



**DECISION OF THE
GENERAL MANAGER
LIQUOR AND CANNABIS REGULATION 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:	Denman Mediterranean Restaurant Ltd. dba Mediterranean Grill 1152 Denman Street Vancouver, BC V6G 2M9
Case:	EH21-015
For the Licensee:	Shane Ali, Carraig Law Group LLP
For the Branch:	Hugh Trenchard
General Manager's Delegate:	Dianne Flood
Date of Hearing:	Written Submissions
Date of Decision:	November 5, 2021

**Liquor and Cannabis
Regulation Branch**

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INTRODUCTION

The Licensee operates a licensed establishment known as the Mediterranean Grill (“the establishment”) under Food Primary Licence No. 186142 (“the License”). The establishment is located at 1152 Denman, in the City of Vancouver. Under the Licence, the Licensee may sell liquor between the hours of 11:00 a.m. to 1:00 a.m., from Monday to Saturday, and between the hours of 11:00 a.m. to 12:00 a.m. on Sundays.

The Licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the licensee Terms and Conditions Handbook (the “Handbook”).

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 of the general manager under section 51 of the *Act* and Part 6 of the *Regulation*.

This hearing was conducted by written submissions.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor and Cannabis Regulation Branch's (the "Branch") allegations and proposed penalty are set out in the Notice of Enforcement Action dated July 22, 2021 (the "NOEA").

The Branch alleges that on June 27, 2021 (business day of Saturday, June 26, 2021) the Licensee contravened the terms and conditions set out in the Handbook — specifically, the prohibition against selling liquor outside the hours indicated on the Licence. This is the Licensee’s second contravention of this type within 24 months.

Item 54, Schedule 2 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 241/2016 (the “*Regulation*”) sets out the range of penalties for a second contravention of this type as a three to seven-day licence suspension and/or a \$3,000-to-\$7,000 monetary penalty.

The Licensee admits that the Licensee sold liquor outside the hours indicated on the Licence and that this is a second contravention of this type. The Licensee admits the person who sold the liquor is a principal of the Licensee and so does not claim a defence of due diligence. The Licensee's submission only addresses the appropriate penalty for this contravention.

ISSUE

The only issue is what is the appropriate penalty?

SUBMISSIONS

Branch

The NOEA sets out the facts, the Licensee's responsibilities and the Branch's enforcement action and proposed penalty, being a three-day licence suspension.

The facts

As the Licensee accepts the facts as set out in the NOEA, those facts are briefly summarized here.

On Sunday, June 27, 2021 (business day Saturday June 26, 2021), at approximately 1:11 a.m., Inspector A entered the establishment. Other patrons were also in the establishment at the time. While waiting to place her order, Inspector A observed a female patron leaving the establishment carrying a sealed can of Kokanee beer. At approximately 1:12 a.m., Inspector A ordered some food and a can of beer from the principal of the Licensee. A sealed can of beer was given to her immediately, but she had to wait until 1:16 a.m. to pay as the principal of the Licensee "had to attend to support his staff." (No description of that activity is provided.) She had to wait until 1:35 a.m. for her food order to be provided. On receipt of her food order, Inspector A left with the food and the sealed can of beer.

Shortly after, Inspector B entered the establishment and advised the principal of the Licensee that he had contravened the Licence by selling liquor outside of the hours permitted by the Licence. A Contravention Notice was subsequently issued.

The Licensee's responsibilities

The Licence is subject to the terms and conditions set out in the Handbook. Licensees are expected to be aware of all of the contents of the Handbook. Under the Handbook, a licensee may only sell or serve liquor during the hours indicated on their licence.

Enforcement Action and Proposed Penalty

The stated reasons for pursuing enforcement action include that the hours when a licensed establishment is allowed to sell liquor are determined, in part, by community standards. This is to prevent disturbances and public safety risks to nearby residents and businesses. Selling liquor after hours also leads to unfair competition with other licensed establishments.

The liquor was sold by the principal of the Licensee, which may reinforce to staff and patrons that selling liquor outside of permitted hours is allowed and is part of the normal operations at this establishment.

The Licensee should be well aware of the responsibility to not sell liquor outside of the permitted hours because the Licensee signed a waiver for a contravention of this same type on September 13, 2020 and a \$1,000 fine was imposed.

Given the September 13, 2020 contravention, this contravention is the second contravention of this type by this Licensee within 24 months. The range of penalties for a second contravention, set out in Item 54 of Schedule 2 of the Regulation, is a three to seven-day suspension and/or a monetary penalty of \$3,000 to \$7,000. The Branch proposes a three-day suspension of the Licence. No reasons for proposing this penalty, and not a monetary penalty, are set out.

In addition to the NOEA, the Branch also submitted a series of emails between Vancouver Police Department (VPD) officers and also between a VPD officer and a Branch inspector. The tenor of those emails is that the Licensee has sold liquor outside the permitted hours on other occasions and that the Licensee is a "chronic offender." Portions of those emails are redacted as they appear to address activities of another licensee.

Licensee

The Licensee admits the facts as set out in the NOEA and that the Licensee sold liquor outside the hours permitted by the Licence. The Licensee acknowledges that the liquor was sold by a principal of the Licensee and so does not claim a defence of due diligence.

The Licensee's submission is exclusively directed to the appropriate penalty. The Licensee submits the appropriate penalty is a monetary penalty of \$3,000, payable \$1,500 on November 1, 2021 and \$1,500 on December 1, 2021.

In support of that submission the Licensee says the Licensee is a small, family-owned restaurant with 10 full-time staff. Due to Covid-19, the Licensee was working with fewer staff than usual and the Licensee's principal lost track of the time.

The Licensee also says the impacts of Covid-19 have disproportionately impacted small businesses, especially restaurants like the Licensee. Hours of operation and capacity have been limited to meet Public Health Orders. The Licensee's regular customer base, being tourists, students and workers, has been reduced due to the impacts of Covid-19.

The Licensee also claims a notice of a suspension would negatively impact the Licensee's reputation and a suspension of the Licence would have a negative impact on the Licensee's employees.

The Licensee says it is a good corporate citizen, having provided food free-of-charge to a community event that would otherwise have been cancelled due to Covid-19.

The Licensee claims it is committed to ensuring future compliance by:

- educating staff on compliance with the Licensee's obligations under the Regulation to not sell or serve liquor outside the hours of liquor service,
- enhancing staff communication regarding last call, that all liquor must be removed from patrons within half an hour of liquor service ending, and the consumption of liquor is not permitted after that time,
- installing a new clock above the service counter to aid with time awareness,
- the floor manager will have an alarm on their phone notifying of the last call,

- posting new signage across the main beer cooler restricting access and sale after the last call,
- ensuring bar stools are turned over on the countertop after last call, and
- turning off light sources in the beer cooler and bar shelf storage after last call.

The Licensee says it has already begun implementing these measures and is committed to full implementation by the end of October 2021.

The Licensee denies it is a chronic offender and denies it sold liquor in red solo cups. The Licensee says the VPD emails and the emails between the VPD and the Branch are unclear and do not provide any facts or evidence to support the statements made in the emails about the Licensee. The Licensee is entitled to that information to make full answer to it, and without that information, the statements are unreliable.

The Licensee also submits that the circumstances of this contravention are different from the first contravention but does not give any specifics of how or what the differences that might be.

ANALYSIS AND REASONS

Based on the evidence in the NOEA and the Licensee's admissions, I find that the Licensee contravened the Handbook by selling liquor outside the hours permitted by the Licence and the defence of due diligence is not available to the Licensee. I find the contravention is proven. My analysis, reasons and findings focus on the appropriate penalty.

"Chronic offender"

With respect to the VPD emails, I find them to be inconclusive in that the email chain is somewhat incomplete, plus it is not clear whether all the un-redacted information related to this or to another licensee. No specific allegations were made, or facts provided to support the description of the Licensee being a chronic offender. I also note the discrepancy between the VPD officer's description of red solo cups being used to serve liquor and the Inspector A's reference to observing liquor having been served in white paper cups. As such, I do not give these emails any weight.

Further, the contravention happened at 1:16 a.m., when permitted service ends at 1:00 a.m. While Inspector A reported other persons were inside the establishment, she did not report seeing liquor being sold to any other persons. And while one female patron was observed leaving the establishment carrying a sealed Kokanee at approximately 1:10 a.m., I have no evidence when that liquor was sold, or if that liquor or any other liquor (other than the beer sold to Inspector A) was sold or served after 1:00 a.m. As such, I have no reliable evidence to support a finding that this Licensee is a chronic offender and, in setting the penalty, I do not give that allegation any weight.

Impacts of Covid-19

I appreciate that Covid-19 has impacted restaurants like the Licensee with reduced hours of operation during part of the pandemic response. However, I note that on the date of the contravention, the hours were not reduced, and the contravention occurred at 1:16 a.m. As such, it would appear that reduced hours are not a significant factor in determining the appropriate penalty in this matter.

I also appreciate that capacity may have been reduced to meet Public Health Orders but note provisions have been made in the Handbook for Temporary Extended Service Areas (TESA) to address or offset those impacts. The Licensee has been granted a TESA for the curbside patio on Denman Street. As such, it would appear that reduced capacity is not a significant factor in determining the appropriate penalty in this matter.

Additionally, I also note that to address or offset any potential impacts of Covid-19 on Food Primary licensees, provisions have been made in the Handbook to allow Sales of Liquor for Off-Site Consumption Without Endorsement. The sale to Inspector A appears to be such a sale. As such, it would appear that a reduction in clientele may not be a significant factor in determining the appropriate penalty in this matter.

For these reasons, I do not find that the possible negative impacts of Covid-19 to have a substantial impact in determining the appropriate penalty to be imposed in this matter.

Posting a notice

As to the Licensee's concerns about damage to the Licensee's reputation as a result of having to post a notice of a suspension, Branch policy is to require the posting of a notice of a contravention, regardless of the penalty imposed. This requirement is not intended to damage the Licensee's reputation but is instead to be a public acknowledgement and reinforcement by the Licensee of its commitment to ensure its establishment will comply with the terms of the Licence.

Further, the Licensee should be well aware of this requirement, and any potential of perceived negative impacts, given this is the second contravention of this nature by the Licensee in 24 months and a similar posting would have been required at that time.

Impacts on employees

As to the Licensee's concerns about negative impacts on the Licensee's employees, a licence suspension does not mean the establishment must be closed — it only means that liquor cannot be served. And with a Food Primary licence, the focus is always supposed to be on the service of food, not liquor, with the menu, furnishings and lighting and advertising all supporting that focus on food. For this reason, suspension of a Food Primary licence may be less onerous on employees than, for example, the suspension of a Liquor Primary licence.

Further, a licensee needs to be aware of and should be concerned about potential impacts on employees if it allows the terms and conditions of its licence to be contravened. That potential impact is not a significant factor in determining the appropriate penalty in this matter.

Choice of Penalty

The Branch proposes a licence suspension but does not provide any reason why a suspension, and not a monetary penalty, should be imposed in this matter. The implication may be that this, being a second offence, is more serious and a suspension is required to reinforce with the Licensee its obligations to comply with the terms and conditions of its Licence, especially given the monetary penalty imposed for the earlier contravention does not seem to have achieved the goal of compliance.

However, I note the Regulation provides for *either* a monetary penalty or a suspension for a second contravention, without any indication if or when one or the other should be imposed.

Implementing new measures

The Licensee says it is committed to ensuring future compliance by implementing a range of new measures. While those new measures look to be reasonable and, in these circumstances advisable, in assessing the appropriate penalty I need to consider what was actually in place and being done at the time of the contravention, not what is promised to be done. For this reason, promised future activities do not impact the determination of the appropriate penalty in this matter.

PENALTY

Licensees are obliged to comply with the legislation and the terms and conditions of their licences. Enforcement action, and any resulting penalty, are intended to both redress the Licensee's non-compliance and to encourage future compliance by this and other licensees by way of deterrence.

Pursuant to section 51(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:

- 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, or
- Order the licensee to transfer the licence

The range of penalties for a second contravention of this type is a 3 to 7-day suspension and/or a \$3,000 to \$7,000 monetary penalty (item 54 of Schedule 2 of the Regulation). In the NOEA, the Branch proposed a suspension of three days.

I am not bound to order the penalty proposed in the NOEA nor am I bound by the maximums, and I may impose higher penalties when it is in the public interest to do so. 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.

Among the factors 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 threat to the public safety, and the well-being of the community. I have also considered the Licensee's expressed preference for a monetary penalty.

In this case, there is a record of a proven contravention by this Licensee of the same type at this establishment within the preceding 24 months of this incident. On this basis, I find this to be a second contravention for the purposes of Schedule 2 and calculating a penalty.

I have found there is no reliable evidence of a past history of warnings by the VPD or by the Branch, other than the September 2020 contravention.

The threat to the public and the well-being of the community include the possibility of disturbances and noise to nearby residents and businesses. I have considered the timing of the contravention – some 12 minutes after the permitted hours – and that there is no evidence of any other after-hours sales of liquor being made. People are allowed to be in the establishment for one-half hour after the last call at 1:00 a.m. On the evidence before me, I find that the potential for and level of disturbance to nearby residents and businesses from this contravention is relatively low.

As to the negative impacts of Covid-19 on licensees, I find these not to be any basis to excuse a contravention of the terms and conditions of the Licence. Nor, in this matter, do I find those impacts to provide any basis to impact the type of penalty to be imposed for this contravention.

Further, I expressly find that being short-staffed is not a reasonable or appropriate basis for the failure to comply with the terms and conditions of the Licence, nor does it impact the choice or reduce the penalty to be imposed.

In summary, I have disregarded the allegation that the Licensee is a chronic offender, I have considered that there is no allegation or evidence of any other after-hour sales that night, that the sale was made some 12 minutes after the permitted hours. I have weighed that against the fact this is a second contravention, and an earlier monetary penalty did not achieve compliance. I have considered all of this in the context of the Regulation, which allows for either a suspension or a higher monetary penalty on a second contravention.

Having considered all of the above, I find that the appropriate penalty for this contravention is a monetary penalty and, in this matter, the appropriate penalty is a monetary penalty of \$3,000.

I do not have any evidence of specific extenuating circumstances that would support allowing the payment of a monetary penalty over time, and so decline to make any such order.

ORDER

Pursuant to section 51(2)(b) of the Act, I order that the Licensee pay a monetary penalty in the sum of \$3,000 to the general manager of the Liquor and Cannabis Regulation Branch on or before December 6, 2021.

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 and Cannabis Regulation Branch inspector or a police officer.

Original signed by

Dianne Flood
General Manager's Delegate

Date: November 5, 2021

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