



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENSING BRANCH
IN THE MATTER OF**

A hearing pursuant to Section 51 of
The Liquor Control and Licensing Act, S.B.C. 2015, c. 19

Licensee:	TMT Investment Group Inc. dba Kin Kao Thai Kitchen 903 Commercial Drive Vancouver, BC V5L 3W8
Case:	EH17-043
For the Licensee:	Terrence Feng
For the Branch:	Hugh Trenchard
General Manager's Delegate:	A. Paul Devine
Date of Hearing:	August 29, 2017
Place of Hearing:	Vancouver, BC
Date of Decision:	October 20, 2017

**Liquor Control and Licensing
Branch**

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INTRODUCTION

The Licensee operates a food primary establishment known as the Kin Kao Thai Kitchen at 903 Commercial Drive in the City of Vancouver. Under Licence Number 306305, the Licensee is authorized to sell all types of liquor with a primary focus on the service of food between the hours of 9 a.m. and midnight from Monday-Sunday inclusive. The establishment has a licensed capacity of 25 persons.

The Food Primary Terms and Conditions Guide (“Guide”) published by the Liquor Control and Licensing Branch (“Branch”) is applicable to licences of this type. The Guide outlines the requirements of the *Liquor Control and Licensing Act* (“Act”) and the *Liquor Control and Licensing Regulation* (“Regulation”) which apply to the serving and consuming of liquor in food primary establishments.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The allegations of the Branch are set out in the Notice of Enforcement Action (“NOEA”) dated June 2, 2017. The Branch alleges that on May 5, 2017 during a routine inspection that occurred at about 6:45 p.m., the establishment was found to be over crowded in excess of both occupant load and person capacity limits of 25 persons. The Inspector who conducted the inspection counted 30 patrons and 3 servers inside the restaurant. The 5 staff in the kitchen were not included in this count.

The Branch elected to proceed by way of enforcement action given the seriousness of overcrowding as a public safety issue. A penalty consisting of a four-day licence suspension was proposed. This is the minimum licence suspension penalty for a first contravention set out in section 78(1) of the *Regulation* which deals with capacity requirements.

EVIDENCE

EXHIBIT 1: Book of Documents of the Branch

EXHIBIT 2: Contravention Notice B020764 (replaces B020762)

POSITION OF THE LICENSEE:

The Licensee does not dispute that its restaurant was over capacity when it was inspected on May 5, 2017 as alleged. Instead, it proposes to pursue a defense of due diligence.

RELEVANT STATUTORY PROVISIONS:

Liquor Control and Licensing Regulation, B.C. Reg. 241/2016

Schedule 2 Overcrowding
Item 13

Contravention	Period of Suspension (Days)			Monetary Penalty
	First Contravention	Second Contravention	Subsequent Contraventions	
A breach of section 78 (1) or (2) of the Regulation [person or patron capacity and occupant load in service area exceeded]	4 - 7	10 - 14	18-20	\$5,000 - \$7000

ORAL EVIDENCE OF THE BRANCH

The Branch called the Liquor Inspector to testify about his inspection of the establishment of the Licensee on May 5, 2017, and his subsequent authorship of the NOEA dated June 2, 2017. In May 2017, his territory included East Vancouver where the restaurant operated by the Licensee is located.

The Liquor Inspector noted that the Licensee is bound by the terms and conditions specified in the Guide. The Guide refers to the issue of avoiding overcrowding. This can be an issue for a food primary establishment such as the one operated by the Licensee where the Person Capacity is less than 100. In the case of the Licensee, the Person Capacity and Occupant Load are the same, set at 25. This means the maximum number of persons in the red line service area at one time cannot exceed 25, including staff. The Occupant Load is determined by the Fire

Department for the City of Vancouver, and may, as here, be the same as the Person Capacity. Section 78(1) of the *Regulation* provides that if a person capacity is established for the service area under a licence or endorsement, the number of people in the service area at one time must not exceed the person capacity. Likewise, if an occupant load has been established for the service area, the number of people in the service area at one time must not exceed the occupant load. There are different penalties for a breach of each of the person capacity and occupant load limits.

The Liquor Inspector was conducting routine inspections of the licensees in his territory on May 5, 2017. The Liquor Inspector testified that he normally visits each of the licensed facilities in his assigned territory twice each year. He arrived at the Licensee's establishment at about 6:45 p.m. On arrival, he noted it was very crowded. It was especially busy near the door. He next proceeded into an area near the kitchen, where he asked an employee if he could speak with a manager. He was told there was no manager available at that time. After he identified himself as a liquor inspector, he did a physical count of patrons in the restaurant. His count was 30 patrons not including the people who are lined up to obtain take out orders.

Following this, an employee identified as N.A. approached the Liquor Inspector and offered to help. He asked the employee to produce the liquor licence for the food primary establishment along with a copy of the floor plan. The employee was only able to find the liquor licence, so the Inspector called up a copy of the floor plan from the Branch's database on his cell phone. The employee initially stated that he thought that the Person Capacity in the restaurant was 50. He was asked if he had a Serving It Right (SIR) certificate. He said that he had an equivalent certificate from Ontario. The Liquor Inspector asked the employee to do a count, and was told the employee count was 31 patrons and 3 servers in the redline area, and five staff in the kitchen. The Liquor Inspector counted 30 patrons not including the servers or kitchen staff. He also did not include patrons waiting for take-out as their numbers changed too quickly. He told the employee the overcrowding constituted a safety hazard in the event of a fire or similar problem. He directed the employee to lower the patron count. The employee said that would be difficult but was directed to do so anyway.

In considering penalty, the Liquor Inspector noted that while the number of employees and staff was relatively small, it comprised an excess over Person Capacity of 32%. The establishment was full, and it was very difficult for customers to walk in and out. The Liquor Inspector decided that the minimum four-day suspension provided for in the *Regulation* would be less punitive than a monetary penalty. The proposed penalty in the NOEA therefore was for a four-day suspension of the Licensee's licence. This would allow the Licensee to remain open but not to serve liquor during the period of the suspension.

EVIDENCE OF THE LICENSEE

The evidence of the Licensee was provided by Mr. Terrence Feng. Mr. Feng is an owner of the licenced establishment. He noted that the restaurant is very small. He attends business there every day that the restaurant is open but was called away on a family emergency shortly before the Liquor Inspector arrived. He called an employee N.A. in to cover for him at about 6:15 p.m. It was his understanding on talking to the employee that things got out of hand quickly in terms of the numbers of patrons. Mr. Feng testified that when he is at the restaurant, he staggers the seating of patrons in order to remain in compliance with the person capacity limits. Customers that attend for take-out are a wild card. Take out customers are told the order will take 30 -35 minutes to prepare. Several persons may attend, however, to pick up one order. If a take-order is not ready when customers arrive for pick-up, they are asked to pay first, then to wait outside until their order is ready to avoid overcrowding.

The Licensee has applied to the City of Vancouver to increase the occupancy load of the establishment to 34, and has been told that a second washroom is required. Mr. Feng has submitted plans to install the second washroom, and has arranged for a contractor to do the necessary work. The City, however, has not yet issued a permit to proceed with the planned renovation although the application has been before it for several months. Once the permit is received, the restaurant will close for one to two weeks for the necessary renovations to be completed.

On cross-examination, Mr. Feng testified that staggering customers at the tables often means sitting pairs on tables which are designed to seat four. Normally, if the numbers are near 25, customers are told the restaurant is too busy, and they cannot be seated. The customers can then elect to be put on a waiting list, and to be called when seats become available.

Mr. Feng stated that new employees undergo a five-hour orientation which mainly focuses on service and food issues. He orally communicates to employees about how to avoid exceeding the number of patrons set out in the terms of the Licence. Staff are informed in their orientation about the maximum allowable number of patrons that can be seated by the restaurant. New employees work on the quieter shifts at the start. During this time, they shadow experienced staff. In the first few weeks of their employment, Mr. Feng observes their progress, and will often ask them questions in a pop quiz format. The Licensee does not have staff manuals, and has no written guidelines for staff, although these are under consideration. Mr. Feng provides written memos to his staff, and will discuss the memos with them informally. These may include issues such as introducing new products. Most of the staff in the restaurant are of long service.

Mr. Feng testified that there is normally a staff member at the door to greet new customers, and to control the count of customers inside the restaurant. Normally the person who acts as host or hostess is responsible to count patrons. Mr. Feng does this job when he is in the restaurant. He also answers the phone to deal with customers ordering food. There are signs in the restaurant requesting that patrons do not block the aisles, and they are asked to leave until called to be seated. Mr. Feng testified that there is a plan of the red line area of the restaurant in a binder in the office. He also understood that the employee told the Liquor Inspector that the person capacity was 33, not 50.

Mr. Feng noted that the City only requires one exit be provided for restaurants that seat up to 60 patrons. There is, however, an exit at the rear of the Licensee's restaurant as well as the one at the front, so patrons can easily find a way out in the event of an emergency.

SUBMISSIONS

The Branch submitted there was no issue that a contravention had occurred as set out in the NOEA. The fact of the overcrowding was not in dispute. Further, the evidence concerning the events leading to the contravention did not give rise to a defence of due diligence. The Licensee had to demonstrate there was a backup plan in place when the manager could not be present, and it failed to provide such evidence. There needed to be some training and a better plan in place for staff to understand these kinds of issues. With such a plan, staff would be able to deal with customers who walk in and seat themselves. Therefore, the defence of due

diligence is not made out. The penalty is a strict liability offence, and eight people over capacity is 32% in excess of the established limits. The Branch made no submissions on the directing mind issue.

Mr. Feng stated that the Licensee takes responsibility for the contravention. He acknowledged that he needs to be better at his training. Another manager has been hired recently to assist in this process. He stated that the concern of the Licensee is the four-day suspension of the Licence will take away from the customer experience at the restaurant. Liquor sales are not, however, a large part of the sales of the restaurant. A monetary penalty would not be justified in light of the small amount of liquor sold in the restaurant.

ANALYSIS AND DECISION

The three issues in this case are:

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?

The first issue is determined because the Licensee does not dispute the fact of the overcrowding contravention. On the question of a defence to the contravention, the Licensee is entitled to a defence if it can be shown that it was duly diligent because it took reasonable steps to prevent the contravention in question from occurring. The onus is on the Licensee to establish first that it had procedures in place to identify and deal with problems relevant to the contravention, and second that those procedures are consistently acted upon.

The leading case on establishing the defence of due diligence is the decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie* (1979) 2 SCR 1299. At page 1331 in the reported decision, Dickson, J. sets out the test of due diligence as follows:

The due diligence which must be established is that of the accused alone. 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. 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 BC Supreme Court, in *Beverly Corners Liquor Store Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, 2012 BCSC 1851, considered and clarified the application of the defence of due diligence in the context of the sale of liquor to a minor contrary to the *Act*. In summary, the Court concluded that the defence of due diligence is to be considered in two stages. First, was the employee who made the sale a directing mind of the licensee. If so, the defence of due diligence is not available and the inquiry stops there. A “directing mind” is someone who can design and supervise the policies of the Licensee instead of just carrying out those policies. If the employee who made the sale to a minor was not a directing mind of the licensee (and there is no requirement that a “directing mind” must be on the premises when the sale is made), then the questions to be considered and answered are whether the licensee had implemented both adequate training and other systems to prevent the contravention (the sale of liquor to minors), and had taken reasonable steps to ensure the effective application of that education and the operation of those systems. Both issues are factual, and will depend on the evidence presented. The onus is on a 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.

As was earlier observed, the onus of establishing due diligence rests with the Licensee. I conclude that the evidence establishes the employee who met with the Liquor Inspector on the evening of May 5, 2017 was not a directing mind of the Licensee. The individual was an employee of the Licensee, and did not perform management functions. On balance, however, I am not able to conclude on the evidence presented by the Licensee that it has established due diligence in the supervision and training of its staff. There is no record or other clear evidence that the Licensee has developed and implemented adequate training or other systems to prevent the contravention of overcrowding, or has taken reasonable steps to ensure the effective application and the operation of such systems. This is evident in that the employee who spoke to the Liquor Inspector was unfamiliar with the proper Person Capacity and Occupant Load limits for the restaurant.

Instead, the Licensee has relied almost entirely on Mr. Feng being present during the time when the restaurant is open. Any failure on his part to be present for any reason would thus be a failure by the directing mind of the restaurant, and so the defence of due diligence would not be available.

The restaurant has plans to increase its Occupant Load, but those plans remain in the formative stage pending approval of the plans to add another bathroom. It appears that once the plans are approved and the Occupant Load is increased, the Licensee will be able to apply to the Branch to increase its Person Capacity so that it can utilize all of its current seating capacity. At the time of the contravention, however, the Licensee was in breach of both its current Person Capacity and Occupant Load limits.

The hiring of a new manager does present an opportunity to properly train and supervise staff to deal with issues such as controlling the number of customers in the restaurant. This does not, however, provide evidence of due diligence to the contravention that occurred on May 5, 2017. I find therefore that the Licensee did not act with due diligence in respect of the contravention that occurred on that date.

PENALTY

I turn now to consider the issue of penalty. Pursuant to section 51(2) of the *Act*, having found that the Licensee has contravened the *Act*, the *Regulation*, and/or the terms and conditions of the Licence, I 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 NOEA. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound by the minimums set out in Schedule 2 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest.

The primary goal of the Branch in bringing enforcement action and imposing penalties is to achieve voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven history of compliance, a past history of warnings by the branch and/or police, the seriousness of the contravention, the threat to the public safety, and the well being of the community.

There was no record of a proven contravention of the same type for the Licensee at this establishment within the preceding 12 months of the contravention in question. The contravention is therefore treated as a first incident for purposes of determining penalty. Sections 78 of the *Regulation* provides as follows:

- 78 (1) If the general manager has established a person capacity for the service area under a licence or endorsement, it is a requirement of the licence that the number of people in the service area at one time must not exceed the following:
- (a) the person capacity;
 - (b) if there is an occupant load for the service area, the occupant load.

The service area is the part of the establishment where liquor is allowed to be sold, served or consumed. It is normally set out on the plans for the establishment and outlined in red. The General Manager sets the person or patron capacity while the occupant load is set by the governing municipality or fire marshal under section 145 of the *Regulation*. In the present case, the Licensee has both a person capacity and occupant load set for its establishment. Both are the same, 25 persons. Any breach of one of these would therefore equally be a breach of the other. This leads to somewhat of an anomaly. Under Item 12 of Schedule 2 of the *Regulation*, if the breach was only for exceeding Person Capacity, the monetary penalties and the minimum suspensions are less. There is a 1 – 3 days suspension for a first contravention, or a monetary penalty of \$1,000 – 3,000.

Nevertheless, it appears that the penalty for breach of person capacity or occupant load is different from the circumstances where both are breached. The wording of the legislation does not allow for a different result when the person capacity and occupant load are the same. Item 13 of the Schedule would normally apply when both the person capacity and occupant load are exceeded, even when the numbers for each are the same.

As noted earlier, the occupant load is set by the municipality where the business of the Licensee is located. In this case, the Licensee has for some time been in the process of working to increase the occupant load for its premises to a number that would meet or exceed the number of patrons and staff that were counted in the current contravention. The only change apparently required is to add another washroom. No other plans to change the layout of the premises has been suggested. As far as public safety is concerned, the evidence of the Licensee is to the effect that there are two existing exits in the restaurant which would safeguard the ability of its patrons to exit in the event of an emergency. This exceeds the minimum requirements necessary for a restaurant of this size.

I agree with the Branch's submission that the fact the Licensee was 32% in excess of its current Person Capacity and Occupant Load comprises a significant contravention of the *Regulation* provisions against overcrowding. I conclude, however, that the circumstances are unique. First, Mr. Feng was called away from the restaurant because of unusual circumstances due to a family emergency, and so was not present when the Liquor Inspector visited the premises. Second, the Licensee has for some time been in the process of increasing its Occupant Load to a number that would encompass the current contravention. This does not require significant alterations to the physical structure of the restaurant in terms of public safety. In view of these circumstances, I am satisfied a suspension of the Licence of the Licensee is not necessary to bring it into compliance, and so no enforcement action is required.

Nevertheless, I remind the Licensee that strict compliance of its current Person Capacity and Occupant Load limits must be maintained. These limits remain in effect until the planned changes to them are put in place. Any further contravention of these limits would likely result in a monetary penalty or a Licence suspension given the fact that the Licensee has been through this process once, and has been given this warning.

ORDER

Pursuant to section 51(2) of the *Act*, I order that the proposed penalty of a four-day suspension of the Licence of the Licensee be waived.

Original signed by

A. Paul Devine

General Manager's Delegate

Date: October 20, 2017

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Rupi Gill, Regional Manager

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