



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: 585534 B.C. Ltd.
Slickity Jim's Chat 'N' Chew
3475 Main Street
Vancouver, BC V5V 3M9

Case: EH16-013

For the Licensee: Michael Zalman

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Hearing: June 14, 2016

Date of Decision: July 26, 2016

**Liquor Control and
Licensing Branch**

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INTRODUCTION

585534 B.C. Ltd. ("the Licensee") operates Slickity Jim's Chat 'N' Chew at 3475 Main Street, Vancouver, B.C. ("the licensed premises"). The Licensee holds Food Primary Licence #304350 (the "licence").

According to the terms of the licence, liquor may be sold from 9:00 a.m. to midnight Monday through Sunday. The licence is, as are all liquor licenses issued in the Province, subject to the terms and conditions contained in the publication "A Guide for Liquor Licensees in British Columbia" (the "Guide").

Mr. Zalman, principal of the Licensee, appeared at the hearing and represented the Licensee.

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 dated April 5, 2016 (the "NOEA") (Tab 1, Exhibit 1).

The Branch alleges that on February 19, 2016 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 contrary to the primary purpose of its licence. 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 food, rather than as the primary activity. A contravention occurs if the primary focus of a Food Primary establishment shifts from the service of food to the service of liquor.

The range of penalties for a first contravention of this type is a 10 to 15 day licence suspension and/or a \$7,000 to \$10,000 monetary penalty (item 1, Schedule 4 of the Regulation). The Branch proposes a ten day suspension in this case.

The Licensee denies the contravention and says:

- its focus is and always has been on the service of food,
- the kitchen in fact was not closed, and
- in any event, no liquor was being served at the time.

RELEVANT STATUTORY PROVISIONS

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

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

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.

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: Branch's Book of Documents, Tabs 1 to 23
- Exhibit 2: Licensee's Point of Sale records for February 2016, and for December 2015
- Exhibit 3: Licensee's Typical Sales, by Hour, for the month of May, 2016
- Exhibit 4: Licensee's Typical Sales, by Hour, for the date of April 11, 2016
- Exhibit 5: Licensee's Reduced Late Night Menu
- Exhibit 6: Licensee's copy of Tab 14 from Exhibit 1, with the Licensee's notations
- Exhibit 7: Photographs of a booth located in Area "9a" of the Premises
- Exhibit 8: Copies of the Breakfast, Lunch and Dinner Menus

EVIDENCE – BRANCH

The Branch Advocate called two liquor inspectors as witnesses.

Inspector 1

Inspector 1 testified that he has been a liquor inspector for almost four years. He said his responsibilities include liaising with licensees, inspections to ensure compliance, observing and recording business practises, identifying gaps in compliance and identifying contraventions. This establishment is located within his geographic area of responsibility.

He said that in the course of his responsibilities he deals with a full range of licenses, including Food Primary and Liquor Primary licenses. He conducts about 1,800 inspections per year. Of those, he said that because the majority of the licensed premises in his area of geographic responsibility are Food Primary licenses, his inspections of Food Primary premises would be about 1,100 to 1,500 per year.

Inspector 1 testified that on February 19, 2016 he was conducting routine inspections with Inspector 2. At approximately 11:05 p.m. the Inspectors arrived outside this establishment. He said that a sign on the door said that after 9:00 p.m. entry was by the rear door, but they tried the front door and as it was unlocked, they entered through it.

Inspector 1 described the layout of the establishment, referring to the floor plan (Tab 4, Exhibit 1). He said the front area, marked as "9a" on the floor plan, has a bar area, tables and booths. He described it as being like a 50's style diner. He said a long, narrow hallway led to a smaller back area, marked "9b" on the floor plan. The back area has a space for performers, tables and chairs and a bench seating area, a small bar and an entryway to the back alley. The kitchen is adjacent to the hallway between the two spaces, "9a" and "9b".

Inspector 1 testified that the two Inspectors made their way toward the back area. A staff member ("the Server") came out of the back area to greet them. The Inspector said he asked the Server if they could get some food. He said the Server said no, the kitchen was closed. He said he then asked the Server again if he could get some food and the Server repeated that the kitchen was closed. He said he asked a third time, saying he was really hungry, and the Server again said the kitchen was closed.

Inspector 1 said he then looked into the adjacent kitchen area and saw two staff there. He said he asked the kitchen staff if he could order food and a staff member (later identified as the Chef) indicated the kitchen was closed. He said the Chef said the kitchen closed at 11:00.

Inspector 1 said the kitchen area was cleaned and no food or food preparation was visible. He said in his opinion the grill was not in use and appeared to be turned off. He said no pots or pans were visible.

Inspector 1 testified he then identified himself as a liquor inspector and he told the Server that the kitchen needed to be open if they were serving liquor. He said that the Server then offered him an appetizer, described in the menu as "Three Dips and Chips", showing him the item on the menu. He told the Server they needed to serve a variety of food, including appetizers and "mains". He said that the Server said she was not aware of that and that they were closing at midnight and if they needed to have the kitchen open to serve liquor, they would cease serving liquor immediately.

He took several photographs of the kitchen area (Tab 10, Exhibit 1). He also took a photograph of the menu the Server showed him, after he had identified himself as a liquor inspector (also at Tab 10, Exhibit 1).

Inspector 1 said the back area had about 20 patrons, listening to music. He testified that he saw no food service and no cutlery on the tables, but did see glasses containing what he believed to be liquor. In his opinion, the presence of the glasses of liquor meant that liquor was being served.

The Inspector issued the Contravention Notice on February 22, 2016 (Tab 2, Exhibit 1) and the NOEA on April 5, 2016 (Tab 1, Exhibit 1). The Inspector said he issued the NOEA and that the reasons for pursuing enforcement are that when he entered the premises, the Licensee was not primarily engaged in serving food. He said that in a Food Primary, liquor is intended to be an accompaniment to food service. In his opinion, the kitchen was cleaned and not being used.

The Inspector then reviewed several of the other documents in Exhibit 1. Those documents, and his evidence in relation to those documents is as follows.

Tab 7 is a copy of the Terms and Conditions for Food Primary Licenses. Inspector 1 testified that Food Primary licensees are expected to be familiar with these Terms and Conditions. Inspector 1 noted page 14, which describes the nature of a Food Primary licence to be the service of food at all hours of operation, and of a Liquor Primary licence to be the service of liquor, as opposed to food. Page 14 also sets out the differences in the rules respecting the presence of minors and the nature of entertainment permissible.

The Terms and Conditions also state the approval processes are different, as a Food Primary does not entail the input of local governments (except in limited cases) or considering the views of local residents. Page 14 also directs Food Primary Licensees about their responsibility to be fully equipped to produce the food on the full menu and for the kitchen to be open and staffed whenever liquor is served.

Tab 9 is copy of Inspector 1's notes from the evening in question.

Tab 10 is a series of photographs taken by Inspector 1 on the night in question, showing the kitchen area as he described it.

Tab 11 is a print copy taken from the Licensee's website, showing the musical acts booked at the establishment for May and June, 2015 and a "Bar Menu".

Tab 12 is an exchange of emails between Inspector 1 and the Licensee addressing the Licensee's use of a different name (Skinny Fat Jack's) for the back area space, which Inspector 1 said is not permitted under the Licence. That issue was identified at the same time as a noise complaint from a neighbour in March, 2015. Inspector 1 said the use of the second name was still an issue as of February, 2016.

Tab 13 is an exchange of emails about the March, 2105 noise complaint. Inspector 1 testified that on getting the noise compliant, he met with the Licensee and discussed it and also the issue about the two names being used, the website content, and the posters at the establishment's front door about the musical acts which also used the name Skinny Fat Jack's. He said the Licensee said he would correct these issues but as of February, 2016 had not.

Tab 14 is an excerpt from the Licensee's Facebook page as of March 9, 2015 that refers to the establishment by the name Skinny Fat Jack's, and subtitles it as a "back alley bar". It talks about a grand opening and half price cocktails.

Tab 15 is a print copy of an article about the establishment, posted on the BEATROUTE website on March 3, 2015. Inspector 1 commented on a photograph in the article, noting that it showed a bartender appearing to be mixing drinks. He notes the article refers to dinner service running from 8 to 10 p.m., and the description of the "backroom bar venue".

Tab 16 is a series of photographs of the front entrance, the alley entrance, a chalk sandwich board listing of various musical acts and posters for various musical acts performing at the establishment.

Tab 17 is a series of photographs of a liquor inspector taking decibel readings at the outside rear of the establishment and of those decibel readings taken, in March, 2015. Inspector 1 said that usually noise complaints are passed on to the City of Vancouver and he believed that is what happened here. He said the complainant had already talked to someone at the City. Inspector 1 testified that he was not an expert in sound readings and he could not interpret the decibel readings.

Tab 22 is a copy of the Terms and Conditions for Liquor Primary Licenses. Inspector 1 noted that Liquor Primary licensees were only obliged to serve hot and cold snacks.

Tab 23 is a print copy of an article about the establishment, posted on the BC Musician's Magazine website on March 12, 2105. Inspector 1 reviewed the photographs in the article as they depicted the establishment. He noted the article described the establishment as "a raucous speakeasy", which he says is an old fashioned term for a nightclub.

Inspector 1 recommended a penalty of ten days as he thought that would give the Licensee time to bring the establishment into compliance with the Terms and Conditions, to re-brand itself as a food establishment, to re-train the employees as to the true purpose of a Food Primary establishment, and to let its customers know that the focus has changed. He also said that it would also have a more limited impact on staff as the restaurant could still operate, it just could not serve liquor.

Inspector 1 confirmed that he did not ask to sit down or ask for a drink of liquor or of any other kind. He confirmed that the Server was the only staff person present (other than the kitchen staff) and he did not see her serve any liquor or any other drink to a patron. He did not see any patrons enter the establishment but he did see some leaving. He re-iterated that the presence of liquor on the tables was evidence to him that liquor was being served.

Inspector 1 confirmed that when he attended the establishment on other occasions it was during the day. He said the establishment was very different at that time - there were lots of plates of food on the tables, in both the front and rear areas. He agreed that the establishment is operated as a restaurant, at least during certain times of the day.

Inspector 1 agreed that if all the items shown on the menu shown to him by the Server (Tab 10, Exhibit 1) were available, that would be sufficient to meet the requirements for a Food Primary to have both appetizers and main courses available. He also said that the Server, in showing the menu to him, pointed only at the appetizer and proposed the "Three Dips and Chips". Inspector 1 confirmed he did not ask the Server when the last food order had been taken. He said he did not discuss with Server what food items needed to be available as that was something that he would discuss with the Licensee.

Inspector 1 did not know if the Chef had difficulties with the English language. He thought the Chef understood him and the Chef answered the question put to him.

Inspector 1 said he believed liquor was still being served because when he spoke to the Server, she said that she would cease service and that she did not know food service was a requirement, so that indicated to him that liquor was still being served at that time.

Inspector 1 acknowledged that in a photograph of the premises, which the Licensee said was taken at 1:30 p.m. (Exhibit 7), no menus and no cutlery were on the tables.

Respecting the notation of a complaint of after hours service in the Licensee's compliance history (Tab 6, Exhibit 1), Inspector 1 acknowledged that the Licensee would not have been notified of that, as it was from neighbours, not an inspection and on investigation and review it was not pursued.

The Inspector also confirmed that the location of a bar in the backroom was not an issue and had nothing to do with his visit or the contravention.

Liquor Inspector 1 testified that he interpreted the Act and the Terms and Conditions to mean that the kitchen had to remain open for food service right up until the time the bar was closed. In his opinion, the kitchen was closed while liquor was being served, which contravened the Terms and Conditions.

Inspector 1 testified that the presence of liquor-focused menus on the table would lead patrons to think it was a Liquor Primary establishment and confusion about the availability of food. Such a menu would be only one of many observations that might lead to a contravention.

Inspector 1 agreed that the "Bar Menu" (Tab 11, Exhibit 1) is not the menu offered to him by the Server, but he said some of the items were the same or similar. The "Dinner Menu" (Tab 10, Exhibit 1) is the only menu offered to Inspector 1 and he never saw the "Bar Menu" that night.

Inspector 1 testified that the March, 2015 complaint had been about more than just noise. He said that the complaint was also about the manner of operation, that the complainant suggested the premises were being operated as a "speakeasy". He said not all of the issues raised in the complaint had been satisfactorily dealt with. He did say there were no further noise complaints made that he knew about.

Inspector 1 said he assumed the photographs at Tab 16, Exhibit 1, of the musicians' information, were taken between the complaint in March, 2015 and the contravention in February, 2016. The three photographs all indicate dates in January and all refer to Skinny Fat Jack's.

Inspector 1 said he could not address the last bullet on page 4 of the NOEA – “Staff was selling liquor to patrons in premises despite the kitchen not being operational for the service of food”. He did state that liquor being consumed is liquor being served. He said that the time period after last call, when liquor is being consumed, is still when liquor is being served and so the kitchen must be opened then.

He stated that a licensee must have food available until the end of the period of time when the licence permits service. He said this means that after last call, and until the premises were closed, there was still the service of liquor and the kitchen must be open.

He said he had concerns after the March, 2015 complaint of the premises operating as a “speakeasy”, the web articles about the establishment, the advertising, his direct observations, and the operating under two names which is not permitted.

Inspector 1 said he had many years experience working in restaurants, and based on that experience and his observations, the kitchen in the premises was closed.

Inspector 2

Inspector 2 testified that she has 12 years (“off and on”) experience as a liquor inspector. She described her responsibilities as inspections and education and working with Food Primary and Liquor Primary licensees. She said she has conducted “thousands and thousands” of inspections, with about half of those being of Food Primary licenses. This establishment is not within her regular geographic area of responsibility.

Inspector 2 said she and Inspector 1 were conducting routine inspections on February 19, 2016. She said they entered the establishment at about 11:05 p.m. She described the layout of the establishment. She said there were people in a booth at the front area, finishing up. She said that the Inspectors made their way to the rear of the premises. She testified that the Server came out to greet them. She said that Inspector 1 asked for food and they were told, “sorry, the kitchen is closed”. She said that he asked again and was again told the kitchen was closed.

She said Inspector 1 then asked the kitchen staff who were visible in the adjacent, open kitchen, and one of the kitchen staff also said the kitchen was closed. She said she did not have any impression the kitchen staff had any problem understanding what was being asked of them.

She said Inspector 1's demeanour as "light and pleasant, as if he was a patron". She described the Server as having "a nice demeanour, as you would expect in a restaurant", with a professional approach.

She said that they then identified themselves as liquor inspectors to the Server who then showed them a menu and offered them a hummus item.

Inspector 2 testified that she viewed the rear area ("9b"). She described it as a small area, and she said she did a head count to determine there were about 20 patrons seated at tables, listening to a musician. She said there was no food or dishes on the tables. She could not recall if there were menus or anything other than drinks on the tables.

Inspector 2 said the patrons had cocktails on the tables in front of them. She described the atmosphere as "not lively" and said the patrons were listening to the music, with a drink in front of them. She said it was not a party atmosphere and there were no tables of shooters. She said she could tell the drinks were liquor because some of the drinks were in standard beer and wine glasses, with liquid that appeared to be beer and wine. She concluded liquor was being served.

She did not observe any other staff persons, other than the Server who had greeted them and the kitchen staff. Inspector 2 said that when she first observed the kitchen staff, they were cleaning or scouring the kitchen.

Inspector 2 said there are significant differences in the licensing fees for Food Primary and Liquor Primary licenses, with the Food Primary fees being less expensive. Additionally, she said, there are significant differences in how they are to operate and that local government input is sought only on Liquor Primary, not on Food Primary licenses.

Inspector 2 confirmed that she and Inspector 1 did not ask for nor were they served liquor. She confirmed that they did not seat themselves at a table nor ask to be seated.

Inspector 2 said that she did not see any drinks being ordered because the only staff person, the Server, was busy with Inspector 1.

Inspector 2 said the premises were busy, but not overcrowded. She thought a few more patrons could have fit in the back area.

Inspector 2 agreed that she could not say if the patrons had eaten earlier. She did not ask to see the sales receipts for the evening. She testified that when the Server was told they needed to have the kitchen open to serve liquor, the Server said that they were open until midnight, but that she would stop service now.

In her opinion, Inspector 2 said that the kitchen can close when they are not pouring liquor any more.

Inspector 2 said the inspection was a regular inspection, not a covert inspection, so they did not order drinks and then ask to order food. In a covert inspection, the inspectors might not identify themselves at the time. Also, the regular inspector, who is responsible for the establishment, would not be sent in on a covert inspection. Instead, she said, on regular inspection they typically ask questions when they go in, just to see how the establishment is operating. She said that if the inspectors do not see liquor being served, then they would take into account if the kitchen is closed and liquor is on the table.

EVIDENCE – LICENSEE

The Licensee called the Server as a witness. Mr. Zalman also gave evidence on behalf of the Licensee.

The Server

The Server gave her evidence by telephone as she was out of the province on the date of the hearing.

The Server testified that she has worked for the Licensee since October, 2015. She said the establishment is open four nights a week – Wednesday to Saturday.

The Server said she is responsible for booking the live music acts and is also the evening server and bartender. The only other evening staff members are the Chef and the Dishwasher. The Server said she does not have any management responsibilities. The Chef and the Dishwasher do not report to her.

The Server testified that she had worked in the industry in Alberta before moving to B.C. She had her "ProServ", which is the Alberta equivalent of the SIR program. She said she had about eight or nine years experience as a server.

The Server said she understood that in a Food Primary establishment, the kitchen has to be open and to serve entrees when liquor was being served, but her understanding was that later in the evening, they could move to a more limited menu with appetizers and burgers.

The Server said while the Licence permits the establishment to remain open until midnight, they frequently close earlier. She said she decides when to close in conjunction with Chef and they base that decision on whether they are busy, which depends on the size of the crowd and on when the musicians are finishing their set.

She said that most patrons order food earlier in the evening, then stay for the music and then leave right after the music finishes. She said very little food is ordered later in the evening.

The Server testified that on the night in question, at the time when the Inspectors came in, the band had only about one or two songs left in their set, so they were going to close in about 15 minutes. She said she had not called last call, but had done a "sweep" of the room and asked patrons if they wanted to order anything more. She said no one indicated they wanted another drink. She said they were in the preliminary stages of closing down.

The Server said that when the Inspectors came in, they did not ask to be seated or try to seat themselves. She said that Inspector 1 said he wanted to order dinner. She said because they were closing soon, she did not want to offer them a full dinner and so said that dinner was not available. She said she did not say the kitchen was closed. She said Inspector 1 was insistent, again asking for dinner to be served. She said she offered him a burger or other food. She said she thought Inspector 1 misunderstood what she said.

She testified that because they were only going to be open another 15 minutes or so, she did not want to serve a full entree, so she "basically refused". She said she did not want to seat a brand new customer for dinner at 11:15 p.m. She said she was aware that the kitchen had to be open, so she listed off to the Inspectors a few of the items on the menu that they could offer. She said it was her way of explaining they were closing down.

The Server said she recalled one of the Inspectors comparing what she offered to a bowl of peanuts, but she said that she offered burgers and not just cheap and salty snacks. The Server said she did not know who the inspectors were and she said she was waiting to see if they wanted to sit down or were going to leave. She said the Inspectors never entered the back area or took a seat. She said she would not have served them in the hallway. She said if they had wanted to, they could have taken seats in the back area and looked at the bar menu.

The Server described Inspector 1 as persistent and pushy, with a passive/aggressive approach. She thought he was looking for a full meal - an entrée - not a snack or a burger. She said the bar menu reflects what people order, especially in a music venue, where people often ask for something to share.

She said that when Inspector 1 asked the kitchen staff for something to eat, the Chef replied that they were beginning to close. She said the Chef was re-iterating what she was saying - that they were not taking any new customers and were beginning to close. She said the suggestion was that the Inspectors should not be ordering food, which is what she thought they should expect "when they walk in late and the premises are closing in about 10 minutes".

The Server said she did not offer to serve any liquor to the Inspectors and was not intending to serve liquor to any other patron, having already asked them and they declined.

The Server could not recall when the last food had been served that night or when the last patron entered, but she thought it was about 9:30. She said her memory was a bit cloudy. She said she knew they opened at 8:00 p.m. She thought the last food might have been ordered at about 9:30 p.m. She said the food orders usually came in two

sweeps – one at the beginning of the show and the other at about 9:30 to 10:30 when it's more likely appetizers and burgers are ordered. She said on that evening the band started early and was ending early. She testified that most patrons had already eaten by then. At that point of the evening she said, no one was really ordering [food], but she said she was not refusing service.

The Server thought the last drink had been ordered at about 10:30 p.m. She had done a sweep for drinks fifteen minutes before and no one ordered, but she had not given last call. She said she would have given last call before the last song.

The Server said that if they serve one drink to a person, then they will feed them until the end [of the evening], but that they will not seat persons at the end of the evening.

The Server testified that during the week, the music usually started at 8 p.m. and was over by 10:30 or 11:00 p.m. On weekends she said the music played until 11:30 p.m. and the venue was done by midnight and cleared by 12:15 to 12:30 p.m. She said that if the patrons are all leaving before midnight, she will talk to the kitchen staff and they will decide whether to close up early. The Chef leaves when the kitchen is cleaned and closed. The Dishwasher stays until the Server leaves.

She said her understanding was you could stop seating patrons before you shut down liquor service. She said her understanding was that the kitchen must be opened when liquor is being served and may close when all the drinks are off the table. So when liquor is not being ordered and drinks are being finished, then the kitchen can stop service.

The Server said her practice is that when seating people between 8:30 and 10:30, to greet them and ask if they want the dinner menu. After that, she said, she offers them the bar menu, which has a variety of options on it, including burgers, sandwiches and breakfast items.

With respect to training, the Server said she was familiar with the differences between a Food Primary and a Liquor Primary licence and knew the kitchen had to be open if liquor was being served. She said because she was coming from Alberta, she wanted to make sure she understood the terms of the licence. She did not review the SIR manual, as she had just gotten her ProServe the year before, but she was told that if she had questions and no one was there to answer them, she could look at it on-line.

She said she had prior service experience and was trained in this establishment by the staff she was taking over from about where things were and what the systems were.

The Sever said that because there was only three staff who all work together four nights a week, they had their own little staff meetings, separate from the daytime staff.

The Licensee

The Licensee testified that he has been in the restaurant business since 1997 and the premises have been licensed for about 15 years. He said the establishment's focus is and has at all times been on food service. He said the food menu far outweighs the drinks menu in terms of number of items. He submitted copies of the Licensee's Breakfast, Lunch and Dinner Menus (Exhibit 8).

The Licensee said the establishment is only open four nights a week, Thursday to Sunday, closing at 4:30 p.m. on Monday, Tuesday and Wednesday. Music is usually presented on all four nights they are open.

He produced the total monthly sales figures for two months, February and May, 2016 (Exhibit 2). These showed the breakdown between food and liquor sales, with food and non-alcoholic beverages at about 80% or more of the total sales and liquor at about 20% or less of the total sales.

He said most of the sales occur in the daytime, with evening sales generally low, when little food or liquor is sold. He said not much food or drinks are ordered after 11:00 p.m. He produced the monthly sales figures for May, 2016 showing total sales by the hour (Exhibit 3) and the daily sales figure for Saturday, April 11, 2016, showing those sales by

the hour (Exhibit 4). He said music was presented on Saturday, April 11 and the sales figures for that date were typical of an evening. He said these hourly sales records show that after 10:00 or 11:00 p.m., the sales significantly diminish to almost marginal. He noted that for the month of May, the total food and beverage sales between 11:00 and midnight were \$89.00 and on April 11, the total food and beverage sales between 10:00 and 11:00 were \$33.50, with no sales after 11:00.

He said the system could not produce the sales by hour, broken down by food and liquor. He also said he did not have the daily sales records for February 19, 2016 because that system did not go back as far as three months.

The Licensee said that he did not authorize the articles posted on the B.C. Musicians Magazine or the BEATROUTE websites. He noted that the articles were from March, 2105 and he said the employee quoted in the articles had been terminated after that because of a difference in opinion about how the space was to be used and presented. He said he could have produced "ten times" the number of articles and restaurant reviews about the premises that focused on food service. He repeated that the Licensee's focus is and always has been on food service.

The Licensee said that when he was told he should not be operating the back area under a different name, he stopped doing that, but it took some time for the advertising and branding "to catch up with that". He agreed he should have been more proactive about that. He said in March 2015 the Inspector had not raised any issues other than the name, the noise, and removing the reference to "Bar Menu" from the late night menu, and that he dealt with both the noise and the removing the reference to "Bar Menu". He thought that if the Inspector had an issue with the contents of the late night menu (Exhibit 5), or with the portable bar being in the back area, the Inspector would have raised it with him but he didn't.

The Licensee re-iterated that he had disagreed with the former employee trying to brand a back alley bar atmosphere. He said that it was not the image of the restaurant he had wanted, so he let her go. He said there are lots of establishments in the area with late night drinking and he did not want to go there. He testified that the Licensee

presents music, in a restaurant atmosphere. He said the backroom is used both during the day and in the evening.

The Licensee said that when they began offering music in the back area, they did close the front door and direct people to use the back alley entry. He said that when told by Inspector 1 that they shouldn't do that, they stopped closing the front door. He also said they were going to stop using the back alley entry but had not yet done that. He said Inspector 1 discouraged the use of the back door, but did not say that it was a contravention to use it. He also said Inspector 1 had seen the design of the backroom and had not given him any reason to think there was a problem with it. He said if Inspector 1 had raised an issue with the design of the backroom, he would have changed it.

The Licensee said that for the most part, he worked during the day and only occasionally came in on evenings to chat with staff and check on sales. He said he could not conclusively say if customers sometimes came in and only ordered a drink. He said that if customers did come in for just a drink, it was staff's job to move food sales. He did not believe the website articles resulted in more people coming in for just a drink.

The Licensee testified that after the March noise complaint, they changed the style of music. He said they added sound panels in the backroom doors. He also said the noise by-law only applies after 10:00 p.m., but sometimes people complain about noise before that. Without seeing the complaint, he did not know what time [of day] it was made. In any case, he said they have not had any further noise complaints.

The Licensee said that he puts condiments on the table during the day because they compliment the breakfast type foods served, but they don't do that in the evening as ketchup and the like would be an insult to the Chef's good food. He said the cutlery is rolled in napkins and only put on the table when guests are seated. He said he thought putting them out earlier was unsanitary and guests would not know who else might have previously touched them. He said menus are presented when guests are seated.

The Licensee submitted his copy of the Facebook pages entered by the Branch as Tab 14, Exhibit 1, highlighting on those pages where the service of food was mentioned (Exhibit 6). He also submitted copies of photographs, taken during the day, of a booth area table with condiments on the table but no menus or cutlery (Exhibit 7).

The Licensee said that while sales for the month generally show a higher ratio of food to liquor, that ratio changes to about 50/50 during the evenings. He said the patrons are an older crowd and it is not often the premises are open right until midnight. He says the Server and the Dishwasher stay until the establishment is closed and the Dishwasher signs out when he leaves, so he knows about the earlier closings from the sign out sheets.

He thought that if it was not busy and no one expressed interest in another drink, then the kitchen could close. He said he is very aware of the implications of a contravention.

The Licensee testified that he was well aware of the differences between Food Primary and Liquor Primary licenses. He said he had considered applying for a Liquor Primary but there were pluses and minuses to doing that. He thought that a Liquor Primary licence could add value, but could also add hassles. He said the restaurant is primarily daytime focused and he did not want to have to deal with people ordering shots and "slamming on the tables".

The Licensee testified that he has two restaurants. The other restaurant is not licensed. Each restaurant has a manager. He leaves it to the restaurant managers to hire and train staff. The staff is small in number and most of the Licensee's policies are communicated orally. Staff members have their SIR certification and are expected to know the nuances of the liquor code. He expects staff to act responsibly.

The Licensee said he fully supports the Server in not wanting to serve a full entrée dinner to a patron just before closing. He said the late night menu is quicker and easier to prepare. He testified that while the kitchen would be open at 11:00 p.m., and appetizers and burgers could be prepared, it was impractical and inefficient to expect a full meal to be prepared when they are just closing.

The Licensee said the two Inspectors' evidence on the time for closing the kitchen in relation to last call was inconsistent. He also said that the prior inspector's interpretation was different from Inspector 1's. He said he previously understood that the kitchen had to stay open until last call. He thought if they are not accepting new customers, no new drinks are being served, then closing the kitchen seems reasonable. He said that if the rules had changed, then he thought there would be some notice. It would be costly to keep staff on to prepare dinner for one patron when the premises were being closed in 10 or 15 minutes. He would encourage staff to offer something other than dinner, which is what the Server did.

The Licensee admitted he was not present on the night in question and cannot say what happened or if the kitchen was closed.

SUBMISSIONS – BRANCH

The Branch Advocate submitted the evidence supports a finding of a contravention. He submitted that Inspector 1's evidence of the kitchen being closed, the operation and branding of the back area as a back alley bar called Skinny Fat Jack's, and the web articles all show a focus on liquor, not food. The Inspectors were not offered menus, were told the kitchen was closed, and even if only beginning to close, a strong message that ordering food was discouraged, all while liquor was evident on the tables and last call had not been actually issued. The Branch Advocate says that someone could have ordered liquor, without food being available.

The Advocate notes the Food Primary manual is clear that a Food Primary must operate as a restaurant at all times, and cannot shift to a Liquor Primary. This means that right until closing, food must be available. If there is any ambiguity on whether the kitchen can close, it should be noted that the Terms and Conditions state that the establishment must operate as a restaurant at all times. As long as the doors are open, then food must be available to be served.

The Advocate suggests the defence of due diligence is not available as the decision to close the kitchen while the service of liquor was still possible was pursuant to a management policy. In the alternative, there is no evidence the staff were effectively trained.

SUBMISSIONS – LICENSEE

The Licensee submits there is no evidence of liquor being served while the kitchen was closed. He says the drinks on the table are not sufficient evidence that liquor service was continuing.

The Licensee says the Server could and did make the decision to close at 11:30 p.m. and not to seat any new customers after having made that decision. The Licensee says the establishment is entitled to close early.

The Licensee says the Inspectors did not behave consistently with the behavior of a typical patron. They did not ask to be seated or for menus. He says simply coming in and saying they want something to eat was aggressive and the Server was right not to encourage them to stay.

He also noted the Inspectors' evidence was inconsistent about whether there were seats available: Inspector 1 said there were none, Inspector 2 said there were seats available. He says this calls into question their credibility and the weight to be given to their evidence.

The Licensee said the two inspectors evidence on the time for closing the kitchen in relation to last call was inconsistent. He also said that the prior inspector's interpretation was different from Inspector 1's. He said he previously understood that the kitchen only had to stay open until last call. The Licensee noted the discrepancy in the Inspectors' interpretations of the requirements, with Inspector 1 saying the kitchen had to be open until the bar was closed, and Inspector 2 saying the kitchen could close after last call. He says if the Terms and Conditions are not clear to the Inspectors, how can they be clear to licensees. He says there is an awful lot of grey area.

The Licensee submitted the evidence fell short of supporting a finding of a contravention. He said the evidence is that the kitchen was open. The Licensee says the Server says the kitchen was open, but even if it was not, he says no contravention has been proven. He says no liquor was being served, so it was ok to close the kitchen. He thought if they are not accepting new customers, no new drinks are being served, then closing the kitchen seems reasonable. It would be costly to keep staff on to prepare dinner for one patron when the premises were being closed in 10 or 15 minutes. He would encourage staff to offer something other than a full dinner, which is what the Server did. Although a reduced menu was on offer, that menu carried a full range of items, including items that would qualify as appetizers and others that would qualify as full meals. He further said the liquor service had stopped. No liquor was asked for by the Inspectors and they did not see any being served. He said that if the rules had changed, then he thought there would be some notice.

The Licensee questioned why some of the Branch's material was entered into evidence and what it was supposed to show. He agreed there had been a noise complaint, but it had been dealt with. He agreed he ought not to have operated under two names, but once he was advised of that, he started to remove that branding. The Inspector gave evidence about the bar in the backroom, but never raised it as an issue. The items on the reduced, late night menu offer a variety of appetizers and mains. If the limited menu was an issue, it could have been addressed other than by issuing a Contravention Notice. When told to remove the word "Bar" from the menu, he did. He noted the website material is old, and not sanctioned by him. The sound readings do not go to anything related to the contravention. He said he thought the Inspector's role is to support licensees and to facilitate understanding of the rules.

The Licensee says his circumstances are different from those in other cases where a contravention was found. There was no liquor served and there was no raucous behavior.

He noted that in 15 years of operation, they have never had a contravention. He says as a small business person he tries to be diligent.

He said the penalty proposed would have significant repercussions for this small business, and given that, the weight of the evidence should be given careful consideration.

REASONS AND DECISION

The Licensee is alleged to have contravened section 20 of the Act and section 11 of the Regulation by operating contrary to the primary purpose of its licence. Specifically, the Regulation provides that

- 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.

The Food Primary Terms and Conditions provide that a food primary licensee is responsible for operating all areas of the establishment as a restaurant, and gives some detail about what the Regulation means, in layman's language:

- Kitchen equipment: the kitchen must be fully equipped to produce food on your full menu and must be open and staffed *whenever* liquor is served (emphasis is from the Guide).
- Menu: The menu must include a reasonable variety of appetizers and main courses and must be available at all times that liquor is being served. Serving salsa, chips, peanuts and other types of "finger food" is not enough to meet this requirement.
- Furnishings and lighting: The décor must be suitable for dining and table service. You must have enough tables, chairs and food service equipment (glasses, plates, etc.) to serve full meals to patrons.
- Entertainment and Games: The types and hours of entertainment offered must not distract from the primary purpose of the service of food.
- Names: The name of your establishment must not mislead the public as to the primary purpose of the service you provide. For example, as a FP you may not call yourself "Joe's Bar" but "Joe's Bar and Grill" is acceptable as food service is also represented in the name.
- Operating hours: You must operate as a restaurant at all times. Restaurants cannot shift their operation to become a bar during certain hours or the day, such as between 4 p.m. and 6 p.m. or in the late evening hours.
- Financial records: You must make all financial records available and provide receipts for the liquor inspector to review upon request.

A side bar on page 14 notes that in determining whether an establishment is operating as a restaurant or a bar, the General Manager does not have to establish that a 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 the licensee is operating as a bar. It also expressly provides that the General Manager may also take into account any other relevant considerations in determining whether an establishment is operating as a restaurant or a bar.

Another side bar, on page 15, notes a revision in June, 2014 that permits the service of liquor without food, but that the primary focus of the business must remain the service of food at all times.

From all of the above, clearly a Food Primary establishment must be primarily engaged in the service of food during all hours of operation. Liquor service is to be an accompaniment to food, rather than as the primary activity. A contravention occurs if the primary focus of a Food Primary establishment shifts from the service of food to the service of liquor.

The NOEA expressly cited the following as elements of the contravention:

- No signs of food service throughout the establishment.
- No odour of food cooking or food preparation in the establishment.
- A staff member told the liquor inspectors the kitchen was closed and there was no food available.
- No restaurant paraphernalia was on the tables – no cutlery, drinking glasses, napkins, menus or condiments.
- The kitchen was closed while liquor service continued.
- The kitchen was not operating as a kitchen at the time of the inspection.
- Staff was selling liquor to patrons despite the kitchen not being operational for the service of food.

Looking at each requirement and the evidence presented, both separately and cumulatively, I have made the following findings.

Menu:

I find that after March, 2015, and on the advice of the Inspector, the Licensee discontinued the use of the "Bar Menu" and switched over to a reduced "Late Night Menu". I also note Inspector 1 testimony that in his opinion the Late Night Menu was sufficient to meet the requirements for a Food Primary to have both appetizers and main courses available.

While I am a bit troubled by the Server's repeated references in her testimony to a "Bar Menu", there is no evidence any other menu being used by the Licensee at the date and time of the alleged contravention. I find that the Late Night Menu was the menu offered to the Inspectors.

From reviewing the Late Night Menu and the evidence in relation to it, I find the Late Night Menu includes a sufficient variety of main courses and appetizers to meet the requirements of a Food Primary licence. I also note the contents of the menu was not an item listed in the NOEA as being an element of the contravention.

Furnishings and Lighting:

In the NOEA and in their evidence, the Inspectors raised the lack of "restaurant paraphernalia" on the tables as evidence of a lack of focus on food.

The Licensee gave a reasonable explanation why napkins and cutlery were not placed on the tables prior to patrons being seated (to allay any patron concerns about sanitary issues). He also said that these items and menus were presented to patrons when seated. I note that the Inspectors did not ask to be seated, so those practises were not tested by them. Without any contrary evidence, I am prepared to accept the Licensee's evidence on this point.

I also accept the Licensee's evidence that condiments were usually on the tables during the day only, given a different type of food is served at night as reasonable.

Without any evidence to the contrary, I accept the Server's evidence that patrons had last ordered food sometime earlier in the evening and so that at the time the Inspectors arrived, the tables were cleared of dishes.

I accept all of this evidence as reasonable explanations for the lack of restaurant paraphernalia on the tables at the time in question, and based on that evidence I do not find this to indicate a lack of a primary focus on food service.

Both Inspectors viewed the establishment on the night in question and neither raised any other lack of furnishings or the lighting as a concern or issue in their evidence or in the NOEA.

Based on the evidence I have accepted, I find the furnishings and lighting on the night in question were sufficient to meet the requirements of a Food Primary licence.

Entertainment and Games:

The Terms and Conditions are clear that the type of entertainment is not to distract from the primary purpose of the service of food. Although there was a fair bit of evidence about the musical performances offered at the establishment (such that it might appear that music, not food or liquor, was the primary focus), the Inspectors did not raise any specific issues about the nature of the entertainment or directly suggest a failure to comply with this requirement

On this basis, I accept that the music performances are in keeping with what would be expected in this type of restaurant at this time of day and that the musical performers did not take away the focus on being a Food Primary establishment. I also note this was not an item listed in the NOEA as being an element of the contravention.

Advertising:

This item is listed under the Regulation but not referred to in the Food Primary Terms and Conditions. The advertising evidence presented consists of website articles and the Licensee's Facebook page, and, to lesser extent, the sandwich board and posters.

With respect to the website articles, I find:

- The articles focus more on the music being presented, and to a lesser extent on liquor and perhaps to a slightly lesser extent on food, with the photograph of a staff member in one article definitely more liquor focussed. However, I also find the articles are significantly dated. They were posted in March, 2015, and no more recent or other articles were submitted to suggest the nature of the articles continued to February, 2016 when the contravention is alleged to have occurred.

- A third party posted the articles, not the Licensee, and the Licensee did not have control over the contents of the articles and so is not responsible for the content of the articles.
- To the extent the Licensee did have control over the content, as allegedly being based on an interview of and containing quotes from an employee, that employee was subsequently terminated, at least in part due to the nature of the articles.
- The Licensee disavowed the contents of the articles.
- The Licensee could have produced numerous independent reviews of the establishment that focussed on its food service.

The print out of the Licensee's Facebook page is dated from March 9, 2015. There is one reference to "Skinny Fat Jacks, A Back Alley Bar", one reference to the grand opening and half price cocktails, numerous references to "Skinny Fat Jacks" (without any reference to the Back Alley Bar), numerous references to the musical performers, and several references to dinner and the types of food or specials. No more recent Facebook page was submitted to show the nature of the current advertising.

The sandwich board and posters simply list the evening music, and do not contain any reference to liquor. They reference Skinny Fat Jacks, but not the Back Alley Bar. The sandwich board indicates July dates and of the posters, one is undated, the others show January dates.

I find the foregoing examples of advertising are, for the most part, out-dated and inconclusive about a focus on liquor rather than food, as of February, 2016. For this reason, I do not find them to be sufficient evidence of a change in focus from the service of food to the service of liquor to support the contravention alleged.

I also note that while the various documents are set out in Exhibit 1 and canvassed in Inspector 1's oral testimony, improper or other advertising is not an item listed in the NOEA as being an element of the contravention.

Names:

This is listed in the Terms and Conditions, but not in the Regulation. The Terms and Conditions raise issues of misidentification of a restaurant as a Liquor Primary by use of the word "bar" alone in the name.

I accept the Inspector's evidence that the use of the name "Skinny Fat Jack's" was raised by him with the Licensee in March, 2015 and that name was still in use as recently as January, 2016. The Licensee admitted to being less than diligent about the "re-branding". I note, however, it is only the initial March 2015 use of "Skinny Fat Jack's" that contains the reference to a "back alley bar". The later posters and sandwich board and other photographs only show a reference to "Skinny Fat Jack's", without any reference to it as a back alley bar.

I find that the use of the name Skinny Fat Jack's may have contravened a requirement that only one name be used (as suggested by the Inspector but without a reference in the Terms and Conditions or the Regulation), but once the reference to the "back alley bar" was dropped, apparently sometime before July 2015, it no longer contravenes the Terms and Conditions requirement on names and as such does not show a change of focus from food to liquor. Additionally, I also note this was not an item listed in the NOEA as being an element of the contravention.

Operating hours:

The evidence of any change in the focus during operating hours is of the different menus and staffing levels, the music being offered, the noise complaint and the sales records.

I find that the establishment does change somewhat from its daytime operations to its evening operations in that the menus are different and the staffing levels are different. However, that does not mean the establishment did not remain focussed on food. I have already addressed the music above and noted that the focus may have shifted from food to music, but not from food to liquor.

With respect to the noise complaint, I note the following:

- The complaint is dated – it is from March, 2015, and there has been no re-occurrence.
- The Licensee says he has addressed the noise issues, which is not disputed.

I will address the financial records below.

I find that this evidence, on its own, is not sufficient to support a finding of a change in the focus of the operations, contrary to the Terms and Conditions. I also note this was not an item listed in the NOEA as being an element of the contravention.

Financial records:

I find the financial records show that during the day, the establishment clearly has a focus on food service, not liquor. While there is some shift in the ratio of food to liquor at night, there is still a strong component of food service, sufficient in this case, to find that this alone does not support a finding of a change in the primary focus from the service of food to the service of liquor.

I also note this was not an item listed in the NOEA as being an element of the contravention.

Kitchen equipment:

There is no question the kitchen is fully equipped to produce the food on the full menu and that the establishment is fully equipped with necessary plates, cutlery, etc. to serve the items on the full menu. There is also no dispute kitchen staff was on the premises and in the kitchen. The dispute is whether the kitchen was open when liquor was being served. This element is more difficult to resolve.

I accept the evidence of the Inspectors, as supported by the photographs and in part by the Server's evidence, that the kitchen was cleaned, no food preparation was in progress and no food was visible. However, this is not determinative of the issue. I find that it may be expected that towards the end of the hours of operation the kitchen staff may begin cleaning the kitchen and putting away food when none has been recently ordered. And I am prepared to accept that a licensee may close earlier than the hours of

its licence, and if it has stopped serving liquor, it can close its kitchen at that time. The question then is whether despite the kitchen being cleaned, could food be ordered and was liquor was being served, or put alternatively, was the kitchen indeed closed and had liquor service stopped?

The uncontroverted evidence is that the Inspectors did not ask to be served liquor and while they were present, no liquor was delivered or offered to them or to any other person. A simple test would have been for the Inspectors, prior to identifying themselves as inspectors, to ask the Server for a drink containing liquor. They did not do that. Similarly, it would have been simple for the Server to say we are closing and not seating or serving anyone now. She did not do that. So was the kitchen open, and was liquor being served?

The point on which this case turns is whether liquor was in fact being served. The Inspectors say that the mere presence of liquor on the tables meant that liquor was being served, as that term is used in the Terms and Conditions. I disagree. I find that once the licensee has made the clear decision not to serve any more liquor (that is to provide any new liquor to any patron), liquor service is stopped. Patrons are simply finishing the drinks earlier provided and the kitchen can close because no new drinks are being provided. However, should any new drink be provided after the kitchen has closed, then a contravention may occur. This means that a "last call" that allows for more drinks to be ordered, requires the kitchen stay open until the "last call" orders are all delivered.

Here, there is still the question whether the clear decision had been made not to serve any more liquor. The evidence is unclear. The Server says she canvassed patrons but had not given last call. There is, however, no requirement for a "last call" and indeed the notion of a "last call" is, in my opinion, more in keeping with a Liquor Primary, not a Food Primary.

While I have some doubts about the Server's evidence, given the balance of my other findings that the focus had not changed from the service of food to the service of liquor, I am prepared in this case to find that the Server had in fact made a decision to discontinue liquor service. I find that liquor was not being served while the kitchen was closed and the contravention has not been proven.

Due Diligence

Having found that the contravention has not been proven, I do not need to deal with the defence of due diligence. If I did need to deal with it, the defence would have failed. To have been successful, the Licensee would need to establish that he is more involved in ensuring the evening operations comply with the terms of the Licence and that better training and follow up is given to the those very few employees who do work in the evenings, with no or very little supervision.

CONCLUSION

Based on my assessment of the evidence, as set out above, I find the evidence falls short of establishing that on February 19, 2016 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 contrary to the primary purpose of its licence.

Original signed by

Dianne Flood
General Manager's Delegate

Date: July 26, 2016

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

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Hugh Trenchard, Branch Advocate