



**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: Erasmia Larsen
dba Water 2 Wine
102-1913 Sooke Rd.
Victoria BC, V9B 1V9

Case: EH08-119

For the Licensee: Robert Larsen

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: February 23, 2009

Place of Hearing: Victoria BC

Date of Decision: March 18, 2009

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

Mailing Address:
PO Box 9292 Stn Prov Govt
Victoria BC V8W 9J8
Telephone: 250 387-1254
Facsimile: 250 387-9184

Location:
Second Floor, 1019 Wharf Street
Victoria BC

<http://www.hsd.gov.bc.ca/lclb/>

INTRODUCTION

The Licensee, Erasmia Larsen owns Water 2 Wine, a UBrew/UVin business located in Victoria BC. The licensee holds UBrew/UVin Licence No. 300654 for the operation of the UBrew/UVin establishment. The hours of sale are 9 AM to 11 PM seven days per week. A UBrew/UVin license is issued to an establishment that provides goods, facilities or services to persons producing or manufacturing beer, cider or wine in the establishment for their own consumption or consumption at no charge to others. 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 branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated December 9, 2008. The branch alleges that on October 8, 2008:

1. The licensee contravened section 24(a) of the *Liquor Control & Licensing Regulation* (the *Regulation*) which states that any liquor produced by the licensee or her employees for their own off-site use must be labelled as belonging to the licensee or employee. The proposed penalty is \$1000 (item 42 of Schedule 4, *Regulation*); and
2. The licensee contravened section 25(1) of the *Regulation* which states that a licensee must ensure that each carboy containing a customer's ingredients has a tag setting out the customer's name and the date any enzymes or yeast were added. The proposed penalty is \$1000 (item 42 of Schedule 4, *Regulation*); and
3. The licensee contravened section 28(1) of the *Regulation* which states that a licensee must ensure that the customer removes his or her liquor from the U-Brew or U-Vin immediately after bottling and must not allow the customer to store it, for any purpose,

at the U-Brew or U-Vin. The proposed penalty is a three (3) day suspension of the liquor licence (item 42 of Schedule 4, *Regulation*).

Item 42 of Schedule 4 of *the Regulation* provides a range of penalties for first contraventions of these types of a license suspension for 1 - 3 days and/or a monetary penalty of \$1000 to \$3000 for each contravention.

The licensee disputes the alleged contraventions.

Relevant Regulatory Provisions

LIQUOR CONTROL AND LICENSING REGULATION

Division 5 — U-Brews and U-Vins

Licensee or employee production

24 A licensee or any of his or her employees may produce or manufacture beer, wine or cider in the U-Brew or U-Vin for their own off-site consumption or for off-site consumption by others at no charge, but the beer, wine or cider

(a) must be labelled as belonging to the licensee or employee,

(b) must not be stored in the licensed establishment after bottling, and

(c) must not be used for any purpose within the licensed establishment.

[am. B.C. Reg. 15/2009, s. 2.]

Storage requirements

25 (1) A licensee must ensure that each carboy containing a customer's ingredients has a tag setting out the customer's name and the date any enzymes or yeast were added.

(2) A licensee must not remove a customer's beer, wine or cider from the U-Brew or U-Vin for any purpose before bottling.

Removal of finished product required

28 (1) A licensee must ensure that the customer removes his or her beer, wine or cider from the U-Brew or U-Vin immediately after bottling and must not allow the customer to store, for any purpose, the beer, wine or cider that has already been bottled at the U- Brew or U-Vin.

(2) A licensee must not deliver a customer's beer, wine or cider.

Issues

1. Did the contraventions occur as alleged in the Notice of Enforcement Action (NOEA) dated December 9, 2008?
2. If so, is a penalty appropriate for any of the contraventions and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

Exhibit 1 Branch Book of Documents #1, tabs 1 – 14.

Exhibit 2 Contravention Notice No. B006699.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Liquor Inspector A testified that he is the branch inspector responsible for the geographical area in which the UBrew/UVin Water 2 Wine is located. He had visited the establishment on July 9, 2008 in response to a complaint concerning signs located outside of the premises (photographs at exhibit 1, tab 9, pages 1 – 4). While there he noted a case of 12 bottles of what he believed to be finished wine. The manager

advised him that a customer would be picking up the wine shortly. The inspector advised the manager that a UBrew/UVin licensee was not permitted to retain bottled wine on the premises, it was to be removed from the premises by the customer immediately after bottling. A verbal warning was given to the manager and he was advised to have the wine picked up by the customer. No enforcement action was taken.

A second inspection of the establishment was made on October 8, 2008 with Liquor Inspector B. The manager and two persons appearing to be employees were on site. The inspectors entered the establishment at approximately 9:40 AM, leaving at approximately 1:35 PM. During the course of the inspection a series of photographs were taken of the establishment (exhibit 1, tab 10, pages 1 – 61). Records, as well as a number of bottles believed to contain finished wine and a number of glass carboys believed to contain wine in process were seized during the inspection. An exhibit receipt was completed on site and a copy provided to the manager (exhibit 1, tab 4, pages 1 – 5).

The inspector testified that the establishment has a front reception area and a back production area. The production area is typical for a UBrew/UVin establishment with full and empty glass carboys and empty bottles (photo pp 4, 46 & 47). There were also several boxes containing 59 full bottles with various wine labels containing what he believed to be finished wine (photos pp 5 – 10). The manager told him that the bottles were returned product from customers, which was spoiled and awaiting removal.

A further seven cases were located stacked on a cart. They contained 82 full bottles labelled "California Red" and contained what he believed to be finished wine (photos pp 13, 23 – 25, 27 & 28). The manager told him that the bottles contained returned product awaiting disposal. The inspector asked the manager whether there was any more finished product on site and was told that there was not.

Further inspection revealed several boxes located on curtained shelves under the sink area (photo p 45). They contained 206 full bottles with various wine labels and

contained what he believed to be finished wine (photos pp 11, 12, 14, 22, 26, 29 - 44). The manager told him that the product belonged to him and was being stored at the establishment because he had recently moved his residence and need more storage space.

The inspectors turned their attention to the carboys sitting on the floor and on storage racks. The carboys contained either amber or red liquid. He believed that they contained wine in process, the contents looked and smelled like wine. Some carboys were unlabeled, others labelled (photos 48 – 58). Some had labels with white adhesive tape marked “sweet” (photos pp 15 – 21). The manager told him that the six carboys unlabelled or with white adhesive marked with “sweet” or the name of a fruit, for example, “peach” or “pear” belonged to him.

The inspector testified that each carboy is required to be labelled with the name of the customer making the product and the date on which the yeast was added. This applies to product being made by the licensee and employees as well. Customers are required to fill out a declaration that they have purchased the ingredients and started the fermentation and the product is not for resale or to be used at a liquor licensed event (photo p 59). Only six signed declarations were located at the establishment.

Following the inspection a decision was made that all product not meeting the regulatory requirements would be seized and removed from the establishment. Because of the quantity of product seized they requested assistance and were assisted by two branch employees. The manager was advised why the liquor was being removed and that if he wished to make a claim to the products being seized he must make a written application to the general manager of the branch within 30 days. The manager said, “They’re all doing it.” Asked, “All doing what”, the manager didn’t respond. A letter dated November 7, 2008 was subsequently received from the manager (exhibit 1, tab 12). As the inspector was leaving the manager gave him the name and telephone number of a woman who he said was at the establishment that day for the purpose of removing finished product. The inspector did not speak to her.

The inspector referred to copies of documents from the Branch file:

- Exhibit 1, tab 3; the UBrew/UVin license in effect at the time of the alleged contravention.
- Exhibit 1, tab 7; excerpts from a copy of the “Guide” forming terms and conditions of the license in effect at the time of the alleged contravention.
- Exhibit 1, tab 8; inspector’s notes made following the inspection.
- Exhibit 2; Contravention notice forwarded to licensee, subsequently withdrawn.
- Exhibit 1, tab 2; Contravention notice forwarded to licensee leading to enforcement proceedings.
- Exhibit 1, tab 6; Inspection/Interview sheet completed December 28, 2007 signed by the licensee and the manager that they understand and will follow the requirements for operating the establishment.
- Exhibit 1, tab 5; Invoice books from the establishment containing names of customers but not containing phone numbers in most instances as required.
- Exhibit 1, tab 1; Notice of Enforcement Action dated 2008 forwarded to the licensee outlining the alleged contraventions and recommended penalties.

The inspector testified that he believed that a penalty was necessary for each contravention. For failing to label wine in process in the carboys belonging to the manager as belonging to an employee, he recommended the minimum monetary penalty of \$1,000.00. For the contravention of carboys not containing any information about the owner of the wine in process and it being impossible to determine to whom it belonged, he recommended the minimum monetary penalty of \$1,000.00. A significant quantity of finished bottled wine was found on site contrary to the regulations. The licensee had been previously warned about this, so he recommended the maximum three day suspension for a first contravention.

On cross-examination the inspector testified that only that product found in circumstances that contravened the regulatory requirements was seized. Product contained in properly labelled or tagged carboys was not seized. He testified that none

of the product seized was subject to any testing to determine whether it was “spoiled”. The “Guide” required a licensee to destroy unsatisfactory product. A licensee could retain one bottle from the product batch to provide to a supplier’s representative. None of the product seized has been returned to the licensee pending the results of the hearing.

Liquor Inspector B testified that he was requested to assist inspector A conduct an inspection of the licensed UBrew/UVin on October 8, 2008. He arrived at the establishment at approximately 9:45 AM, departing approximately 1:30 PM. The establishment is typical for its type with a retail area in the front and a production area in the rear. Entering the production area the inspectors discovered three lots of cases of what appeared to be finished bottled wine and liqueurs. They also discovered several carboys containing product that were not properly labelled or tagged. The inspectors made a determination to seize the bottled and carboy products that did not appear to meet the regulatory requirements. He contacted the branch regional manager for assistance in removing the seized items. Inspector A completed the exhibit receipt forms.

He testified that in the circumstances of this inspection with much bottled product on site and unlabelled or improperly tagged carboys for which they were unable to determine the owner of the contents or its origins, the inspectors couldn’t differentiate between product manufactured by the licensee and product produced by customers as required by a properly operating UBrew/UVin.

EVIDENCE - THE LICENSEE

Licensee witness C testified that she is a customer and business associate of the manager of the establishment. She arrived at the establishment on October 8th as the inspectors were carrying out their inspection. After waiting approximately 40 minutes she felt uncomfortable with the situation and left. She recalls that the inspectors had called for a pick-up vehicle and it arrived shortly thereafter as she was leaving.

She testified that her purpose in going to the establishment on that occasion was to pick up some wine for the manager in her truck for transportation to his residence. It was cases of wine that either belonged to the manager or was spoiled wine that had been returned to the establishment by customers. She had stored the wine for him earlier in the month in a shed at her residence. The wine had been at his house prior to this however there had been a water problem necessitating it being moved. It was moved to a shed at her property and had to be moved out when she was renovating the shed. She had taken it back to his house but it could not be stored there at that time so it was taken to the establishment for storage until it could be moved to his house. She had come to the establishment that day with her truck for that purpose.

Licensee witness D testified that he manages the establishment on behalf of his mother who is the licensee. He is the only employee but is assisted sometimes by his wife and sister. The establishment does not have its own written policies and procedures but follows the branch guidelines. At the time of the inspectors' visit he, the manager, was in the process of trying to implement a new software system that would keep track of wine during the production process. It was a challenge to input all of the necessary data to make the system functional and consequently the store was in disarray. This resulted in some of the carboy tags not being completed as they were to be entered into the software system. This was explained to the inspectors however they wouldn't allow him to link the customer information to the individual carboys. The carboys bearing tags marked "sweet", "peach" and "pear" did not belong to customers but were his property. They did not bear a start date because there was no individual start for each. They were made from the residual wine in process that was left over from the primary fermentation stage. There would normally be some wine left over in the primary fermentation container after the customer's carboy was filled. Rather than throw this residual amount out he gathered it together in carboys and used it to make wine coolers for himself. A couple of the carboys not tagged contained completed wine which had been returned by customers and which he was trying to repair.

The wine in carboys with the white adhesive tag marked "Gala" contained a white Shiraz style wine. They were made for a business group gala of which Water 2 Wine was a member and a sponsor of the gala. It was to be bottled and a bottle given to each guest attending the gala.

He testified that the wine located under the counter was his wine that had been stored at his residence and had to be relocated following an emergency at his residence. There was no other place to store it. It was stored behind curtains so as not to be visible to customers.

He testified that when the inspector had visited in July he had shown the bottled wine to the inspector and had explained to him that the customer had just bottled it however the labels were not yet available so it had been left to be labelled. On October 8th the inspector did not ask whether there was any more bottled wine until he had finished gathering all of it together. He told him there was not, they had it all. He did not attempt to mislead him and was forthright on each occasion.

He testified that the wine in bottles labelled "California Red" were customer returns. He had stored it hoping that it would improve, it didn't and he was waiting for it to be picked up by the representative for the wine kit supplier. He had replaced the wine for customers and it now belonged to him. If the supplier representative would not replace it he would retain it himself.

The wine in bottles labelled "Rosso Perfetto" was a customer return that continued to carbonate after it had been bottled. It had been returned to the carboy, restabilized and rebottled just the night before the inspectors' visit.

He testified that he was holding the unsatisfactory wine until the supplier's representative made a trip to the island. He had tried shipping wine in bottles via parcel courier however the bottles ending up breaking in transit and the supplier representative told him to retain the wine until such time as he could attend at the premises. He

testified that approximately 30 batches of unsatisfactory wine had been returned from customers. It represented a considerable expense if they were not able to obtain reimbursement from the representative. The wine was bought back from customers and Water 2 Wine would be out of pocket if he couldn't return it to the supplier.

SUBMISSIONS – LICENSEE

The licensee representative submitted that the notes of liquor inspector A indicated that on the morning of October 8, 2008 he first went to the location of another UBrew/UVin establishment found that they were not open so left and drove to Water 2 Wine. They likewise were not open but he called for the assistance of inspector B and waited until the manager arrived then the two inspectors entered the premises. Both inspectors testified that they called for assistance removing the products seized. Normally it would take approximately 45 minutes for someone to drive from Victoria but in this instance a truck arrived to pickup the product in a much shorter length of time. Only inspector A identified himself, the others did not do so. He submitted that this did not appear to be a routine inspection. He submitted that none of the product was tested by the branch to determine if the explanation given was valid. If tested it would have been found that the product returned from customers was spoiled. The inspector was provided with the name of one of the customers but did not contact the customer. Licensee witness C was present during the course of the inspection, the inspector could have asked her what her purpose was in being there or could have contacted her later. He did not do so because he was not interested in determining what was going on.

He submitted that the carboys containing the manager's product was marked differently than those of customers in that they were tagged with the flavour of the contents rather than have customer's information.

He submitted that there was no customer's product being stored on site. The contraventions were neither malicious nor intended.

REASONS AND DECISION

The evidence is that on October 8, 2008 two liquor inspectors carried out an inspection of the UBrew/UVin licensed establishment Water 2 Wine. The establishment is licensed to provide goods, facilities or services to persons producing or manufacturing beer, cider or wine in the establishment for their own consumption or consumption at no charge to others. There is no evidence that the inspection was not carried out within the authority of the liquor inspectors or that it was carried out in an unreasonable manner.

During the course of their inspection the inspectors located a quantity of what appeared to be wine, either in the production process and contained in carboys or finished and contained in bottles, that did not meet the regulatory requirements. While no tests were made to determine that the contents of the carboys or bottles were in fact wine, inspector A testified that all appeared to be wine. The bottles bore wine labels. The contents of the carboys looked and smelled like wine. At the hearing the representative for the licensee did not contest that the products in question contained in the carboys or in bottles were wine and frequently referred to each as wine. On the whole of the evidence I find on a balance of probabilities that the contents of the subject carboys and bottles were wine.

UBrew/UVin licensed establishments are subject to the regulatory scheme found at Division 5 of the *Regulations* to the *Liquor Control and Licensing Act*. They are also subject to the terms and conditions found the branch publication titled as, "A guide for liquor licensees in British Columbia" which essentially fleshes out the regulatory scheme.

Alleged Contravention #1

Regulation Section 24(1)(a)

24 A licensee or any of his or her employees may produce or manufacture beer, wine or cider in the U-Brew or U-Vin for their own off-site consumption or for off-site consumption by others at no charge, but the beer, wine or cider
(a) must be labelled as belonging to the licensee or employee,

The evidence is that the inspectors located a large quantity of wine in bottles and in carboys, which was determined to be produced by the manager of the establishment, an employee of the licensee. The bottles and carboys were not labelled as belonging to the licensee or employee. I find on a balance of probabilities that this is a contravention of Section 24(1)(a) of the Regulations.

Alleged Contravention #2

Regulation Section 25(1)

25 (1) A licensee must ensure that each carboy containing a customer's ingredients has a tag setting out the customer's name and the date any enzymes or yeast were added.

The evidence is that the inspectors located a number of carboys in the establishment that bore no tags or the tags did not include a customer's name or date. I find on a balance of probabilities that this is a contravention of Section 25(1) of the Regulations.

Alleged Contravention #3

Regulation Section 28(1)

28 (1) A licensee must ensure that the customer removes his or her beer, wine or cider from the U-Brew or U-Vin immediately after bottling and must not allow the customer to store, for any purpose, the beer, wine or cider that has already been bottled at the U-Brew or U-Vin.

The evidence is that the inspectors located a large quantity of wine in bottles in the establishment belonging to and stored for customers awaiting the representative of the

wine kit supplier. I find on a balance of probabilities that this is a contravention of Section 28(1) of the Regulations.

Due Diligence

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. Here there is no evidence of what role the licensee plays, if any, in the operation of the establishment. The operation is under the day to day control of the manager who is the directing mind of the licensee at the time of the contravention.

Here, there is little evidence on which to find that the licensee has been duly diligent. Prior to obtaining the license both the licensee and the manager attended a branch presentation on December 28, 2007, less than one year prior to the date of the contraventions. The presentation provided information concerning the operation of the licensed establishment, including the Act and Regulations and the terms and conditions found in the "Guide". A copy of the "Guide" was provided to them for future reference. The manager testified that the establishment has not developed its own policies and procedures but follows the branch guidelines.

The manager testified that the operation of the establishment was in disarray at the time of the inspection as they were implementing a new software system. I find that that does not excuse the licensee from following the requirements for labelling carboys containing wine being produced at the establishment.

The manager testified that wine belonging to himself as an employee and some of the wine being held for the supplier's representative had been moved offsite but had to be returned to the establishment because of storage problems at his residence and that of

a friend. It was to be removed later that day. I find that that does not excuse the licensee from seeking alternative storage areas that do not offend the Regulations.

The manager testified that the bottled wine belonging to customers was spoiled or unsatisfactory wine that was being held until it could be examined by the supplier's representative. If the representative did not reimburse the amount for the wine kit he would allow the customer to make another batch at the licensee's expense but he would take property of the wine. This is contrary to the provisions in the "Guide" for "unsatisfactory" wine. A licensee may allow the customer to make a free or discounted batch provided the licensee destroys the unsatisfactory product. The regulatory scheme and the terms and conditions of the license do not contemplate the licensee or its employees taking ownership of wine unsatisfactory to a customer. The liquor inspector testified that in the circumstances of a customer returning unsatisfactory wine it would be acceptable for the licensee to retain one bottle of the wine to be given to the supplier's representative while destroying the remainder.

In summary I find that the licensee has not been duly diligent.

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 license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

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 *Regulations*. 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 NOEA.

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 are, 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 previous proven contravention of the same type for this licensee within the year preceding this incident. Pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, Section 1(1)(b), the branch has treated the allegations as first contraventions. The range for a first contravention of these types is a license suspension for 1 - 3 days and/or a monetary penalty of \$1000 to \$3000, (Schedule 4, item 42).

The branch's primary goal in bringing enforcement action is to achieve voluntary compliance.

In the circumstances of this case I am satisfied that a penalty is necessary to ensure future compliance. The actions taken by the manager which lead to the contraventions were in each instance based upon what worked best for him. He did not consider whether what he was doing met the regulatory requirements or the terms and conditions of the license.

Any penalty imposed must be sufficient to ensure compliance in the future.

Alleged Contravention #1

Regulation Section 24(1)(a)

In the circumstances I find that the minimum monetary penalty is necessary to encourage future voluntary compliance. A \$1,000.00 monetary penalty is appropriate and reasonable.

Alleged Contravention #2

Regulation Section 25(1)

In the circumstances I find that the minimum monetary penalty is necessary to encourage future voluntary compliance. A \$1,000.00 monetary penalty is appropriate and reasonable.

Alleged Contravention #3

Regulation Section 28(1)

In the circumstances I find that the minimum suspension penalty is necessary to encourage future voluntary compliance. A one day suspension penalty is appropriate and reasonable.

ORDER

Pursuant to Section 20 (2) of the *Act*, I order the payment of a two thousand dollar (\$2000) monetary penalty by the licensee to the general manager on or before Thursday, April 30, 2009.

Pursuant to Section 20(2) of the *Act*, I order a suspension of UBrew/UVin Licence No. 300654 for a period of one (1) day, to commence as of the close of business on Tuesday, April 28, 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*).

During the license suspension, you may allow existing customers to bottle their product if required to maintain product quality, however you must not let anyone start a new batch. You may also oversee the fermentation, filtration, racking and aging of the product to get it ready for bottling.

At the end of the suspension, if requested you must deliver all of your sales records and receipts for the time of the suspension to your liquor inspector.

To ensure this Order is effective, I direct that the liquor license be held by the branch or the RCMP Detachment from the close of business on Tuesday, April 28, 2009 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: March 18, 2009

cc: RCMP Westshore Detachment

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

Liquor Control and Licensing Branch, Victoria Office
Attn: Olubode Fagamiye, Branch Advocate