



**DECISION OF THE
GENERAL MANAGER
LIQUOR AND CANNABIS REGULATION BRANCH
IN THE MATTER OF AN APPLICATION FOR RECONSIDERATION**

A reconsideration pursuant to Section 53.1 of
The Liquor Control and Licensing Act, S.B.C. 2015, c. 19 ("Act")

Licensee: Italian Tomato Restaurant Inc.
dba Italian Tomato Restaurant
1047 Davie Street
Vancouver, BC V6E 1M5

Case: REH19-088

For the Licensee: Pejman Ghassemikian

For the Branch: Hugh Trenchard

General Manager's Delegate: Dianne Flood

Date of Decision: May 1, 2020

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

Italian Tomato Restaurant Inc. (the "Licensee") has applied to the General Manager for a reconsideration of the penalty imposed in the General Manager's Decision, dated March 16, 2020 (the "Section 51 Order"). That application has been referred to me, as the General Manager's hearing delegate, for determination.

BACKGROUND

The Licensee holds Food Primary Licence No. 308255 (the "Licence"), pursuant to which it operates the establishment called the Italian Tomato Restaurant, located at 1047 Davie Street, Vancouver.

On February 19, 2020, the General Manager's hearing delegate conducted an in-person hearing with respect to the Branch's allegation that on September 19, 2019, the Licensee contravened section 77(1)(a) of the *Liquor Control and Licensing Act*, S.B.C. 2015 c. 19 (the "Act") by selling, giving or otherwise supplying liquor to a minor. At the hearing, the Branch and the Licensee both presented evidence and made submissions, including submissions on penalty.

Under Item 7, Schedule 2 of the *Liquor Control and Licensing Regulation*, BC Regulation 241/2016 (the "Regulation"), the range of penalties for a first contravention of section 77(1)(a) is a 7 to 11-day licence suspension and/or a \$7,000 to \$11,000 monetary penalty. The Branch proposed either a 7-day licence suspension or a monetary penalty of \$7,000 be imposed.

The Licensee admitted that liquor was sold to a minor by one of its staff members but claimed a defence of due diligence. The Licensee indicated that if that defence failed and a penalty was to be imposed, it preferred a monetary penalty of \$7,000.

On March 16, 2020, the General Manager's delegate issued the Section 51 Order, making his findings and concluding the defence of due diligence had not been established. He imposed a monetary penalty of \$7,000 and ordered that the penalty be paid within 30 days.

On March 17, 2020, due to the COVID-19 crisis, the Provincial Health Officer (PHO) issued a verbal order stating that all bars and nightclubs must close, and restaurants must move to take-out or delivery unless they could ensure that people can maintain a distance of one to two metres between each other.

On March 20, 2020, the PHO issued a written order stating that all liquor primary establishments that only provide snacks or appetizers must close and food primary establishments may only provide take-out or delivery service.

On April 16, 2020, the Licensee filed an application for reconsideration of the Section 51 Order, requesting the monetary penalty be substituted with a seven-day suspension.

On April 20, 2020, an extension of time for filing the application was granted, the application for reconsideration was accepted as meeting the requirements of section 53.1(5) of the *Act*, and the Order to pay the monetary penalty was stayed until July 20, 2020 or until a decision on the application for reconsideration is issued, whichever occurs first.

THE LEGISLATION

Section 53.1 of the *Act* governs reconsiderations of section 51 orders. Amongst other things, section 53.1 provides that a reconsideration is a review on the record and may only be based on one or more of the prescribed grounds. Section 152 of the *Regulation* sets the prescribed grounds. The grounds are a failure to observe the rules of procedural fairness, an error of law and, subject to section 53.1(4) of the *Act*, new evidence.

Subsection 53.1(4) provides the General Manager may consider new evidence only if satisfied that the new evidence is substantial and material to the reconsideration and did not exist when the section 51 order was given or did exist at that time but was not discovered and could not, through the exercise of reasonable diligence, have been discovered.

In a reconsideration order, the General Manager may confirm, vary or rescind the section 51 order that is under reconsideration.

In combination, sections 53.1(10) and 51(3) direct that on a reconsideration the General Manager is to take into account the licensee's compliance history, the matters prescribed by regulation, and other matters that the General Manager considers relevant.

When making a reconsideration order, the General Manager must set out the reasons for that order. If a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid are to be set out. The date for payment must be within 30 days after the applicant receives the order, or the General Manager may specify a longer period in the order. If a licence suspension is imposed, the period of the suspension and the dates on which the suspension must be served must be set out.

THE LICENSEE'S RECONSIDERATION APPLICATION

The Licensee says that, at the time of the hearing and when the Section 51 Order was issued, the establishment was open for business and it would have been able to pay a monetary penalty. However, it says in compliance with the PHO's order the establishment was closed on March 20, 2020. As a consequence, the Licensee asks for a seven-day suspension instead.

REASONS AND DECISION

I find that the Licensee, without expressly stating it, relies on the ground of new evidence, being the imposition on March 20, 2020 of the PHO's order to limit all food primary establishments to take out or delivery service only. I am satisfied that this new evidence is substantial and material to the reconsideration and did not exist on March 16, 2020 when the Section 51 Order was made.

The Licensee says and, without any evidence to the contrary, I accept that the establishment has in fact been closed since March 20, 2020. The Licensee says that at the time of the hearing it could have paid a monetary penalty, but circumstances have changed. The Licensee does not expressly say, but I take that it can be implied, that the

closure of the establishment has significantly negatively impacted the Licensee's ability to pay the monetary penalty.

I find that it is important to recognize that the Licensee is not asking that no penalty be imposed, only that the penalty be changed from a monetary penalty to a licence suspension.

As directed by the *Act*, I have taken into account the Licensee's compliance history, which is set out in the Section 51 Order. That Order states that there is no record of a proven contravention of the same type for this Licensee at this establishment within the 24-month period preceding the incident and that there has been no history of a lack of compliance by the Licensee since it commenced business fourteen years ago.

Other matters that I consider relevant include the unexpected and rapidly evolving circumstances due to the COVID-19 pandemic. I find as a matter of public record that the restaurant industry as a whole has been significantly negatively impacted due to the restriction on restaurant activities, leading some to close as a result of the PHO's and the public's interest in containing the spread of the COVID-19 virus.

I am, however, also very mindful of the public interest in the need to ensure that minors are not served liquor, in order to protect young, growing minds from the negative impacts and also other societal impacts due to consumption of liquor by minors. It is important that this Licensee, other licensees and the public recognize and acknowledge the responsibility to ensure minors are not sold liquor. Imposition of penalties is an important aspect of that recognition and acknowledgement and is an effective means to bring licensees to voluntary compliance.

A suspension is recognized under the *Regulation* as an alternative penalty, and thus an effective means to bring a licensee into compliance with its obligations under the *Act*, the *Regulation* and the terms of its license. And, like a monetary penalty, a suspension forms part of a licensee's compliance history and will be taken into account if there is a future contravention.

For these reasons, and in balancing the current significant negative impact of a monetary penalty on this Licensee with society's need to protect minors, I am prepared to impose a seven-day suspension.

ORDER

In accordance with the provisions of section 53.1 (9) of the *Act*, I vary the Section 51 Order made by the Hearing Delegate on March 16, 2020. This Order replaces that Order.

Pursuant to subsections 53.1(9) and (11), I order that the Licence be suspended for a period of seven days, to commence on Saturday, May 9, 2020 and to continue each succeeding calendar day until the suspension is completed.

To ensure that the order is effective, I direct that the Licence be held by the Branch or the Vancouver Police Department from Saturday, May 9, 2020 until the Licensee has demonstrated to the Branch's satisfaction that this suspension has been served.

Original signed by

Dianne Flood
General Manager's Delegate

Date: May 1, 2020

cc: Liquor and Cannabis Regulation Branch, Vancouver Office
Attn: Peter Mior, Regional Manager

Liquor and Cannabis Regulation Branch, Victoria Office
Attn: Hugh Trenchard, Branch Advocate