



DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH
IN THE MATTER OF
A hearing pursuant to Section 20 of
The Liquor Control and Licensing Act RSBC c. 267

Licensee:	Atmosphere Restaurant Ltd. dba Atmosphere Restaurant 310 Robson St, Vancouver BC
Case:	EH03-126
Appearances:	
For the Licensee	No appearance or submission was made on behalf of the licensee
For the Branch	Peter K. Jones
Enforcement Hearing Adjudicator	Edward W. Owsianski
Date of Hearing:	October 23, 2003
Place of Hearing:	Vancouver, BC
Date of Decision	January 26, 2004

INTRODUCTION

The licensee, Atmosphere Restaurant Ltd., operated the Atmosphere Restaurant under a Food Primary Licence No. 215089 located at 310 Robson St., Vancouver B.C. The licence permits the sale and consumption of liquor subject to the terms and conditions for liquor primary establishments during the hours of sale from 11:30 A.M. to 1:30 A.M., Monday through Sunday. The licence permits 100 patrons in Area 1, 40 in Area 2 and 27 on the Patio.

The branch advised the licensee by way of a Notice of Enforcement Action (NOEA) dated September 3, 2003, of an alleged contravention of Section 44 (1)(b) of the Regulations to the Liquor Control and Licensing Act (the Act). A Hearing date was subsequently set for Thursday October 23, 2003.

The hearing commenced on Thursday October 23, 2003. The branch was represented by its advocate Peter Jones, no one appeared on behalf of the licensee.

The branch advocate advised that the licensee representative had been notified of the date, time and place for the hearing by way of a letter dated September 25, 2003, sent to the licensee via both fax and post. The advocate had attempted, without success to contact the licensee representative on several occasions that morning at the telephone numbers known to the branch. He requested that in the circumstances the hearing be commenced *ex parte*.

All reasonable measures having been taken to notify the licensee, the hearing proceeded *ex parte*. The advocate entered a Book of Documents as Exhibit 1. He requested that the Notice of Enforcement Action (NOEA) dated September 3, 2003, and found at tab 1 of the exhibit be amended at page 2 to show the date of the alleged contravention as being July 12, 2003, and not July 13, 2003, as shown.

To ensure that the licensee was fully aware of the alleged contravention the enforcement hearing was adjourned to permit the Branch to provide the licensee with an amended NOEA. The amended NOEA showing the date of the alleged contravention as July 12, 2003, rather than July 13, 2003, was subsequently sent to the licensee on November 10, 2003, at which time the licensee was advised that Section 20(2) of the *Act* allows the general manager to take action against a licensee with or without a hearing and that due to the licensee's failure to participate on October 23, 2003, the licensee had lost the opportunity to have this matter determined by way of a hearing. Consequently, the adjudicator would make a determination regarding this matter after considering the information contained in the amended NOEA, the Book of Documents and any written submissions that either the licensee or the Branch advocate provide.

The licensee was advised that if it wished to provide a written submission for the adjudicator to consider prior to his decision, it must be received by the Branch no later than November 26, 2003. Any submissions received after that date would not be considered. The adjudicator would determine whether the contraventions set out in the amended NOEA occurred, and if so, whether enforcement action would be taken and the type and severity of the enforcement action. The adjudicator may accept the penalty recommended in the NOEA, may impose a higher penalty, may impose a lesser penalty or may impose no penalty.

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

The Liquor Control and Licensing Branch has alleged:
that on July 12, 2003, the licensee contravened section 44(1)(b) of the *Liquor Control and Licensing Regulations* (the *Regulations*) by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a) of the *Regulations*. The recommended enforcement action is a \$5000 penalty. Schedule 4 of the *Regulations* provides a range of penalties for a first contravention of this nature of a licence suspension of four to seven days or a monetary penalty of \$5000 to \$7000.

Sections 42 and 44 of the Regulations state as follows:**Consumption of liquor in licensed establishments**

42 (1) A person must not consume liquor in a licensed establishment unless that liquor has been purchased from or served by the licensee of that licensed establishment.

(2) A licensee must not allow consumption in the licensed establishment of liquor that was not purchased from or served by the licensee.

(3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

(4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

(5) A licensee who seals an unfinished bottle of wine in accordance with subsection (4) (a) must inform the patron of the requirements of section 44 of the Act.

(6) This section does not apply to a U-Brew or U-Vin.

Time

44 (1) Unless otherwise authorized by the general manager,

(a) liquor primary licensees and liquor primary club licensees must ensure that patrons are cleared from the licensed establishment within 1/2 hour after the time stated on the licence for the hours of liquor service, and

(b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a).

(2) Unless otherwise authorized by the general manager, if a licensee has been issued a licence, other than a food primary licence, in respect of an establishment, the licensee must not allow patrons to enter the licensed establishment during the hours when liquor service is not allowed by the licence.

(3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

(4) A person must not consume liquor in a licensed establishment beyond the time allowed for consumption under subsection (3) in that licensed establishment.

(5) A reference to time in this regulation or in a licence is a reference to the local time observed at the place of the licensed establishment.

ISSUES

1. Whether the licensee contravened Section 44(1)(b) on or about July 12, 2003?
2. If so, is the recommended penalty an appropriate penalty in the circumstances?

EXHIBITS

Exhibit 1	Book of Documents
Tab 1	Notice of Enforcement Action (NOEA) dated September 3, 2003.
Tab 2	Contravention Notice No. B004027.
Tab 3	Documentation referred to in the NOEA under Appendix A.
Tab 4	Notes of LCLB Regional Manager and Liquor Inspector.
Tab 5	Liquor Licence issued to the establishment.
Tab 6	Floor Plan of the establishment.

EXHIBIT 2 Letter of November 10, 2003, with attachments.

EVIDENCE - The Liquor Control and Licensing Branch

A routine inspection was conducted on July 12, 2003, at 4:27 A.M. by the Regional Manager and a Liquor Inspector following a complaint of after hours liquor service occurring at the establishment. The Atmosphere Restaurant is a Food Primary premise with liquor service between 11:30 A.M. and 1:30 A.M. 7 days a week.

Upon their arrival the Regional Manager and the Liquor Inspector observed four persons entering the establishment through a side door opened by the restaurant manager. Inside 18 patrons were consuming bottles of beer and cocktails. The Regional Manager counted 7 bottles of beer, 3 draft glasses of beer and 3 other mixed drinks. The restaurant manager provided the Liquor Licence and his "Serving It Right" card to the Liquor Inspector.

A review of the cash register showed that the last drink was rung in at 4:11 A.M. The restaurant manager stated that he accounted for that drink as spillage. The last meal entry in the Cash Register was at 1:42 A.M. A staff drink was rung in at 2:39 hours. The restaurant manager advised that this was for a staff member staying late to assist the manager. The restaurant manager was advised about the regulations concerning employee conduct.

The premise was dimly lit, the majority of the area dark and not in use. The area where the patrons were located was set up like a lounge. There was no food, cutlery, or condiments on any of the tables. The kitchen was closed. The area had black out curtains on all windows. The restaurant manager appeared to have been drinking. He stated that he had a shot of Bavaria earlier and had just started drinking when we walked in, he had a very long shift and was just tired.

EVIDENCE - The Licensee

No evidence was presented behalf of the licensee.

SUBMISSIONS

Liquor Control and Licensing Branch

Reasons for Recommended Enforcement Action:

A licensee is required to clear all liquor within 1/2 hour after liquor service has ceased. This licensee had been issued a Contravention Notice B004761 for failing to clear within 1/2 hour after liquor service and allowing after-hours consumption of liquor on June 15, 2003, one month previous to the date of the alleged contravention. In the opinion of the Branch the owner and manager of the restaurant have not changed their method of operating after hours despite the issuance of the earlier Contravention Notice.

Reasons for Proposed Penalty:

A \$5000.00 minimum monetary penalty is recommended. It falls within the prescribed penalty range in Schedule 4. It is submitted that a monetary penalty is necessary to bring this licensee back into compliance. The Liquor Inspector has reported that the owner has accepted responsibility and has acknowledged that the establishment had been operating after hours with his consent. It is the Branch position therefore that the staff should not be penalized through a licence suspension for the actions of the owner. Recent information indicates that the establishment may no longer be operating. The liquor licence remains in effect.

Licensee

No submissions were made on behalf of the licensee.

Decision and Reasons

Having considered all of the evidence, I find that on July 12, 2003, the licensee failed to ensure that liquor was taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. I find that the liquor did not consist of a bottle of wine sealed in accordance with the provisions of section 42(4)(a) of the *Regulations*. Consequently, I find that the licensee contravened section 44(1)(b) of the *Regulations*. In reaching this decision I accept the observations made by the Regional Manager and the Liquor Inspector that at the time of their inspection, 4:27 A.M. on July 12, 2003, 18 patrons were found in the establishment consuming liquor.

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 have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
 - cancel a liquor licence
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- impose terms and conditions to a license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound to follow the minimums set out in Schedule 4 of the *Regulations*. Schedule 4 provides a range of penalties for a first contravention of this nature of a licence suspension of 4 to 7 days or a monetary penalty of \$5000 to \$7000.

The branch's primary goal in determining the appropriate penalty is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community.

Although this is a first contravention for this licensee, a previous Contravention Notice was issued to the licensee on June 15, 2003, for the same issues, failing to clear liquor within ½ hour after liquor service hours and allowing the consumption of liquor beyond ½ hour after liquor service hours. The Branch did not proceed with enforcement action in that instance. I find that a penalty is necessary in these circumstances to ensure the licensee's voluntary compliance. The hours during which a licensed establishment is open for the sale of liquor are determined, in part, by community standards. Hours of liquor sales and consumption can detrimentally affect the surrounding residents and businesses in the community. As this establishment may not be operating at this time a suspension penalty would not be reasonable. Consequently I find that the minimum monetary penalty of \$5000 is appropriate.

ORDER

Pursuant to Section 20 (2) of the Act, concerning Food Primary Liquor Licence No. 215089, I impose a monetary penalty of \$5,000.00 (five thousand dollars) to be paid no later than March 5, 2004.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: January 26, 2004

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Office
Attention: Wendy Jones, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter K. Jones, Branch Advocate