the kitchen. She testified that she asked to order food and was informed by the server that the kitchen was closed. She testified that she did not see any food on other tables but that there were glasses and jugs that appeared to be beer, and that all the patrons appeared to be drinking beer. The inspector ordered an alcoholic beverage and her colleague ordered a non-alcoholic beverage.

She described the restaurant as quite full, the lighting was dim, there was a three piece band and when the band started to play, the atmosphere in the restaurant was electric. Overall, she described the atmosphere as resembling a liquor primary more than a restaurant. She stated that patrons seemed to know each other, and that there was a party mood. Inspector #1 went to the women's washroom and telephoned Inspector #3 to suggest that she do an official inspection.

Inspector #2 and another inspector entered at approximately 11:50 p.m., not knowing that other inspectors were already present. He testified that he was able to hear loud music from the restaurant before they entered. They found a table across from the kitchen, next to the table of the other inspectors. Inspector #2 testified that he chose this establishment because they had been out all night, he was hungry and he wanted to eat. There was a tent card on the table that indicated the special was a roast beef sandwich. However, when he asked to order food the server said the cook had gone home and the kitchen was closed. When he reiterated that he was very hungry and needed something, the server jokingly said he would not want her to cook. He and his colleague ordered beer.

Inspector #2 testified that he could see into the kitchen and that he could not see anyone in the kitchen, nor any activity there. He testified that he did not see any evidence of food preparation or food consumption and did not see any place settings on the tables. He described the interior as very loud and crowded, with many people standing and not enough chairs for the number of patrons. He described it as a party atmosphere with everyone drinking. The only staff he could identify were the server and a male behind the bar.

Inspector #3 testified that she has been assigned to the downtown entertainment district for six years and that she knows this establishment well. She attended shortly after midnight while the other four inspectors were still present, in response to the telephone call from Inspector #1. She observed that patrons were standing around the bar area and, although it was not over capacity, it was full. She was not concerned about the number of patrons and she acknowledged that there would have been sufficient seating for the number of people present. She testified that she looked around the room and found no evidence of food service, cutlery, or dirty dishes. She spoke to the licensee, who was working behind the bar, and asked him if there was any food service. He assured her the kitchen was open, that he was the cook and he held his hand over the grill, which she accepted as an assurance that the grill was hot. However, she testified that there was no evidence of food preparation or service, and there was no aroma of food. She testified that the music and conversations were very loud and the lighting was dim.

Inspector #3 asked the licensee to send her the receipts for the day, which he did (see Exhibit No. 1, tab 8). The most favourable interpretation of the receipts, from the licensee's point of view, is that food sales were \$211.20 and liquor sales were \$890.61. The inspector testified that this shows liquor sales grossly exceeding food sales. She acknowledged that although the branch has in the past used the ratio of 60:40 food to liquor, as indicative of expected sales in a Food Primary establishment, that expectation has been relaxed. She

acknowledged that the sales ratio could be 20:80 and the establishment could still be functioning with a food primary focus. The ratio is only one indicator.

Inspector #3 stated that she is the inspector for the area, she reviewed the evidence and decided it was necessary to proceed with enforcement action, and authored the Enforcement Action Recommended report at Exhibit No. 1, tab 2.

In her testimony, she reviewed the branch's file history with this licensee. Historically, the branch has noted problems with the way this establishment has been run. On June 8, 2004, Inspector #3 and another inspector held a Compliance Meeting which the current licensee attended although he had not officially taken over The Nelson. The meeting was convened because of Contravention Notices the branch had issued alleging overcrowding, prohibited entertainment and after hours service. She recalled that the licensee seemed excited by the prospects of taking over this establishment. During the meeting, they discussed numerous legislative requirements, and at the bottom of the form it is noted that they gave the licensee a copy of the 'Guide', discussed the food to liquor ratio of 60:40 and discussed the alternatives of hostess versus door security (see Exhibit No. 1, tab 14). Inspector #3 testified that she had recommended to the licensee that he provide a copy of the 'Guide' to his employees.

On September 22, 2004, the branch held another meeting with the licensee in preparation for issuing the FPL. The branch showed him a video directed to new licensees and on September 23, 2005, an inspector did a final inspection and signed off for approving the licence.

In considering the recommended penalty, Inspector #3 noted that a 10 day licence suspension is the minimum suspension for a first contravention. The alternative is a \$7,500 monetary penalty. She testified she thought the

suspension would be preferable for this establishment because the licensee would still be able to operate the restaurant.

Licensee's Evidence

The licensee presented a notarized statement from the server (see Exhibit No. 2, Tab 1, page 5), sworn September 8, 2005, but written a few months earlier, in which she acknowledges having told patrons that the kitchen was closed:

As a favour to the owner, Mark Dobinson, I agreed to fill in as a temporary server when he was unable to find anyone to cover the shift on this date [February 5, 2005]. It has since been brought to my attention that during evening (*sic*) I made the false assumption that the kitchen was closed and therefore informed patrons that food was no longer available when this in fact was not the case. I came to this conclusion because the cook on duty had been relieved but I had forgotten that Mark himself sometimes takes over the late night cooking duties in order to save hours or do an employee a favour. I was mistaken and food was still available. I am officially admitting my error and apologize for the subsequent misunderstandings and inconveniences that occurred as a result.

The licensee testified that he had worked with this server in another restaurant previously and that she worked for him on a temporary basis, while maintaining other employment, for approximately one month.

The licensee noted that the inspectors had come in at 11:40 p.m., 11:50 and just after midnight. He testified that he was doing the cooking at that point and the server was mistaken. He also testified that later the same night, his former banker came in with some others, and they ordered and received food. The banker provided a notarized statement in which he deposed that his group arrived at 12:30 a.m., February 5, 2005, and was served a large order of nachos and a couple of full meals. He also deposed that he has attended this establishment frequently in the early morning hours and has never had a problem ordering food. (Exhibit No. 2, Tab 1)

The licensee presented a third notarized statement from a customer who deposed that she eats at The Nelson Café regularly and has always been able to order food regardless of the time of day. She commended the chef for catering to her dietary needs and those of her father. (Exhibit No. 2, Tab 1)

The licensee testified that after this event he reinstated the chef's hours because allowing the chef to leave early resulted in an incorrect perception. He also testified that there is always a greeter at the door and there was one on this night. The accountant referred to Exhibit No. 1, Tab 9, the Daily Sales Reports, "labour \$40.00" and testified that this was for the doorman.

In October 2005, the licensee hired the accountant, who has [1] years experience in the hospitality industry, to assist with improving business. The accountant recommended improving the food menus to increase food sales. The licensee and the accountant testified to the steps taken over the past year to improve the food offerings and encourage food consumption. They referred to receipts from April 2004, when this licensee was first becoming involved in the business, compared to receipts from April 2005, to underline the improvement in food sales. Documents provided in Exhibit No. 2, illustrate various stages in designing the menus and show the increase in the number of menu items offered and decrease in price. The licensee produced food manuals for use in the kitchen, which are designed to teach the licensee or other staff how to cook and present the menu items. He testified that the kitchen is small, designed for one cook, and close to the bar. When he was acting as bartender, he could turn around and operate the kitchen equipment.

The licensee testified most of the staff he hired had previous experience so that his training for staff was directed to teaching the menu and the cash register, and placing food and liquor orders. He experienced a high turn over in staff. He has had some staff meetings and has issued memoranda regarding staff duties. He

[1] Personal information severed pursuant to the Freedom of Information and Protection of Privacy Act.

testified that the staff always encourage food sales. If patrons have ordered two rounds of liquor and do not order food, the staff give them their bill and tell them they cannot serve them any more liquor. He testified that the tent menu cards stated that it is a restaurant, that patrons are required to eat and that patrons may be required to produce two pieces of identification if they order liquor.

The accountant testified that he helped conduct four staff meetings since he became involved in November 2004. Typically, the meetings are held on Sundays before opening time. He testified that the amount of cutlery and dishes is consistent with a Food Primary establishment. He also testified that the current licensee replaced the old 'cocktail' style high tables with regular restaurant style tables.

SUBMISSIONS

The licensee submitted that the evidence of the food planning process demonstrates that the licensee was, in good faith, trying to promote the sale of food. This incident was an unfortunate, isolated event that happened because the server was of the wrong impression. He has discontinued the practice of allowing the cook to leave early so there is a cook on duty now until closing time.

Further, the fact is there was a cook and food was available. However, it was late at night and there was not much evidence of food because most patrons would have eaten and were just having drinks after dinner.

Concerning the penalty, the licensee submitted that the recommended penalty is extremely harsh and out of proportion given that this was an isolated incident. He noted the improvement in compliance since the old owner who was served 30 Contravention Notices in a short period of time.

The licensee submitted that if I found a contravention had occurred, I should exercise my discretion to impose no penalty. If I found a penalty was necessary, he submitted that a licence suspension would be preferable to a monetary penalty.

ANALYSIS AND DECISION

For the reasons that follow, I find that during the time the liquor inspectors were present, from approximately 11:40 p.m. to 12:30 a.m., on the business day of February 4, 2005, the licensee had allowed The Nelson to depart from its primary operating purpose.

Under the terms of the FPL, the licensee is required to maintain the primary purpose of food service, throughout all hours of operation. The 'Guide' explains the differences between FPLs and Liquor Primary Licences (LPL) and between the licensing processes for both and states that before approving a LPL, the branch consults the neighbourhood and local government. At page 5, it is stated in bolded print:

Applying for a food-primary licence and then operating your business as a bar circumvents this approval process and is a serious contravention.

According to the terms and conditions of a FPL, the establishment must offer both appetizers and main courses. On page 6 of the 'Guide', FPL licensees are advised that they may "*occasionally* serve liquor to a customer, without food, at any table within the dining area."

The licensee admitted that the server told the inspectors the kitchen was closed. Although the licensee characterized this as a mistake, and a one time incident, to my mind it is indicative of a more pervasive understanding and attitude. I find

that when Inspectors #1 and #2 entered The Nelson their server had no intention of serving them food but was eager to serve them liquor. The licensee testified that the server had experience working in Food Primary establishments, but it is apparent she either did not know rules governing FPLs or did not understand that The Nelson was operating under a FPL. I find that the server was content to allow new patrons to consume liquor without ordering or consuming food. That is contrary to the terms and conditions of the licence.

Additionally, I find there was no evidence of food preparation or service and I accept the inspectors' evidence that there was a party ambience and atmosphere that was indicative of a liquor primary rather than a food primary establishment. I find as fact there was no greeter to escort patrons to a table, the lighting was dim, there were no table settings (cutlery or dishes), no food was being served, there was no evidence of dirty dishes, many patrons were standing and visiting with one another rather than being seated, and there was a live band. Not one of these factors is determinative on its own, but taken together I find they demonstrate a shift away from a primary focus on food service.

I have reviewed the receipts and the ratio of food to liquor sales. I agree with the licensee that the fact that liquor sales may exceed food sales is not determinative. In part, that depends on the hours of operation, whether the lunch trade is mainly food without liquor and the relative price of liquor compared to the food items.

The licensee contended that he was the cook and that food service was available. I accept that he was able to cook some or all of the menu items. He pointed to the statement by a patron who had ordered food. Those facts do not persuade me that the licensee was operating The Nelson as a food primary at that point. At most, it assures me that food was available as an accompaniment to liquor, although the server did not know that. Under the terms of the FPL,

liquor may be served as an adjunct to the service of the food, but not the reverse, regardless of the time of day or night.

The licensee also contended that there would not be much food service at this time of night and that most patrons would have eaten earlier. Regardless of whether some or most patrons had eaten and were enjoying drinks after dinner, I find as fact that the licensee was permitting patrons to enter without providing food service. This is contrary to the terms of the FPL.

DUE DILIGENCE

It is well accepted that the defence of due diligence applies to contraventions under the *Act*. Generally, the case law relating to regulatory offences and the defence of due diligence is found in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 and the cases following it. The contraventions in the *Act* are in the category of strict liability offences in which the licensee can absolve himself by demonstrating that he took all the care a reasonable person might be expected to take and, therefore, show that he was not negligent.

Concerning liability for the actions of employees, the B.C. Supreme Court addressed due diligence in *The Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248, a case involving alleged illegal conduct:

[25] If a licensee is not to be responsible for unlawful conduct occurring in its establishment within the meaning of s. 36(2)(b), it must prove, on a balance of probabilities, each of two facts: that the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose, and, if that proof is provided, that those who were in fact responsible for that part of the licensee's operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities.

Since the *Plaza* decision, in cases assessing the evidence of due diligence in relation to various contraventions, the branch has stated that a licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. As a test of due diligence, the branch has considered whether there were more steps the licensee could have taken to ensure that staff were aware of the legislative requirements and were properly trained to do the job, and whether there were more preventative measures the licensee could have taken to prevent the occurrence of the contravention. (For a discussion of due diligence factors, see for example, *Haney Hospitality Ltd. (dba Haney Motor Hotel)*, EH03-170, July 27, 2004.)

The licensee was working this night and was the 'directing mind' of the corporate licensee. Although considerable emphasis was placed on the server's advice to the liquor inspectors, there are the other factors of ambience and atmosphere noted above, which were general to the operation and which I have found demonstrated a shift away from a primary focus on food service. I find that the licensee was responsible for those aspects of the operation. The server was the front line staff and, therefore, I have also considered the defence of due diligence as discussed in the *Plaza* case.

In both instances, I have taken into consideration the licensee's evidence about the emphasis on promoting food, staff meetings, staff memoranda, and staff training. I find that evidence falls short of demonstrating the licensee had practices and procedures in place to counteract or prevent this occurrence. It is apparent that the server was not trained on the importance of maintaining a food primary focus at The Nelson. Neither she nor the licensee ensured that the establishment was operating, or gave the appearance of operating, as a food primary. I find the licensee did not have procedures in place for regular staff training and for reinforcing with staff the need to guard against shifting from a food primary focus to a liquor primary focus. Overall, I find that the licensee was

not operating in the manner of a reasonable person operating under a FPL. I find the licensee has not demonstrated a defence of due diligence through policies, procedures, training, or the actions of its staff.

I find that the branch has established that the licensee contravened Section 20(1)(d) of the *Liquor Control and Licensing Act* (“the *Act*”) and Section 11(1) of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (the “*Regulation*”) by operating the establishment contrary to the primary purpose and that the licensee has not established a defence of due diligence.

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
- 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 proven contraventions, offences or enforcement actions of the same type for this licensee 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 allegations as first contraventions. Under the *Regulation*, Schedule 4, item 1, the range of

penalty for this contravention is 10 to 15 day licence suspension and \$7,500 to \$10,000 monetary penalty.

The branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are 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 the public safety and the well being of the community. The branch held meetings with the licensee, before he took over The Nelson, and specifically addressed the legislative requirements concerning Food Primary Licenses. The fact that the branch considers this contravention to be serious is stressed in the 'Guide'. Additionally, the legislature has indicated its concern by establishing the range of penalties for first contraventions.

The licensee submitted that I could exercise my discretion under Section 20 to take no enforcement action. There have been occasions when adjudicators have not imposed a penalty, despite a finding of contravention. That has occurred when the licensee has demonstrated extraordinary circumstances or that the licensee was genuinely mistaken about the legal requirements, was trying to do everything legally and was not knowingly operating outside the law so that it was not a flagrant violation. (See for example *Funky Planet Cabaret*, May 4, 2001; *Milestones Restaurant Inc.*, EH05-055, July 14, 2005)

In this case, the licensee stressed the efforts expended to improve the food selection and food sales, to provide a policy manual for the kitchen staff, and noted that there has been a huge improvement between the previous operation and the current operation. He also submitted that disruption in the service of the liquor would have a major impact on the business, including the food service, and would probably defeat their attempts to improve the establishment.

I accept the licensee's evidence of the steps taken to improve and I appreciate the licensee's efforts. I also appreciate that this is a small operation that can ill afford a licence suspension. However, I find that there are no extenuating circumstances that would warrant not imposing a penalty. These issues had been brought to the licensee's attention during the licence approval process and it should have been clear to him that he was licensed to operate a food primary establishment. He chose to operate as a liquor primary, at least for a period of time. The legislature has set minimum penalties for contraventions and this one is particularly severe.

I find that the branch has established that this contravention is deserving of a licence suspension. The branch's recommended penalty is the minimum and I find that is appropriate. I order a ten (10) day licence suspension.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 200643 for a period of ten (10) days to commence at the close of business on Thursday, October 27, 2005, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*). I direct that the Liquor Licence No. 200643 be held by the branch or the Vancouver Police Department, from the close of business on Thursday, October 27, 2005, until the licensee has demonstrated to the branch's satisfaction that The Nelson has been closed for ten (10) business days.

Original signed by

M.G. Taylor
Enforcement Hearing Adjudicator

Date: September 29, 2005

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Sonja Okada, Branch Advocate

Appendix A

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267 (the "Act")

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 for any of the following reasons:

(d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002 (the "Regulation")

Food primary licences

11 (1) A food primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on in the establishment is the service of food during all hours of its operation.

(2) The following terms and conditions apply to a food primary licence:

(a) minors are allowed in the establishment;

(b) liquor must not be served unless the establishment is open for service of a varied selection of food items, including both appetizers and main courses, or their equivalent;

(c) subject to limitation by the general manager, hours of liquor service must start no earlier than 9:00 a.m. and end no later than 4:00 a.m. the next day.

(3) The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is or will be the service of food during all hours of its operation, any or all of the following:

(a) kitchen equipment;

(b) furnishings and lighting;

(c) menu;

(d) type and hours of entertainment and games offered by the licensee;

(e) advertising;

(f) hours of operation;

(g) financial records;

(h) the ratio of receipts from food sales to receipts from liquor sales in the establishment;

(i) any other relevant consideration that may assist in the determination.
