



**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: Jose Davidson's Grill Ltd.
dba Jose's Pepper Club Café
205-399 Main Street
Penticton, BC V2A 5B7

Case: EH08-066

For the Branch: Tania Cogin

General Manager's Delegate: Kathleen McIsaac

Date of Hearing: By way of written submissions

Date of Decision: February 3, 2009

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Jose Davidson's Grill Ltd., operates as Jose's Pepper Club Cafe ("Cafe") in Penticton, BC. It holds a Food Primary Licence No. 177206, with liquor sales from 11:00 a.m. to 1:00 am. Monday to Saturday, and 11:00 a.m. to midnight on Sundays. Under the terms and conditions of the licence, patron non-participation entertainment is permitted and the licence has a lounge endorsement pursuant to s.12 of the *regulations*. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The Liquor Control and Licensing Branch's ("branch") allegations and proposed penalty are set out in the Notice of Enforcement Action ("NOEA") dated July 18, 2008. The branch alleges the following:

1. That on May 22, 2008, the licensee contravened section 20 of the *Liquor Control and Licensing Act* ("Act") and section 11 of the *Liquor Control and Licensing Regulation* ("Regulation") by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence, that is, as a Liquor Primary rather than a Food Primary establishment. Item 1 of Schedule 4 of the Regulation provides a range of penalties for a first contravention of this type: a licence suspension of 10-15 days and/or a monetary penalty of \$7500-\$10,000. The proposed penalty is a 15-day suspension of the liquor licence.
2. That on May 22, 2008, the licensee contravened section 50 of the *Act* by permitting entertainment in the establishment that is contrary to the terms and conditions of the licence. Item 35 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type: a licence suspension of 1-3 days and/or a monetary penalty of \$1000-\$3000. The proposed penalty is a 3-day suspension of the liquor licence.

The licensee does not dispute that the two contraventions took place, just the penalties proposed. It was agreed that this hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

Act, section 20

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.

Regulation, section 11 - Food primary licenses

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.

Act, section 50 - Entertainment

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 or carried on in the establishment for which the licence is issued.

ISSUE

What penalties, if any, are warranted?

EXHIBITS

- EXHIBIT 1 Branch's book of documents
- EXHIBIT 2 Letter from licensee, Luke Baxter, undated, faxed September 22, 2008

EVIDENCE

The liquor inspector's written account of the incident is summarized as follows:

On Thursday May 22, 2008 at approximately 23:05 PM a liquor inspector and RCMP officer arrived at the Jose's Pepper Club Cafe. Both were in street clothes and did not identify themselves. The music from inside was very loud and could be heard for several blocks. The patio appeared to be very crowded and the patrons could be heard shouting. As they entered, the inspector asked a male staff person if they could eat and was informed that it was unlikely they would get served food.

Upon entry the establishment was very packed and a punk/heavy metal band was playing inside adjacent to the patio. At least a hundred patrons were standing up and many were standing on chairs and tables. The majority had drinks such as highballs and beers. The crowd was screaming to the music and jumping up and down. The inspector and officer arrived as the last songs were played and the band ended at 23:15 p.m.

The liquor inspector did not observe any dirty dishes, cutlery, food or any signs of food service. There was no doubt in his observations that this licensed establishment was conducting itself as a liquor primary establishment.

A male bartender served liquor continually while the inspector and officer were inside. The inspector was able to purchase two beers but when he asked one of two female servers at the end of the bar if he could order food one server stated, "the kitchen staff would kick our ass if I rang the bell." The liquor inspector placed the menu back on the bar and asked when they could order food and their response was "way earlier in the night." The inspector had a clear view inside the kitchen area from this point in the bar and did not observe any kitchen staff, dirty dishes or food and could not smell any food cooking.

The liquor inspector and the officer left at 23:30 and the bartender was observed selling beer. Patrons were entering the establishment as they left.

The liquor inspector requested register receipts from the licensee for May 22, 23 and 24, 2008. Compared to May 23 and 24, the receipts show an increase in liquor sales and a decrease in food sales for May 22.

SUBMISSIONS

Branch (NOEA)

The branch's reasons for recommending enforcement action for the contraventions of s.20 of the *Act* and s.11 of the *Regulation* are as follows:

Food-primary establishments must be primarily engaged in the service of food during all hours of operation. Restaurants offer liquor service as an accompaniment to food, rather than as the primary activity. This contravention occurs if the primary focus of a food primary establishment shifts from the service of food to the service of liquor. It is contrary to the public interest for the branch to allow restaurants to operate as bars. The liquor licensing process requires public and local government input for liquor primary licence but not for food primary licence. Obtaining a liquor licence for a restaurant and then operating as a bar circumvents this process. Restaurants operating as bars also tend to be associated with community complaints from neighbours about noise, drunkenness and unruly patrons. A compliance meeting was held with the licensee nine days prior to the contravention at which time the licensee agreed to keep the kitchen open during operating hours and agreed to operate as a food primary establishment. The licensee also agreed to hold staff training sessions to ensure staff were aware of the terms and conditions and responsibilities of a food primary licence. The licensee informed me on May 27, 2008 training for bar staff had not yet occurred.

A 15 day suspension is being recommended. This is the maximum penalty for a first contravention and falls within the guidelines in schedule 4 of the *Liquor Control and Licensing Regulations*, item 1. Although this is classified as a first contravention, the licensee did serve a 10 day suspension in 2005 for the same contravention. On May 14, 2008 the licensee and I talked about that suspension and how the licensee must operate as a food primary establishment. He told me he and his partners wanted to operate in total compliance of their licence. Eight days later they are observed in contravention. A fifteen-day suspension will, hopefully, provide incentive for compliance. There has been five compliance meetings relating to observed contraventions since the licensees took over this establishment in 2003. This penalty should be sufficient to achieve voluntary compliance in the future.

The branch's reasons for recommending enforcement action for the contravention of s. 50 of the *Act* are as follows:

The licensees have had numerous compliance meetings in the past. The activity of their restaurant continues to morph into a liquor-primary establishment. Despite numerous meetings and training sessions management of this establishment is incapable or refuses to run their business according to the terms and conditions of their license. Although the recommended penalty is the maximum of the range for a first offence at Schedule 4 of the *Regs*, Item number 35, I believe a strong message is required to ensure compliance. I further believe that this licensee must become compliant immediately in order for other licensees and the community to understand the seriousness of this contravention. In order to achieve that immediate compliance a strong message is required as previous actions have not had the lasting effect.

The licensee is responsible for ensuring the primary focus of the restaurant, which is food service, is not altered. By allowing patron-participation entertainment of this fashion, the focus of the establishment is altered into a liquor-primary establishment. This type of activity, historically, tends to draw a younger crowd. The potential for adult oriented activities increases when the focus changes to a liquor-primary atmosphere. This is an establishment where minors are permitted thus the potential for minors becoming involved in adult oriented activity is increased.

Licensee

The licensee submitted a letter addressing the proposed penalties. The letter is not dated but was faxed to the branch on September 22, 2008.

The licensee writes that on May 22, 2009, a band of young local teens was hired to play at the Pepper Club restaurant. The event was going as planned with parents arriving early and eating dinner, and friends eating appetizers, when around 10:30 p.m. a large group of already intoxicated, local youth came in and ordered water. When they were informed about the \$5.00 minimum charge after 9 p.m. they became belligerent and were asked to leave. They then tried to start fights.

The owner was called and he instructed the manager to close the establishment and to enlist the help of the chef for control measures. Two managers arrived within 15 minutes of the liquor inspector and the restaurant was closed and emptied by 11:30.

The licensee's letter continues as follows:

For the last three years our primary focus has been our food. Quality and variety is continually improving. Because of this the Pepper Club has been enjoying the results of an environment and ambiance conducive to the sale of food. Our menu has been our greatest strength and as our reputation because of it has grown in leaps and bounds.

We work hard to make the restaurant look and feel like the kind of place the people of Penticton would like to dine. Our food sales have grown consistently and our business is slowly becoming lucrative. This is where we want to be and we understand that a bar environment would only compromise our intended reputation and our customers dining experience.

We are in full agreement with the inspector's mandate as far as safety and the responsible and legal service of alcohol. We have worked with him and followed his recommendations and completely understand his position and concerns; however we feel that the enforcements recommended are harsh and don't take into consideration our immediate attempt to control an unpleasant situation. We did what was necessary, in a timely manner and avoided a potential disaster.

With continued shut downs in our small business, we will not be able to attract the clientele that we are desperately trying to encourage; couples and families. If a couple comes in for their anniversary during our suspension and is told that they cannot enjoy a bottle of wine with dinner, they may leave and we can only assume they will not return. When we have large parties in for a birthday dinner, but the birthday person can't be bought a celebratory drink, we lose those functions and once the word gets out that our liquor license is suspended then we get no business at all. How does this benefit any of us? We operate in a seasonal economy and we are one of few independent restaurants open all year round with 18 employees. These suspensions are detrimental to our business, and directly impact our ability to keep our business thriving in a town that borders on economic disaster 8 months out of the year. If we were negligent, then the shut down would be warranted but we don't feel we were negligent at all. The ramifications of a liquor suspension at this time of the year when business has ground to a virtual halt would devastate us. Most of our employees would have to be laid off and go on EI and eventually the restaurant would go under. We are not disagreeing with the inspector's contravention or what happened, but it was not our intention to run contrary to license and simply put, we dealt with this situation as soon as discovered, to the best of our ability.

We humbly ask that you reconsider your enforcements and perhaps offer ways to avoid these situations in the future

PENALTY

As the licensee admits that the contraventions occurred, I find the licensee contravened the *Act*, sections 50 and 20 and the *Regulation*, section 11. Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, and the terms and conditions of the licence, I may do any one or more of the following:

- 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, and 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 achieving voluntary compliance. 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.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding this incident. I therefore find this to be a first contravention.

Since taking over ownership in 2003, the licensee has received several warnings by way of Contravention Notices and Compliance Meetings regarding operating as a Liquor Primary rather than a Food Primary establishment.

At Compliance meetings in 2003 and 2004, the liquor inspector reviewed the liquor laws and Food Primary obligations with the owners and managers of the Café. In 2005, the licensee served a 10-day suspension for operating contrary to its Food Primary Licence when an inspector found no food service was available while liquor was served (Waiver dated October 25, 2005).

On May 14, 2008, several days prior to the present contravention, the liquor inspector met with the Café's Chef who also identified himself as an owner. The inspector showed the Food Primary presentation to the owner and specifically discussed with him the requirement of keeping the kitchen open during operating hours despite patrons ordering liquor only during late hours. The owner agreed to hold staff training sessions to ensure they were aware of the terms and conditions and responsibilities of a Food Primary Licence. By May 22nd this had not taken place.

While I acknowledge that the licensee had to deal with a large group of intoxicated youths who entered the premises at 10:30 p.m. on May 22nd, the licensee does not provide an explanation as to why, when the liquor inspector and officer arrived at the establishment shortly after 11:00 p.m., liquor was being served while food service was not available and, according to one staff member, was only available "way earlier in the night". Taking into consideration that the Chef was called out to help control the group of youths, the lack of any signs or smells of food preparation or dirty dishes indicates to me that the kitchen had already been shut down.

I am satisfied, given the evidence, that the licensee also received warnings and has had several discussions with the liquor inspector regarding the contravention of the term and condition of their licence that allows only non-participation entertainment (*Act* s.50). On May 22nd the licensee submits that it immediately attempted to control an unpleasant situation, which I take to be the group of intoxicated youth who entered the premises and became belligerent when they

were asked to leave. Given their response I find this situation was likely not the cause of the patrons' participation in the entertainment as the inspector and officer observed the band playing until 11:15 p.m, well after the groups arrival at 10:30 p.m. and at least a hundred patrons standing up, many on chairs and tables, screaming to the music and jumping up and down.

I find these contraventions serious as it shows a blatant disregard for the liquor laws as well as the safety and well being of the community. Given the evidence I find penalties are warranted and the following penalties reasonable to encourage voluntary compliance; 15 days for the contravention of s.12 of the *Act* and s.11 of the *Regulation* and 3 days for the contravention of s.50 of the *Act*.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of liquor primary licence #177206 for a period of fifteen (15) days for the contravention of sections 11 and 20 of the *Act* and three (3) days for the contravention of section 50 of the *Act*, to run consecutively and to commence at the close of business on Wednesday, March 4, 2009 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*).

To ensure these orders are effective, I direct that liquor primary licence #177206 be held by the branch of the Penticton R.C.M.P. from the close of business on Wednesday, March 4, 2009, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Kathleen McIsaac

General Manager's Delegate

Date: February 3, 2009

cc: Penticton R.C.M.P.

Liquor Control and Licensing Branch, Victoria Office

Attn: Gary Barker, Regional Manager