



**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: Vancouvercruises.com Charters Ltd.,
dba M.V. Queen of Diamonds
PO Box 2277
349 West Georgia Street
Vancouver, BC V6B 5E7

Case: EH09-139

For the Licensee: Russell Bennett

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Place of Hearing: Written Submissions

Date of Decision: March 29, 2010

INTRODUCTION

M.V. Queen of Diamonds is a motor vessel with a listed address at Dock B, Plaza of Nations Marina, 750 Pacific Boulevard in Vancouver, B.C. This establishment conducts sales and service of alcohol under Food Primary Liquor Licence No. 302456, held by Vancouvercruises.com Charters Ltd. Hours of sale indicated on the Liquor Licence are 11:00 a.m. to midnight, seven days per week with a licensed capacity of 400 persons.

ALLEGED CONTRAVENTIONS and PROPOSED PENALTIES

The branch alleges that that on November 7, 2009, the licensee contravened the following sections of the *Liquor Control and Licensing Act* and/or the *Liquor Control and Licensing Regulation* and proposes the following penalties:

1. Section 20(1)(d) of the *Act*, and section 11(1) of the *Regulation* by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence. The branch proposes a \$7,500 monetary penalty in accordance with item one of Schedule 4 of the *Regulation*.
2. Section 43(1) of the *Act* by selling or giving liquor to an intoxicated person. The branch proposes a \$5,000 monetary penalty in accordance with item nine of Schedule 4 of the *Regulation*. In the alternative, that the licensee contravened section 43(2)(b) of the *Act* by permitting an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied, also with a proposed penalty of \$5000 in accordance with item 11 of Schedule 4 of the *Regulation*.
3. Section 36(2)(b) of the *Act* by permitting unlawful activity or conduct. The branch proposes a \$7,500 monetary penalty in accordance with item eight of Schedule 4 of the *Regulation*.

4. Section 42(4) of the *Regulation* by allowing liquor to be taken from the licensed establishment. The branch proposes a \$1,000 monetary penalty in accordance with item 29 of Schedule 4 of the *Regulation*. In the alternative, section 12 of the *Act* by permitting liquor to be removed from the redline area. The branch proposes a \$1,000 monetary penalty in accordance with item 46 of Schedule 4 of the *Regulation*.

In email correspondence dated March 3, 2010 (Exhibit #1) the licensee admits that the contraventions took place, but disputes the proposed penalties. The branch and the licensee agreed that the hearing would take place by way of written submissions.

ISSUES

1. Did the contraventions occur?
2. If so, are penalties warranted under the circumstances?
3. If penalties are warranted, what are the appropriate penalties?

EXHIBITS

The following documents were submitted for consideration:

1. A series of printed emails, marked as Exhibit #1.
2. The branch's package of disclosure to the licensee dated February 12, 2010, marked as Exhibit #2.
3. The licensee's submission dated February 22, 2010, marked as Exhibit #3.

EVIDENCE AND SUBMISSIONS

As the licensee does not dispute that the contraventions occurred and provides no evidence contrary to that provided by the branch with respect to the mechanisms of the contraventions, I conclude that the contraventions occurred as alleged by the branch. In view of this, the evidence can be summarized as set out below.

The Branch's Evidence and Submissions are summarized as follows:

- 1. Contrary to primary purpose*

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 noise, intoxication and other behavior contrary to community standards and the public interest. This contravention reflects a shift in the primary focus of a food-primary establishment from the service of food to the service of liquor.

On the night in question, this premise was operating with a primary focus on liquor service. This was evident prior to the event itself, as the event was advertised as "Booze Cruise 2009" and "A wild harbour party cruise" more than a month prior to the event. Measures such as the inspection of bags and jackets, prohibition of minors and checking of guests' identification and the provision of loud dance music on all floors of the vessel, indicated from the outset of the event a clear intent to operate in a manner similar to a bar or cabaret instead of a restaurant.

Restaurants offer liquor service as an accompaniment to food rather than as the primary activity. A contravention occurs if the primary focus of a food primary establishment shifts from the service of food to the service of liquor. Despite the evidence that minimal food service was available, a significant majority of purchases made on the vessel on the night in question consisted of alcoholic beverages. Little food was visible on tables. A small buffet menu was available at a price in addition to the cover charge, but most patrons were engaged in socializing while standing and moving about the premises. While food was available on one deck (despite three licensed food primary decks remaining in operation throughout the evening) most patrons were dancing to loud music and holding or drinking alcoholic beverages rather than sitting at tables. Receipts from the night demonstrate that the percentage of liquor sales was approximately 90% of total sales for the evening with food making up only 8% of the gross sales (the remaining sales were attributed to non-alcoholic beverages).

2. Sell or give liquor to intoxicated persons

Persons showing signs of intoxication need to be prohibited from continued access to alcohol. It is for this reason that there is a responsibility on the part of the licensee to ensure that intoxicated persons are refused liquor service in order to ensure patron safety and public safety. Any intoxicated patrons already consuming liquor must be barred from further consumption and removed from the licensed area. Given that this was a motor vessel underway, extra vigilance was required to ensure that patron intoxication was prevented and measures were required to provide for removal of intoxicated patrons. None of these measures were observed by the inspection team.

The issue of service to intoxicated patrons is a serious contravention which can constitute a significant risk to public safety. Intoxicated patrons can jeopardize their own personal safety in addition to the safety of other patrons, staff and property. Allowing patrons continued exposure to alcohol consumption once intoxicated can lead to significant health problems including alcohol poisoning and unconsciousness. These risks were amplified given that this motor vessel was underway and timely access to

emergency medical services or police was limited. Significant police and community resources were devoted to managing intoxicated patrons following the event. The licensee could have prevented this through voluntary compliance with the branch regulations and policies.

The signs of gross intoxication displayed by numerous patrons in question were significant and very clearly visible by the inspection team and should have been visible to the licensee's staff. Despite these outward signs of intoxication, patrons were permitted to continue purchasing and consuming alcohol in large quantities. Trained and experienced security staff from liquor primary establishments were contracted to provide supervision for this event. The staff members interacted with the patrons for a protracted period, however, there is no evidence that steps were taken to remove the variety of bottled beers, wine bottles or mixed drinks from patrons who were clearly over-served, or to refuse service from these patrons when they continued to order liquor.

3. Permit unlawful activities or conduct

Illegal activities in licensed establishments, such as using drugs, present a serious safety concern for staff patrons and the surrounding community. These types of activities may impact a licensee's ability to manage and control the establishment. Patrons under the influence of illicit drugs can pose a significant threat to safety of other patrons, staff property and themselves. The risk is heightened when combined with the effects of alcohol consumption.

In this instance, two security staff members contracted by the licensee were located approximately 15 feet away from a group of patrons smoking marijuana. Despite a strong odour of marijuana that was noticeable from the opposite end of the deck, the staff took no action. Later in the evening a single patron was observed by the inspection team smoking marijuana in a service area. Despite several staff passing by a noticeable odour of marijuana present, staff took no action.

4. *Allow liquor to be removed from establishment*

Removing liquor from licensed establishments, or from the redlined area of licensed establishments, is a concern affecting public safety and community standards. Allowing patrons to remove liquor beyond the control of the licensee creates a situation where intoxicated or impaired patrons are consuming alcohol without adequate monitoring or supervision. Further, it creates the potential for increased disturbances to the community and damage to persons and property. This presents a public safety risk to the patron and others.

Several patrons were observed to be moving about the motor Vessel without regard to approved areas of liquor consumption. Patrons carried and consumed liquor while climbing steep metal stairs and while on small narrow service decks not approved for liquor consumption. Several of these areas were wet and slippery. Patrons carried liquor to the bow of the vessel where marine service equipment was located, creating safety issues for those patrons and occupants of the vessel. Numerous beer and wine bottles were observed being thrown overboard from decks and areas not approved for the carrying or consumption of liquor by patrons, creating additional hazards.

Although several security staff members contracted to this vessel were placed in positions throughout the vessel on all three passenger decks, at no time did any inspection team member observe any attempt to prevent patrons from carrying liquor outside of the approved service areas.

The branch submits that each of the monetary penalties recommended is the minimum penalty for a first contravention and should cause the licensee to ensure future compliance with the *Act* and *Regulation* in the future.

The Licensee's Evidence and Submissions are summarized as follows:

The licensee writes, "The liquor inspector allowed these infractions to happen when he knew or should have known it would happen... In doing so, he put the public and crew at risk." The licensee further submits that the inspector should have alerted the licensee to the details of the advertising campaign that he observed, and that would have allowed the licensee to modify its business model and comply with the *Act* and *Regulation*. By failing to notify the licensee, the inspector entrapped the licensee and put the public at risk.

The licensee chartered the vessel to a client in anticipation of the client holding a dinner cruise. The licensee did not know that the client changed the focus of the cruise.

The licensee asserts it was "wronged" by the branch and accordingly no penalty should be imposed.

The licensee submits that it recognises that because the establishment is a motor vessel on the water, a passenger cannot be ejected. That is the reason for the extra precautions (such as searching and breathalysing patrons on entry, and interviewing the client before a cruise) which are over and above what are normally required for a food primary establishment.

ANALYSIS AND DECISION

The contraventions have not been contested. The branch's disclosure documents clearly describe detailed and unambiguous facts that lead to the conclusion that the licensee did operate contrary to its primary purpose, did over-serve multiple patrons, and did permit multiple occurrences of illegal activity during the "Booze Cruise" of November 7, 2009. The documents, however, do not disclose that liquor was removed from the licensed establishment. Although not contested by the licensee, the facts do not disclose any incident of liquor being removed from the vessel. I find that the vessel

is the licensed establishment. In the same way as a more traditional land-based licensed establishment has redlined areas from which liquor (by the terms and conditions of the food primary liquor licence) must not be removed, so does the vessel. The facts disclose that liquor was removed from the redlined areas of the licensed establishment, and accordingly I find the alternatively pleaded contravention of contravening the terms and conditions of the licence by allowing liquor to be removed from the redlined areas did occur. I find that each of the first three contraventions described above and the alternative to the fourth contravention did occur as alleged.

DUE DILIGENCE

The licensee is entitled to a defense to the allegations of the contraventions if it can be shown that it was duly diligent in taking reasonable steps to prevent 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.

In this case, the evidence suggests that the principle of the licensee and its controlling mind had previous experience with this particular charter client and had no previous problems. He “had no idea they had changed the focus of this cruise.” The licensee is not entitled to rely on past experience with a charter client for his due diligence in the place of scrutiny and control of the circumstances that will exist in the licensed establishment. The cruise was advertised in a fashion that should have brought the issue of primary purpose to the forefront of the licensee’s attention. The licensee had an obligation to monitor or supervise the promotional advertising relating to the establishment and so doing would have brought the focus of the cruise to its attention. Also, the evidence establishes that multiple staff members took no action to prevent the other contraventions, notwithstanding the presence of those staff members and the obvious commission of the contraventions. There was no evidence before me of policy, procedures, direction or training that the licensee provided to its employees to guide them in performing their duties that evening. In conclusion, I find that the licensee was not 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 the 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 to follow the minimums set out in Schedule 4 of the *Regulations*.

For operating contrary to primary purpose (s. 20 *Act*, s.11 *Regulation*), the branch recommends a monetary penalty of \$7,500. The range of penalty for a first contravention of these provisions in accordance with Schedule 4 of the *Regulation* is ten (10) to fifteen (15) days suspension and/or a monetary penalty of \$7,500-\$10,000.

For selling or giving liquor to intoxicated persons (s. 43(1) *Act*) the branch recommends a monetary penalty of \$5,000. The range of penalty for a first contravention of these provisions in accordance with Schedule 4 of the *Regulation* is four (4) to seven (7) days suspension and/or a monetary penalty of \$5,000-\$7,000.

For permitting an unlawful activity or conduct (s. 36(2)(b) *Act*) the branch recommends a monetary penalty of \$7,500. The range of penalty for a first contravention of these provisions in accordance with Schedule 4 of the *Regulation* is ten (10) to fifteen (15) days suspension and/or a monetary penalty of \$7,500-\$10,000.

For allowing liquor to be removed from the redlined areas (s. 12 *Act*) the branch recommends a monetary penalty of \$1,000. The range of penalty for a first contravention of these provisions in accordance with Schedule 4 of the *Regulation* is one (1) to three (3) days suspension and/or a monetary penalty of \$1,000-\$3,000.

The branch proposed the minimum monetary penalties for first contraventions of these types. The *Regulation* directs a range of penalties for first contraventions. The fact that these are first contraventions and the licensee has no previous compliance history, is only one consideration in determining whether penalties are warranted.

The licensee has provided submissions that indicate that it has no remorse for having allowed the contraventions to occur. Indeed the licensee's submissions are predominantly in the nature of a redirection of blame to the liquor inspector and the branch for having put the public in danger by not more actively controlling the conduct of the licensee. The *Act* and *Regulation* firmly place the obligation for controlling the activities that occur in a licensed establishment on the shoulders of the licensee. The licensee is responsible for ensuring compliance with the *Act* and *Regulation*. The documentary evidence provides absolutely no support for the proposition that there is culpability on the part of any party other than the licensee. The evidence is of an organized event that did not comply with the permitted activities allowed by the liquor licence. There was considerable staff available and the evidence indicates that the staff passively failed to act to prevent non-compliance.

I am of the view that the combination of multiple contraventions involving multiple patrons, along with the licensee's lack of remorse and deflection of blame for that evening's events, make penalties appropriate and indeed warrant more than minimum penalties. Penalties are designed to be reinforcement of the principle for the need for licensees to comply with the *Act* and *Regulation*. They are designed to ensure future voluntary compliance. In this instance, I find the licensee's deflection of responsibility suggests the need for increased penalties in order for the licensee to become accountable for compliance with the rules of operating a licensed establishment.

I accept the branch submissions with respect to the importance of compliance to public safety in each of the contraventions.

I find the following monetary penalties to be appropriate:

1. For operating contrary to primary purpose (s. 20 *Act*, s. 11 *Regulation*), a monetary penalty of \$10,000.
2. For selling or giving liquor to intoxicated persons (s. 43(1) *Act*), a monetary penalty of \$7,000.
3. For permitting an unlawful activity or conduct (s. 36(2)(b) *Act*), a monetary penalty of \$10,000.
4. For permitting liquor to be removed from the redlined area (s. 12 *Act*), a monetary penalty of \$3,000.

ORDER

Pursuant to section 20(2) of the *Act*, I order the licensee to pay a monetary penalty of Thirty Thousand Dollars (\$30,000) relating to Food Primary Licence No. 302456 in respect of Enforcement Action EH09-139. The monetary penalty must be paid no later than the close of business on April 29, 2010.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: March 29, 2010

cc: Vancouver Police Department

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

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