

### **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 RSBC c. 267

Licensee:	Oscar Vision Productions Inc. dba West Beach Bar and Grill 1101 Elm Street White Rock, BC
Case:	EH10-054
For the Licensee:	Randy Ledgerwood Roxana Mirhashemi
For the Branch:	Bode Fagbamiye
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	November 16 and 17, 2010
Place of Hearing:	Vancouver, B.C.
Date of Decision:	December 6, 2010

## **INTRODUCTION**

The licensee holds Food Primary Liquor licence 303045 under which it operates the West Beach Bar and Grill located in White Rock on the beach strip. The licence indicates that liquor may be sold from 9:00 a.m. to midnight, seven days per week. The food primary licence specifies a patron capacity of 58, with an additional 12 patrons permitted in an area designated by a lounge endorsement and an additional 25 patrons permitted in a patio area. The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Food Primary Terms and Conditions, A Guide for Liquor Licensees in British Columbia* (the Guide).

Appearing for the corporate licensee were Randy Ledgerwood and Roxana Mirhashemi the two primary shareholders and operating executives of the company.

## THE ALLEGED CONTRAVENTIONS

The branch's allegations and proposed penalty are set out in a Notice of Enforcement Action (NOEA) EH10-054, dated May 25, 2010.

The branch alleges that on April 16, 2010, at approximately 9:00 p.m. the licensee contravened section 20 of the *Liquor Control and Licensing Act* (the *Act*) and section 11 of the *Liquor Control and Licensing Regulation* (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 fifteen (15) day suspension of the liquor licence in accordance with item 1 of Schedule 4, of the *Regulation*, as well as a change in the terms and conditions of the licence: the branch proposes to remove the patron non-participation entertainment endorsement.

The branch alleges that on April 16, 2010 at approximately 10:00 p.m. the licensee contravened section 42(3) of the *Regulation* when an employee consumed liquor while working. The branch proposes a three (3) day suspension of the liquor licence in accordance with item 27 of Schedule 4 of the *Regulation*.

The branch alleges that on April 16, 2010 at approximately 9:00 p.m. the licensee contravened section 12 of the *Act* and the terms and conditions of its licence by allowing patrons to remove liquor from the redlined area. The branch proposes a three (3) day suspension in accordance with item 46 of Schedule 4 of the *Regulation*.

The branch alleges that on April 16, 2010 at approximately 9:00 p.m. the licensee contravened section 12 of the *Act* and the terms and conditions of its licence by allowing patron participation contrary the patron non-participation entertainment endorsement on the licence. The branch proposes a three-day suspension in accordance with item 46 of Schedule 4 of the *Regulation*.

## **RELEVANT STATUTORY PROVISIONS**

## Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

#### Licences

- 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).
  - (3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
    - (a) limit the type of liquor to be offered for sale,
    - (b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,
    - (c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,
    - (d) designate the areas within an establishment where minors are permitted.

- (e) approve, prohibit or restrict games and entertainment in an establishment,
- (f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
- (g) vary seating requirements in the dining area of an establishment,
- (h) vary requirements with respect to the location of an establishment,
- (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
- (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
- (k) specify requirements for reporting and record keeping, and
- (I) control signs used in or for an establishment.

## 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:

# Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

[includes amendments up to B.C. Reg. 43/2010, April 1, 2010]

# **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.

#### Consumption of liquor in licensed establishments

42 (3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

## **ISSUES**

- 1. Did the licensee contravene the Act and Regulation as alleged?
- 2. If any of the contraventions occurred, is a penalty required for those contraventions under the circumstances of this case, and if so, what penalty is appropriate?

## **EXHIBITS**:

**Exhibit No. 1:** The Branch's Book of Documents, tabs 1-16 (Branch).

**Exhibit No. 2:** DVD of photographs copied from the internet (Branch).

**Exhibit No. 3:** Photocopy of the bill alleged to be the inspectors' (Licensee).

**Exhibit No. 4:** Sample food coupon for free meal (Licensee).

**Exhibit No. 5:** Recalculation of the food to liquor ratio exclusive of lounge area (Licensee).

**Exhibit No. 6:** Open tabs for two individuals who paid outstanding accounts on April 16

and 17, 2010.

## EVIDENCE AND DISCUSSION

The branch called three inspectors. Inspectors 1 and 2 attended together in a covert capacity. They arrived at the establishment at approximately 8:00p.m. on April 16, 2010. They sat at a table from which they were able to see most of the establishment but for the kitchen and part of the patio area (the location of which they identified on the floor plan at exhibit #1, tab 4). They made individual observations as they consumed food and liquor over a period of approximately two hours. They left the establishment at approximately 10:00 p.m. and each made notes of their observations in the remaining hours of that night.

The licensee provided a copy of an invoice that the licensee identified as relating to the inspectors' consumption (Exhibit No. 3). Inspector 1 testified that it might have been their bill because it correctly identified the food they ordered, but she was uncertain if the beer order accurately identified their order. Inspector 2 was adamant that the beer portion of the invoice did not accurately reflect what they ordered. The inspectors each testified that they did not

consume all of the liquor they ordered and that in order to maintain a covert status it is necessary to order food and liquor commensurate with the environment. One of the inspectors testified that neither of them were intoxicated or had their judgement or powers of observation compromised to any significant extent by alcohol consumption. There was no evidence to the contrary. I find the inspectors were not intoxicated and therefore any evidence of alcohol consumption by the inspectors is not relevant to their observations or evidence they provided relating to the alleged contraventions.

The inspectors each identified copies of their notes in Exhibit No.1 (tab 9b and 9c).

Inspector 3 was the lead for the covert operation and the inspector responsible for the licensed establishment and the file relating to the allegations. This inspector arrived at the licensed establishment at approximately 9:45 pm on April 16, 2010. He identified himself as the licensee's inspector and was seated. Inspector 3 testified that he had a good view of most of the establishment from his seat which he located on the floor-plan at Exhibit No.1, tab 4. He requested an audience with the licensee and had a short discussion with Randy Ledgerwood at his table. He made observations over a period of approximately fifteen minutes and departed at approximately 10:00 p.m. Inspector 3 identified each of the documents tabbed in Exhibit No.1 including the author and relevance of each one.

The two licensees, Randy Ledgerwood and Roxana Mirhashemi each testified and in addition called the assistant manager of the establishment, a patron who is also a regular performer at the establishment, and one of the establishment's full time servers. Both of the licensees and all of the witnesses they called were present in the establishment between 8:00 p.m. and 10:00 p.m. on April 16, 2010. The assistant manager and the server were both on shift at the relevant time. Each of these witnesses provided evidence of their observations relating to that night and of their knowledge and experience with respect to the establishment's policies, procedures and employee training. They also each testified as to the physical circumstances that existed on April 16, 2010, including whether an external gate between the patio and the establishment as well as a large overhead door between the main area and the patio were open.

## **Operating Contrary to the Primary Purpose**

Section 11(1) of the *Regulation* sets out the criteria that the general manager may consider when determining if the primary business carried on at the establishment is the service of food. *The Publik Restaurant PG Ltd. v. The General Manager of the Liquor Control and Licensing Branch*, 2009 BCSC 249 and its antecedent, enforcement hearing decision EH07-011 (LCLB February 22, 2008) are the cases commonly cited as the authority for taking a holistic approach to this determination. In essence, the test is whether after taking into account all of the circumstances of the operation, the establishment functions more like a restaurant or a bar. It is significant that a food primary establishment must focus on the service of food with liquor available as an accompaniment at all times of its operation. In order to assist in making that determination, reference may be had to the above noted regulatory criteria.

## Food to liquor ratio

The food/liquor ratio is commonly utilized by the branch to establish *prima facie* whether an establishment is operating more like a restaurant or a bar. The *Guide* indicates that in most cases a food primary establishment should sell more food than liquor. Hence a comparison of the revenues obtained for food and liquor represents a good starting point for any investigation.

In this case, the branch presents a calculated food to liquor ratio (Exhibit No. 1, tab 11a and 11b) which indicates that the food to liquor ratio for the whole of April 16, 2010 is 41% to 58% and for the period 6:00 p.m. to midnight April 16, 2010 the ratio is 33% to 66%. The ratio is based on the sales figures that the licensee provided to the branch. The branch argues that these figures demonstrate a pattern of operation that is clearly not focused primarily on food and cannot be interpreted functionally as a scenario where liquor is served as an accompaniment to food.

The licensee argues that although the sales figures used for the branch's calculations are correct, they do not accurately paint a picture of the circumstances in the establishment. In support of that position, the licensee testifies that promotional coupons for free meals are distributed locally in a discount coupon book widely available to patrons. A coupon so used is presented as Exhibit No. 4. Both of the licensees, the assistant manager and the server say that the coupons are routinely accepted by the establishment and in each case meals are provided free of charge. The witnesses indicate that when coupons are used, the transaction is identified in the receipt by a \$0.00 or \$0.95 price entry and/or a note indicating "free drink." The free drink entry is used as a tracking device because it is an available input key due to the fact that there are no free drinks served at any time. The licensee recalculates the ratios using the same sales data provided to the branch but inserting the menu prices for meals purchased with the promotional coupons. The results are food to liquor ratios of 46% to 54% (rounded) for the whole of April 16, 2010, and 45% to 55% (rounded) for the hours 6:00 p.m. to midnight April 16, 2010.

Randy Ledgerwood testified that its recalculated ratios do not take into account appropriate adjustments for two invoices that represent payment of outstanding bar tabs for drinks consumed prior to April 16, 2010 but paid for on April 16, 2010. The invoices are marked as Exhibit No. 6. I note that one of the invoices was paid twenty-six minutes past midnight (and therefore on April 17, 2010) and does not appear to be included in the sales data used by the branch in its calculations. The assistant manager also testified as to personal knowledge of the settlement of those two accounts. I accept the evidence of the licensee and the assistant manager that the invoice for \$119.14 of Exhibit No. 6 represents settlement of an outstanding account. This invoice was processed at 6:09 p.m. on April 16, 2010 and accordingly was used in both the total ratio for the day and the evening calculations. As approximately \$100 of that account is for liquor, and the total liquor sales for the full day and evening are \$1772 and \$434 respectively, that invoice is mathematically significant.

Randy Ledgerwood also testified that the establishment has a lounge endorsement, in which a maximum of 12 patrons at any time of the day may drink liquor without the necessity of ordering food. In this area, patrons may drink liquor in any amount otherwise allowed under the terms of the licence and the establishment is not required to focus primarily on food. The establishment does not separate sales data relating to liquor sales in the lounge area from sales data for the rest of the establishment. Therefore the liquor to food ratios are further distorted by the inclusion of sales from an area for which the ratio is not applicable.

In many cases the food to liquor ratio is a valuable tool for identifying the potential issue of whether an establishment is operating contrary to its primary purpose and a critical tool for assessing the *de facto* operation of an establishment. In this case, however, I find the ratio is subject to too many variables to provide any utility. The food to liquor ratio is an incomplete indicator of primary purpose. The relative cost of food items and liquor items can in some circumstances significantly distort the ratio. If food, for example is particularly inexpensive due to promotional activities or a licensee's interest in keeping its patrons seated and eating, the ratio based on revenues will not be an accurate reflection of whether liquor is effectively an accompaniment to food.

Furnishings, lighting, door staff, cover charge, kitchen equipment and hours of operation, menu

These are matters often cited in order to help establish whether a licensed establishment is operating in accordance with its primary focus. There was no contradictory evidence with respect to any of these matters. By all accounts, the furnishings and lighting of the West Beach Bar and Grill are consistent with the operation of a restaurant providing a casual dining atmosphere. There were no staff members at the door monitoring the ingress and egress of patrons and no cover charge applied to entry. The kitchen was indicated to be a full service facility with all requisite equipment in place and operational and there was no indication or argument that the kitchen closed before the establishment closed. A copy of the food menu was presented (Exhibit No. 1, tab 13 (h)) and it appears comprehensive, with a large selection of meals and appetisers consistent with a restaurant. The branch did not represent that the

licensee's available food selection was lacking. With respect to these matters I find the establishment operates as a food primary establishment.

#### Noise level

The liquor inspectors testified that at times the establishment was quiet as is usually appropriate in restaurants, and at times, the live music produced sound levels not usually associated with a typical restaurant environment. The evidence indicated that when the band was playing the sound level was higher than would usually be encountered in a typical restaurant. The licensees, the assistant manager, the patron, and the server, all testified that the White Rock strip is a destination known for live music and a variety of restaurants and bars that promote live music. These witnesses indicated that the typical patrons in restaurants in this neighbourhood are local residents who come to experience entertainment while they eat. Many restaurants on the strip feature live music.

I have no doubt that the sound levels in casual dining establishments featuring live music can be significantly higher than would normally be associated with a typical restaurant without entertainment or in a more formal dining venue. I am mindful that the branch issued the licensee with a food primary licence including both a lounge endorsement and an entertainment endorsement. The branch has full knowledge of the layout of the establishment and has approved it. While I do accept that at times the level of sound produced by the live entertainment would exceed that usually encountered in a food primary establishment without entertainment, there is no evidence before me that indicates noise levels beyond what must surely have been considered and expected to exist under the current licensed situation. I find the level of noise to be consistent with the licensee's primary purpose.

# Patron participation

The presence of patron participation entertainment has historically provided some indication that a food primary establishment was operating more like a bar or nightclub than a restaurant. In this case there is a distinct allegation that a couple was dancing contrary to the patron non-

participation entertainment endorsement. For the purposes of the allegation of operating contrary to primary purpose, I note the patron non-participation endorsement on the licence and the absence of either a dance floor or a suitably sized open area that would permit or promote dancing. Further, Randy Ledgerwood, Roxana Mirhashemi, the assistant manager, the patron, and the server, testified that patrons rarely attempt to dance and that there is no practical room to dance (though it is not impossible), and that whenever a patron starts to dance he is immediately told to stop and advised that dancing is not permitted by the terms of the liquor licence.

Inspectors 1 and 2 observed a couple slow-dancing in a space described as "tight between two tables." There is evidence that those two patrons were advised to stop dancing and did so. There were no allegations of patrons singing or otherwise participating in the entertainment other than passively listening.

I find that there was no patron participation occurring at the relevant time such as would indicate that the establishment was operating outside of its primary purpose.

#### Types and hours of entertainment offered

The patron testified that on April 16, 2010, the West Beach Bar and Grill had live music consisting of a band of four members: two guitars, a mandolin and a bass guitar. They played folk and bluegrass music. The patron said that the band was a regular performer at the establishment and that they also play regularly at other restaurants on the White Rock strip. The patron further testified that he is a musician who performs regularly at the West Beach and that his music is not unlike the music of the band that performed on April 16, 2010.

Once again, I note that the branch licensed the establishment and granted it a patron non-participation endorsement. There is no evidence before me that the band was of a type other than that anticipated by the branch. No hours of entertainment were provided during the hearing and no argument was made that the hours that the band plays are in any way inappropriate. When determining whether an establishment is operating contrary to its primary

purpose, one must keep in mind the context of the operation in terms of its location, surrounding environment, and the nature of the primary purpose that could reasonably be anticipated by its licence and history. With a view to these matters, the establishment's involvement in the White Rock strip, its casual dining business model, and the entertainment and lounge endorsements on its licence, I find this criterion does not contribute to a finding that the licensee is operating contrary to its primary purpose.

#### Other relevant considerations

This is the provision that authorizes the general manager to consider site-specific qualities of the operation of an establishment when evaluating whether a licensee is operating a food primary establishment in accordance with its primary purpose being the focus on food at all hours of business. As there is not a single restaurant or bar model that would apply to all food primary or liquor primary establishments there must be a continuum of sort. Every establishment will be located somewhere on that continuum and the applicable question of primary focus will be determined based on the facts of each case. In my view the evidence presented at this hearing points to two issues in this regard. On one hand, there is considerable evidence that the location and nature of this business (White Rock strip, live entertainment, lounge endorsement, casual dining business model) inherently places it toward the liquor primary end of the range of acceptable operations. On the other hand there is considerable evidence that puts the West Beach Bar and Grill outside of the acceptable range of operations for a food primary establishment. That evidence is of the dearth of meals evident during a two-hour inspection.

Inspector 1 observed that in the first fifteen minutes of her arrival at 8:00 p.m., there was virtually no food service evident while two servers delivered a constant flow of liquor to patrons. She did not note any odour of food. Over two hours she observed the service of a plate of fish and chips, a quesadilla, a toasted sandwich plate, and two plates of finger-food. During that time she attested to the presence of approximately twenty-five patrons in the establishment at any time. She only observed cutlery or napkins when plates of food were delivered to patrons. There were no place settings provided where patrons were only drinking liquor. She said that liquor service continued throughout her visit, with most patrons drinking what appeared to be

beer or highball drinks. Although she and inspector 2 were not directed to a table when they arrived, they were presented with menus when they sat down. The inspectors ordered food and drinks and were provided with cutlery and napkins when the food was delivered.

Inspector 2 testified that when he arrived with inspector 1 he noted two parties of four patrons seated at booths in the establishment. He said that one of the parties included a young child and on the table were crumpled up napkins and evidence that the party had recently finished a meal. The second party of four was finishing what appeared to be four meals. There were no other meals in evidence at the time. The inspector estimated that there were 40-45 patrons present including those on the patio. He related the same five dishes of food that the first inspector described. He clarified that the two plates of finger food were french fries, and salsa with chips. Inspector 2 noted that the lounge had "perhaps 14 people in it" when he arrived and the lounge remained full for the duration of his stay. He said that most everybody in the whole of the establishment was drinking and the two servers were hustling to keep up with the drink orders.

Inspector 3 testified that he arrived about 9:30 p.m. and was not greeted at the door nor seated at a table by staff. He sat himself and immediately a server arrived. He identified himself as a liquor inspector to the server and asked to see the owner or manager. He said that he was present for only fifteen minutes and in that time he observed only one plate of food: a plate of nachos. He said there were plenty of glasses and bottles of beer on the tables in front of seated patrons. He saw no place settings except with the plate of nachos. The servers were busy delivering liquor and collecting empties. The inspector counted 38 persons (including staff) in the main area of the restaurant and four patrons on the patio.

The evidence of the licensee's witnesses with respect to this consideration does not contradict the volume of food, or lack thereof described by the inspectors between 8:00 p.m. and 10:00 p.m. on April 16, 2010. The assistant manager and the server did testify to a policy of providing cutlery, napkins, and place settings, to patrons only when food is delivered due to the propensity of patrons in the West Beach moving from table to table throughout the night. The assistant manager and the server also testified that menus are always presented as

patrons seat themselves. The server said that the third liquor inspector was not presented with a menu because the inspector identified himself immediately and asked for the owner. The server concluded that the inspector would not be ordering anything as he was there on business and that the licensee would take care of the inspector.

I find there was a notable absence of food during the covert inspection. At the same time, the evidence that liquor was served in abundance is uncontroverted. Taken alone, this finding might lead one to conclude that the licensed establishment was operating contrary to its primary purpose during those hours. The licence requires that the focus be on food with liquor provided as an adjunct at all hours of operation. If the *Publik Restaurant*, *infra*, stands for the proposition that compliance with a single criterion listed in section 11(1) of the *Regulation* cannot relieve an establishment from an allegation of operating contrary to its primary purpose, then noncompliance with a single criterion may likewise be insufficient to establish the contravention. Section 11(1) of the *Regulation* is permissive in that it lists criteria that the general manager may consider when determining if a licensee is operating in compliance with its licence. It was not necessary to the operation of the section for the regulation to set out a list of applicable criteria. The list then must be informative, and as such designed for the guidance of the licensee. I conclude that notwithstanding the reasonable appearance that at the stated hours the West Beach Bar and Grill was operating more like a liquor primary establishment than a food primary establishment with a primary focus on the service of food at the relevant time, reference must be had to the other listed criteria in s. 11(1) of the *Regulation* and a holistic evaluation undertaken.

The establishment demonstrated a lack of food service and a considerable liquor service between 8:00 p.m. and 10:00 p.m. on April 16, 2010. However, the establishment satisfied all of the other available significant considerations identified in s.11(1) of the *Regulation*, which is to say in all other respects the licensee was operating the establishment consistent with its licence and according to its primary purpose. I find that taken as a whole, the evidence indicates that the establishment was not operating contrary to its primary purpose. The elements of the contravention have not been established.

## **Employee Consuming**

Section 42(3) of the *Regulation* stipulates that a licensee and its employees may not consume liquor when working in the establishment. The branch alleges that two such contraventions occurred during the inspection on April 16, 2010.

#### Band member

The branch alleges that a musician and member of the band, part of the entertainment that evening, was observed drinking beer during a break between performances. The branch position is that as part of the licensee's entertainment, the band member is technically one of the licensee's employees and accordingly it is a contravention for that employee to be consuming while working or on breaks between shifts (Guide, p.23).

Inspector 1 said that she saw a band member drinking from a Sleeman's beer bottle while on stage between sets and she also saw the same individual continue to drink from that bottle while mingling with patrons in the general seating area. Inspector 2 testified that he saw a band member drinking beer while talking to patrons during a break in the music. The band member was between tables in the main seating area of the restaurant at the time. Inspector 3 testified that he saw a band member drinking while on a break. He did not indicate where the band member was at the time.

The licensees both testified that the *stage* on which the band performed is not elevated and is in fact not a stage at all, but a very small floor area from where musicians perform. Ms. Mirhashemi pointed out the location of the *stage* on the floor plan at Exhibit 1, tab 4, and described the areas as approximately five feet wide by five feet deep. I note the stage is not identified on the floor plan. Mr. Ledgerwood demonstrated the width and depth of the entertainment area by simply stretching out his arms to delineate the dimensions. The licensees argued that once away from his equipment (chair and microphone) the band member was no longer able to be physically on the stage, as the stage was completely filled with the band's equipment and seats. I find the testimony of the licensees compelling with

respect to the stage. There was no specific evidence from any witness contradicting the licensee's description of the stage. I conclude that if the entertainer was standing with a beer in hand, despite being near his equipment, he was not on stage. I find the evidence of a band member drinking beer while with patrons in the seating area in between musical sets to be consistent and uncontroverted.

I note that the Guide in effect at the time of the contravention (Tab 6) indicates at page 23: "Entertainers may not consume liquor during a performance or while on stage in view of patrons." The Guide was amended in July 2010 (after the allegation) to clarify the issue of prohibition between performances. It now reads, "Entertainers may not consume liquor during a performance, while on stage in view of patrons, or between performances." At the time of the contravention the Guide did not make specific reference to periods between performances. However, at the time of the contravention, the Guide did prohibit drinking between sets for exotic dancers. I find that in light of the (old) Guide's specific stipulation prohibiting the consumption of liquor for exotic dancers in a parallel situation, the language of the Guide in place at the time of the alleged contravention did not prohibit an entertainer from consuming liquor between musical sets while not on the performing stage.

The rules of statutory interpretation instruct that specific references are to be preferred to general references with respect to identification or definition in a statute or regulation. Accordingly, while a band member may be the licensee's employee for general purposes, he is more specifically captured by the description "entertainer," and therefore the language of the regulation or Guide relating to entertainers prevails. I find that with respect to the band member, this alleged contravention did not occur.

#### Licensee Randy Ledgerwood

Inspector 1, testified that before attending at the establishment on April 16, 2010, she met with the other inspectors involved in this inspection and was briefed about the establishment, its licence, and its owners (licensees). She was provided with a photograph of Mr. Ledgerwood. She testified that shortly after being seated in the establishment she identified Mr. Ledgerwood

behind the bar. She said he was working as a bartender and spent the whole of the two hours that she was in attendance pouring beer and working behind the bar but for a short time during which he appeared to be tending to patrons on the patio, and when he was with the inspector 3. Inspector 1 said: "After [inspector 3] left, I observed the owner pick up a Granville Island pint glass and saw him pour beer from the tap and fill his glass and continue to consume it behind the bar". I note that inspector 3 testified that he left at approximately 10:00 pm. Inspector 1 testified that she was certain the individual behind the bar was Mr. Ledgerwood. She also identified the same licensee at the hearing.

Inspector 2 said that immediately upon entering the establishment he noticed Randy Ledgerwood working behind the bar. He testified that Mr. Ledgerwood remained behind the bar pouring drinks for servers to deliver to patrons and serving patrons throughout most of the duration of the covert inspection. Inspector 2 testified that he did not see the licensee consume anything while behind the bar. He noted that inspector 1 did not advise him that she saw the licensee drinking. He said that he and inspector 1 were monitoring many activities so he is not surprised that they did not discuss this matter. He added that he had his back to the bar and could only see the bar when he turned around or moved his chair as he did occasionally throughout the inspection, while inspector 1 had a good view of the bar during their entire stay in the establishment.

The patron testified as follows: "I saw Randy Ledgerwood in there. I saw him working – well I saw him behind the bar-- I don't know if he was working. I believe he probably consumed behind the bar."

Mr. Ledgerwood said: "I did not pour myself a drink and drink it behind the bar." He said that after inspector 3 left, he was upset and went back to talk to Roxana Mirhashemi. He added that he poured a drink and had it while seated at a table in the main patron area of the restaurant.

I accept the evidence of inspectors 1 and 2 as credible and consistent with several pieces of evidence provided by other witnesses, including notably the testimony of the patron. Inspector 1 testified that she could see Randy Ledgerwood behind the bar for most of her stay. She said

Mr. Ledgerwood was with inspector 3 and then afterward he went back to the bar and poured himself a drink and consumed it behind the bar. The patron called by the licensee, testified that he saw Randy Ledgerwood behind the bar and that he believed Mr. Ledgerwood consumed liquor behind the bar. Randy Ledgerwood said that he was upset after inspector 3 left and went back to talk to Roxana Mirhashemi. She testified earlier that she spent much of her time that night in or near the kitchen. The floor plan of the establishment shows the bar on the way back toward the kitchen. Inspector 2 said Mr. Ledgerwood spent much of his time behind the bar but testified that he did not see Mr. Ledgerwood drink liquor behind the bar. This is consistent with inspector 2's demonstrated seating position that did not allow a continuous view of the bar. All of the testimony, but for Randy Ledgerwood's statement that he drank a beer at a table in the main area of the restaurant, is consistent with the testimony of inspector 1. Most of Mr. Ledgerwood's testimony is also consistent with that view, including that he "went back" after inspector 3 left, and that he poured himself a beer. It is noteworthy that inspector 1's notes include the time of day relative to the departure of inspector 3, and details about the glass into which she saw the licensee pour the beer from a beer tap. I find this detailed evidence to add credibility to inspector 1's testimony and note that Mr. Ledgerwood did not dispute inspector 1's evidence of the type of glass or type of beer that she saw him consume. Although all of the witnesses saw Mr. Ledgerwood behind the bar, none of the witnesses recalled seeing him at a table at any time that evening. I find that Randy Ledgerwood was working behind the bar and did pour a glass of beer behind the bar and consume it while working.

## Contravene a Term and Condition - Liquor Removed from Redlined Area

The terms and conditions of the licence stipulate that the licensee must not allow liquor to be removed from the licensed establishment. The branch alleges that two separate incidents of patrons removing liquor from a redlined area occurred during the inspection. Each of the incidents involves liquor allegedly being carried across a small area outside of the redlined area between the front door of the main restaurant area and the patio. In the photos at Exhibit No. 1, tab 6, the area can be seen between a black expanding gate and the front door. All witnesses agree that this small area outside the establishment between the patio and the front door of the establishment is not part of the redlined area. Once one enters the main entrance of the

establishment the patio may be accessed through one of two opening overhead doors. If they are closed, the only route between the main dining area and the patio is through the area outside of the redlined area. Neither the liquor inspectors nor the licensees testified as to whether the overhead doors were open or closed. The licensee's assistant manager testified that the overhead doors were both closed on April 16, 2010. The licensee's server said that he recalls closing one of the overhead doors at the end of the night and that he is sure one door was open between 6:00 pm and midnight.

In the photographs identified above, the black expanding gate is in the closed position, blocking transit between the patio and the front entrance of the establishment through the unlicensed area. Inspector 1 testified that the gate shown in the photos was not present when she was there. Inspector 2 said that he did not notice the presence of a gate in that position. Inspector 3 testified that if the gate was present, it was in the open position because he would have noticed if the patio was closed off to the front entranceway. The assistant manager said that the gate was installed before April 2010, but that it is sometimes open and sometimes closed. He said that whenever he sees the gate in the open position he closes it to prevent patrons from passing in and out of the patio that way. Randy Ledgerwood testified that the unlicensed area in question is about three feet wide by about six feet long and it typically takes two steps to cross it. He indicated that the gate was installed after a previous allegation brought to light the problem of patrons passing through the unlicensed area between the patio and the front door. He said: "The gate does not have a lock. Patrons can open and close the gate at will. There are no signs at the entrance that indicate that liquor cannot be taken through the main entrance of the establishment." He also said that the licensee did not station staff at the entrance to the patio to prevent patrons from removing liquor from redlined area.

## Group of ten

Inspector 1 testified that shortly after she and Inspector 2 were seated, a group of approximately ten patrons left the patio and made their way across the unlicensed area and in through the main doors of the establishment. She said at least one of them carried a pint glass of beer.

On further questioning she was not sure if it was a glass or a bottle and she could not say if it was full or empty.

Inspector 2 said that he saw a group of about ten people leave the patio. He said they then disappeared from his sight and reappeared just inside the main doors of the establishment. He described the route as crossing over the unlicensed area although he could not actually see them walking outside due to the closed front door. He said several of them had beer glasses in hand. He said: "From where I am sitting I can see people on the patio, then at the entrance. I can't see them for the moment in between. It's possible that they walked in the front door and grabbed their drinks from the bar just inside the door. I just saw patio people inside with the drinks."

Although there was no further evidence specifically referring to this group of patrons, the assistant manager said that he often carries drinks over the unlicensed area for patrons who wish to move from the patio to the inside.

Inspector 1's evidence is unclear as to whether any alcohol was carried across the unlicensed area. Inspector 2's evidence left open the possibility that the liquor he saw the patrons carry was picked up inside the front door (in the redlined area). It is also consistent with the assistant manager's evidence that those in the group of ten whom inspector 2 saw inside the establishment may have been handed their liquor once in the redlined area. The evidence is inadequate to establish the elements of the contravention with respect to these patrons.

### Three women

Inspector 1 testified that she saw three women carrying drinks from the inside of the establishment, out the main entranceway, across the unlicensed area and into the patio area. She noted the time on her cell phone as 9:34 p.m. and made reference to the event and the time in her notes. This reference appears at page 2 of her notes (Exhibit No. 1, tab 9b). On questioning she could not recall what kind of liquor they had and agreed that it is possible it might have been tea or coffee rather than liquor. She had no specific recollection of these

particular details of the event at the hearing other than that she made the notes that appear in the exhibit. The notes indicate: "...three women take drinks from inside to outside and on to patio..." She stated that she wouldn't have written "drinks" if they were not liquor.

Inspector 2 said that he saw three women with wine glasses leave the establishment through the front door and appear on the other side of the unlicensed area with the drinks. He saw the women sit at a table in the patio area. He thought all three wine glasses had what appeared to be red wine in them, but he allowed that one might have been white wine.

The best interpretation of the evidence is that there was a gate between the patio and the unlicensed area outside of the main door to the establishment, but that it was open. This is consistent with the evidence of Mr. Ledgerwood and the assistant manager. If one considers that the design of the gate is such that when open (contracted) it would have a particularly small profile, this is also consistent with the evidence of all of the liquor inspectors, who did not see the gate, but cannot conclusively determine that it was not present. I accept the evidence of both liquor inspectors that three women carried liquor across the unlicensed area from the establishment on their way to the patio. The floor plan and the photographic evidence clearly demonstrate that patrons leaving through the front door cannot arrive at the patio without removing liquor from the redlined area. Inspector 2 was confident that he saw three women with what appeared to be wine in wine glasses exit through the front door and arrive at the patio. This description is consistent with his evidence of the group of ten patrons who disappeared and reappeared beyond the area obscured by the front door. Inspector 1 testified that she witnessed three women carrying liquor out the front door and onto the patio. I accept her evidence that she would not have recorded the activity and the precise time it occurred in her notes had the drinks obviously been tea or coffee. I find that these patrons did remove liquor from the redlined area.

# Contravene a Term and Condition - Patron Participation Contrary to Entertainment Endorsement

Food primary licence No. 303045 has a patron non-participation entertainment endorsement. This means that the licensee may have live music, but may not allow patrons to dance.

Inspector 1 testified that at 9:17 p.m. she observed a male and a female rise from their table and begin to dance. The inspector said the band was playing and the patrons slow danced for the duration of several musical pieces. She also said that the band announced that dancing in the restaurant was contrary to local bylaws and asked that the couple not dance. Inspector 1 added that at the end of the set, a band member visited with the patrons who had been dancing. He thanked them for enjoying his music but insisted that they refrain from dancing. Inspector 1 testified that the restaurant has no dance floor and very little room to dance, and that the couple was dancing right at their table, very near to where the inspectors were seated. She qualified that the couple was "not break-dancing, or clapping their hands, but certainly dancing."

Inspector 2 said that he saw a couple dancing near his table. He said they were slow dancing, with their arms around each other and swaying to the music. They were right beside their own table and when the male dancer noticed inspector 2 watching them, he said, "We're in love." The inspector also testified that there was little room to dance anywhere in the restaurant, there was no dance floor, and the couple was "just between tables."

## The assistant manager said:

I don't remember anyone dancing. If I saw it I would have stopped them. Between 8:00 and 9:00 I was all around. I would have been outside too. I don't know when I was outside. I heard the band announce there was no dancing allowed. I suppose they did it because someone was dancing. I didn't know.

None of the other witnesses saw anyone dancing. I accept the evidence of the two liquor inspectors who witnessed a couple dancing. I accept the evidence of the assistant manager that he heard the band announce that there was no dancing. I find the assistant manager's conclusion that the band made that announcement because someone was dancing to be reasonable. I find that a couple of patrons were dancing.

### **CONCLUSION**

I find that the licensee has not contravened section 20 of the Act and section 11 of the *Regulation* by operating the establishment contrary to the primary purpose of its licence. I find, subject to the possible defences of due diligence, that the licensee contravened s. 42(3) of the *Regulation* by consuming liquor while working, and s. 12 of the *Act* and the terms and conditions of its licence by allowing liquor to be removed from a redlined area and by permitting patron participation entertainment contrary to the endorsement on its licence.

## **Due Diligence**

The licensee is entitled to a defence to allegations of any contraventions of the *Act* or *Regulation* if the licensee can show that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. In order to show due diligence, the licensee must not only establish that it had policy and procedures in place to identify and deal with potential problems, but that it acted to ensure that those policies and procedures are consistently acted upon in order to prevent contraventions from occurring. As the elements of three different contraventions have been established, the due diligence required of the licensee must relate to the circumstances of the specific contraventions.

## **Employee Consuming**

The "employee" in this instance is one of the principles of the licensee. Randy Ledgerwood was one of the licensees in charge of management of the establishment and was working and on the premises at all relevant times. I found that he poured himself a beer and consumed it behind

the bar in plain sight of any patron who cared to look. He was the directing mind of the licensee and in control or in joint control of the management of the establishment at the time of the contravention. Mr. Ledgerwood had complete control over whether he consumed contrary to the *Regulation*, and an obligation to be aware of the requirements of the *Regulation* and of the Guide in that regard. The history of the establishment and of the licensee including a previous allegation of a contravention of the same section of the *Regulation* and at least one information session confirm the licensee's knowledge of the prohibition. In this case, no evidence of policies or procedures will satisfy the requirements of due diligence when the operating mind of the licensee is the culpable party. I find the contravention occurred as alleged.

## Contravene a Term and Condition - Liquor Removed From the Redlined Area

The terms and conditions of the licence and the Guide provide that the licensee must not allow liquor to be removed from the redlined area of the establishment. I have found that patrons carried liquor out of the establishment. The remaining issue in this regard is whether or not the licensee did all that it could reasonably do to prevent the contravention from occurring. There was a previous finding of a contravention of this resulting from patrons carrying liquor across the same unlicensed area on December 12, 2008. As a result, the licensee installed a gate to prohibit patrons crossing the unlicensed area. Clearly the licensee had full knowledge of the issue. This is confirmed in the pre-hearing record for this matter where it is indicated:

The licensee knows that [carrying drinks through the unlicensed area] is prohibited and in general they take steps to prevent it. However, in their opinion the rule about this is not reasonable as the distance is so small and there is no risk when it happens as long as no one is standing around outside on the sidewalk area.

I have found that the gate was open. This provides an easy route for patrons to take liquor out of redlined area *en route* to and from the patio. If the gate were closed patrons would likely use the overhead door to transit to and from the patio, if it were open. The evidence as to whether the overhead door was open is equivocal. A simple lock would prohibit the gate from being opened by patrons even after it had been closed. Ensuring the overhead door was open would

ensure an easy route for patrons moving between the main restaurant and patio area. The licensees, as well as the assistant manager and the server each confirmed that there are no written directives to keep the gate closed, and no testing or policy manuals attesting to the importance of keeping patrons from crossing the small non-redlined area between the main establishment area and the patio. While documentary evidence of training, policies, and procedures, is good evidence toward a possible finding of due diligence, it is not determinative. Having the documents but not implementing the systems is a failure of diligence. Similarly, not having the documents but having an oral tradition of careful training and testing supported by evidence of thorough implementation of that training could provide satisfactory evidence of due diligence. In this case, the licensee testified that he has a history of professional activities including training employees in other settings, and that he verbally trained all of the establishment's staff. Notwithstanding this general evidence, which I accept, I have very little specific evidence of the training of the staff on duty on April 16, 2010, and in particular of training as to the importance of keeping the gate closed or ensuring that no patrons cross over the unlicensed area between the patio and the main area of the establishment with liquor in hand. Again, I find it an inescapable conclusion that the simple installation of a small lock, and ensuring that the overhead door remained open would all but eliminate the problem. I find insufficient evidence of due diligence relative to this contravention to constitute a defence. The contravention has been proven as alleged.

# <u>Contravene a Term and Condition - Patron Participation Contrary to Entertainment Endorsement</u>

The licence carries a patron non-participation entertainment endorsement. The relevant aspect of that endorsement for purposes of this allegation is that dancing is prohibited by the terms of the licences. I have found that one couple was indeed dancing in the establishment at approximately 9:00 p.m. on April 16, 2010. The evidence establishes that there is no dance floor in the restaurant. There is no evidence that the licensee or its staff encourage dancing. The couple was slow dancing in the restaurant area between two tables. There is evidence from both licensees; as well as the assistant manager, the patron, and the server, that the staff is instructed to prohibit and prevent dancing if it occurs. The assistant manager provided

evidence that in the past he has thrown out a patron for dancing. There is uncontroverted evidence that a band member saw the couple dancing. Inspectors 1 and 2 witnessed the band member approach the couple between music sets. Inspector 2 heard the band member talk about dancing and did not hear the rest of the conversation. Inspector 1 heard the band member tell the couple they cannot dance, as it is a prohibited activity in the establishment. I find this did occur. Several witnesses heard the band make an announcement prohibiting dancing. I find that the announcement did occur. There is no evidence of any dancing beyond the time of the announcement (including as to the couple that had been dancing). I find that the licensee had adequately educated his staff and the entertainers as to the prohibition on dancing and that the entertainer did act on that training in such a way as to advise the couple that dancing was prohibited. The band member then followed up his direction with a public announcement during the next musical set. I find the intervention was successful. I find that the licensee was duly diligent with respect to its efforts to prevent dancing in the establishment contrary to the entertainment endorsement on the licence. I find this diligence is a complete defence to this allegation.

## **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 by the minimums set out in Schedule 4 of the *Regulations*. 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 penalties proposed in the Notices of Enforcement Action.

The terms of the licence are fixed and enforceable, and include compliance with the *Act* and *Regulation* and any terms and conditions of the licence. It is the sole responsibility of the licensee to ensure compliance with these terms while operating the establishment. While the branch wishes to have voluntary compliance, it has the mandate to assure compliance through enforcement action if required to do so.

For the purposes of this adjudication, I must consider past contraventions proven and alleged as a whole and in the context of this enforcement action. The licensee has no proven compliance history of the type found in this matter, in the 12 months prior to the date of the contraventions. The contraventions I found to have occurred on April 16, 2010 are therefore first contraventions for the purpose of assessing a penalty in accordance with the *Regulation*.

Schedule 4 of the *Regulation* provides the range of penalties for contraventions of the *Act* and *Regulation*. The penalty range for a first contravention of s. 42(3) of the *Regulation* for the Licensee or an employee consuming liquor while working is a licence suspension of one to three days and/or a monetary penalty of \$1,000-\$3,000. It is clear that the licensee has full knowledge of the prohibition of this activity. Further it was one of the licensee's principles that committed the contravention as distinct from an employee, and I find that to be egregious. I find a three (3) day suspension is warranted and appropriate.

The penalty range for a first contravention of s. 12 of the *Act* and the terms and conditions of the licence for allowing liquor to be removed from the establishment is a one to three day suspension and/or a monetary penalty of \$1,000-\$3,000. There have been several previous allegations and a finding of a previous contravention for allowing this activity. In light of the ease of reducing the likelihood of this occurring by simply locking the gate and ensuring the overhead

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Date: December 6, 2010

door was open, and in light of the licensee's clear knowledge of the potential for this problem to continue due to the layout of the establishment and in particular the patio area, I am surprised that the licensee has not done what he might have to attend to this issue. I find a three (3) day suspension to be necessary and appropriate.

## **ORDER**

Pursuant to section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 303045 for a period of six (6) days to commence at the close of business on Thursday, January 6, 2011, 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 *Regulations*). I direct that liquor licence 303045 be held by the branch or the Surrey Detachment of the RCMP from the close of business on Thursday, January 6, 2011, until the licensee has demonstrated to the branch's satisfaction that the licensed establishment has been closed for six (6) business days.

Original signed by

Sheldon M. Seigel Enforcement Hearing Adjudicator

cc: White Rock RCMP

Liquor Control and Licensing Branch, Surrey Office Attn: Michael Clark, Regional Manager

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