



**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: Players Chophouse Whistler Ltd.
dba Player's Chophouse
201-2075 Lake Placid Road
Whistler, BC V0N 1B0

Case: EH11-179

For the Licensee: David Branigan

For the Branch: Peter Mior

General Manager's Delegate: George C.E. Fuller

Place of Hearing: Written Submissions

Date of Decision: May 17, 2012

Liquor Control and
And Licensing Branch

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INTRODUCTION

The corporate licensee, Player's Chophouse Whistler Ltd., (the "Licensee") owns and operates an establishment known as Player's Chophouse at 201 - 2075 Lake Placid Road, Whistler, BC. The licensee holds Food Primary Licence No. 303231 (the "Licence"). The authorized representative of the Licensee is David Branigan.

According to the terms of its licence, the Licensee may sell liquor from 9 a.m. until 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, "*Guide for Liquor Licensees in British Columbia* (the "Guide").

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action (the "NOEA") dated January 25, 2012.

The Branch alleges that on December 15, 2011, the Licensee contravened Section 12 of the *Liquor Control and Licensing Act* (the "Act") and the terms and conditions of its licence when it advertised its establishment in a way that mischaracterized what the licence permitted. The proposed penalty is a one (1) day licence suspension (item 46 of Schedule 4, *Liquor Control and Licensing Regulation* (the "Regulation")). The range of penalties for a first contravention of this type is a one to three day licence suspension and/or a monetary penalty of between \$1,000 and \$3,000.

The Branch also alleges that on December 15, 2011, the Licensee contravened Section 12 of the Act and the terms and conditions of its licence when it permitted patron participation entertainment. The proposed penalty is a two (2) day licence suspension (Item 46 of the Schedule 4, of the Regulation). The range of penalties for a first contravention of this type is a one to three day licence suspension and/or a monetary penalty of between \$1,000 and \$3,000.

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;
- 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 licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).
- 12(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may
- (e) approve, prohibit or restrict games and entertainment in an establishment,

ISSUES

1. Did the contraventions occur?
2. Has the licensee successfully established a defence of due diligence?
3. If not, and the contraventions are proven, what penalties, if any, are warranted under the circumstances?

EXHIBITS

The following documents were submitted for consideration:

Exhibit No. 1: The Branch's book of documents, Tabs 1 to 12 inclusive.

Exhibit No. 2: Letter dated April 1, 2012, to the branch from David Branigan, the representative of the Licensee's establishment, setting out the Licensee's submissions.

EVIDENCE OF THE BRANCH

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

Accordingly, the evidence may be summarized as follows:

The establishments' food primary licence has a patron non-participation entertainment endorsement. At approximately 10:10 p.m. on December 15, 2011, Inspector A attended at the establishment in a covert capacity. Inspector A observed that no one approached her upon her entry and that there appeared to be a private party in progress downstairs, which included patrons participating in karaoke. At approximately 10:20 p.m., Inspector A noted that there was live music and an open mike upstairs. Tables were grouped together and the patrons were watching the performers. Furthermore, the performers invited the patrons to participate in the entertainment. In this regard, Inspector A noted a male and female participating in the entertainment on stage. Inspector A departed the premises at approximately 11:05 p.m.

Inspector B also attended the establishment at approximately 10:30 p.m. and observed a group of approximately 50 people, either standing or seated downstairs. The Licensee's manager approached Inspector B and introduced himself. The manager informed Inspector B that it was a "private party". This group was also having karaoke and Inspector B advised the manager that the karaoke performance was a contravention, and advised that she would be issuing a contravention notice.

Inspector B and the manager then went upstairs where live music was in progress. There Inspector B observed an open mike, and a host inviting people from the audience to perform, which they did. Inspector B departed the premises at approximately 11:00 p.m.

With regard to the alleged advertising contravention, in October of 2008 the food primary licence was issued to the Licensee's establishment. At that time the Licensee had applied to the Branch for a lounge endorsement. Local government approval is required prior to the issuance of a lounge endorsement and this approval had not been sought or approved. Therefore on December 15, 2011, the licensed establishment did not possess a lounge endorsement.

As set out at page 28 of the Guide, in the event that a Licensee possesses a lounge endorsement, it is permitted to describe its premises as a "lounge", "bar", "cocktail lounge", or a "cocktail bar". Conversely, a Licensee is not permitted to use any of these descriptions in the absence of a lounge endorsement. On December 15, 2011, an advertisement appeared in the publication known as Pique Newsmagazine, which indicated "Doc Branigan's Kitchen – Bar". On November 17, 2011, Inspector B spoke with the Licensee and held a compliance meeting regarding the November 10, 2011, edition of the Pique Newsmagazine which was advertising "Doc's Lounge". In addition, on September 11, 2011, the Licensee's manager had been provided with a copy of the Guide for his reference and review. In view of the fact that his past experience in the

hospitality industry had been with a variety of liquor primary establishments, Inspector B had informed him that there needed to be a focus on food, rather than on liquor.

Furthermore, lounge endorsements were discussed and those usages which are permitted were clarified. At the conclusion of that meeting, the Licensee committed to no longer making any reference to the term "lounge" in any external or in-house advertising.

SUBMISSIONS OF THE BRANCH

The Branch says that the contraventions have been proven and that the proposed penalties are appropriate in the circumstances.

With regard to the entertainment contravention, the Branch says that the Licensee is responsible for managing and controlling the behaviour of patrons and ensuring the safety of staff, patrons and the community. Entertainment is a factor that may effect the Licensee's ability to maintain effective management and control of the establishment. If the entertainment utilizes part of the licensed area, overcrowding may impact the ability of staff to observe and control patron conduct. Furthermore, entertainment in an establishment may also generate noise, nuisance and other negative impacts on nearby residents and businesses.

The General Manager of the Branch has imposed restrictions on the types of games and entertainment available in food primary establishments, in order to maintain the primary focus on the service of food. In the instant case, the Licensee was given the opportunity to voluntarily comply with the Act, however one month later, the Licensee, once again, permitted patron participation in the form of both karaoke and open mike sessions. Accordingly, the Branch submits that this current contravention as deserving of more than the minimum and has recommend a licence suspension in the mid-range of item 45, schedule 4 of the Regulation being a licence suspension of two days.

With regard to the contravention concerning advertising practices, the Branch also notes that the current contravention regarding that subject matter occurred less than one month after Inspector B held a compliance meeting to deal specifically with the entertainment and advertising issues. Furthermore, during that meeting the Licensee committed to no longer making any reference to “lounge” in its advertising. Accordingly, a minimum licence suspension of one day is appropriate in the circumstances.

SUBMISSIONS OF THE LICENSEE

The Licensee admits the contraventions as alleged but feels that a three day licence suspension and resulting closure over a weekend will cause undue hardship on its business which is trying to survive challenging economic times. The Licensee denies that it did not take the initial compliance meeting seriously and in fact it has completely changed its operation after meeting with Inspector B. Shortly after that meeting, the Licensee contacted the Pique Newsmagazine and directed them to pull any reference to “jam” or “lounge” in its advertising copy. The Licensee also says that it has lost the opportunity to bring in headline musical acts due to the uncertainty of when the suspensions will take place.

The Licensee further submits that it has done everything that Inspector B instructed the Licensee to do and although he took the meeting seriously, the manager forgot the “kitchen-bar” part of the conversation.

The Licensee submits that although there were contraventions, they were not flagrant or intentional. Nor were they in the same category as over-service, serving minors or serving after hours. In 2012 the business has been operating as a traditional restaurant, however by operating in that fashion, revenues have not met expenditures. If the business continues on that path it may very well go bankrupt. Finally, the Licensee advises that it is applying for a patron participation amendment to its licence

and generally appeals to the mercy of the Branch for lesser penalties for the contraventions committed.

ANALYSIS AND DECISION

The Licensee has admitted to the contraventions. Having considered all of the evidence, and the submissions filed in these proceedings, I find that on December 15, 2011, the Licensee contravened section 12 of the Act and the terms and conditions of its licence when it, first, advertised its establishment in a way that mischaracterized the licence permitted and, second, when it permitted patron participation entertainment.

DUE DILIGENCE

The Licensee is entitled to a defence to the contraventions, if it can be shown that it was duly diligent in taking steps to prevent the contraventions from occurring. The Licensee must not only establish the existence of 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 virtually no evidence upon which I can find that the Licensee was duly diligent. Although the Licensee says that it has made many changes to its operations since the compliance meeting and since the date of these contraventions, that can only be interpreted as being an admission that at the time of these latest contraventions, the Licensee was not operating in accordance with the Act and Regulations, and that there was more it reasonably could have done to prevent them. I have concluded, therefore, that the Licensee, in this case, is not entitled to the benefit of the defence of due diligence.

PENALTY

Pursuant to section 20(2) of the Act, having found that the Licensee has contravened the Act, the Regulation or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- take no enforcement action;
- impose a suspension of the liquor licence for a period of time;
- cancel the 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 and/or a monetary penalty is warranted, I am bound by the minimum 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 penalty proposed in the notice of enforcement action.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the Act, 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.

Item 46 of Schedule 4 of the Regulation sets out penalties for first contraventions of Section 12 of the Act; a licence suspension of one (1) to three (3) days and/or a monetary penalty of between \$1,000 and \$3,000. The Branch has recommended a total licence suspension of three days.

The most troubling aspect of these present contraventions is the fact that, despite very specific counseling given to the Licensee, regarding both the advertising and entertainment requirements, within less than a month these identical contraventions were repeated. Even though the Licensee attempted to explain this away by indicating that he was very busy during that period such an admission is a clear indication that the Licensee did not have these matters at top of mind. Accordingly, I find that a penalty is warranted in this case in order to bring this Licensee into voluntary compliance. In my view, therefore, a licence suspension totaling three days for committing these two contraventions is both reasonable and appropriate in all of the circumstances, and it is so ordered.

ORDER

Pursuant to Section 20(2) of the Act, I order a suspension of Food Primary Licence No. 303231, for a period of three (3) consecutive days, to commence at the close of business on Wednesday, June 20, 2012, and to continue each succeeding business day until the suspension is completed.

To ensure that this order is effective, I direct that the liquor licence be held either by the Branch, or the Whistler R.C.M.P. Detachment, from the close of business on Wednesday June 20 2012, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the general manager notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: May 17, 2012

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attn: Peter Mior, Branch Advocate