

INTRODUCTION

Guys & Dolls Billiards (2008) Ltd. (the "Licensee") holds Food Primary Licence No. 301547 (the "Licence"), pursuant to which it operates an establishment called "Guys & Dolls Billiards" at 2434 Main Street, Vancouver, BC, V5T 3E2 (the "Establishment").

According to the terms of the Licence, the Licensee may sell liquor from 9:00 a.m. to Midnight Monday through Sunday. It is a specific term of the Licence that "Liquor may only be sold, served and consumed within the service areas outlined on the official plan, unless otherwise endorsed or approved by the LCLB".

The Licence is, as are all food primary liquor licences issued in the Province, subject to the terms and conditions contained in the publication "Food Primary, Terms and Conditions" (the "Terms and Conditions Handbook").

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's (the "Branch") allegations and proposed penalties are set out in the Notice of Enforcement Action dated February 14, 2018 (the "NOEA").

In the NOEA, the Branch alleges that the Licensee is in breach of section 141(4) of the *Liquor Control and Licensing Regulation* B.C. Reg, 241/2016 (the "Regulation") made pursuant to the *Liquor Control and Licensing Act* S.B.C. 2015 c. 19 (the "Act") by allowing liquor to be taken from the Establishment's service area as outlined on the official plan.

Item 27, schedule 2 of the Regulation sets out the range of penalties for a first contravention of this type as being a 1 to 3 day licence suspension and/or a \$1,000 to \$3,000 monetary penalty. In the NOEA, the Branch proposes either a one day suspension or a \$1,000 monetary penalty be imposed as a result of this alleged contravention.

For the purposes of this hearing and in accordance with section 5 of the Act, the General Manager has delegated to me the powers, duties and functions provided to the General Manager by section 51 of the Act.

RELEVANT STATUTORY PROVISIONS OF THE REGULATION

Liquor Control and Licensing Regulation, B.C. Reg. 291/2016

Consuming and removing liquor from service areas

141 (4) A licensee or permittee must not allow liquor to be taken from the service area except in the following situations:

- (a) a bottle of wine that is unfinished by a patron and sealed by the licensee is taken by the patron from the service area;
- (b) liquor is sold for consumption off premises under an off-premises sales endorsement;
- (c) liquor is taken from a service area as described in subsection (2) (b);
- (d) liquor is removed from a service area in a liquor primary club licence under section 11 (2) (b);
- (e) liquor is removed under section 38 from a service area under a manufacturer, liquor primary or food primary licence;
- (f) a drink containing liquor is taken from the service area under a liquor primary or food primary licence in a hotel by a patron in accordance with section 85;
- (g) liquor is taken from the service area under a liquor primary licence in a hotel by the licensee in accordance with section 86 (1);
- (h) liquor is taken from a service area located on a golf course in the circumstances described in section 88 (1).

*Liquor Control and Licensing Regulation, B.C. Reg. 291/2016***Schedule 2****Monetary Penalties and Licence Suspensions****Liquor Service**

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First Contravention	Second Contravention	Subsequent Contraventions	
27	Contravention of section 141 (4) of this regulation [<i>allowing liquor to be taken from the service area</i>]	1-3	3-6	6-9	\$1,000-\$3,000

ISSUES

1. Did the contraventions occur?
2. If so, has the Licensee established a defence to the contraventions?
3. If the contraventions are proven, what penalties, if any, are appropriate?

EXHIBITS

- Exhibit 1: Branch book of documents, tabs 1 to 14;
- Exhibit 2: A copy of a prehearing conference letter, dated March 13, 2018, (the "Prehearing Letter") addressed to the Licensee at the address of the licensee's representative ("Licensee's Representative");
- Exhibit 3: A copy of an email dated April 4, 2018 from the Branch Registrar to the email address of the Licensee's Representative (the "April 4th Email");
- Exhibit 4: A copy of a letter dated April 11, 2018 from the Branch Registrar addressed to the Licensee at the address of the Licensee's Representative, to which was attached a copy of the NOEA (the April 11th Letter");
- Exhibit 5: A copy of a letter dated May 11, 2018 from the Branch Registrar addressed to the Licensee at the address of the Licensee's Representative (the "Document Disclosure Letter"); and
- Exhibit 6: A copy of an email from a Branch Inspector to the Branch Registrar dated May 28, 2018 (the "May 28th email").

THE LICENSEE'S NON-APPEARANCE

As it would appear that the Licensee's Representative has elected not to make any submissions with respect to the NOEA, I am left to make my decision on the exhibits before me, all of which have been submitted by the Branch.

These exhibits set out the following sequence of events.

The NOEA

The Incident

The NOEA states that on Saturday, January 6, 2018 at approximately 11:20 pm Liquor Inspector A ("Inspector A") and Liquor Inspector B ("Inspector B") entered the Establishment. While in the Establishment, these liquor inspectors observed two bottles of Red Stripe beer located outside the service area of the official plan of the Licence. These bottles were located adjacent to a billiard table within the Establishment despite there being clear signage confirming that liquor was not permitted into this unlicensed area of the Establishment.

When Inspector A queried the Establishment's bartender (the "Bartender") about the beer being outside the service area, the Bartender advised that she was aware that the beer had been removed from the service area and that she had asked the patron with the beer to bring it back within the licensed area of the Establishment. When asked, the Bartender acknowledged that she had failed to follow up to ensure that the patron had complied with her request.

Inspector A advised the Bartender that she believed that a contravention of the Regulation had occurred and asked the Bartender to notify the Licensee's Representative that Inspector A would be in touch with him to advise him of her belief.

In addition, Inspector A asked to see the Bartender's Serving It Right particulars. The Bartender did not have this information available at the time of Inspector A's request, but the following day sent these particulars to Inspector A by email.

The Notice to Produce

On January 11, 2018, a Notice to Produce was emailed to the Licensee's Representative requesting food receipts, CCTV footage, liquor receipts and all receipts for Red Stripe beer sold by the Establishment during the entire day of January 6, 2018.

On January 18, 2018, the Licensee's Representative responded via email providing screen shots of the sales of both food and liquor for January 6, 2018, noting that Red Stripe beer was the special for that day. However, he failed to provide CCTV security footage claiming that the recorder was broken.

Service of Contravention Notice

On January 30, 2018, Inspector A served Contravention Notice B020528 on the Establishment and sent a copy of this Contravention Notice to the Licensee by email to the Licensee's Representative's email address.

Compliance History

The NOEA includes a listing of the following past enforcement actions and compliance meetings with respect to the Licensee:

Past Enforcement Action Taken

<u>Date of Incident</u>	<u>Finding of Contravention</u>	<u>Enforcement Action</u>
November 3, 2012	Selling liquor to minor contrary to section 33(1)(a) of the Act	\$7,500 monetary penalty
June 10, 2015	Not operating in accordance with primary purpose of food primary licence contrary to section 20 of the Act and section 11 of the Regulation	10 day licence suspension

Compliance Meetings

<u>Date of Meeting</u>	<u>Topic</u>
September 4, 2009	Employee consuming liquor while working contrary to section 42(3) of the Regulation
March 1, 2012	Allowing liquor to be removed from the red lined area contrary to section 12 of the Act
March 2, 2016	Contravention of section 12 of the Act

The Prehearing Letter

The Prehearing Letter (Exhibit 2) referenced the NOEA and advised the Licensee's Representative that the Branch Registrar had set a pre-hearing conference for Wednesday, April 4, 2018 @ 11:00 AM in order to discuss the NOEA. Included in this letter is a 1-877 telephone number and a conference identification number to be used by the Licensee's Representative when he called into the telephone conference call.

As well as notifying him of the pre-hearing conference, the Prehearing Letter advised the Licensee's Representative that he had the following three options:

- Option #1 – The Licensee could sign a waiver and thereby:
 - i. Agree that the contravention occurred as alleged in the NOEA,
 - ii. Accept the proposed enforcement action outlined in the NOEA,
 - iii. Agree that the contravention and enforcement action would form part of the Licensee's compliance history, and
 - iv. Waive the opportunity for an enforcement hearing.

- Option #2 – The Licensee could agree to a penalty only written submissions hearing whereby the Licensee:
 - i. Admitted that it contravened as alleged in the NOEA,
 - ii. Confirmed that it was not pursuing a due diligence defence to the contravention, and
 - iii. Confirmed that its only dispute was the proposed enforcement action (penalty).

- Option #3 – The Licensee is entitled to an oral enforcement hearing, at which the Licensee would be in a position to:
 - i. Dispute that it had contravened as alleged in the NOEA, AND/OR
 - ii. Pursue a due diligence defence to the contravention.

The Prehearing Letter stated that if the Licensee chose either Option #2 or Option #3 that the Licensee's Representative would still be required to participate in the prehearing telephone conference scheduled for April 4, 2018.

The April 4th Email

The April 4th Email (Exhibit 3) is a copy of an email from the Branch Registrar addressed to the Licensee's Representative, to which is attached a copy of the NOEA and a copy of the Prehearing Letter. In this email, the Branch Registrar noted that the Licensee's Representative did not call into the telephone conference call scheduled for April 4, 2018 at 11:00 AM as per the Prehearing Letter and requested that the Licensee's Representative contact the Branch Registrar at the Licensee's Representative's earliest convenience to discuss how the Licensee wished to proceed.

The April 11th Letter

The April 11th Letter (Exhibit 4) is a copy of a letter from the Branch Registrar, is addressed to the Licensee at the Licensee's Representative postal address, and attaches a copy of the NOEA and the Prehearing Letter.

In this document, the Branch Registrar noted that he had received no response from the Licensee's Representative to either the Prehearing Letter or the April 4th Email. He advised the Licensee's Representative that if he had not received a response from the Licensee's Representative by April 27, 2018 that the Licensee would lose its opportunity for an oral hearing and that the allegation contained in the NOEA would be forwarded to a Hearing Delegate to make a determination as to which penalty to apply.

The Document Disclosure Letter

The Document Disclosure Letter (Exhibit 5) is a copy of a letter from the Branch Registrar addressed to the Licensee at the Licensee's Representative's postal address and includes the Branch's disclosure documents.

In this letter, the Branch Registrar again noted the lack of response from the Licensee's Representative on behalf of the Licensee and again offered the Licensee the opportunity, to be exercised by June 1, 2018, whereby the Licensee's Representative might "provide whatever information is relevant to the disputed issue" in the form of a submission on the issue of the proposed penalty in the NOEA.

The Branch Registrar ended this letter observing that generally the decision of the Hearing Delegate was final and encouraging the Licensee's Representative to make a submission if he believed that one was warranted.

The back of the Disclosure Letter appears to have an endorsement of two parties. One of these parties is alleged by the Branch to be a member of the staff of the Establishment and the other is Inspector A. This endorsement is dated May 16, 2018 and claims that the member of the staff of the Establishment received a copy of the document on that date.

The May 28th Email

The May 28th Email (Exhibit 6) is a copy of an email string from Inspector A to the Branch Registrar in which email string:

- Inspector A confirmed for the Branch Registrar the email address of the Licensee's Representative;
- Confirmed that she had left a copy of the April 11th letter at the Establishment on April 12, 2018; and
- As the Licensee's Representative was not at the Establishment during her visit on April 12, 2018, Inspector A confirmed that she had left a copy of this document with the daytime staff at the Establishment who had agreed to immediately text the Licensee's Representative to let him know that this document had been delivered.

REASONS AND DECISION

Contravention

As the Licensee, despite repeated attempts to encourage it to have the Licensee's Representative communicate with the Branch with respect to this matter, has chosen to refuse such communication, I have no choice but to proceed and to determine this matter based upon the submissions of the Branch referenced above.

Based upon these submissions, and with no suggestion that the exceptions in subsections 141(4)(a) to 141(4)(h) are applicable to the matter at hand, I find the Licensee as alleged in the NOEA to be in breach of Section 141(4) of the Regulation by allowing liquor to be taken from the Establishment's service area as outlined on the official plan.

As the Licensee, having been given ample opportunity to do so, has chosen not to participate in this proceeding, I find that the Licensee has not established a defence to this contravention.

PENALTY

Pursuant to section 51(2)(b) 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 a monetary penalty is warranted, I am bound to follow 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 to do so.

Above I have set out in some detail the repeated attempts by the Branch Registrar and Inspector A to communicate with the Licensee and the Licensee's Representative. On the evidence before me, I am quite satisfied that the representatives of the Branch have taken more than reasonable steps to ensure that the Licensee and the Licensee's Representatives were aware of what was occurring and the possible consequences should they choose not to participate in this enforcement process.

As was noted above, it is a specific term of the Licence that unless otherwise endorsed or approved by the Branch, liquor may only be sold, served and consumed within the service area outlined on the Establishment's official plan which accompanies the Licence. There is nothing before me to suggest that the Branch has endorsed or approved the consumption of alcohol outside the defined service area for the Establishment. Indeed, the issuance of the contravention notice by Inspector A confirms this.

Therefore, not only was the Licensee acting in contravention of section 141(4) of the Regulation on January 6, 2018 by permitting alcohol to be taken outside the defined service area of the Licence, but it was, as well, acting contrary to a specific condition of the Licence.

As there is no record of a proven contravention of the same type as is dealt with here for the Licensee within the preceding 12 months of this incident, I find this to be a first contravention for the purposes of schedule 2 and calculating a penalty. As noted above, Item 27 in schedule 2 provides a range of penalties for a first contravention of this type of contravention to be a 1 to 3 day suspension of the Licence and/or a \$1,000 to \$3,000 monetary penalty.

However, even if within the preceding 12 months there is no record of a proven contravention by the Licensee of the same type as is before me, I note with great concern both the record of past enforcement actions taken against the Licensee and the record of past compliance meetings to which the Licensee has been a party. These records clearly demonstrate that the Licensee is not for the first time facing an allegation of a contravention of the rules around the service of alcohol. Indeed, the very contravention against removing liquor from the service area appears to have been the topic of discussion in a number of compliance meetings.

In addition, based upon the facts stated in the NOEA, facts which were not in any way refuted or questioned by the Licensee although given ample opportunity to do so, the Bartender was well aware that liquor was being taken outside the service area of the Licence and yet she appeared unable or unwilling to enforce the prohibition against this happening.

The major factor that I have considered in determining the appropriate penalty in this case is how to secure the recognition by the Licensee that the issuance of the Licence to the Licensee is a privilege granted to the Licensee. It is not a right to which the Licensee is entitled. And with this privilege granted to the Licensee comes the corresponding obligation to comply with the Act, the Regulation and the terms and conditions of the Licence. This compliance includes participating in the enforcement process.

Ideally, this compliance is voluntary. However, in cases such as the one at hand where the Licensee for its own reasons has chosen not to participate in this process, it is obvious that a deterrent in the form of a penalty is required to encourage a change in attitude and behavior.

The Branch in the NOEA recommended either the minimum suspension of 1 day or a minimum monetary fine of \$1,000. This is the low end of the penalty scale for the possible penalties set out in Item 27 of schedule 2 of the Regulation and might have been considered appropriate had the Licensee chosen to participate in this enforcement process.

Indeed, if the Licensee had participated in this enforcement process rather than ignoring it and if the Licensee had demonstrated a history of compliance, I might have been more willing to accept the Branch's recommendation in the NOEA. However, given the Licensee's refusal to participate in the enforcement process and its history of compliance I have determined that a penalty at the other end of the penalty scale is more appropriate. I therefore find a suspension of 3 days is the appropriate penalty.

ORDER

Pursuant to section 51(2)(b) of the Act, I order a suspension of Food Primary Licence number 301547 for a period of three (3) days to commence at the close of business on Friday, August 3, 2018 and to continue each succeeding business day until the suspension is completed.

To ensure this order is effective, I direct that the Licence be held by the Branch or the Vancouver Police Department from the close of business on Friday, August 3, 2018 until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Signs satisfactory to the General Manager notifying the public that such suspension has been imposed will be placed in a prominent location in the Establishment by a Branch inspector or a police officer, and must remain in place during the period of suspension

Original signed by

R. John Rogers
General Manager's Delegate

Date: June 29, 2018

cc: Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: McKenzie Castle, Regional Manager

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