



**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:	Hancer Restaurants Inc. dba Brix Restaurant 1138 Home Street Vancouver, BC V6B 2X6
Case:	EH06-007
For the Licensee:	David Hannay
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	Written Submissions
Date of Decision:	June 6, 2006

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee operates a food primary establishment known as Brix Restaurant in the City of Vancouver under Food Primary Licence No. 166723. The licence identifies a lounge interior capacity of 24 persons.

On December 9, 2005, the licensee exceeded that capacity. The Liquor Control and Licensing Branch (the branch) issued a Contravention Notice (CN) and then a Notice of Enforcement Action (NOEA) and recommended a one-day suspension of the licence as a result.

This hearing was conducted by way of written submissions by agreement of the licensee and the general manager.

ALLEGED CONTRAVENTION

The branch alleges, and the licensee admits, that on December 9, 2005, the licensee contravened Section 6(4) of the *Liquor Control and Licensing Regulation* by permitting more persons in the licensed establishment than the person capacity set by the general manager, and the number of persons in the licensed establishment was less than the occupant load.

The recommended enforcement action is a one (1) day suspension of the liquor licence (item 14, Schedule 4, *Liquor Control and Licensing Regulation*).

The licensee disputes that a one (1) day suspension is warranted.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

Section 1(1) "**person capacity**", in relation to an establishment, means the maximum number of persons allowed by the general manager in the establishment.

Section 6(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

Section 63 In this part, "finding of contravention" means in respect of an alleged contravention of a licensee,

(b) a determination made by the general manager under section 65, that the contravention occurred.

Section 64(3) The general manager may hold an enforcement hearing to determine whether the licensee committed the alleged contravention and, if so, to determine what enforcement actions are to be taken against the licensee as a result.

Section 66(1) If, in relation to a contravention, the enforcement actions specified under s 64(2)(a) or referred to in section 65(1) include a suspension, the period of the suspension must, [at minimum] fall within the range established for the contravention under Schedule 4.

ISSUE

The licensee has accepted that the establishment was overcrowded beyond the person capacity identified on his licence. The issue therefore is whether a penalty is required under the circumstances of this case, and if so, what penalty is appropriate.

EVIDENCE and EXHIBITS

Exhibit No. 1: The licensee provided correspondence dated April 8, 2006.

Exhibit No. 2: The branch provided a package of documents including:

- Enforcement Action Recommended Report dated January 10, 2006
 - Contravention Notice (CN) B006336 issued December 13, 2005
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- Notes of Compliance & Enforcement Officer #1
- Notes of Compliance & Enforcement Officer #2
- Inspection Interview Report dated April 15, 1999
- Inspection Interview Report dated November 24, 2005
- Food Primary Licence No. 166723
- Pages 3, 12 & 13 from *Guide for Liquor Licensees, Food Primary Licence*
- Floor plan of establishment
- CN A014331 issued January 16, 2003
- Compliance Meeting Report dated April 27, 2004
- CN B005008 issued July 7, 2005
- Compliance Meeting Report dated November 2, 2005
- Compliance Meeting Report dated January 5, 2006

SUBMISSIONS

The branch submitted that the overcrowding was the result of the licensee's conscious decision to exceed the person capacity. The licensee was aware of the seriousness with which the branch treats this issue, as the proprietor of the licensee was in attendance at a Compliance Meeting at which overcrowding was discussed.

The branch further submitted that the recommended penalty is required to "ensure that the licensee realizes the serious nature of this type of contravention and takes steps to comply with his occupancy load and person capacity..." (Notice of Enforcement Action, page 3).

The licensee submitted that following a renovation of the establishment, it sought to divide the space into two lounges. Upon ascertaining that the licence did not allow for the split, the licensee requested that the total person capacity that it sought to be split between the two lounges be allotted entirely to the one existing lounge. Due to a miscommunication, the person capacity for the lounge

remained as it was before the application. The licensee desired an increase of fourteen additional persons to the existing lounge. The licensee accepted responsibility for the miscommunication.

The licensee then applied for an increase in person capacity, and was advised by the branch that in due course that the application would be granted.

Due to financial and business pressure, the licensee chose to fill the establishment beyond the existing person capacity but within the expected new limits. The licensee confirmed that it was aware that the new person capacity was not in effect until formal notice was provided.

The licensee accepted responsibility for its actions and indicated that in the future, compliance would not be an issue.

ANALYSIS AND DECISION

The licensee has acknowledged that it had contravened the *Regulation*. The evidence of the branch is uncontroverted. I find therefore, that the contravention occurred.

The licensee also acknowledged that the contravention was intentional but argued that it was harmless in the context of the administrative error that allowed it.

As to the administrative error, the licensee said:

I take the full blame for this mishap. (Exhibit No. 1)

The licensee continued:

For the next few weeks, we attempted to run the room at the number stipulated by our licence. This was not a popular decision with the nightly line-up of patrons at our door. With thirty physical seats and more standing room, twenty-four people made the room look barren. People looked at a half-full room and proceeded to become annoyed and abusive or simply leave angry. Some even attempted to sneak into the room. The situation was extremely taxing on all involved, guest and staff alike. (Exhibit No. 1)

The licensee then was advised that the administration would be granting an increase to a thirty-eight-person capacity, in the future. The proprietor said:

I knew that the structural change was not official until the new licence was in my possession but we were in a position of truly damaging our business and our staff morale.

On Tuesday December 6, 2005, we began to run the lounge area at thirty-eight persons. I knew this was not within the bounds of my current licence, but with Christmas approaching, waiting until January for our updated licence seemed to be a heavy burden to bear. (Exhibit No. 1)

The reason for assessing a particular penalty for a contravention is complex. Primarily, a penalty is a disincentive for non-compliance. The inverse of this is the established principal that penalties are utilized by the branch to obtain voluntary compliance in the future. The nature and extent of the penalty is determined with reference to the sometimes-competing factors of public safety,

severity of the infraction, and the necessity of dissuasion relative to the likelihood of future contraventions.

I find that on the facts, the licensee is not likely to contravene Section 6(4) of the *Regulation* in the future. In this respect, I find that a penalty is not required to ensure voluntary compliance with this provision.

I am concerned; however, that the licensee took it upon itself to determine what is reasonable with respect to complying with the *Regulation*. This is not something that can be allowed. If licensees were permitted to anticipate changes to their licenses without formal confirmation, the branch would no longer have control over the process.

A licensee may not knowingly contravene a term of its licence with impunity, on the strength of a reasonable apprehension of a future change in those terms.

I find, therefore, that a penalty is appropriate in order to assure compliance with the *Act* and the *Regulation* in general, and the terms and conditions of the licensee's Food Primary 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 its licence, I have the 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;
 - impose terms and conditions to a licence or rescind or amend existing terms and conditions;
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- 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*.

The range of penalty for a first contravention of Section 6(4) of the *Regulation* in accordance with item 14 of Schedule 4 of the *Regulation* is one (1) to three (3) day suspension of the liquor licence and/or a monetary penalty of \$1,000-\$3,000.

I find that a one (1) day suspension of the licence is appropriate in the circumstances of this case.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 166723 for a period of one (1) day, to commence as of the close of business on Thursday, June 22, 2006, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*).

To ensure this order is effective, I direct that Food Primary Licence No. 166723, be held by the branch or the Vancouver Police Department from the close of business on Thursday, June 22, 2006, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[Original Signed]

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: June 6, 2006

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Sonja Okada, Branch Advocate
