



**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: Bryesco Enterprises Ltd.,
dba Modern Cafe
221 Commercial Street
Nanaimo, BC V9R 5G8

Case: EH11-104

For the Licensee: Scott Cooper

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator George C.E. Fuller

Place of Hearing: Written Submissions

Date of Decision: January 16, 2012

INTRODUCTION

The Corporate Licensee, Brysco Enterprises Ltd., (the "the Licensee") owns and operates an establishment known as Modern Cafe, in Nanaimo, BC. The Licensee holds Food Primary Licence Number 300856. The authorized representative of the Licensee is Scott Cooper.

According to the terms of its licence, the Licensee may sell liquor from 9:00 am to midnight, seven days a week. The licence is, as are all liquor licences issued in the Province, subject to the terms and conditions contained in the publication, "*A Guide for Liquor Licensees in British Columbia*".

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated August 30, 2011.

The Branch alleges that on July 24, 2011, the Licensee contravened Section 12 of the *Liquor Control and Licensing Act* (the "Act") in failing to comply with the following term and condition which appears on the face of the licence: "Hostess/Server must be present on patio #2 at all times the patio is in operation." The proposed penalty is a monetary penalty of \$1,000. (Item 46, schedule 4 of the *Liquor Control and Licensing Regulation* (the "Regulation").

The Licensee does not dispute that the contravention occurred as alleged, but it does dispute the proposed penalty. It was agreed that the hearing to address what penalty, if any, is warranted would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act [RSBC 1996] chapter 267

Licenses

12(1) The General Manager, having regard for the public interest, may, on application, issue a license for the sale of liquor;

12(2) The General Manager may, in respect of any license 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 license is subject under the regulations, or
- (b) that are in addition to those referred to in paragraph (a).

ISSUES

1. Did the contravention occur?
2. Was the Licensee duly diligent?
3. If the contravention occurred and the Licensee was not duly diligent, is a penalty warranted under the circumstances?
4. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

The following documents were submitted for consideration:

- Exhibit 1: The Branch's disclosure package, Tabs 1 to 13.
- Exhibit 2: Undated letter from the Licensee to the Branch setting out its submissions.

- Exhibit 3: Letter dated November 28, 2011 from the Branch to the Licensee pointing out defects in the Licensee's initial submission and inviting further submissions.
- Exhibit 4: Email dated December 9th from the Licensee to the Branch setting out the Licensee's submissions with respect to the issue of the appropriateness of the monetary penalty proposed by the Branch.

EVIDENCE

As previously noted, the Licensee does not dispute that the contravention occurred as alleged, and, therefore, it is deemed to accept the facts put forward by the Branch with respect to the issue of whether the contravention occurred. The Licensee has, however, made submissions with respect to the appropriateness and fairness of the penalty which the Branch has recommended.

Accordingly, the evidence may be summarized as follows:

Outside of the main restaurant area of the premises, there are two patio areas. Patio #1 is immediately adjacent to the front of the restaurant and patio #2 is located approximately 12 feet from the main door of the restaurant. This latter patio does not have a clear line of site from within the restaurant. As noted, the term and condition printed on the face of the licence states, "Hostess/Server must be present on Patio #2 at all times that the Patio is in operation."

On the afternoon of Tuesday, June 28, 2011, a liquor inspector of the Branch was conducting routine inspections of bars and restaurants in downtown Nanaimo. During the inspector's thirty minute observation of patio #2, she only saw the Server on that patio for very short periods of time and, in the inspector's view, that patio was left mainly unsupervised.

The inspector returned to her office and contacted the representative of the Licensee, Scott Cooper, by telephone, and advised Mr. Cooper of her concerns with regard to the Licensee's apparent non-compliance with a term of its licence that a member of staff had to be on patio #2 at all times during its operation. The inspector stated that the only exception to this clear requirement would be when a server was absent in order to submit or pick up drink orders. The inspector went on to explain that the reason for the requirement regarding patio #2, was its relatively long distance from the restaurant and/or its site lines. At the conclusion of this discussion, it was agreed that the Licensee would come into compliance with the term and condition on its licence.

At approximately 3:45 p.m. on Wednesday, July 6, 2011, the inspector again made observations of the operations of patio #2 over a twenty minute period. At that time, the server only appeared on patio #2 in order to serve drinks, and then left patio #2 immediately to serve restaurant customers, and chat with the bar tender and patrons. No other server was observed working inside the restaurant. The inspector then spoke with the female server in the restaurant, who advised that she was the only server on duty and the next server did not begin her shift until 4:30 p.m. The server also agreed that, given the distance from the restaurant to patio #2, it was not possible for her to monitor both areas.

On Thursday, July 7, 2011, the inspector again contacted Mr. Cooper by telephone and advised him of her observations and informed him that a contravention notice would be issued relating to the lack of staff coverage on patio #2. The inspector advised, however, that enforcement action would not be taken at this time but, rather, the inspector would hold a compliance meeting in an effort to resolve the situation. Accordingly, on Tuesday, July 12, 2011, a compliance meeting was held at which time the staffing requirements regarding patio #2 were thoroughly canvassed. At the conclusion of that meeting, Mr. Cooper, voluntarily and in writing, undertook to:

- Introduce a point of sale terminal for the server on patio #2 to lessen the amount of time the server had to be absent to place orders – Mr. Cooper expected this would be in place by the end of July, 2011;
- Ensure that a server/hostess would be on patio #2 at all times the patio is in operation;
- Employ additional staff to enable him to meet the terms and conditions of his licence.

For approximately two weeks the situation appeared to improve. At approximately 10:50 p.m. on Sunday, July 24, 2011, the inspector again conducted an inspection of the establishment for approximately thirty-five minutes. During this time the inspector observed that a server was present on patio #2 only for a short period of time, to serve beers to two customers and to bring them their bill and to collect payment. During the remainder of the inspector's observations, the server was working inside the restaurant. At approximately 11:05 p.m. the inspector observed Mr. Cooper depart the restaurant but did not see him alert staff to the fact that there was no server on patio #2 nor attempt to remedy the situation himself.

At approximately 11:25 pm the inspector asked the bar tender to provide a copy of the staff schedule. That document indicated that a member of staff was scheduled to work on patio #2 only between 12:00 noon and 5:00 pm that day. It was also determined that the establishment was scheduled to close at 5:00 p.m. on that date. However, as it was very busy, a decision was made to stay open. This meant that there was no dedicated staff coverage for patio #2. The inspector questioned the bar tender about whether Mr. Cooper had made the staff aware of the term and condition of the licence with respect to patio #2. The bartender replied that he was aware, but that the restaurant had become busy and, therefore, the term and condition could not be complied with.

When the inspector departed the establishment, she noted that no member of staff took up their positions on patio #2 where the two patrons remained finishing their beers.

SUBMISSIONS OF THE BRANCH

The Branch says that in view of the fact that the Licensee has admitted to the allegations, the contravention is proven, thus leaving only the matters of the appropriateness of penalty and due diligence to be dealt with.

With regard to penalty, the Branch says that notwithstanding significant efforts made by the inspector to bring the establishment into voluntary compliance, without taking any formal punitive action, the Licensee continued to operate patio #2 without regard for the terms and conditions set out on the face of its licence. The recommended monetary penalty of \$1,000, therefore, is warranted. This penalty should sufficiently impress upon the Licensee the need to comply with any terms and conditions that the Branch considers to be required on its license and discourage similar incidents from occurring in the future.

SUBMISSIONS OF THE LICENSEE

The Licensee says that it has taken many steps before this occurrence to ensure that it was always in compliance, including staff meetings, staff training and a large increase in staff hiring, all to ensure a physical presence on the patio at all times. Accordingly, the Licensee does not believe that a \$1,000 penalty is warranted as it has never received a complaint before from the liquor authority, RCMP, or any of its commercial/residential neighbours, for operating the Modern Café in an improper manner. Accordingly, and in light of all of the above, if a \$1,000 penalty is levied, the Licensee would ask for a one day suspension that could be served in January or February of 2012.

ANALYSIS AND DECISION

The Licensee has admitted to the contravention. Having considered all of the evidence, and the submissions filed in these proceedings, I find that on July 24, 2011, the Licensee contravened Section 12 of the Act by failing to comply with a term and condition of the licence that a "Hostess/Server must be present on Patio # 2 at all times the patio is in operation."

DUE DILIGENCE

The Licensee is entitled to a defence of the allegations of the contravention, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention 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 that problems are dealt with.

Here, there is a paucity of evidence upon which I can find that the Licensee was duly diligent in this case. The Licensee did not lead convincing evidence or produce documentation that satisfies me that such procedures, policies, or staff training were in place at the time of the contravention.

Furthermore, I have reviewed and considered the Licensee's employee handbook, found at Tab 10 of Exhibit 1 in these proceedings, and have found nothing within that document which provides any guidance to staff with respect to the specific contravention committed in this case. The Licensee also makes reference to the conducting of staff meetings but, again, no details were provided regarding the substance of those gatherings. Finally, the Licensee advises that it has increased staffing levels in order to ensure the physical presence of staff on the patio at all times but, again, no details were provided in order to substantiate this claim. Accordingly, I am compelled to conclude that the Licensee's due diligence defence must fail.

PENALTY

Pursuant to Section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation and/or the terms and conditions of the licence, I 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. 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 Notice of Enforcement Action.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the Act, the Regulation, and the terms and conditions of the licence. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the Branch and/or the police, the seriousness of the contravention, the threat to public safety and the well-being of the community.

There is no compliance history found for this Licensee. I do note, however, that the Licensee in this case was afforded some leniency, when the inspector did not pursue enforcement action after the initial contravention of June 28, 2011, but, rather counselled the Licensee in an effort to bring the establishment into compliance. Furthermore, the inspector, again, did not pursue enforcement action with respect to the second contravention of July 6, 2011, but, rather chose to conduct a compliance meeting. At the conclusion of that meeting, the Licensee promised, in writing, not to commit any further contraventions with regard to patio#2, but then proceeded to do just that.

Schedule 4, item 46 of the Regulation sets out penalties for first contraventions of Section 12 (a licence suspension of one to three days and/or a monetary penalty of \$1,000 to \$3,000). In order to bring the Licensee into voluntary compliance in this case, I find that a monetary penalty of \$1,000 is appropriate.

ORDER

Pursuant to Section 20(3) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$1,000 to the General Manager of the Liquor Control and Licensing Branch on or before February 14, 2012.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: January 25, 2012

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

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