



**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:	Bamboo Garden Restaurant Ltd. dba Bamboo Garden Restaurant c/o Luong (Dave) Dinh 1130 Cliffe Avenue Courtenay, BC V9N 2K1
Case:	EH16-120
For the Licensee:	David Dinh
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Dianne Flood
Date of Hearing:	Written Submission
Date of Decision:	January 23, 2017

**Liquor Control and
Licensing Branch**

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INTRODUCTION

The Licensee, Bamboo Garden Restaurant Ltd. operates a licensed establishment located at 1130 Cliffe Ave. Courtenay, BC ("the establishment"), under Food Primary License #303745 ("the License"). Under the Licence, the Licensee may serve liquor Monday to Sunday between the hours of 9:00 a.m. to midnight.

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

This matter is being heard by written submissions. Mr. Dave Dinh, the president and a shareholder of the Licensee, made the written submission and reply on the Licensee's behalf.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch alleges the Licensee contravened section 13(4) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 and section 43 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 by failing to ensure a person (a server) had successfully completed the Serving It Right ("SIR") training program and by failing to provide proof of successful completion of the SIR program. The range of penalty for a first contravention of these provisions is a suspension of one to three days and/or a monetary penalty of \$1,000 to \$3,000. The Branch proposes a monetary penalty of \$2,000.

The Licensee, by agreeing to a written submission on penalty only, admits the contravention and the facts as set out in the Notice of Enforcement Action ("NOEA"). The Licensee is not pursuing a due diligence defence. The Licensee only disputes the amount of the proposed penalty. The Licensee suggests a penalty of \$1,000 is more appropriate.

RELEVANT STATUTORY PROVISIONS

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

Training

13 (4) A person, other than a person referred to in subsections (1) to (3), must successfully complete a prescribed training program or recertification as required by the regulations.

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

Beverage service training

43 (1) In this section:

"**recertification**" means recertification under the SES Program or the SIR Program, as applicable;

"**SES Program**" means the training program "Special Event Server Program", provided by a person or organization approved by the general manager;

"**SIR Program**" means the training program "Serving it Right: The Responsible Beverage Service Program", provided by a person or organization approved by the general manager.

(2.2) The following must have successfully completed the SIR Program:

(a) a person who supervises the sale or service of liquor, and a person who sells or serves liquor, in a licensed establishment that is the subject of a licence referred to in subsection (2)...;

(3.4) Subject to subsection (3.5), a requirement under this section that a person successfully complete the SES Program or the SIR Program includes the requirement that the person successfully complete recertification at least once every 5 years.

(5) Successful completion of the SES Program or the SIR Program or recertification under either program must be evidenced by a valid certificate of completion issued by a person or organization approved by the general manager in the name of the person who completed the program or recertification.

(8) Subject to subsection (7), before allowing a person to supervise the sale of liquor in a licensed establishment, or to sell or serve liquor in a licensed establishment..., the licensee must verify that the person has successfully completed the SES Program, the SIR Program or recertification under the applicable program.

(9) A person who claims to have successfully completed the SES Program, the SIR Program or recertification under either program must produce his or her certificate of completion when requested to do so by the general manager or a peace officer.

Guide for Liquor Licensees in British Columbia (the "Guide")

Additionally, under section 12 of the Act the General Manager may impose, in the public interest, terms and conditions on licenses. The Guide sets out the terms and conditions and re-states aspects of the Act and Regulations in layperson's language.

The Guide states that a licensee is responsible to understand and comply with the Act, the Regulations and the terms and conditions, including ensuring that employees follow the liquor laws and comply with the terms and conditions of the license, even when the licensee is not on site.

The Guide also expressly addresses the reasons for and requirements of successfully completing the SIR program. The Guide states that it is a requirement for all licensees, managers and all servers to have successfully completed the SIR program. A licensee is responsible for ensuring staff take the SIR program and for keeping photocopies of staff SIR certificates available at all times for inspection by a liquor inspector.

ISSUES

The Licensee admits the contravention and the facts as set out in the NOEA and does not claim a due diligence defence. As such, the only issue is what penalty, if any, is appropriate in these circumstances.

EXHIBITS

- Exhibit 1: The Branch's Book of Documents
- Exhibit 2: The Licensee's written submission dated November 30, 2016 and accompanying email dated December 2, 2016, together with a letter dated November 22, 2016, signed by four servers
- Exhibit 3: The Branch's response to the Licensee's submission, dated December 6, 2016
- Exhibit 4: The Licensee's reply, dated December 13, 2016

EVIDENCE – BRANCH

The facts as set out in the NOEA, which are accepted by the Licensee, are summarized as follows.

On July 13, 2016 a Liquor Inspector, while making routine liquor inspections in the area, attended at the establishment. Two servers were present and they advised no manager or supervisor was present. On conducting an inspection, the Inspector noted:

- The Food Primary License was on display behind a bar service area.
- Spirits, draught beer, bottled and boxed wine were listed on the menu provided to him and were on display within the view of restaurant patrons.

He also observed a number of compliance deficiencies:

- No staff SIR certificates were available for inspection and both servers said they did not have an SIR certificate.
- No liquor registry was available for review.
- The prices of spirits, draught beer, bottled and boxed wine were all shown on the menu but the size of the drink or the amount of liquor in each serving were not shown on the menu.
- No Approved Social Responsibility Materials were observed in the establishment.

While at the establishment, the Inspector spoke by telephone to the Manager, who had been contacted by one of the servers. The Inspector told the Manager about the compliance deficiencies. He advised her that these deficiencies were identified in the Guide and that the Guide was available to download and should be reviewed. He also advised her that he would return in approximately 30 days to conduct a follow-up inspection and that he hoped the non-compliance issues would be addressed.

On August 24, 2016 the Inspector returned to the establishment to conduct the follow-up inspection. Again no manager or supervisor was present. One of the servers from the July inspection was present. The server said she did not have an SIR certificate. She also said she did not serve liquor when the Manager is not present. The server was told that if no SIR certified staff was on duty, the liquor on display in the bar area had to be removed from public view. Another server arrived and the two servers removed the liquor from public view.

The Inspector also noted that the menu still showed the prices of liquor drinks, but not their size as is required by the terms and conditions. He did not observe any Approved Social Responsibility Materials on display in the establishment, also as required by the terms and conditions.

The Inspector advised the servers that a Contravention Notice would be issued.

On August 25, 2016, the Inspector telephoned the contact number for the Licensee and reached the Manager at the establishment. The Manager said she had been unable to download the Guide and said she had left him a voice mail advising him of that. She also said that she was too busy to take steps toward complying with the terms and conditions. She said that she told staff not to serve liquor while she was away on holidays.

Later that day, the Licensee called the Inspector and acknowledged that the Licensee was in non-compliance. The Licensee expressed concern that a monetary penalty might be imposed.

On August 28, 2016, the Licensee emailed the Inspector scanned copies of SIR certificates for two servers. No SIR certificate for the Manager for any other servers was provided at that time or at any later time.

EVIDENCE – LICENSEE

As part of its submission, the Licensee submitted a letter, dated November 22, 2016, signed by four servers. In that letter, the servers said that they worked at the establishment and that while the Manager was on holidays, they stopped serving liquor or advertising it to customers. They also said that customers do ask [for liquor] but they say they are not offering it [when the Manager is away]. They said that when the Manager returned from holidays, they still did not offer liquor [to customers] until they achieved their SIR certificate. They said their SIR certificates were attached but no SIR certificates were actually provided. SIR certificates for two of the servers were provided on August 28, 2016.

SUBMISSIONS – BRANCH

The Branch Advocate says the SIR program educates licensees, managers and servers about their legal responsibilities when serving liquor and provides effective techniques to prevent problems arising from over service. He says all licensees, managers, servers and bartenders must have a SIR certificate as evidence of having successfully completed that program.

The Branch Advocate says voluntary compliance with the Act, the Regulations and the terms and conditions is encouraged. He says that, here, the Inspector's efforts to achieve voluntary compliance by the Licensee failed. He says the Licensee only started moving toward voluntary compliance when advised a Contravention Notice would be issued.

The Branch Advocate says a \$2,000 monetary penalty is justified in these circumstances. A 30 day warning was given about the failure to comply, but no action was taken to achieve compliance.

The Branch Advocate notes the servers said they do not serve liquor when the Manager is not present. He says it is reasonable to infer from that, that they do serve liquor when the Manager is present which, without an SIR certificate, is a contravention. He also notes that the Manager's SIR certificate was not produced.

Further, the Branch Advocate questions the Licensee's assertion that liquor service was suspended while the Manager was away on holidays.

The Branch Advocate says that the Licensee's representative has been involved in the establishment since 2009. As such, the Licensee's representative ought to have known the servers needed their SIR certificates. He says the Licensee's representative presented no reasonable excuse for failing to ensure that the Manager and all serving staff had obtained their SIR certificates.

SUBMISSIONS – LICENSEE

The Licensee's representative says that when the Inspector conducted the inspection the Licensee was in the process of selling the business and transferring the business to new owners. He also says that a couple of main chefs were away on holidays.

The Licensee's representative further says that the Manager has her SIR certificate and it was in the establishment, but the servers could not find it when requested by the Inspector. He says the service of liquor was stopped when the Manager was away on holidays. He also says that when the Manager was away, the liquor was put in storage and liquor advertising was taken down. He says when the Manager returned from holidays, the servers immediately got their SIR certificates and action was taken to meet the other issues of non-compliance.

He says this is a first contravention in many years of doing business at this establishment and the penalty should be reduced to \$1,000.

REASONS AND DECISION

Contravention

The Licensee's representative has admitted the contravention and accepted the facts as set out in the NOEA. On this basis, I find the Licensee has contravened section 13(4) of the Act and Section 43 of the Regulation and the terms and conditions.

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 there were procedures to identify and deal with the issue, it must ensure that those procedures are consistently acted upon and problems are dealt with.

The availability of the defence will depend on the evidence presented. The onus is on the licensee to establish on a balance of probabilities that it had exercised all reasonable care by establishing adequate systems and ensuring effective application of them.

The Licensee's representative has not presented any evidence of due diligence, nor has he made any claim for that defence.

As such, I find there is no evidence of due diligence to prevent the contravention from occurring and the defence 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

Licensees are obliged to comply with the legislation and the Terms and Conditions. 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 twelve months of this incident. On that basis, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item #23 in Schedule 4 provides a range of penalties for a first contravention of this type: a one to three day licence suspension and/or a \$1,000 to \$3,000 penalty.

I am not bound to order the penalty proposed in the NOEA. 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.

Proven Compliance History

No prior compliance issues were identified. The Licensee's assertion that this is his first non-compliance issue was not challenged by the Branch. This factor weighs in the Licensee's favour in determining the appropriate penalty.

Past History Of Warnings

On July 13, 2016, the Inspector advised the Manager of several non-compliance issues. The Inspector took no enforcement action at that time. Instead, he sought the Licensee's voluntary compliance and gave the Manager notice that he would re-inspect in 30 days. The Inspector's intent was to give the Licensee the opportunity to voluntarily make the necessary changes to comply with the Act, Regulations and terms and conditions.

On August 24, 2016, the Inspector re-inspected the establishment. The Inspector concluded no action had been taken to address the issues of non-compliance. The Inspector says the Licensee only took action when advised a Contravention Notice would be issued.

The Licensee, while accepting the facts set out in the NOEA, has offered a different explanation – that these servers did not serve drinks without the Manager being present – implying that steps were taken to address the issue.

I have considered this submission and find that even if these servers did not serve drinks when the Manager was not present, this does not bring the Licensee into compliance with his responsibilities, despite being given more than 30 days to do so. These servers did not have their SIR certificates and were servers in a licensed premise. All servers in a Food Primary establishment must have their SIR certificates. That is the law, and the Licensee is obliged to and should be aware of and fully comply with the law.

I find the evidence that two servers obtained their SIR certification within days after the second inspection shows how quickly that may be done and the ease with which the Licensee could have achieved compliance had he chosen to do so when first warned.

I find the Licensee's failure to voluntarily comply with the law when first warned about the issues of non-compliance weighs heavily against the Licensee in determining the appropriate penalty.

The Seriousness of the Contravention and the Threat to Public Safety

The requirement for SIR certification is to protect the public, both the persons being served and the general public, from the serious harm that can occur from over-service and/or the service of liquor to minors.

The SIR program is designed to encourage a responsible and professional approach to the service of liquor. It provides critical information on the effects of liquor on people and techniques to prevent over-service. It educates on how to recognize the signs of intoxication and how to identify minors to prevent underage drinking. It helps servers to recognize and know how to handle situations requiring intervention. These are very important issues in any establishment that serves or sells liquor. It is a very serious matter to allow persons to serve liquor who do not have proper training in these matters.

In considering this factor, I note the Licensee has accepted the contravention occurred, accepting, as a fact, that the servers did not have the SIR training and were unable to provide proof of SIR certification as required. Therefore, I have considered the evidence and submissions presented regarding the service of liquor simply for the purposes of determining the seriousness of the contravention and the amount of the penalty.

I have carefully considered the evidence and the law and find that the servers were required to have their SIR certification, whether the Manager was present or not. While the Licensee and the servers assert that liquor service had been temporarily stopped while the Manager was on holidays, no other independent evidence, such as sales records, was presented to support that assertion. No evidence was presented about the timing of Manager's holiday.

In any event, the evidence is clear that the Manager had returned by the day after the second inspection (if not before) and the servers had not yet obtained their SIR certifications. At the second inspection, the Manager was not present and liquor was in full view of patrons. The menu still showed liquor as being available and there was no signage or otherwise to advise the patrons liquor was not available. This leads me to conclude liquor was available to patrons when no one with an SIR certificate was present.

I also find that while the Manager may have an SIR certification and provided some supervision to the servers, that is not enough to comply with the law. Further, I am troubled that no SIR certificate was ever produced for the Manager, despite the Branch Advocate drawing attention to that lack of proof. The certificate, if it exists, was not produced on either inspection or after the issuance of the Contravention Notice, and that in and of itself is non-compliance with the regulatory requirement that the certificate be available for inspection. I also note that section 43(3.4) of the Regulation requires recertification every five years, so even if the Manager was certified at some point in time, there is no evidence that her certification is current. On this basis, I have no degree of confidence that anyone actively involved with the sale of liquor in the establishment had a current SIR certification.

As a result, given the SIR program is intended to protect the public from the serious harm, to prevent over-service and service to minors, this contravention is serious. This factor weighs heavily against the Licensee in determining the appropriate penalty.

The Well-Being Of The Community

It is important for the well-being of the community that all licensed establishments comply with the requirements set by the Act, Regulations and terms and conditions.

The Licensee and the Manager have, in effect, said they were too busy to comply with those requirements, which are set to protect the public interest. This is a blatant disregard for the well-being of the community and such conduct brings the effectiveness of the liquor regulatory scheme in disrepute. This factor weighs heavily against the Licensee in determining the appropriate penalty.

Other factors

The Inspector did not take enforcement action with respect to the other non-compliance issues he identified on July 16 and were not addressed by the re-inspection on August 24. However, the Licensee by his acceptance of the facts as set out in the NOEA accepts that there were other non-compliance issues. These are also factors that weigh against the Licensee in determining the appropriate penalty.

Having considered all of the above, I find that the appropriate penalty in this matter is \$2,000.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$2,000 to the general manager of the Liquor Control and Licensing Branch on or before February 22, 2017.

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
General Manager's Delegate

Date: January 23, 2017

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Stephen Hitchcock, Regional Manager

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