



**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: 649168 B.C. Ltd
dba Also Restaurant
120 4200 No. 3 Road
Richmond, BC V6X 2C2

Case Number: EH08-071

For the Licensee: Phillip Chou

For the Branch: Tanya Cogan

Enforcement Hearing Adjudicator: K. McIsaac

Date of Hearing: September 10, 2008

Place of Hearing: Vancouver, BC

Date of Decision: October 22, 2008

INTRODUCTION

The licensee, 649168 B.C. Ltd., operates the Also Restaurant (restaurant) in Richmond, BC. It holds Food Primary Licence No. 302200, with liquor sales from 9:00 a.m. to midnight, seven days a week. 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" (Guide).

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (NOEA) dated July 10, 2008. The branch alleges:

1. On July 6, 2008, the licensee contravened section 44(1)(b) of the *Liquor Control and Licensing Regulation* (Regulation) by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. In early July, the licensee signed a waiver for a May 2008 incident of the same type. Therefore, this is being treated as a second contravention for the purposes of the penalty schedule. The range of penalties for a second contravention of this type is a 10-14 day licence suspension (Item 25, Schedule 4 of the Regulation). The proposed penalty is a ten (10) day suspension of the liquor licence.
2. On July 6, 2008, the licensee contravened section 12 of the *Liquor Control and Licensing Act* (Act) and the terms and conditions of its licence by failing to post its liquor licence in a prominent location in the licensed area to ensure it is immediately available for review by liquor inspectors and police. In early July, the licensee signed a waiver for a

May 2008 incident of the same type. Therefore, this is being treated as a second contravention for the purposes of the penalty schedule. The range of penalties for a second contravention of this type is a 3-6 day suspension (item 46, Schedule 4 of the Regulation). The proposed penalty is a three (3) day suspension of the liquor licence.

The licensee does not dispute that the contraventions took place. However, he does dispute the penalties proposed.

RELEVANT STATUTORY PROVISIONS

Regulation

44 (1) Unless otherwise authorized by the general manager,

(a) liquor primary licensees and liquor primary club licensees must ensure that patrons are cleared from the licensed establishment within ½ hour after the time stated on the licence for the hours of liquor service, and

(b) food primary licensees must ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a).

Act

12 (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.

(2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions

(a) that vary the terms and conditions to which the licence is subject under the regulations, or

(b) that are in addition to those referred to in paragraph (a).

ISSUES

1. What penalty, if any, is warranted?

EXHIBITS

Exhibit No. 1: Branch's Book of Documents

EVIDENCE

The circumstances of the contravention are not disputed. On July 6, 2008, two liquor inspectors and several members of the RCMP conducted a routine inspection of the Also Restaurant. The inspectors and officers arrived at the restaurant at approximately 1:10 a.m. The door was unlocked and when they entered, they observed three males seated at a table in the main dining area, finishing their meal and drinking tea. The only other patrons were two young males and one young female who were seated in the lounge area (Exhibit 1, Tab 7). On their table were two glasses of white wine, approximately one third full each and an uncorked 750 ml bottle of white wine (Obsession Ironstone – 12% alc./vol.) with a small amount of wine left in the bottle. One of the police officers took photos of the glasses and wine on the table (Exhibit No 1, Tab 4).

When one of the liquor inspectors asked the manager for the liquor licence she could only produce an expired liquor licence from September 30, 2007. The inspector issued a contravention notice for failing to clear liquor (Regulation section 44(1)(b)) and for contravening a term and condition of the licence by failing to produce a valid liquor licence (Act section 12).

Liquor Inspector

One of the liquor inspectors who conducted the inspection testified that he recommended enforcement action because there had been two similar incidents in the restaurant in the past year. On August 14, 2007, the liquor inspector issued a Contravention Notice to the licensee for failing to clear liquor and failing to produce a valid liquor licence. The liquor inspector held a compliance meeting with the manager on behalf of the licensee (Exhibit 1, Tab12). The manager committed to stop the service of liquor at 12:00 midnight and to clear all liquor by 12:30 a.m. She also committed to posting a valid liquor licence and floor plan on the premises at all times. The liquor inspector did not recommend enforcement at that time.

On May 10, 2008, the liquor inspector conducted an inspection and found a similar situation to that of August 14, 2007. He issued a contravention notice for failing to clear liquor within one half hour after liquor service hours and for failing to post a valid liquor licence. The inspector recommended enforcement action and a NOEA was sent to the licensee. He said he recommended the minimum penalty for a first contravention.

The liquor inspector testified that on July 6, 2008, when a third, similar incident occurred, he concluded that the previous measures did not seem to be working and again recommended enforcement action. The manager on duty was also present at the time of the previous two incidents.

On July 10th the liquor inspector met with the licensee who signed a waiver for the May 10th contravention. He testified that the licensee informed him that he had not been working at the restaurant for about two years due to other business interests and had had no opportunity to monitor the manager during his absence. The liquor inspector testified that since the licensee signed a waiver for the May 10th contravention, he recommended the minimum penalty for a second contravention for the July 6th contravention. This was communicated to the licensee by letter dated July 30, 2008 (Exhibit 1, Tab 2).

Under cross-examination by the licensee, the liquor inspector testified that at the time of the second contravention on May 10, 2008, he and the police officers could not enter the premises because the door was locked. He could hear the manager shouting to the staff in Chinese. As one of the officers was fluent in this language the inspector and officers knew the manager was instructing her staff to clear the tables. The inspector testified that the manager knew who he was and concluded she was trying to delay the inspection.

In the NOEA, the liquor inspector gave further reason for recommending enforcement action. He states:

The hours during which a licensed establishment is open for the sale of liquor are determined, in part, by community standards. In particular, hours of liquor sale affect the surrounding residents and businesses in the community. The failure by the licensee to take liquor from patrons in a food-primary licensed establishment gives patrons the opportunity to continue consuming liquor while the restaurant remains open, even though the hours of liquor service have ended. This, in turn, can result in a shift in focus in the establishment's operation. A food-primary licence must ensure that liquor is cleared from dining areas within one-half hour after the time stated on the licence for the hours of liquor service.

The liquor inspector confirmed that although the licence was not produced, the Also Restaurant held a valid Food Primary Liquor Licence at the time of the contravention.

Licensee

The licensee testified that he has been the licensee of the Also Restaurant for approximately six years. He considers it a high-end restaurant and one of the finest in Richmond. He said that for the past two years he has left the manager in charge of the restaurant as he has been out of country half of the time due to other business interests. He said the manager was also his girlfriend and he often phoned her later in the evening and told her to close up and go home.

The licensee testified that he was not aware of the August 2007 incident because the manager did not tell him. When he received the NOEA for the May 10, 2008 incident, the manager told him it was not true. He believed her. The manager also informed him that she had taken the liquor licence to photocopy and had left it in the office. He said he explained to her that the licence was not to leave the premises and should be posted.

The licensee testified that it wasn't until he was notified of the July 6th incident that he realized the manager was not telling the truth about the May 2008 incident. He contacted the liquor inspector and met with him on July 10th to sign a waiver for the May 10th contravention.

When asked about the extent of the manager's training, the licensee testified that she had taken the SIR course and he was confident that she was aware of the liquor laws. Before he left her in charge of the restaurant he had a conversation with her about her responsibilities as manager. He also said he did not think it important to test her knowledge.

The licensee acknowledged that his manager was unreliable and did not take her responsibilities seriously. He said it was the manager's friends who were drinking after hours. The licensee testified that he has fired the manager who will leave at the end of the month, and he is training a new manager with more experience and maturity. Since signing the waiver he is at the restaurant every day. He has also met with his staff to review the legislation requirements regarding hours of liquor service. The licensee also plans to close the restaurant at 10 p.m. each night to avoid a similar incident happening again.

SUBMISSIONS

The branch submitted that a penalty is warranted, as this was the third contravention of the same type in one year. The proposed penalty however, is the minimum for a second contravention.

The licensee submitted that he takes full responsibility for the contravention but asked for an opportunity to correct the situation. He said he had no opportunity before July 6th to take steps because he believed the May 10th contravention did not take place. The licensee submitted that he has learned from his mistakes and is committed to going forward.

The licensee said it would be a financial hardship to serve a second suspension as he has already lost thousands of dollars over the past two years due to the close proximity of a new transit line. He has also been supporting the restaurant over the past two years with income from his other businesses. The licensee said if the liquor licence is suspended, the loss of liquor service would discourage customers from celebrating special occasions at the restaurant.

DECISION AND REASONS

The license does not dispute that the contraventions took place. Therefore, I find that the licensee contravened the *Regulation*, section 44(1)(b), for failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. I also find that the licensee contravened the *Act*, section 12 and the terms and conditions of its licence, by failing to post its liquor licence in a prominent location in the licensed area to ensure it is immediately available for review by liquor inspectors and police.

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 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.

Within the last year, two similar types of contraventions occurred in the establishment. I am satisfied the manager, hired by the licensee to operate the restaurant in his absence, knew and understood her obligations regarding the hours for serving liquor and the posting of the liquor licence. The licensee discussed the liquor laws with the manager before placing her in charge of the restaurant and, after receiving the contravention notice for the August 4, 2007 incident, the liquor inspector met with to discuss her responsibilities. At that meeting, she committed to ensuring that liquor service would stop at 12:00 midnight and that all liquor would be cleared by 12:30 a.m. at all times. She also committed to posting a valid liquor licence and floor plan on the site at all times (Exhibit 1, Tab 12). Despite this commitment, the manager was prepared to knowingly disregard the liquor laws and continued to operate outside the law.

I find the present contravention particularly serious as the evidence indicates that the systems in place were insufficient to monitor the operations of the restaurant or the manager's performance while he was absent. Other than receiving a phone call at night from the licensee who would tell her to close the restaurant and go home, the manager did not appear to be accountable to the licensee as evidenced in her failure to inform him of the August 2007 contravention notice.

The licensee may not have been aware of the August 2007 incident but when he received the NOEA regarding the May 2008 contravention, he was put on notice that at least from the branch's perspective, there was a problem in the restaurant's operation. At that point, he had an obligation to conduct his own investigation and satisfy himself that the establishment was being operated within the law, whether or not he trusted and wanted to accept his employees' version of events. However, the licensee chose to believe the manager without taking further action such as contacting the liquor inspector, a step that I consider would have been reasonable in the circumstances. It was only when he received the Contravention Notice for the present contravention, two months later, that the licensee took steps to address the situation. While I acknowledge his plans to put measures into place to ensure that this does not happen again, I find that in the circumstances, the licensee had sufficient opportunity to reasonably prevent the present contraventions from taking place, thus ensuring the safety and well being of the community.

I find a penalty is warranted and that the proposed minimum penalties for a second contravention of these types, is sufficient to encourage future voluntary compliance, that is, a ten (10) day suspension for contravening section 44(1)(b) of the *Regulation* (Item 25, Schedule 4) and a three (3) day suspension for contravening section 12 of the *Act* (Item 46, Schedule 4 of the Regulation).

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 302200 for a period of thirteen (13) days to commence at the close of business on Friday, November 7, 2008, 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 this order is effective, I direct that Liquor Primary Licence No. 302200 be held by the branch or the Richmond Police Department from the close of business on Friday, November 7, 2008, 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

K. McIsaac
Enforcement Hearing Adjudicator

Date: October 22, 2008

cc: RCMP Richmond

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Tanya Cogan, Branch Advocate