



**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:	0719776 B.C. Ltd Hanoi Harbor Vietnamese Restaurant and Lounge 200-4200 No. 3 Road Richmond, BC V6X 2C2
Case:	EH08-013
For the Licensee:	
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	May 8, 2008
Place of Hearing:	Vancouver, BC
Date of Decision	May 22, 2008

INTRODUCTION

The licensee operates a restaurant in Richmond with a Food Primary Licence. The hours of operation indicated on FP No. 208967 are noon to 2:00 a.m. seven days per week.

PRELIMINARY MATTER

The hearing was scheduled to commence at 9:30 a.m. on May 8, 2008, at the Vancouver Regional Office of the branch. The branch advocate was in attendance and advised that so were his witnesses. The licensee did not attend. I commenced the hearing at 9:42 a.m. after inquiring of the advocate as to his expectations of the licensee's attendance.

The branch advocate advised as follows:

- April 23rd was scheduled to be the disclosure date for the file.
- The advocate got in touch with the licensee, who indicated that he does not have a fax number and would prefer to come to the branch's Surrey Office on April 24th to pick up the branch's disclosure documents.
- The branch agreed and committed to have the documents available at that time and place.
- The licensee did not pick up the branch's disclosure documents.
- The advocate emailed the licensee on April 25th and advised that he would mail the disclosure documents out if the licensee did not contact the advocate by a chosen date.
- The licensee did not contact the advocate.
- The advocate sent the disclosure documents by *Rush and Trace BC Post*.
- BC Post confirmed that they attempted delivery on April 30th and left a note for the licensee to pick up the package locally.
- The licensee did not pick up the package as of the morning of the hearing.

- On May 5 2008, the advocate again called the licensee to advise him to pick up the disclosure documents.
- In that telephone call, the licensee confirmed that the post office attempted delivery, but he had not picked up the materials.
- The advocate advised again that the licensee should pick up the documents from the post office or from the branch.

Based upon the information provided by the advocate, I concluded that the licensee did not plan to attend the enforcement hearing. I proceeded in his absence.

ALLEGED CONTRAVENTIONS

The branch made allegations and recommended enforcement action as set out in the Notice of Enforcement Action (NOEA) dated February 4, 2008. The branch alleges that:

On January 20, 2008, the licensee contravened s. 20 of the *Act* and s. 11 of the *Regulation* by operating the establishment contrary to the establishment's primary purpose.

RELEVANT STATUTORY PROVISIONS

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

(a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

(b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;

(c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;

(c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;

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

(e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

(a) [Repealed 1999-36-13.]

(b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

- (e) cancel all or any part of the licensee's licence;
- (f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

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

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.

ISSUES

1. Was the establishment operated contrary to its primary purpose in contravention of s. 20 of the *Act* and s. 11 of the *Regulation*?
2. If so, is a penalty warranted, and what is the appropriate penalty?

EXHIBITS

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

EVIDENCE

The branch presented two liquor inspectors and a licence and bylaw enforcement inspector for the City of Richmond. Each of them testified that he attended at the establishment on January 20, 2008, at 1:00 a.m. (business day of January 19, 2008) in the presence of each other, and made observations. Each prepared notes, copies of which are at Tab 6 of Exhibit No. 1.

The city licence inspector provided evidence that:

- When he entered the restaurant he noted that the music was very loud.
- He conducted between 70 and 80 patrons inside the restaurant.
- He observed only two bowls of french-fries; essentially finger foods, in the entire restaurant but every table inside the restaurant had liquor on it.
- He took photographs of the restaurant, and those photographs clearly depict the preponderance of liquor and the absence of food inside the restaurant.
- The patrons inside the restaurant were engaged in dice games, a common occurrence in some liquor primary establishments.
- There was no odour of food resulting from food preparation in the kitchen.
- There was no staff in the kitchen.
- The lighting inside the restaurant was very dim.

One liquor inspector provided evidence that:

- The branch conducted a final inspection interview with the licensee in November 2005 before the licensee was issued a food primary licence.
- The branch reviewed the *Act, Regulation* and *Guide* with the licensee during the final inspection.
- The restaurant's décor and furnishing was not conducive to a food primary establishment.
- Lighting inside the restaurant was very dim. As a result, a patron would not be able to determine if his or her food was properly cooked.
- Patrons were seated, but there were no table settings, cutlery, or plates on the tables.
- The private rooms had coffee tables, which were not conducive to dining in a restaurant.
- The sales receipts on the date of the alleged contravention show a total sale of \$997.28, with liquor sales being \$997.28 and other purchases such as finger food purchases -- french-fries, fish balls etc., totalling only \$60.

- The only food identified inside the restaurant were 2 bowls of french-fries; essentially finger foods.
- There was no staff stationed in the kitchen, and there was no sign of food preparation in the kitchen, other than a bag of frozen french-fries lying on a table.
- There was no sign that the kitchen equipment, including stove, dishwasher or deep fryer, was in use.
- There were no dirty dishes in the kitchen.
- The music inside the restaurant was very loud.
- There have been complaints in the past about the licensee operating contrary to primary purpose. Though enforcement action had not been pursued by the branch for those complaints, the complaints were discussed with the licensee and the licensee was expected to address the complaints.
- The restaurant operates more like a lounge than a restaurant.

The first liquor inspector identified all of the documents in Exhibit No. 1, including the Notice of Enforcement Action (NOEA) included in the book of document at Tab 1.

A second liquor inspector testified that;

- There was no staff stationed in the kitchen.
- There was no sign of food preparation in the kitchen.
- No orders were being placed, nor were there any dirty dishes evident in the kitchen.
- The kitchen equipment (stove, dishwasher, deep fryer) were not in use.
- The licensee had an extensive drink menu and a wide variety of liquors and beers were available, but few food items.
- All the tables inside the restaurant had beer cans on them, but there was no food on those tables but for a couple of shared appetizer dishes.

- The tables inside the private dining rooms are knee height tables, not typically conducive to dining.
- The tables in the private dining rooms had no table settings, no cutlery, no plates and no menus on them.
- The furniture in the private dining rooms is typical of lounge décor (sofas, coffee tables, etc) and is not typical of a food primary establishment.

SUBMISSIONS

The branch submitted that the establishment was clearly operating as a bar, not as a food primary establishment, on the date of the inspection. This was confirmed by:

- Very loud music, uncharacteristic of a restaurant.
- No food (but for a couple of “finger-foods”) visible on the tables despite many patrons in attendance.
- Considerable quantities of liquor on the tables.
- No sign of cooking or food preparation in the kitchen.
- No evidence of used or dirty dishes, and the dishwasher not in operation.
- A summary of sales for the night in question from 9:00 p.m. to 1:00 a.m. that totalled approximately \$900, only approximately \$60 of which was attributable to food items.

Food primary establishments must be primarily engaged in the service of food during all hours of operation. The emphasis is on the word *all* during the hours of operation. The *Regulation* does not contemplate a departure from food service at certain hours of the day, such as during the evening periods. Restaurants offer liquor as an accompaniment to food rather than as the primary activity. Consequently, for a food primary establishment the service of food must remain the primary focus during all hours of operation.

ANALYSIS AND DECISION

I find that the contravention occurred as alleged in the NOEA.

There is clear evidence that the licensee operated contrary to the primary purpose of its licence. The licensee did not engage in the service of food during all hours of operation on the date of the alleged contravention.

The licensee clearly failed to meet the requirements of the *Regulation* which stipulates at section 11(1) that, “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**”

On the day of the alleged contravention, the licensee clearly failed to engage in the service of food during all hours of its operation. The receipts identified at Exhibit 1, Tab 4 are a strong indication that the licensee was operating contrary to its primary purpose.

Further, the *Regulation* provides at section 11(3) that:

11(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 hour of entertainment and games offered by 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 and
- (i) any other relevant consideration that may assist in the determination

The evidence supports that the kitchen was not operating as it would in a food primary establishment, the furnishings and lighting (see Tab 5, Exhibit No. 1) in the restaurant are at variance with that of a restaurant, and the ratio of the receipts of food sales to liquor sales indicates a liquor primary focus.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* 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 by the minimums set out in Schedule 4 of the *Regulations*. However, 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's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act, Regulation, and Rules*. Among the factors that are considered in determining the appropriate penalty is whether there is a past 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 NOEA states at page three:

Food-Primary establishments must have as their primary purpose the service of food during ALL hours of operation. Restaurants offer liquor service as an accompaniment to food, rather than as the primary activity.

It is contrary to the public interest for the branch to allow restaurants to operate as bars. The current liquor licensing process requires public and local government input into licence applications for liquor-primary establishments but not for restaurants. Obtaining a liquor licence for a restaurant and then operating as a bar circumvents this process. Restaurants operating as bars tend to be associated with community complaints around late night noise, intoxication and other behaviour contrary to community standards and the public interest.

This contravention reflects a shift in the primary focus of a food-primary establishment from the service of food to the service of liquor. When a restaurant is not primarily engaged in the service of food there will generally be a number of indicators of this shift. For example; the establishment is serving liquor without food, the conduct of staff indicates that it is not necessary to order food or the kitchen is not conducting food preparation.

The owner on paper Thomas Ha attended the food primary terms and conditions seminar and signed a declaration that he understood the terms and conditions of a Food Primary Licence on November 9/2005. That completed the transfer of liquor licence to Mr. Ha. On November 13/05, RCMP conducted an inspection after hours and as a result, a contravention notice was issued to Ha for Fail to clear liquor within 1/2 hour after liquor hours and permitting an intoxication person to remain. A compliance meeting was then conducted by Inspector Dyck with Mr. Ha on November 16th and again Ha signed the compliance meeting document committing to compliance in the future. On December 2/05, the RCMP again conducted an inspection after hours and as a result, a contravention notice was issued for Fail to clear liquor (a 4 day suspension of the liquor licence was the result of this inspection). On June 18/06, the RCMP again conducted an after hours inspection of this premise which resulted in a 31 day suspension of their liquor licence (for Contravening a Term and Condition; Fail to clear liquor within 1/2 hour after liquor hours; Permit unlawful activity). Although the contravention of Operate Contrary to primary Purpose was also issued to this licensee for the June 18/06 inspection, it was decided that no enforcement action be recommended at that time.

Within 7 months of serving a 31 day suspension, this licensee was again identified by RCMP and LCLB Failing to clear liquor within 1/2 hour after liquor service hours and Allowing patrons to consume liquor beyond 1/2 hour after liquor service hours which resulted in a 14 day suspension of their liquor licence.

This current contravention for Operate Contrary to Primary Purpose is yet another area of non-compliance with this licensee. Operating Contrary to Primary purpose has been discussed with the licensee in the past and is a contributor to all previous contraventions.

This licensee seems to either not have an understanding of his responsibilities as a Food Primary Operator or chooses to operate with disregard of these responsibilities. Due to the previous compliance history of this establishment and attempts to bring this licensee into voluntary compliance, enforcement action is the only alternative.

Absent any argument to the contrary and finding that the NOEA was duly served and available to the licensee, I accept the above description as accurate.

The record shows that this licensee has served lengthy suspensions in the past and this has not resulted in a noticeable change in his method of operation or voluntary compliance with the regulatory scheme.

I feel that a penalty is appropriate in this circumstance, and I feel the appropriate penalty is a significant monetary one.

For the contravention of operating the establishment contrary to its primary purpose in contravention of the *Act* and *Regulation*, I find a monetary penalty of \$10,000 is warranted.

ORDER

Pursuant to section 20(2) of the *Act*, I order the licensee to pay a monetary penalty of Ten Thousand Dollars (\$10,000.00) relating to Food Primary Licence No. 181982 for this contravention. The monetary penalty must be paid no later than the close of business on June 20, 2008.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 22, 2008

cc: Richmond RCMP
Liquor Control and Licensing Branch, Vancouver Regional office
Attn: Donna Lister, Regional Manager
Liquor Control and Licensing Branch, Surrey Regional office
Attn: Olubode Fagbamiye, Branch Advocate