



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

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act R.S.B.C. 1996, c. 267

Licensee:	San Diego Restaurant Ltd. dba San Diego Café 105 – 8171 Alexandra Road Richmond, BC
Case:	EH05-015
For the Licensee:	M. Barber
For the Branch:	Shahid Noorani
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	May 30, 2005
Place of Hearing:	Vancouver, B.C.
Date of Decision:	June 14, 2005

INTRODUCTION

The San Diego Café holds a Food Primary Licence No. 204229. The hours of sale are 11:30 a.m. to 1:30 a.m., seven days per week.

ALLEGED CONTRAVENTIONS

The branch's allegations and recommended enforcement action are set out in the Notice of Enforcement Action (NOEA) dated March 16, 2005. The Branch alleges that:

1. On January 30, 2005, the licensee contravened Section 20(1)(d) of the *Liquor Control and Licensing Act (Act)* and Section 11(1) of the *Liquor Control and Licensing Regulation (Regulation)* by operating the licensed establishment in a manner that is contrary to the primary purpose of the business as stated on the licence. The recommended enforcement action is a monetary penalty of seven thousand five hundred dollars (\$7,500).
2. On January 30, 2005, the licensee contravened Section 44(1)(b) of the *Regulation* by failing to clear liquor within half hour after liquor service hours end.

The licensee admitted and acknowledged that it contravened Section 44(1)(b) of the *Regulation* as indicated above, and has accepted the recommended enforcement action. Both parties have advised me that the licensee has executed a waiver of the right to dispute this contravention. The branch has accepted the waiver. The only remaining contravention to be proven is *operating contrary to primary purpose*.

RELEVANT STATUTORY PROVISIONS

Section 20(1)(d) of the Act is as follows:

20(1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

- (d) the existence of a circumstance that, under section 16, would prevent the issue of a license;

Section 11(1) of the *Regulation* is as follows:

11(1) A food primary license in respect of an establishment may be issued, renewed, or transferred if the primary purpose of the business carried on in the establishment is the service of food during all hours of its operation.

(2) The Following terms and conditions apply to a food primary license:

- (a) minors are allowed in the establishment
- (b) liquor must not be served unless the establishment is open for service of a varied selection of food items, including both appetizers and main courses, or their equivalent;
- (c) subject to limitation by the general manager, hours of liquor service must start no earlier than 9:00 a.m. and end no later than 4:00 a.m. the next day

3. The general manager may consider, in deterring whether the primary purpose of the business carried on in the establishment is or will be the service of food during all hours of is operation, any or all of the following;

- (a) kitchen equipment;
 - (b) furnishings and lighting;
 - (c) menu;
 - (d) type and hours of entertainment and games offered by the licensee;
 - (e) advertising;
 - (f) hours of operation;
 - (g) financial records;
 - (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment;
 - (i) any other relevant consideration that may assist in the determination.
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ISSUE

- 1) Did the licensee contravene Section 20(1)(d) of the *Act*, and Section 11(1) of the *Regulation* on January 30, 2005?
- 2) If so, is the recommended penalty appropriate under the circumstances?

EXHIBITS

The following exhibits were presented:

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| Exhibit No. 1: | The Branch's Book of Documents |
| Exhibit No. 2: | The correction of the Liquor Licence that appears at tab 9 of Exhibit No. 1 |
| Exhibit No. 3: | The current Liquor Licence that has been in effect since April 30, 2005. |

EVIDENCE

The branch called the liquor inspector. He testified that he was part of a multi-agency inspection team conducting inspections of several licensed establishments looking for Criminal Code, Liquor Act, Fire Regulation, and Municipal By-Law offences.

The team entered through the rear fire exit at approximately 2:10 a.m. on January 30, 2005. They went through an unlocked door and up the back staircase. There were no staff persons on duty at the door.

They entered the area identified as area #2 on the licence red-line drawing. The inspector observed very loud music and counted thirty-one (31) patrons. There was no food on the tables, but for some jars of nuts. There were pitchers of what

was later confirmed to be alcohol (Chives Regal Whisky and green tea), and glasses with the mixture in it. There were also approximately five (5) bottles of Coors Light beer.

The inspector identified all of the documents in Exhibit No. 1 including the licence, which indicates that the hours of sale end at 1:30 p.m. and that the establishment's licence is a Food Primary Licence. He also identified the language of the Guide at tab 10, which is included by reference to the terms of the licence. Further, the inspector testified that the licensee has applied for a lounge endorsement.

The inspector testified that he observed the patrons sitting and standing, having a party, consuming liquor, playing dice games, and listening to the music. He saw no food at any table. Neither did he see any evidence of food or the remains of any meals on the tables.

There were two staff members in the establishment, the manager, and a female server. He interviewed them and was directed to a plastic tray on the floor behind the bar. In the tray, the inspector noticed three small plates, and "perhaps a fork or a pair of chopsticks". There was no food or anything that would suggest a meal had previously been consumed. The server confirmed the contents of the pitchers of mixed whisky and tea.

The inspector then went downstairs to the kitchen and found the door locked. He returned to the manager, who escorted him to the kitchen and unlocked it. The kitchen lights were off, the kitchen was clean and closed, and the equipment was cold to the touch.

The inspector was provided with some table receipts. They did not contain dates or identify tables, or separate alcohol from food. The inspector testified that they

were of no use in assisting him to determine the primary function to which the establishment was being put.

The inspector observed no place settings, menus, or utensils at the tables. The patrons were drinking and playing dice games. The room was set up like a bar-with low tables, couches, and a large bar along one side of the room. As the team conducted its inspection, the party ended and the patrons left. A Contravention Notice was issued to and acknowledged by the manager on behalf of the licensee. The manager confirmed his understanding of the allegations contained in the Contravention Notice, but did not argue or comment on the allegations.

The inspector described the history of Compliance Notices, enforcement action, and Compliance Meetings as indicated by the documents in Exhibit No. 1. He also indicated that the licensee has made application for a lounge endorsement for area #2 in the licence, the area in which the inspection took place on January 30, 2005.

The branch also called the City license inspector. He attended at the licensed establishment as part of the inspection team for a different reason, in particular enforcement of City By-laws. He testified that he attended at the licensed establishment at 2:00 a.m. with the inspection team, entered through the back door and up the backstairs, and observed loud music and approximately twenty to thirty (20-30) patrons and two employees. He saw no food on the tables but for a jar of peanuts, several jugs of drink, and bottles of beer. He testified that people were drinking and playing dice. He also testified that many people were at small tables, which were not for eating a meal, but low tables, for drinks or games. The chairs would not fit under the tables, as the tables were too low.

The licensee called the manager as a witness. The manager testified that last call for food was at 12:30 a.m. The kitchen staff was told at that time that there

were no further food orders. They cleaned the kitchen and left without further involvement with the manager as usual. At 1:30 a.m., the manager testified, he cleans up and starts getting patrons out of the establishment. He had already cleaned up three tables and those were flipped up, as can be seen in the photos. All food remains were brought to the kitchen and put inside.

He indicated that they had not cleared the liquor in time and had accepted the consequences for that.

The manager testified that there were only seven (7) or eight (8) patrons in the bar at the time of the inspection, and that those patrons had been there for dinner. They had eaten and the staff had cleaned up the dishes and put them in the kitchen. The kitchen was closed and the light was off but the manager had the key and would just open the door and put the trays of dishes in the kitchen on the counter by the door and then lock up again.

He indicated that the liquor on the tables was left over liquor from the patrons' meals, which liquor they had not finished by the time the inspection occurred. He confirmed that last call for food is always at 12:30 a.m., not 1:30 a.m. as allowed under the licence, and that no alcohol is served after last call for food.

ANALYSIS AND DECISION

I find on the uncontroverted evidence that last call for food was at 12:30 a.m. By the time of the inspection, which was at approximately 2:10 a.m. there was no evidence of food service available from the kitchen, no evidence of recent activity in the kitchen, and no evidence of any meals being served or consumed in area #2. The kitchen was closed for the night and had been for some time. Alcohol, however, was present in sufficient quantities to suggest that patrons had been served the alcohol well after food service had terminated. I am persuaded by the evidence of the two inspectors as to the number of patrons present in area #2 at

the time of the inspection and I find there to have been at least twenty (20) patrons. The amount of liquor found by the inspectors is consistent with that number of patrons. I find that the pitchers of alcohol mix were mostly full. This further supports the inference that they were served after the close of food service more than one and a half hours earlier.

The room was decorated and furnished as a bar or lounge would be. Although this is in itself, not determinative of the use to which it was being put, it is a factor in so deciding. I accept the evidence of the inspectors that the music was louder than what is customary in a dining environment, that patrons were moving about as they would in a lounge or bar, and that the furnishings were also consistent with that use. The lack of menus, place settings, and any residue of food service further supports the conclusion that the establishment was not being used for food primary services as required by the liquor licence, the Guide, and the applicable *Regulation*. I find it also noteworthy that the licensee has applied to the branch for an endorsement, which would allow for precisely the kind of activity that it is currently being carried on. I reject the evidence of the manager of the establishment that the dining accoutrements had been promptly removed and stored in the closed kitchen and the liquor left over from last call at 12:30 a.m.

The rules of operation for Liquor Primary and Food Primary Licenses are different from one another. The approval process for each type is distinct as well. In particular, the process for obtaining a Liquor Primary Licence includes input from the public and local government, whereas Food Primary Licenses generally do not require such input.

A Food Primary Licence requires that the establishment must maintain the service of food as its primary purpose at all hours of operation.

The licensee provided receipts to the liquor inspector, which was of little use in assisting his determination of the use to which the area was being put. The receipts did not provide dates or table numbers or identify the ration of food to alcohol purchases. The licensee did not provide any receipts for the hearing, which would support its position.

I am satisfied that at the time of inspection on January 30, 2005, the establishment was not operated in accordance with the primary purpose of the licence.

PENALTY

Pursuant to Section 20(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 have discretion to order one or more of the following enforcement actions:

- Impose a suspension of the liquor licences for a period of time
- Cancel a liquor licence
- Impose terms and conditions to a licence or rescind or amend existing terms and conditions
- Impose a monetary penalty
- Order a licensee to transfer a licence

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 *Regulation*.

There is a record of prior contravention allegations, including one for a similar offence within the year preceding this incident, however the branch has treated this allegation as a first contravention.

The evidence indicates that the manager of the establishment had no experience running a licensed establishment prior to his employment with the San Diego Café. The establishment has only been licensed for a number of months. The evidence of past contraventions includes several allegations, which the branch chose not to pursue, including at least one allegation similar to this one. The manager had attended a Compliance Meeting with branch representatives and had been warned against operation the facility in a manner inconsistent with the Food Primary Licence.

The purpose of bringing about enforcement action and assessing penalty is to encourage voluntary compliance. Having considered the evidence, I am satisfied that a penalty for the contravention of operating the licensed establishment in a manner that is contrary to the primary purpose of the business as stated in the licence, is necessary to ensure future voluntary compliance.

I have considered the submissions of the parties with respect to penalty and find the recommended penalty of seven thousand five hundred dollars (\$7,500) to be appropriate.

ORDER

Pursuant to Section 20(2) of the Act, I order the licensee to pay a monetary penalty in the amount of seven thousand five hundred dollars (\$7,500) relating to Food Primary Licence No. 204229. The monetary penalty must be paid no later than the close of business on July 15, 2005.



Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: June 14, 2005

cc: R.C.M. Police Richmond Detachment

Liquor Control and Licensing Branch, Vancouver Regional Office
Attention: Lee Murphy, Regional Manager

Liquor Control and Licensing Branch, Surrey Regional Office
Attention: Shahid Noorani, Branch Advocate
