



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: 623219 B.C. Ltd. dba
Lucy Mae Brown
826 Richard Street
Vancouver BC V6B 3A7

Case: EH08-136

For the Licensee: Michael Mitton

Advocate: Peter Mior

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: April 22, 2009

Place of Hearing: Vancouver, B.C.

Date of Decision: May 12, 2009

INTRODUCTION

The Licensee operates a food primary establishment in Vancouver. The hours of operation indicated on Food Primary Licence #212905 are noon to 2:00 am, seven days per week.

The licence is, as are all food primary liquor licences issued in the province, subject to the terms and conditions contained in the publication *Food Primary Licence Terms and Conditions: Guide for Liquor Licensees in British Columbia* (Guide).

This licence has a lounge endorsement for the lower floor of the establishment, and an occupant load and person capacity of 60 persons on the lower floor, 48 persons on the main floor, and 49 persons on the patio.

ALLEGED CONTRAVENTIONS

The Branch made allegations and recommended enforcement action as set out in the Notice of Enforcement Action (NOEA) dated January 8, 2009. The Branch alleges that on October 25, 2008, the Licensee contravened s. 20 of the *Liquor Control and Licensing Act* R.S.B.C. 1996, c. 267 (Act) and s. 11 of the *Liquor Control and Licensing Regulation*, B.C. Regulation 244/2002 (*Regulation*) by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence. In addition, the Branch alleges that on the same date the Licensee contravened s. 6(4) of the *Regulation* by permitting more persons in the licensed establishment than the person capacity set by the general manager and the number of persons was more than the occupant load.

The proposed penalties are a ten day suspension for the contravention of s.20 of the *Act* and s.11 of the *Regulation* and a seven day suspension for the contravention of s. 6(4) of the *Regulation*.

RELEVANT STATUTORY PROVISIONS

See Appendix "A"

ISSUES

At the time of the inspection, was the establishment being operated contrary to its primary purpose in contravention of s. 20 of the Act and s.11 of the Regulation?

At the time of the inspection, was the establishment overcrowded beyond person capacity greater than occupant load?

If either or both these contraventions is found to have occurred, are penalties warranted, and if so, what are the appropriate penalties?

EXHIBITS

- Exhibit #1 is the Branch's Book of Documents. (Branch)

EVIDENCE

The Branch:

Two liquor inspectors testified. Together they identified the contents of exhibit #1. They each said that they are experienced liquor inspectors, had been in the establishment before October 25, 2008 and were familiar with the premises.

They testified that they were in each other's company and together inspected the establishment on the night and at the relevant time. Their inspection was an overt one brought on further to a request by the Vancouver Police Department (VPD). They indicated that the VPD was "cracking down" on illegal activities in the entertainment district and downtown Vancouver.

Inspector #1 further testified as follows:

She and Inspector #2 entered the premises at approximately 11:30 pm on October 25, 2008. There was no door staff at the entranceway. There were people smoking outside of the front door. She walked through the top floor of the establishment and noted no food service whatsoever. She saw persons drinking what appeared to be liquor, and bar staff waiting on people. She observed no food on the tables, no patrons eating, no cutlery or eating utensils, no dirty dishes or plates, but plenty of glasses of what appeared to be liquor. She and the other inspector walked through the establishment to the stairs to the lower level. There she was confronted by very loud music, dim lighting, and a large crowd that she knew from experience with the establishment to be well over the licensed capacity. She said that the patrons were crammed in "like sardines" and recounted that one of the patrons pushed her aside to get to the bar to order shooters. The Inspector testified that she found at least one patron to be aggressive. She said that she was worried for the safety of the other inspector and instructed her to leave the lower level and retreat to the upper one and find the manager.

Upstairs, Inspector #2 went to look for the manager while Inspector #1 went to the kitchen. Inspector #1 noted that there were no employees in the kitchen. No food was being prepared, no dishes, clean or dirty, were to be seen, and there was no food in sight. She later learned that the two kitchen employees on duty were the two individuals that she had seen outside the front door smoking cigarettes.

She expressed the view that the environment inside the establishment was dangerous and would lead to disaster if there were an emergency, if someone needed medical attention, or if there was a fire.

Inspector #2 further testified as follows:

She attended at the establishment with Inspector #1 on October 25, 2008, at approximately 11:38 pm. The inspectors noted people smoking outside the front door, entered without being approached by any door staff, and walked through the main (upper) floor. She observed no food or food service, and no indication of food having been consumed, although she looked for these things. She followed Inspector #1 to the stairs to the lounge area in the lower level and descended into what she described as a noisy bar environment that was very crowded, with loud music that made conversation difficult. She thinks that Inspector #1 was concerned for her safety. She pushed her way through many of the people, and then on her toes, proceeded to count persons in the room. She arrived at a count of at least 90 persons with the use of a mechanical counter.

She went upstairs as requested by Inspector #1, and went to speak to the manager. She advised the manager of the patron and person capacities and occupant loads, and that the establishment was beyond all of the limits. She told the manager that she saw no food on the tables or being served in the establishment. She then went to the kitchen where she noted there was no staff working and there was no food being prepared. She also said she could not smell any food odours while in the kitchen.

She was advised by the manager that the kitchen was empty because the kitchen staff members were outside having a smoke.

Inspector #2 testified as to the occupant load, and the person capacities for the various areas of the establishment, and referenced the appropriate tabs of exhibit #1.

The Licensee:

The Licensee called an employee who was on duty on October 25, 2008. The employee said the establishment was not overcrowded on that occasion. When the inspectors were there, he told one of them that there was indeed a table at which there was some food, though he did not point that table out to them. He also testified that there was an employee at the top of the stairs counting how many patrons were in the downstairs lounge and that is how he knows the establishment was not overcrowded.

The Licensee's principal shareholder and operator testified that the establishment was not overcrowded and was operating as per its licence. He said that 90 persons could not fit in the lounge, and that if it was so crowded as to make moving through the patrons difficult, dancing would be impossible. He made no specific claims as to what food if any was being served, or how many people were in the establishment, but said that in this economic and political climate it is important to "dot the i's and cross the t's" and that is what he does as a responsible license holder.

He said that people come to his establishment as a destination and stay for the evening. He denied that patrons come in just to drink, but said that after patrons eat a meal upstairs, they often go downstairs to the lounge and stay for some drinks. He said: "They eat, then they sit and they sit and drink." He said that the cooks had been busy all day and it was not fair that the inspectors came by and

in nineteen minutes decided that the establishment operated as a bar instead of a restaurant.

ANALYSIS AND DECISION

The Liquor inspectors provided clear evidence relating to both alleged contraventions. Their testimony was consistent and corroborating. Cross-examination yielded nothing to diminish their credibility.

The witnesses for the Licensee did not directly challenge the critical evidence provided by the inspectors as to the nature of the operation at the time of the inspector's visit or the number of patrons in the establishment. Rather, they provided only general testimony that the establishment operated in an acceptable manner and was not overcrowded at the relevant time.

I found the testimony of the Licensee's employee less than credible. He provided no figures to substantiate his claim that the establishment (and particularly the downstairs lounge) was not overcrowded. The employee who allegedly had a counter did not testify, nor was that employee identified by name, and I note that the inspectors made no mention of being advised that there was an employee with a counter when they spoke to the manager on the night in question, and there is no reason to doubt that the manager had that opportunity. Similarly, the Licensee's principal did not indicate that the inspectors were so advised on the relevant occasion. I give this testimony no weight.

The Licensee's principal testified that he thought it acceptable for patrons to arrive and eat upstairs and then go downstairs to sit and drink for the night. He said that many of the patrons who were in attendance when the inspectors arrived had eaten earlier. I find that this situation is not one anticipated by the food primary licence. In a restaurant, a food primary establishment, patrons may drink before, during or after their meal, but the focus must be the meal. Liquor

must be an accompaniment to a meal in a premise with such a licence. I find that the situation described by both the inspector and the Licensee's witnesses does not fit that mandate. I am not suggesting that the distinction between upstairs, and the downstairs lounge endorsement is critical to this mandate. Rather, I find that once a patron has eaten a meal and stayed a reasonable time beyond the period during which she has consumed food, further liquor cannot be said to be accompanying food. Where the line is drawn will depend on the facts in each circumstance. In this case, arriving for a dinner, and staying (whether upstairs or down) in the establishment "destination" for the whole of the night thereafter to sit and drink, does not meet with my view of the food primary mandate. It is not impossible to legally operate in this fashion, but doing so requires a liquor primary licence.

The question of primary purpose requires an evaluation of the activities being conducted at the establishment. In this instance, the absence of evidence of food service or food at a specific moment, the entire kitchen staff being absent from the kitchen, loud music, dim lighting, a doorman, a disc jockey and patrons dancing, absent a plausible explanation, is strong evidence that the focus is not on food. From the evidence, I find that an impartial observer entering the establishment would more likely think it a bar than a restaurant. The food and liquor receipts provided in the exhibits favour liquor sales over food sales, but not by so much as to make it clear that the Licensee was not operating as a food primary establishment during some portion of the day. It is critical however, that a food primary have as its focus, the service of food at all times of its operation. It is not acceptable conduct or within the terms of the license to focus on food during some hours and liquor at others. I find that the establishment was not operating pursuant to its required primary focus on the service of food at the time of the inspectors' visit.

With respect to the overcrowding issue, the Licensee's witnesses provided no specific numbers to contradict the inspectors. The only testimony to the contrary

was that 90 persons (Inspector #2's count) couldn't fit in the lounge, a claim that I find supports the inspector's observations that it was difficult to move through the people, and that if the establishment was as crowded as the inspectors testified it was, then dancing would be impossible.

I find the best evidence to be that of the liquor inspectors and I find that the establishment was overcrowded beyond the person capacity and greater than the occupant load contrary to the license and the Regulation as supported by the documents in exhibit #1. In particular, I find that the establishment had more than the person capacity of 60 persons as specified in the license and more than the occupant load as defined by the document at tab 8 of exhibit #1.

The testimony produced no evidence of due diligence on behalf of the Licensee, as the Licensee's witnesses made no claims to have acted reasonably and with awareness of their obligations to avoid or prevent the contraventions that did occur.

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 *Regulation*. 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 Guide. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

The Branch submitted that 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.

I find a penalty is warranted in order to ensure future compliance. Schedule 4, item 1 of the *Regulation* sets out penalties for a first contravention of operating contrary to primary purpose, including a license suspension of 10-15 days and/or a monetary penalty of \$7,500- \$10,000. The Branch recommended a suspension of ten days, representing the minimum suspension. The evidence suggests that the Licensee has been to a compliance meeting relating to this

type of allegation before. I find that a ten (10) day suspension for this contravention is reasonable.

For the second contravention, the Branch recommended a seven (7) day suspension, which represents the top of the range for a first contravention of this kind. I note that the Licensee has served several suspensions for overcrowding in the past, and that on this occasion the overcrowding was by a considerable margin.

Licensees that exceed their capacity by overcrowding are operating contrary to the public interest, specifically, with regard to public safety and preserving community standards. The issue of public safety is most apparent when the overcrowding exceeds the occupant load. Extricating oneself from a premise safely during a fire or other threat is difficult in an environment where liquor is served, loud music is playing, and lighting is dim. The risk of death or serious injury is greater when the establishment is overcrowded. The maximum capacity established for a liquor primary license takes into account community input during the licensing process. The maximums are set out so as to reduce the risk of negative impacts on neighbourhoods and communities. These negative impacts include late night disturbances, parking problems, and traffic flow problems. Allowing licensees to exceed their approved capacity effectively negates this community input and puts undue pressure on community resources.

I find that a penalty is warranted to help to direct the Licensee toward voluntary compliance and an understanding and application of principles of responsible behaviour.

I find that a license suspension of seven (7) days is an appropriate penalty for the second contravention, consistent with the Regulatory scheme and the facts as established in this matter.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Food Primary License No. 212905 for a total period of seventeen (17) days, to commence as of the close of business on Friday June 12, 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).

I direct that Food Primary License No. 212905 is to be held by the branch or the local Police Department from the first day of the suspension until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 12, 2009

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver office
Attn : Peter Mior, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act

[RSBC 1996] CHAPTER 267

Action against a licensee

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.

(2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,

(a) impose a monetary penalty under subsection (2) (c) that is greater than the amount provided for in the prescribed schedule of penalties, or

(b) suspend a licensee's licence under subsection (2) (d) for a period longer than that provided for in the prescribed schedule of suspensions.

(2.2) The general manager must, in taking action against a licensee under subsection (2.1), take into account

(a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), and

(b) the particular circumstances giving rise to the taking of action by the general manager.

(2.3) The general manager may not impose a monetary penalty referred to in subsection (2.1) (a) that is greater than the following amounts:

(a) \$50 000 for a contravention of section 38 (1), and

(b) \$25 000 for any other reason referred to in subsection (1) of this section for taking action against the licensee.

(2.4) If a corporation is liable to a monetary penalty imposed under this section in respect of a contravention of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(2.5) A person on whom a monetary penalty has been imposed under this section must pay the penalty whether or not the person

(a) has been convicted of an offence under this Act or the regulations, or

(b) is also liable to a fine for an offence under this Act or the regulations.

(2.6) A monetary penalty imposed under this section must be paid within 30 days after the date on which the notice referred to in subsection (4) (a) is provided to the licensee or within any longer period specified by the general manager.

(2.7) All monetary penalties received by the general manager under this section must be paid into the consolidated revenue fund.

(3) Despite subsection (2) (d), (e) and (f), the general manager must suspend, cancel or order the transfer of a licence held by a person who has been

convicted of a prescribed number of prescribed offences under the laws of Canada or British Columbia.

(4) On taking action against a licensee under subsection (2), the general manager must

(a) provide the licensee with written notice of the action in accordance with the regulations,

(b) set out in the notice the reasons for taking the action,

(c) set out in the notice the details of the action including

(i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and

(ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served, and

(d) [Repealed 2002-48-37.]

(4.1) For the purposes of any hearing referred to in subsection (2), the general manager, by summons, may require a person

(a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and

(b) to bring and produce before the general manager all documents, writings, books, deeds and papers in the person's possession, custody or power touching, or in any way relating to, the subject matter of the hearing.

(4.2) A person named in and served with a summons referred to in subsection (4.1) must attend before the general manager and answer on oath, unless the general manager directs otherwise, all questions touching the subject matter of

the hearing, and produce all documents, writings, books, deeds and papers in accordance with the summons.

(4.3) When the general manager exercises a power under subsection (4.1), a person who fails or refuses to comply with subsection (4.2) is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(5) [Repealed 1999-36-14.]

Liquor Control and Licensing Regulation

[includes amendments up to B.C. Reg. 213/2007, June 21, 2007]

Definitions

1 (1) In this regulation:

...

"**occupant load**" means the least number of persons allowed in an establishment under

- (a) the Provincial building regulations,
- (b) the *Fire Services Act* and British Columbia Fire Code Regulation, and
- (c) any other safety requirements enacted, made or established by the local government or first nation for the area in which the establishment is located;

Capacity

6 (1) Before the general manager

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,

- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

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.