



**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:	Café Deux Soleils 2096 Commercial Drive Vancouver BC V5N 4B2
Case:	EH07-054
For the Licensee	Jeffrey Maisonet
For the Branch	Sonja Okada
Enforcement Hearing Adjudicator	Sheldon M. Seigel
Date of Hearing	September 20, 2007
Place of Hearing	Vancouver, BC
Date of Decision	October 19, 2007

INTRODUCTION

The licensee operates an establishment with a Food Primary Licence No. 30152. The hours of operation indicated on the licence are 9:00 am to midnight, Monday through Sunday. The establishment is located in a mixed-use residential and commercial district.

On April 4, two liquor inspectors attended at the establishment late in the evening to do a licensed premise check. As a result of the inspection, the establishment was served with a contravention notice.

The inspectors alleged the following:

- The establishment was operating as a bar or liquor primary establishment notwithstanding it holds only a food primary licence.
- Patrons were openly smoking marijuana in clear view of the employees of the licensee.
- Patrons were dancing to the music of a disc jockey although that activity is not allowed by the terms of the licence.

ALLEGED CONTRAVENTIONS

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action dated April 30, 2007. The branch alleges that:

1. On April 4, 2007, the licensee contravened s. 20(1)(d) of the *Liquor Control and Licensing Act (Act)* and s. 11(1) of the *Liquor Control and Licensing Regulation (Regulation)* by operating the licensed establishment in a manner that is contrary to the primary purpose of the business as stated on the licence.

2. On April 4, 2007, the licensee contravened s. 36(2)(b) of the *Act* by permitting unlawful activities or conduct in the licensed establishment and,
3. On April 4, 2007 the licensee contravened s. 50 of the *Act* by allowing prohibited entertainment in the licensed establishment.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, RSBC 1996 Chapter 267

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.

36(2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment

- (b) any unlawful activities or conduct

50(1) If entertainment is permitted under the regulations or the terms and conditions of a licence, a municipality or regional district may restrict or prohibit any or all of the types of entertainment permitted.

- (2) without limiting section 12, the general manager may, at the time of the issue of a licence or at any time during the term of the licence, impose as a condition of it the restrictions and limitations that the general manager considers necessary on any type or form of entertainment performed for carried on in the establishment for which the licence is issued.

Liquor control and Licensing Regulation, B.C. Reg. 244/2002

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 deterring 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.

ISSUES

1. Was the establishment operating as a liquor primary rather than a food primary establishment when the inspectors attended?
2. Was there an illegal activity occurring in the establishment and did the licensee permit it to occur?
3. Were patrons dancing in the establishment and did the licensee permit it to occur?

EXHIBITS

Exhibit No. 1: The branch's book of documents.

EVIDENCE

The liquor inspectors testified that they arrived at the establishment at approximately 11:30 p.m. on April 4, 2007. Music could be heard from a distance outside of the establishment. There was a doorman on duty and he was collecting a cover charge from any person admitted. Inside the lights were low, and the music was loud. The room was crowded. A disc jockey provided entertainment. There were between fifty and sixty-five patrons dancing on a makeshift dance floor in the area marked "children's play area" on the floor-plan. The kitchen was closed and there was no food visible on the tables. There was a considerable volume of alcohol on the tables, and being consumed by patrons.

One of the inspectors saw several groups of patrons smoking marijuana openly and in plain sight of the licensee's staff. One of the inspectors, who did not walk through the room until later, did not see anyone smoking, but said the air was "full of marijuana".

One inspector spoke with the manager. He testified that the manager advised him that the event was called Reggae Night, and the police “were okay with [the patrons] smoking pot as long as they didn’t smoke cigarettes.”

The inspectors advised the manager that the music should be stopped, the lights slowly brought up and the patrons allowed to leave. They were concerned that the situation might become difficult if the patrons became agitated with the forced closing. They both testified that one of the licensee’s staff announced to the patrons that the night had been shut down by the two inspectors. One of the inspectors was fearful for his safety.

The inspectors both testified that the Branch held a contravention meeting with the licensee the night before the alleged contraventions took place. In that meeting, the branch representatives told the licensee that dancing was not permitted under the terms of their license, and that the establishment is not allowed to operate as a bar.

The licensee testified that Reggae night is a regular event that is welcomed by the community. He said that the police had no problem with the patrons smoking marijuana as long as the patrons kept the marijuana inside and did not take it out on the street. He also indicated that there were baked goods available for sale in display cases in the establishment throughout the night. He did not indicate what the baked goods consisted of.

The licensee confirmed that the branch had advised him that his licence did not allow dancing on the premises, and that he had participated in a compliance meeting the night before the allegations were made, in which that prohibition was made clear. In that meeting he was also advised against operating the establishment as a bar. He said that the prohibition against dancing was “obscene” and “like in the movie *Footloose*.”

The licensee expressed his surprise that enforcement was pursued. He testified that the Branch, through a previous liquor inspector, had advised him that there was nothing to worry about because enforcement action would not be taken until he receives three contravention notices in a single year.

SUBMISSIONS

The branch submitted that there was clearly a shift in focus of the operation from food primary to liquor primary on the night in question, the establishment was being operated as a bar rather than a restaurant. The branch also submitted that patrons were dancing contrary to the terms of the licence, and smoking marijuana, which is an illegal activity, in clear view of the management and staff.

The licensee submitted that the branch had misled him into believing that he was safe from enforcement action until such time as he had three contravention notices served on him in one year. He also submitted that the prohibition against dancing was inappropriate and that the police had no issue with his patrons smoking marijuana in the establishment. Finally, the licensee submitted that the branch's enforcement action was racially motivated as the branch was not interested in allowing certain minorities the opportunities presented to other races in the city of Vancouver.

ANALYSIS AND DECISION

I find the evidence of the two liquor inspectors to be credible and consistent with one another. They testified that at 11:30 p.m. on April 4, 2007, there was a doorman on duty at the establishment, a cover charge being collected for entry, very dim lighting, loud music, live entertainment, and a large number of patrons dancing on a dance floor that is at other times configured as a play area for children.

One of the inspectors testified that he walked through the establishment and saw several patrons openly smoking marijuana. The other inspector testified that he walked through the establishment somewhat later than the first inspector and although he saw no marijuana, the air was thick with the smell of it.

Interestingly, the licensee did not directly contradict any of this evidence, but for the question of how loud the music was and from what distance it could be heard.

The licensee did indicate that there were display cases with baked goods available for patrons on the evening in question. The inspectors testified that they saw no such cases.

Was the establishment operating as a liquor primary rather than a food primary establishment when the inspectors attended?

The Café Deux Soleil has a food primary licence. This requires that the primary function of food service not be usurped by a focus on liquor.

A food primary licence requires that the establishment must maintain the service of food as its primary purpose at all hours of operation.

The rules of operation for liquor primary and food primary licences are different from one another. The approval process for each type is distinct as well. In particular, the process for obtaining a liquor primary licence includes input from the public and local government, whereas food primary licences generally do not require such input. Accordingly, the distinction between licences is relevant with respect to community and effective management of the establishments.

I find that the tables were full of liquor, the patrons were drinking liquor, and no food was being served or consumed by the patrons at the time of the inspection. This is clearly contrary to the primary purpose of a food primary establishment. The presence or otherwise of display cases with baked goods available inside does not make the operation of the room into a *de facto* restaurant. Further, I find that the operation of the establishment at the relevant time, with a doorman, cover charge, live entertainment and dancing, loud music and dim lighting is very much the description of a club or bar, rather than a restaurant or food primary establishment.

I find that the establishment was operating contrary to its primary purpose.

Was there an illegal activity occurring in the establishment and did the licensee permit it to occur?

While the evidence of the inspectors was credible, it lacked sufficient detail to establish this offence.

I accept that one inspector saw what he believed was marijuana, and one inspector smelled what he believed was marijuana.

This allegation and the consequences of establishing this contravention are of significance to the licensee. In order to make a finding that a contravention occurred, the evidence must clearly establish the requisite components of the allegation.

My acceptance of what the inspectors believed is not sufficient to discharge this test. The branch presented no evidence that the inspectors know what marijuana smells like or looks like, and therefore while I can accept that the evidence of the inspectors is credible, I cannot extrapolate their knowledge to matters not presented in evidence.

Further, I do not have jurisdiction to make judgements based on “judicial notice” or some equivalent concept, and therefore my personal knowledge of what may or may not be illegal cannot form the basis for the finding of a contravention. The branch provided no evidence that smoking marijuana is an illegal activity, and without that evidence I cannot find that permitting the activity is a contravention.

The contravention of s. 36(2)(b) of the *Act* has not been proven.

Were patrons dancing in the establishment and did the licensee permit it to occur?

I find that there were significant numbers of patrons dancing on a dance floor, which was reconfigured to permit precisely that activity. The disc Jockey, the physical layout, the dance floor, and the dim lighting, all invited patrons to dance. I find that dancing was not only anticipated by the licensee, but invited by the licensee.

The terms of the licence include by stated reference, the provisions of the Guide for Liquor Licensees in British Columbia (Food-Primary), which states:

Any entertainment you offer must conform to local bylaws. You must apply to the general manager to offer any other types of entertainment. This includes patron-participation entertainment (such as dine and dance). Your local government must support your application for patron-participation entertainment.

No application was made to the local government and no application was made to the general manager to permit dancing in the establishment. Licence No. 301582 does not allow patron dancing.

I find that the licensee did permit activities not allowed under the terms of the licence.

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.

For the contravention of s. 11(1) of the *Regulation* relating to April 4, 2007, the branch recommended a ten (10) day suspension.

The range of penalty for a first contravention of section 11(1) of the *Regulation* 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.

For the contravention of s. s. 50 of the *Act* relating to April 4, 2007, the branch recommended a one (1) day suspension.

The range of penalty for a first contravention of section 50 of the *Act* in accordance with Schedule 4 of the *Regulation* is one (1) to three (3) days suspension and/or a monetary penalty of \$1,000- \$3,000.

I find that a penalty is warranted in this instance.

The licensee admitted to having participated in a compliance meeting one day prior to the allegations. He was told in that meeting that he was not allowed to have dancing at the establishment. This was consistent with municipal planning for the area, and the branch was obligated to enforce with no more than usual vigilance, the licence restrictions in that regard. Further, the licensee was advised at the compliance meeting that he could not operate the establishment as a liquor primary bar or club, which it was alleged he was doing contrary to the terms and conditions of his licence. One day later, he was knowingly inviting dancing and knowingly operating the establishment in a manner that can only be described as a *bar* in open defiance of the terms and conditions of his licence.

I find that the licensee chose to ignore the warnings communicated in the compliance meeting, and chose to disregard any effort extended by the branch and its representatives to obtain voluntary compliance with the licence requirements. At the hearing, the licensee showed no remorse for having contravened the *Act* and *Regulation*. In addition, he rather aggressively pursued one of the inspectors during cross-examination in an effort to establish that the branch enforces inappropriate restrictions and is racially motivated in enforcement. He reinforced his position that the branch has a systemic disregard for racial sensitivity in his submissions. Notwithstanding the seriousness of those allegations, the licensee presented no evidence in support of those claims.

The evidence supports a finding that an employee worked to agitate the crowd when the inspectors closed down the event. I find this was a potentially dangerous action. I find the employee's action was intended to incite conflict. The evidence supports that the manager was aware of the employee's actions and that he took no steps to stop it. I find that the manager was the directing mind of the licensee for the purposes of this issue. I find that the actions and approach of the employee, the manager, and the licensee, all speak to the existence of a culture of autonomy and independence from branch administration within the Café Deux Soleils.

I find that the recommended penalty of eleven days is unlikely to cause the licensee to become voluntarily compliant with the *Act* and *Regulation*, and the branch's administration in the future.

I find that a suspension of fifteen days for the contravention of s.11(1) of the *Regulation*, representing the maximum penalty for a first contravention of this type as specified in the *Regulation* might be more likely to elicit some notice on the part of the licensee, and so I find it appropriate.

Further, I find that a suspension of three days for the contravention of s.50 of the *Act*, representing the maximum penalty for a first contravention of this type as specified in the schedule 4 of the *Regulation* might contribute to the procurement of voluntary compliance in the future, and so I find it appropriate.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 301582 for a period of eighteen (18) days to commence at the close of business on Tuesday, October 30, 2007, 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: October 19, 2007

cc: Vancouver Police Dept – Cst. Peter Ryan

Liquor Control and Licensing Branch, Victoria Headquarters
Attn: Donna Lister, Regional Manager

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