



**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: Brownco Holdings Ltd.
dba The Local Bar and Grill
1205 Wharf Street
Victoria, BC V8W 1T9

Case: EH12-282

For the Licensee: Greg Harney, legal counsel
Michael Boulton, articling student
Jeremy Petzing, licensee

For the Branch: Cristal Scheer and Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: November 7, 2013 & February 7, 2014

Date of Decision: May 2, 2014

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, Brownco Holdings Ltd., operates a licensed establishment under the name of The Local Bar and Grill, at 1205 Wharf Street, Victoria BC (the “establishment”) under food primary licence 302531 (the “Licence”).

Under the Licence, liquor sales are permitted from 9:00 a.m. to 12:00 a.m. from Sunday to Thursday and from 9:00 a.m. to 1:00 a.m. on Friday and Saturday.

The Licence has a lounge endorsement for 20 people. The person capacity is 198 persons, comprised of: Person01 area 40; Person02 area 58; Lounge Interior area 20; and Patio1 area 80.

The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the *Guide for Liquor Licensees in British Columbia* (the “Guide”).

The food primary terms and conditions set out in the Guide make it clear that in determining whether an establishment is operating as a restaurant or a bar, the General Manager does not have to establish the Licensee has failed to meet all of the requirements for operating as a restaurant. Failing to meet any operating requirement is sufficient for the General Manager to conclude a food primary licensee is operating the establishment as a bar, where the primary purpose is the service of liquor, as opposed to the service of food. The General Manager may also take into account any other relevant considerations on determining whether an establishment is operating as a restaurant or a bar.

Minors are allowed in restaurants, but not in bars. The approval process is also different for each type of licence. Food primary licensees are cautioned to make sure they operate their establishment as a restaurant.

The Guide also provides that as long as the business is being run properly as a restaurant, occasional service of liquor may be made at any table within the dining establishment. Additionally, the Guide provides that a restaurant lounge is a separate area within a restaurant where patrons may order a drink without the intent of ordering a meal. The hours of service of liquor in the lounge may not go beyond the hours of

liquor service in the main dining area. The kitchen and full menu must be available whenever the lounge is open.

Jeremy Petzing appeared at the hearing as the Licensee's representative.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The alleged contravention is operating contrary to the primary purpose of the food primary licence contrary to section 20 of the *Liquor Control and Licensing Act* (the "Act") and section 11 of the *Liquor Control and Licensing Regulation* (the "Regulation"). Food primary establishments must be primarily engaged in the service of food during all hours of operation. Liquor service is to be an accompaniment to service of food. A contravention occurs if the primary focus of a food primary establishment shifts from the service of food to the service of liquor.

The penalty range set by the Regulation for a first contravention is a suspension of the licence for a period of 10 to 15 days or a monetary penalty of \$7,500 to \$10,000. The Branch proposes a penalty of a 10 day suspension of the Licence to impress on the Licensee the need to adhere to the terms and conditions of the Licence. Because the suspension would only affect liquor service, it would also provide the Licensee with the opportunity to re-establish a food primary business without the distraction of liquor service.

RELEVANT STATUTORY PROVISIONS

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

- 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

- 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:
- (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;
- (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.

ISSUES

1. Did the contravention occur?
2. If so, has the Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

- Exhibit 1:** The Branch's Book of Documents
- Exhibit 2:** The Licensee's Late Night Menu
- Exhibit 3:** The Licensee's Employee Information, as of December 21, 2012

EVIDENCE – BRANCH

The Branch called two liquor inspectors, referred to here as Inspector 1 and Inspector 2, to give oral evidence. Their written notes were part of Exhibit 1.

Inspector 1

Inspector 1's testimony was that on Friday, December 21, 2012 he and Inspector 2 carried out a number of covert inspections, including an inspection of the establishment. A covert inspection is an inspection where the Inspectors do not identify themselves to the Licensee. The Inspectors were not from Victoria and the establishments to be inspected were on a list provided by Inspector 3 who is based in Victoria.

He testified that the Inspectors entered the establishment at about midnight. He said a hostess met the Inspectors at the entry and asked if they wanted to go to the bar or have a seat. They seated themselves at a table in the restaurant area. No menu was given to them.

Inspector 1 said that Server A asked the Inspectors if they would like to order a drink. She served them alcoholic beverages. Server A did not ask the Inspectors if they wanted food.

Inspector 1 testified that Inspector 2 had a conversation with Server A about getting some food and Server A said the kitchen was closed. He could not recall the exact words of that conversation. He thought Inspector 2 asked for a menu.

Inspector 1 said a stand-up, double folded Late Night Menu (Exhibit 2) was on the table, but the outside of the Menu only mentioned drinks. He said the Menu had to be completely unfolded to find any mention of food. He said the Inspectors did not open up the Late Night Menu to see the food listed inside until after the conversation with Server A about food service. They did not follow up the menu offerings with Server A because she had already said the kitchen was closed. He thought the information about food service was difficult to find on the Menu, and the Menu promoted liquor sales more than food sales.

Inspector 1 said no condiments or utensils were on the table or any of the other tables. Inspector 1's notes state that no food specials, only drink specials, were on the menu boards. No food service was evident to the Inspector from their table or when he did a "walkabout" of the establishment.

Inspector 1 said he walked through the lounge area. He thought it had about 40 people in it, both seated and standing. Inspector 1 said he did not do a formal count, but he described the lounge as crowded. He said the noise level was loud and the mood was festive. People continued to enter the lounge area until 1:00 a.m.

He said he viewed the kitchen from the doorway to the kitchen. The view was of short duration, less than five seconds. In Inspector 1's opinion, the kitchen appeared closed. The lights were on but he did not see any staff or any cooking going on. The kitchen was clean. He said there were no odours of food cooking. He did not see anyone served food while they were in the establishment.

Inspector 1 did not ask to speak with the Licensee, the Manager, or any other staff person that night. He said the Inspectors left at about 1:15 a.m.

Inspector 2

Inspector 2 testified that the Inspectors entered the establishment at about midnight on December 21, to conduct a covert inspection. He said a hostess greeted them and asked if they wanted to sit at the bar or at a table. They seated themselves at a table. His evidence was that no menu was offered to them when they were seated and no cutlery or condiments were on the table.

His evidence was that Server A asked them for their drink order, but did not ask if they wanted food. Inspector 2 said that Server A later asked them if they wanted more drinks but did not ask them if they wanted food.

Inspector 2 testified that, at about 12:20 a.m., he asked Server A about food service. He said that Server A told the Inspectors the kitchen was closed. He referred to his notes, made that night after leaving the establishment. In his notes he recorded the conversation between him and the Server as follows:

Inspector 2: Where can we get something to eat around here?

Server: The Mint is open to 2.

Inspector 2: What time are you open until?

Server: Until 1

Inspector 2: Why are you closing at 1 and they stay open until 2?

Server: I don't know. It must be because of Christmas.

Inspector 2: Can I get something to eat here?

Server: No. The kitchen is closed.

Inspector: Really. What about snacks?

Server: I don't think so, but I can ask.

Inspector 2: That's okay.

Inspector 2's notes indicate he then asked for directions to the Mint, which the Server gave to him.

Inspector 2 said no condiments or utensils were on the table or any of the other tables. He did not smell any food or cooking.

Inspector 2 said when he walked through the lounge area he had difficulty doing that because, in his opinion, it was crowded. He said people were sitting and standing, taking up the whole bar area.

Inspector 2 said there were other people seated in other areas of the establishment, but he did not see any evidence of food service. He did not know if any of the other people in the establishment had ordered food earlier, but he said none were eating while he was there and there was no evidence whether they had eaten.

Inspector 2 testified that he viewed the kitchen from the doorway to the kitchen. His view was less than five seconds. He said he thought the kitchen appeared closed, because he didn't see any staff or any cooking going on, and the kitchen was clean. He also said he did not smell any odours of food cooking. Inspector 2 agreed that when viewing the kitchen he could not see if the appliances were operative.

Inspector 2 was of the opinion that the Late Night Menu focussed more on liquor than food. He said the Menu contained 10 cocktails, 15 bottled beers, 10 draught beers, 5 microbrews, 6 red wines, 2 white wines, 18 food dishes and 3 desserts.

Inspector 2 did not ask to speak with the Licensee, the Manager, or any other staff person that night.

Inspector 2 issued the Contravention Notice and the Notice of Enforcement Action (NOEA). He recommended enforcement action because liquor primary licences go through a more stringent, rigorous process of checks and balances and public consultation than food primary licences, so it was important not to let food primary licences operate as if a liquor primary licence. Inspector 2 acknowledged that a public hearing is also required to get a lounge endorsement.

Inspector 2 said the focus on the service of food was to remain at all times, so that even if a person orders food, after the person consumes their food, they can't then stay and just order liquor. He agreed that if people have dinner and a bottle of wine, after finishing their dinner and wine, they could have another drink without offending the legislation.

After December 21, Inspector 2 asked the Licensee for sales records. Based on the information provided by the Licensee, Inspector 2 calculated the food to liquor ratio referred to in the NOEA. That ratio was 36 to 64 (food sales to liquor sales). He agreed that the sales records showed most of the liquor sales came from the bar.

Inspector 2 agreed that if the kitchen had been open, the Contravention Notice would not have been issued, but said that simply having the kitchen open would not mean there was no contravention, as the primary focus must be on food service at all time the establishment is open.

Inspector 2 testified that the inspection was conducted on the suggestion of Inspector 3. He said Inspector 3 told Inspectors 1 and 2 that this establishment was operating as a bar so he (Inspector 2) had that conclusion, but no evidence.

Inspector 2 acknowledged that the Licensee had a clean compliance history regarding liquor service.

EVIDENCE – LICENSEE

The Licensee's representative, Mr. Petzing, gave evidence. The Licensee also called four employees as witnesses: the Executive Chef, the Cook, Server A, and the Floor Manager.

The Licensee's representative

The Licensee's representative testified that the Licensee knows that if the kitchen closes, then the establishment closes, because they know that an open kitchen is a requirement of the Licence.

He testified that he was at the establishment on December 21, 2012 but went home at about 10:30 p.m., so his personal knowledge of what happened that night is based on the Licensee's records and conversations with employees. Based on that information, he said the kitchen was open until 1:00 am on Saturday, December 22, 2012. The employee time sheets, included in Exhibit 3, confirm that the Cook worked from 5 p.m. to 1:30 a.m. on December 21, 2012.

His evidence was that, prior to the Contravention Notice, the Late Night Menu (Exhibit 2) was used from 10 p.m. to 1 a.m. on Fridays and Saturdays. It was left on the tables, standing up with a candle in the middle. The intent of the Late Night Menu was to have an array of items. In the opinion of the Licensee's representative, all of the "fancy snack" items listed on the Late Night Menu were meals.

The Licensee's representative said that professional designers prepared the Late Night Menu and, before using it, the Licensee's representative emailed a copy of it to Inspector 4, the person he usually dealt with at the Branch. Inspector 4 did not raise any concerns about its appearance or contents with the Licensee. The Licensee's representative thought anyone would open the Late Night Menu and see the food items listed inside. He is puzzled why the Inspectors thought the information on food items was difficult to find.

The Licensee said it no longer uses the Late Night Menu and instead now uses a larger, leather-backed menu the whole time they are open. That menu is handed to people. Prior to the Contravention Notice, the Licensee did not put cutlery on the table at all times, but they now do that.

The Licensee's representative also said that once food is consumed, the plates and cutlery are to be removed right away so a lack of dirty dishes on tables did not mean no food had been served.

His evidence was that the kitchen is oddly configured. From the doorway to the kitchen where the Inspectors stood, they would be unable to see the inside of the walk-in fridge or to see the ranges, the walk-in freezer or the staff washroom.

The Licensee's representative said more people eat earlier than late, so later in the evening the kitchen staff will begin cleaning the kitchen, but while they do that, the kitchen is open and the staff would be ready to cook.

He testified that cleaning the kitchen for closing can take some time. When preparing for closing, garbage is taken out the corridor, up some stairs and out into the lane. The Cook might have been doing this or may have been in the walk-in fridge or freezer or in the staff washroom, or cleaning the ranges, when the Inspectors looked in. Cleaning the kitchen may be started before 1:00 a.m. but the kitchen is still open, the gas range, the ovens, and the deep fryer would still be on, and food could be served right up to when the restaurant closes at 1:00 a.m.

The Lounge endorsement is for the bar area. It can seat 12 people, the others can stand behind the bar seats.

The Licensee's sales records for December 21, 2012, provided to the Branch (tab 10, Exhibit 1), show the service of food that evening. Some food was ordered at 9:35 p.m. and the last food order was about or shortly after 11:00 p.m.

The Licensee's representative testified that a difficulty with the food to liquor sales ratio is that it is not mandatory for people to order food in the restaurant, and people cannot be forced to order food. People may come in, have a drink and then leave without ordering food. He said the Licensee does encourage food and snacks, but once people have a meal and a drink, and then order more drinks, they can't be expected to order more food.

Also, he said, people can order inexpensive food but expensive liquor. Non-alcoholic drinks are cheaper than those with liquor, plus non-alcoholic refills are free, all of which can skew the food to liquor sales ratio. Additionally, a number of Christmas parties were held in the establishment in December 2012. When there are Christmas parties, the sales skew toward liquor.

In his opinion, the "occasional" service of liquor without food, as referred to in the Guide, is hard to assess. He says there is a need to look at the sales and where the liquor was served – that is, the restaurant or the lounge.

He said that on December 21, by the time the Inspectors attended, the Floor Manager, bartender, two servers and the Cook were on duty. Both servers were relatively new, but the Floor Manager had been on staff for a number of years.

The Licensee's representative testified that staff meetings are held every six to eight weeks and the Terms and Conditions and the nature of the food primary Licence are discussed. A meeting was held after the Contravention Notice was issued. He said that agendas were used but none had been brought to the hearing. Notices were not distributed to staff to remind them about the food primary Licence because it is spoken about with a huge importance at the staff meetings.

In his view, Server A simply made a mistake because the kitchen was open.

The Executive Chef

The Executive Chef gave evidence that he was present on December 21, 2012 but went home at about 10:30 or 11:00 p.m. It was a quiet night. He also said that if the kitchen closes, the restaurant closes because they know that an open kitchen is a requirement of the Licence. The kitchen might close early but only if the bar closed early because it was slow.

He said the time sheets (Exhibit 3) are how the hourly employees get paid. They are signed off by a manager and show that the Cook worked from 5 p.m. to 1:30 a.m. on Friday, December 21, 2012. The Cook is in charge of the kitchen when the Executive Chef is not there.

He also testified that the items on the Late Night Menu would have been available until 1:00 a.m. that night, if ordered.

The Executive Chef could not recall if there were any food specials being promoted that night. He thought there might have been a Wine Night promotion, which is the current Friday night special. He said he talks to Inspector 4 about promotions. The establishment now has ½ price appies. He said they switch it up on various nights.

He also testified that the kitchen is oddly configured. From the doorway to the kitchen where the Inspectors stood, they would be unable to see the inside of the walk-in fridge or to see the ranges, the walk-in freezer or the staff washroom. The kitchen has three fryers. Late at night one or two would be turned off. The fryers do not emit odours unless something is being cooked.

He said that cleaning the kitchen for closing can take some time, and may be started as early as 10:00 or 11:00 p.m., but the kitchen is still open and would have been open on that night until 1:00 a.m.

The Executive Chef said that the establishment has very high standards for kitchen cleanliness. Everything is to be wiped down and polished. The health inspector has complimented them on how clean their kitchen is. Garbage is taken out twice—once earlier and then again when preparing to close. To take out the garbage, staff have to go out the corridor, up some stairs and out into the lane. He said the Cook might have been doing this or having a smoke, or may have been in the walk-in fridge or freezer or the staff washroom, or cleaning the ranges when the Inspectors looked in.

The Licensee's sales records (tab 10, Exhibit 1) show the service of food that evening. The Executive Chef testified that it is hard to know when the last food order was taken as the records only show when the tab was started. Food could be ordered anytime after that. People usually order a drink first. The sales records show most of the sales later in the evening were in the lounge.

The Executive Chef confirmed that there were a number of Christmas parties in the establishment in December 2012. He said that when there are Christmas parties, the sales skew toward liquor.

The Cook

The Cook testified that he worked from 5 p.m. to 1:30 a.m. on December 21, 2012. He entered his hours for that date on Exhibit 3, and he said those hours are accurate.

He said kitchen clean up includes sweeping all the floors, wiping equipment, taking out the garbage, and also includes emptying the bins that hold all the sauces, chopped vegetables, and other items the cooks use in preparing food. The bins are located over the ranges. The ranges are not visible from the doorway where the Inspectors stood when they viewed the kitchen. Items from the bins would be wrapped and then stored overnight in the fridge. He testified that the last thing he does is turn off the equipment. He also said that if it was slow, kitchen clean up could start as early as 10:00 p.m. but he would still keep cooking orders if asked to.

The Cook testified that he did not know where he was when the Inspectors viewed the kitchen. He did not recall seeing them. He said there were a number of places he could have been—in the walk-in fridge or freezer, or cleaning the bins or the ranges, or taking out the garbage.

The Cook had no idea why Server A would think the kitchen was closed.

Server A

Server A testified that she started working at the establishment in late November 2012. She had worked a number of earlier day shifts but December 21, 2012 was her first late evening shift. She was anxious and nervous as this was a new situation for her. She only had a few tables in her area because she was new.

Server A said she had previously worked at another food primary establishment, as the hostess and then as a bartender, but had not worked as a server previously. She said she had her Serving It Right certificate.

Server A's testimony was that she was trained by the Floor Manager, who told her the establishment was a food primary establishment. She said she knew the difference between a food primary and a liquor primary and that food had to be present for a food primary licence. Her evidence was that she understood that offering food was to be the main focus, but she only had to offer food, people did not have to order it. She had been tested on her knowledge of the menu items but not on the law and the policies. She was not familiar with the Guide for food primary licensees.

Server A confirmed that she did say the kitchen was closed and recommended another place to eat. She testified that she does not know why she said the kitchen was closed, when she knew it was not. She said she was nervous of screwing up on her first night and she made a mistake. It was simply what popped into her head when asked. She testified that, on reflection, she has no idea why she said that, other than the newness of the job and being overwhelmed. She said she was not influenced by not seeing others serving food.

Server A also testified that she offered to the Inspectors to check on the availability of snacks. She said she could have asked the Floor Manager, the other server, or the bartender, but did not, because the Inspectors told her not to bother. She said she did not want to then come back with food options because she did not want to seem to be annoying the Inspectors who were customers.

Server A said there were normally food specials. She could not remember if there was a food special that night, but she did recall that there was a wine special. In her opinion, many people had ordered food off the Late Night Menu but they don't have that menu any more.

The Floor Manager

The Floor Manager's evidence was she had several years' management experience at the establishment and was responsible for training the servers. She understood the difference between a food primary licence and a liquor primary licence and that a food primary licence required food service always be available. She also said she understood a lounge endorsement permitted the service of liquor without food.

She said that staff training involves meeting with staff and going over the goals of the establishment, reviewing policies like the Serving It Right, reviewing the menu, reviewing policies on last call and how to avoid over-service. No tests are conducted. The Floor Manager said staff are trained to encourage food, unless the patron is in the lounge, but did not give any evidence of what that training was, or how it was accomplished. The establishment's policies are not put in writing. She said staff are told that the kitchen was always open and that, while people did not have to order food,

food had to be available. She thinks it was just a lot of information for Server A to take in, so she made a mistake.

The Floor Manager said the hostess is trained to take customers to the table, and then it is up to the servers to give customers information about food specials and to take their orders.

The Floor Manager said that people are encouraged to order food, but can't be made to do that. She testified that if customers are not in the lounge and they don't order food after two or three or four drinks, they "push food" on them, or they are given their bill so that they leave. Her understanding of "occasional service of drinks without food" means "occasional to the table".

The Floor Manager testified that she was working that night and was available for Server A to ask any questions. The bartender and the other server were also available if Server A had any questions. She did not think Server A was too busy, nor did she think Server A's long shift that day contributed to her error.

The Floor Manager said she remembered the night and remembered the Cook being there until closing.

She said that from the sales records, food was served after 11:00 p.m. She testified that the sales records show drinks served in the lounge under the notation "Bar", and under her name. The lounge sales are included in the food and liquor sales so, in her opinion, the food to liquor ratio is skewed by that inclusion.

The Floor Manager testified about the sales records for the servers that night. She agreed that they served more alcohol than food, but said people come in, have a drink, and go. In her opinion, most of the people in the restaurant seats order food.

The Floor Manager's evidence was that she is active in marketing for the establishment and, in her opinion, the establishment is aggressive in marketing both food and drink specials. She referred to food specials being offered during the week, and to wine nights on the weekend.

She said she could not recall if there was a food special that night. She said the prices in the Late Night Menu were about a dollar lower than the prices for these items on the regular menu. They also now offer ½ price appies on the wine nights.

SUBMISSIONS – BRANCH

The Branch Advocate submitted that the contravention had been proven. Section 11(3) of the Regulation sets out a non-exhaustive list of the things the General Manager may consider in determining if the primary purpose of the business is the service of food, during all hours of operation, as required by the licence.

She submitted that a food primary licence has a less rigorous process than a liquor primary licence. A food primary should not be operating as a liquor primary, even if it has a lounge endorsement. A lounge endorsement does not change the need to have the primary focus on food at all times.

The evidence established that Server A said the kitchen was closed, the Inspectors' view of the kitchen was that it was closed. No food was seen to be served, no condiments or utensils were visible, the Late Night Menu focused more on liquor than on food, and the sales receipts show a high ratio of liquor sales to food. The lounge area was crowded and the atmosphere was loud, more like a bar than a restaurant. The Branch Advocate also noted that the lounge area had about 40 people in it, about twice the licensed capacity.

The Branch Advocate said that, even if the Cook was available to cook and the kitchen was open, it did not matter if the front of house staff was not taking orders. Server A was new, young and inexperienced. Her "mistake" shows a deficit in her training. The failure to properly train staff about the licence conditions and about the kitchen needing to be open indicates that the primary focus of the Licensee is not on food service at all times, as required by the licence.

The Branch Advocate said the sales records from between 8:00 p.m. and 1:00 a.m. that night showed liquor sales exceeded food sales by more than two to one. The sales records also show that liquor sales exceeded food sales on 12 of the 29 days the establishment was open in December 2012, and on 18 of those 29 days, more liquor items were sold than food items. Additionally, the receipts from December 21 show that in the later hours of operation, almost no food was sold. This shows a greater focus by the Licensee on liquor sales over food sales.

The Branch Advocate referred to three decisions as being of assistance: QB Habitat Resources, Sept 9, 2010; 669502 B.C. Ltd., May 10, 2006; and The Publik Restaurant PG. Ltd, 2009 BCSC 249.

The Branch Advocate noted that the suspension of the liquor licence did not mean the Licensee had to close the restaurant. It simply meant that liquor could not be served, so the restaurant could still be open for food service during that time.

SUBMISSIONS – LICENSEE

The Licensee disputes the contravention and says its kitchen was open and food service was available. The Licensee says that food does not have to be actually served throughout the hours of operation, only that food must be available to be served. Server A, a new employee, made a mistake in saying the kitchen was closed.

The food to liquor sales ratio does not indicate a focus on liquor service, especially given the lounge endorsement, which does not require food service be the primary focus in the lounge.

The Licensee says the inspection was substandard. The Inspectors went in with a conclusion that the Licensee was operating as a bar, and only looked for evidence to support that conclusion.

The Licensee says no menu was given to the Inspectors because the Late Night Menu was already on the table. Neither of the Inspectors opened up the late Night Menu, which goes to show they were not looking to see if there was food on offer, rather they were looking to say there was no focus on food. The Late Night Menu included food items. The Licensee has now replaced the Late Night Menu, and keeps cutlery on the tables.

Inspector 2's conversation with the Server was not whether there was food or a menu for food in the establishment, but where they could get food. The Inspectors told the Server not to bother following up whether there was food available. She testified that she knew food had to be served; she just made a mistake. It was the Server's first night and a long shift. A mistake by the young, inexperienced Server should not outweigh the other evidence.

The Licensee says for the contravention to be found, the kitchen had to be closed in fact, not just that a server said it was closed when in fact it was not. The Inspectors' view of the kitchen was brief and the Inspectors could not see the whole of the kitchen. The lights were on, the Cook was there, and the appliances were still on and ready to cook.

The liquor sales include both the restaurant and the lounge sales, so the ratio of food and liquor sales would have to be adjusted. Further, the summary prepared by the Branch Advocate shows that on 17 days, food did outsell liquor, even when the lounge liquor was included. Liquor sales can be expected to be higher at the end of the evening, after people have eaten. Most people have a drink with their meal and might then order a drink or two after, so more liquor units will be sold, even with a focus on food. Liquor costs are higher and liquor prices and revenues can be higher. When the contravention notice was issued, the Inspectors had no idea of what the food and liquor sales were. Nor did the Inspectors say if they knew whether there was a lounge endorsement.

The narrative in the NOEA does not refer to the number of patrons in the lounge area. The number of patrons is not clear, only "doubled". The Inspectors' notes are inconclusive on this.

The Licensee has no prior contraventions. It has a clean compliance history. The imposition of a suspension would be disproportionate and would impact all employees negatively. If any penalty is to be imposed, the minimum monetary penalty of \$7,500 is more appropriate.

REASONS AND DECISION

Contravention

I find that it was reasonable for the Inspectors to conclude the kitchen was closed. They had been told by the Server that the kitchen was closed, they saw no food being served, from their view the kitchen had been cleaned, no kitchen staff was present and no cooking was being done. However, the Inspectors' view of the kitchen was limited in terms of what they could see from where they stood, and the length of time of their respective views was very short.

The employee records show the Cook was present and I accept his oral evidence that, in fact, he was there. I also accept the Cook's oral evidence that even though the kitchen was cleaned, the appliances would have still been on and if an order had been placed it would have been made. I am satisfied by the evidence of the Cook, supported by the evidence of the Executive Chef and the other witnesses for the Licensee, that the kitchen was in fact open until 1:00 a.m. on the date of the alleged contravention.

However, contrary to the Licensee's assertions, I find that the kitchen being open is not conclusive evidence that the contravention has not been proven. I find that the whole of the circumstances must be considered to determine if, as required by section 11(1) of the Regulation, the primary focus was on the service of food, so that the service of liquor was simply an accompaniment, at all times the establishment was open. While under section 11(2) of the Regulation the availability of food service at all times is a condition of all food primary licences, simply satisfying that condition is, on its own, not sufficient to establish that the primary purpose is the service of food. For this reason, I have considered the evidence of the other elements of the contravention as set out in the NOEA.

I accept the Inspectors' evidence about the lack of cutlery, condiments or dirty dishes on the table. However, I do not find this to be conclusive that the primary focus was not on the service of food. However, I find this should be considered in the context of all of the other evidence reviewed below.

I accept the evidence that the Late Night Menu was left on the table and that it was intended to replace the menu that was used earlier in the day. However, I find that while it did include food items, they were located under the second fold, with only drinks on the front and first page of the fold out. The number of drinks listed is more than double the number of food items (48 liquor items to 21 food items). I do not find that emailing a version of the Late Night Menu to a Branch inspector constituted receiving Branch approval of it. For these reasons, I find that this menu primarily promoted the sale of liquor. This alone does not support a finding of a lack of primary focus on food service, but taken with the rest of my findings below, is indicative of a loss of focus by the Licensee on the primary service of food at all times.

I accept the Inspectors' evidence, which was unchallenged, that they were simply asked by the hostess where they wanted to sit. They were not asked if they intended to eat, which would have allowed the hostess to advise them that if they did not intend to eat, they could sit in the lounge. By failing to do so, the hostess did not give a clear indication that the establishment was a restaurant, not a bar, and the Licensee's expectation was that the ordering of drinks without food was permitted only in the lounge. I find the lack of distinction of the seating areas in the hostess's greeting of the Inspectors to be an indication of a loss of focus by the Licensee on the primary service of food in the restaurant.

I accept Inspector 2's description of the conversation with Server A, which was not challenged. I accept Server A's explanation that she made the statement because she was new and nervous. I accept that the opening words of the conversation ("where can you get something to eat around here?") might have initially distracted Server A. However, I find that Inspector 2 did ask her the direct question "Can I get something to eat here?" The Inspector got a clear response that the kitchen is closed. I find that given that response, whether snack items might have been available was of no consequence, as the provision of snack items are not sufficient to establish a primary focus on food

service. I find that the statement by Server A that the kitchen is closed, taken with the other evidence I have accepted, supports a finding of a lack of focus by the Licensee on the primary service of food in the restaurant at all times.

I find that the Executive Chef, Server A and the Floor Manager could all recollect the drink special that night was a wine special, but none of them could recollect any food specials. This indicates that liquor sales were given more emphasis than food sales by the Licensee's senior management and by the serving staff.

Additionally, there was no evidence given of management going over food specials with serving staff at the start of their shift or in any other manner, to reinforce to serving staff that food, and not liquor, should be their primary focus.

I have considered the sales records from December 21, 2012. The records for sales by the servers within the restaurant area indicate a high volume of liquor sales later in the evening, with little or no food sales. While I accept that some of those customers might have eaten earlier, the records indicate they were allowed to remain on the premises and order a not insignificant number of drinks. This is not consistent with the establishment being a food primary licence. The sales records say to me that, at least in the latter part of the evening, the sale of liquor was not an accompaniment to food; instead, the sale of food seems to have been incidental to the liquor sales.

I have considered the evidence about the overall ratio of food sales to liquor sales. I accept the Licensee's submission that the ratio may be skewed by a number of factors. I do note that no industry averages or any range of suggested acceptable ratios were entered in evidence. I also note that there is no requirement that lounge sales be kept separate from overall establishment sales. However, I note that on 5 of the 29 days in December, not only were the liquor dollar value sales substantially higher than the dollar value of the food sales, but the number of liquor items sold were substantially higher than the number of food items sold. This is not consistent with a primary focus on food, with liquor as an accompaniment.

I do not accept the Floor Manager's evidence that, after two or three or four drinks without food, customers are actively encouraged to order food or move on. Server A made no mention of that policy, nor did any other witness. If there is such a policy, it does not appear to be widely known by staff or consistently applied. The sales records indicate otherwise.

I accept the Inspectors' evidence that the lounge was crowded and navigating through the crowd was difficult. I also accept the Inspectors' evidence that the people in the lounge were noisy, suggesting the ambience was not that of a restaurant. While the Inspectors' evidence suggests that the licensed capacity of the lounge may have been exceeded and drinks may have been allowed to be taken outside, neither of these were alleged in the Contravention Notice and do not form a basis for the contravention. However, the crowded lounge, the noise and the hostess's lack of direction on seating in the lounge if not intending to order food, all indicate to me that, at least in the latter part of the evening, the Licensee and its staff did not distinguish between the lounge and the restaurant, and how the primary focus in the restaurant needed to be on the service of food at all times.

CONCLUSION

Under a food primary licence, food service is to be the focus, with liquor an accompaniment, at all hours of operation. While a lounge endorsement permits the sale of liquor without food, it only applies to the area designated as a lounge.

Staff and patrons need to know there is a difference between the lounge area and the restaurant. Presenting and maintaining a clear distinction in patrons' minds is important. Here, patrons (including the Inspectors) were allowed to choose where to sit, without any consideration being given by staff to whether they intended to order food. Had the Inspectors been asked on entry if they wanted to order food, it would have been an early indication that staff understood the difference between the food primary licence and the lounge endorsement. It would have been an indication that staff understood the lounge endorsement, where no food order was required, only applied to the limited seating in the lounge, with an expectation that food would be ordered if

seated in the restaurant. It would have been a clear indication to the Inspectors that the kitchen was open and food could be served.

Patrons who are seated in the restaurant should continue to be given clear signals they are in a restaurant, not an extension of the lounge area. When taking first drink orders, staff should indicate that they will be back to take food orders. Staff should offer to explain the menu, or identify specials, or if any specific food items are not available that day. Staff can identify the restaurant's signature dishes or other customers' favourites, to keep the focus on food. Here, there was only the passive placement of the Late Night Menu, without any attention being drawn to customers about the food items on it.

I accept that the Inspectors may have come into the establishment with the preliminary perspective that the establishment was operating as a bar and not a restaurant. However, I do not find that the Inspectors had a closed mind, refusing to consider any contrary evidence, or that they conducted a substandard inspection, ignoring any contrary evidence. If the hostess had asked about the Inspectors' intention to order food, or if Server A had asked if they wanted food or had said yes, the kitchen was open, then the Inspectors may not have drawn their final conclusions.

The lack of cutlery or condiments, the clean kitchen, the Late Night Menu's focus on liquor, the crowded noisy bar, not seeing any food ordered by others, all reasonably supported their conclusion that the primary focus at the time was on liquor, not food. Simply because the kitchen was in fact open does not mean the primary focus was on food service during the whole of the time the establishment was open.

I find that the service of liquor without food, permitted under the lounge endorsement, was allowed to creep into the area licensed as the restaurant such that, for at least the late hours of operation, staff and patrons alike made no distinction between the two areas or the differences in the licence terms and conditions that apply to these two different areas. A lounge endorsement, which does not require the sale of food, does not allow a food primary to operate as if that lounge endorsement applied to the whole of the premises. Licensees need to ensure staff and patrons both understand the lounge endorsement only applies to the area designated as such on their licence, otherwise the licensee is, in effect, operating a food primary licence as if a liquor primary licence.

I find that the lack of direction from the hostess, Server A's statement the kitchen was closed, the focus by the Late Night Menu on liquor, the lack of cutlery and condiments on the tables, the focus on drink specials and not food specials (at least on the weekends), the food to liquor sales, the very few food items served in the last hours of operations, and the crowded, noisy lounge, all support a finding that the primary focus on the service of food shifted during the later hours of operation to the service of liquor. On this basis, I find the contravention has been proven.

Due Diligence

The Licensee is entitled to a defence 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 problems are dealt with.

The Licensee referred *R v. Sault Ste. Marie* (1978) CanLii 11 (SCC) at page 1331, as the leading case for the test of due diligence, which is:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

I note the court goes on to say:

The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The Licensee said that decision was interpreted in *The Plaza Cabaret v. General Manager, Liquor Control and Licensing Branch*, 2004 BCSC 248 that, to establish the application of due diligence, a licensee must establish on the balance of probabilities that (1) the employee was not the directing mind of the licensee in relation to that part of the licensee's operations in connection with which the unlawful conduct arose; and (2) if that proof is provided, that those who were in fact responsible for that part of the

licensee' operations were duly diligent in attempting to prevent the occurrence of unlawful conduct or activities (emphasis is that of the Licensee).

The Licensee said in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, the court said that the directing mind must be someone who sets and implements policy, as opposed to an employee who merely carries it out.

I interpret *Beverly Corners* as saying the defence of due diligence is to be considered in two stages:

1. Whether the employee who undertook the unlawful action was a directing mind of the licensee – if so, the defence of due diligence is not available and the inquiry stops there.
2. If the employee who undertook the unlawful action was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises at the time), then the questions to be considered and answered are whether the licensee had:
 - a. implemented adequate training and other systems to prevent the contravention; and,
 - b. taken reasonable steps to ensure the effective application of that education and the operation of those systems.

I find both of these issues are factual, and will depend on the evidence presented. If the second issue is considered, the onus is on the licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate training and other systems and ensuring effective application of them.

My finding on the contravention, a shift of the primary focus from the service of food to the service of liquor, is based on a combination of management decisions and staff actions, not a single unlawful action like the sale of liquor to a minor. To consider the factual basis for the defence of due diligence in this case, I need to consider the various elements that supported that finding.

Those elements include the:

- Focus by the Late Night Menu on liquor
- Lack of cutlery and condiments on the tables
- Focus on drink specials and not food specials (at least on the weekends)
- Food to liquor sales
- Very few food items actually served in the last hours of operations
- Crowded, noisy lounge
- Lack of direction from the hostess on seating
- Server A's statement the kitchen was closed

I find Mr. Petzing to be a directing mind of the Licensee. He made the management policy decisions to not have cutlery and condiments available on the table and for the design and placement of the Late Night Menu on the table. He is responsible for the decisions on food and drink specials which focussed more on liquor than food, and permitting the sale of food to liquor ratio to become skewed. These actions all contributed to the shift in the focus of the establishment, at least in the later hours of operation, from the primary service of food to the primary service of liquor.

The Floor Manager is a member of the management team and she participates in setting and implementing policy, and is not simply an employee who merely carries it out. She is also a directing mind of the Licensee for the purposes of the defence of due diligence. She was present at the time of the contravention and was responsible for the operation of the establishment, including allowing the crowded, noisy lounge atmosphere to spread into the restaurant. She also should have been aware of the very limited amount of food being ordered in the restaurant during the later hours of operation.

As such, the Licensee is directly responsible for these matters and the defence of due diligence does not apply to these elements.

Respecting the staff actions that contributed to my conclusion (the lack of direction from the hostess on seating and Server A's statement the kitchen was closed), I find that these employees are not directing minds of the Licensee. As such, the Licensee is only responsible for their actions if the Licensee had implemented adequate training and other systems to prevent those actions and had taken reasonable steps to ensure the effective application of that training and the operation of those systems.

I find no evidence of staff training on how to properly direct customers to the different areas within the establishment so that staff and patrons alike clearly understood the lounge was different from the rest of the establishment. I find the evidence of training of staff to ensure that food service is always the primary focus to be less than adequate. I also find that there was no evidence of any program in place to ensure that staff continued to apply that focus. The defence of due diligence is not available for these actions by staff.

For these reasons, I find that the defence of due diligence is not available to the Licensee.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow 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.

The factors that I have considered in determining the appropriate penalty in this case include: whether there is a proven compliance history; a past history of warnings by the branch and/or the police; the seriousness of the contravention; the threat to the public safety; and the well-being of the community.

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action is intended to both redress the licensee's non-compliance, and to encourage future compliance by way of deterrence.

There is no record of a proven contravention of the same type for this Licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 1 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10 – 15 day licence suspension and/or a \$7,500 to \$10,000 penalty.

Considering the Licensee's clean compliance history and all of the circumstances of the contravention, I find that the appropriate penalty is a monetary penalty of \$7,500.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$7,500 to the general manager of the Liquor Control and Licensing Branch on or before June 2, 2014.

Signs satisfactory to the General Manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

Original signed by

Dianne Flood
Enforcement Hearing Adjudicator

Date: May 2, 2014

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

Liquor Control and Licensing Branch, Vancouver Office
Attention: Cristal Scheer, Branch Advocate