



**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:	395047 B.C. Ltd. dba Boston Pizza
Case:	EH06-074
For the Licensee	Raymond Wong
For the Branch	Shahid Noorani
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	October 27, 2006
Place of Hearing	Cranbrook B.C.
Date of Decision	November 17, 2006

INTRODUCTION

The licensee operates a Boston Pizza franchise with food primary licence #143072 in Cranbrook B.C. On January 24, 2006, the liquor inspector attended at the restaurant and seized a quantity of liquor from the display shelves and the liquor storage area. Samples of the liquor were taken and sent for analysis.

As a result of the inspection and the analysis, the branch issued a Notice of Enforcement Action (NOEA) to the licensee.

The licensee's restaurant manager appeared at the hearing with the licensee's authorization.

ALLEGED CONTRAVENTIONS

The Branch alleged that on January 24, 2006, the licensee contravened s. 38 of the *Act* by keeping for sale or selling liquor not purchased from the liquor distribution Branch in accordance with the terms and conditions of the licence, and contravened s. 38.1 of the *Act* by diluting or adulterating liquor.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

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.

- (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.

38.1 (1) A licensee must not dilute or adulterate liquor purchased from the Liquor Distribution Branch or keep for sale, sell or in consideration of the purchase or transfer of property or for other consideration give to another person liquor that has been diluted or adulterated after its purchase from the Liquor Distribution Branch.

(3) A licensee must not refill a bottle or container or add to the contents of a bottle or container purchased from the Liquor Distribution Branch.

ISSUES

1. Did the licensee contravene s. 38 of the *Act* by selling or keeping for sale, liquor not purchased from the Liquor Distribution Branch?
2. Did the licensee contravene s.38.1 of the *Act* by diluting or adulterating liquor?
2. If the contraventions are found, is a penalty warranted, and if so, what is the appropriate penalty to be imposed?

EXHIBITS

- Exhibit No. 1: Branch's book of documents (Branch)
- Exhibit No. 2: Liquor store order forms and p.o.p records (licensee)
- Exhibit No. 3: Licensee's letter to the Branch Registrar (licensee)

EVIDENCE

The Branch called the liquor inspector. He testified as to the following:

- He is the local inspector and has knowledge of the establishment's licence terms and conditions.
- The licensee is by the terms of its licence directed to make all liquor purchases from the only government liquor store in Cranbrook.
- The government liquor store keeps a record of all purchases made by the licensee. He accessed the current store records and the Vancouver office's records dating back before those on site at the liquor store.
- The licensee is supposed to keep at the establishment a liquor register of all purchases relating to liquor that is on the premises.
- He attended on January 24, 2006 to do an illicit liquor check. He requested the attendance of the manager of the government liquor store, who arrived soon after the inspector.
- He spoke with the Boston Pizza's duty manager, who contacted the restaurant manager. The restaurant manager arrived soon thereafter.
- He took possession of several bottles of liquor that he found in the liquor storage area, and on the liquor display shelves. They included:
 1. Medallion Rum (half bottle)
 2. China White Crème de Cacao (full bottle)
 3. 5 bottles of Turning Leaf Merlot wine (unopened)
 4. Valpolicella red wine (unopened)

5. Wiser's Deluxe Canadian Whiskey (open bottle)
 6. Royal Reserve Rye Whiskey (open bottle)
 7. Bacardi White Rum (open bottle)
 8. Barolo de Campiforio red wine (unopened)
- The liquor store manager advised him that:
 1. The China White Crème de Cacao is not available in British Columbia.
 2. The Turning Leaf Merlot is available in B.C. but not in the liquor store in Cranbrook. The store has no record of ever having sold it.
 3. The Valpolicella is not available in Cranbrook at the LRS.
 4. There is no record of the Licensee making any special orders for any of the products seized, which are not available normally in the Cranbrook liquor store.
 5. There was no record at the liquor store of the Licensee purchasing the Wiser's Deluxe Whiskey.
 6. The Medallion Rum has never been sold to a Licensee in Cranbrook.
 7. There was no record of the Licensee purchasing any Royal Reserve Whiskey from the liquor store in Cranbrook.
 - The restaurant manager advised during the inspection that the seized wine was purchased in Alberta for personal use and was not for sale at the establishment. The manager also said that the Medallion Rum was confiscated from some youths in the parking lot and was not for sale.
 - None of the liquor seized was identified in the licensee's liquor register.

- He took sterile samples from the Wiser's Deluxe Canadian Whiskey, Royal Reserve Whiskey, Bacardi Rum, and Medallion Rum, and submitted them to Ottawa for analysis with proper neck labels.
- The results of the analysis (tab 7, exhibit #1) confirmed that the Bacardi Rum sample was consistent with Bacardi Rum. The Medallion Rum sample was consistent with white rum but the testing was not determinative, as to whether or not it was Medallion Rum. The sample of Wiser's Deluxe Canadian Whiskey contained a Canadian Whiskey but was not consistent with Wiser's Deluxe. The Sample of Royal Reserve was a Canadian Whiskey but was not consistent with Royal Reserve.
- He met separately with the manager of the liquor store and reviewed the records of the licensee's purchase. The liquors seized were not listed on the records.

The liquor store manager testified as follows:

- The government liquor store is the only place in Cranbrook where licensees are allowed to get their inventory of liquor.
- He has been working in the store for many years.
- Licensees identify themselves and the liquor store records the purchases for submission to the government. A licensee's total purchases determine the cost of the licensee's liquor licences.
- The records are stored on the premises electronically for three months and then sent to Vancouver where they are kept for seven years.

- If the store does not stock a particular product, the licensee can special order it if it is on the available B.C. liquor list.
- Special orders are recorded on the licensee's records in the liquor store.
- A licensee can purchase liquor in Fernie or at another store in B.C. if he identifies himself. The local store would contact the Cranbrook store for verification of the licensee, and the records for any such purchase would be forwarded to the Cranbrook store and be put on the licensee's record.
- The liquor store does not carry Turning Leaf Merlot. It does carry Turning Leaf Cabernet Sauvignon and Zinfandel.
- He reviewed the licensee's purchase records for the past three years in preparation for this hearing.
- The records confirm the licensee did not purchase Turning Leaf Merlot from a B.C. government liquor store.
- The Valpolicella and the Barolo are not in the Provincial guide and the Cranbrook store has never sold them.
- The China White Crème de Cacao and the Medallion Rum are not available anywhere in B.C.

The Licensee called an employee of the restaurant. She testified as follows:

- She is a waitress and supervisor.
- She has bought liquor for the restaurant twice, but only at the government liquor store.

- She always identifies herself as an employee of the Licensee when she purchases liquor for the restaurant.
- She has never bought liquor for the restaurant outside of Cranbrook.
- She has never poured liquor from one bottle to another.
- She has never seen another employee or the restaurant manager purchase liquor other than at the government liquor store in Cranbrook, or pour liquor from one bottle to another.
- She has sold the China White Crème de Cacao and the Medallion Rum in the restaurant, but not the Turning Leaf Merlot.
- The Turning Leaf Merlot has been in stock in the restaurant for about a year.
- She does not recognize the Borolo or the Valpolicella.

The Licensee called another employee of the restaurant. She testified as follows:

- She is a waitress at the restaurant.
- She has bought liquor for the restaurant seven or eight times, but only at the government liquor store.
- She always identifies herself as an employee of the licensee when she purchases liquor for the restaurant.
- She has never bought liquor for the restaurant outside of Cranbrook.

- She has never poured liquor from one bottle to another.
- She has never seen another employee or the restaurant manager purchase liquor other than at the government liquor store in Cranbrook, or pour liquor from one bottle to another.
- She is not familiar with the Borolo but she has seen all of the other liquors, which were seized at the restaurant. She does not recall serving any of them.

The restaurant manager testified on behalf of the Licensee. He said:

- The liquor store shipped the wrong wine. The liquor store sells other varietals of Turning Leaf. He ordered those and was shipped Merlot instead.
- Some of the bottles were put in the storage area or in the display shelving because of size restrictions. Their presence in one area or another did not indicate that they were for sale.
- The least expensive Canadian Whiskey on the B.C. list sells for \$30.00 per bottle. The Wiser's sells for \$33.65.
- The liquor that is available in B.C. but not carried in the Cranbrook store must have been delivered by mistake.
- The liquor that is not available in B.C. that was found in the restaurant is of unknown origin. He does not know how the bottles got in the restaurant, but there are lots of staff and opportunities for the bottles to get there. Their presence does not mean they were for sale.

- Exhibit No.3 is a statement, which forms part of his testimony.

SUBMISSIONS

The licensee submitted that there was no reason to mix liquors or to pour from one bottle to another. The establishment is a large revenue producer, and the savings from so doing would be insignificant.

The licensee also submitted that it couldn't control everything in the establishment. If products are left in the restaurant inadvertently, errors will occur.

The Branch submitted that the unlawful sale of illicit liquor has devastating effects on the public and the liquor system as a whole: There are health risks to unsuspecting patrons, the province is cheated out of taxes, and it leads to an unfair playing field among licensee's and retailers.

ANALYSIS AND DECISION

The evidence is overwhelming that the licensee had in its liquor display and storage areas, liquor that was not purchased at the Cranbrook government liquor store. The terms and conditions of the licence require that liquor purchases be so made.

I accept the evidence of the manager of the government liquor store that there is no record of the licensee special ordering any of the product not usually stocked in the Cranbrook liquor store or purchasing it from another proper channel in accordance with the usual requirements.

I find that the liquor seized from the licensed establishment on January 24, 2006 is illicit liquor as described in s.38 of the *Act*. Further, the evidence is convincing that the liquor was sold or being kept for sale by the licensee contrary to s.38.

I found the contrary evidence of the licensee's manager to be inconsistent with the evidence of the employees and not credible.

Further, I find that the evidence of the laboratory analysis confirms that liquor samples taken from the establishment were not the product described on the label of the liquor bottles. It is an inescapable conclusion that the liquor had been adulterated or tampered with. Though there is no direct evidence of how that situation came to be, I find that the licensee is obligated to maintain control of the liquor in his possession such as to eliminate any possibility of the product being adulterated.

Accordingly, I find that both of the allegations against the licensee have been proven.

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 the 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*. 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 recommended a ten (10) day suspension for the contravention of s.38 of the *Act* relating to January 24, 2006.

The range of penalty for a first contravention of this section of the *Act* in accordance with Schedule 4 of the *Regulation* is ten (10) to fifteen (15) days suspension and/or a monetary penalty of \$7,500-\$10,000.

I find a ten (10) day suspension is appropriate.

The Branch recommended a four (4) day suspension for the contravention of s.38 (1) of the *Act* relating to January 24, 2006.

The range of penalty for a first contravention of this section of the *Act* in accordance with Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

I find a four (4) day suspension is appropriate.

The fourteen-day total suspension is significant. The licensee operates a well-known franchise. The Brand has many locations throughout the province and beyond. The public relies on established and well-known operators to provide a high degree of security and consistency. In selling illicit and adulterated liquor, the licensee has endangered the public and abused its confidence.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of the Food Primary Licence No. 143072 for a period of fourteen (14) days to commence at the close of business on Tuesday, December 12, 2006, 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 *Regulations*).

[ORIGINAL SIGNED]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: November 17, 2006

cc: R.C.M. Police Cranbrook Department

Liquor Control and Licensing Branch, Surrey Regional Office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch
Attn: Shahid Noorani, Branch Advocate