



**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: 0719776 B.C. Ltd.
dba Hanoi Harbor Vietnamese
Restaurant and Lounge
200-4200 No 3 Road
Richmond, BC V6X 2C2

Case Number: EH07-075

For the Licensee: Thomas Chun Wai Ha

For the Branch: Sonja Okada

Enforcement Hearing Adjudicator: K. McIsaac

Date of Hearing: November 1, 2007

Place of Hearing: Vancouver, BC

Date of Decision: December 20, 2007

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, 0719776 B.C. Ltd., (“licensee”) operates the Hanoi Harbor Vietnamese Restaurant and Lounge (“Hanoi”) under Food Primary Licence No. 181982. Hanoi, located in Richmond, BC, is licensed to sell liquor from Noon to 2:00 a.m., seven days a week. It has a licensed capacity of 170 persons and the licence is subject to terms and conditions that include the terms and conditions contained in the publication “A Guide for Liquor Licensees in British Columbia.”

ALLEGED CONTRAVENTION

By Notice of Enforcement Action dated June 12, 2007, the Liquor Control and Licensing Branch (“branch”) alleged that on May 12, 2007, at 2:50 a.m., the licensee contravened the *Liquor Control and Licensing Regulation* (“*Regulation*”), sections 44(1)(b), and 44(3). By letter, dated October 30, 2007, the branch informed the licensee it was no longer pursuing enforcement action for the alleged contravention of section 44(3) of the *Regulation*.

The branch recommends a fourteen-day suspension of the liquor licence. This is the maximum penalty for a second contravention of this type as set out in Schedule 4, Item 25, of the *Regulation*.

RELEVANT STATUTORY PROVISION

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).

ISSUES

The licensee admits that liquor was not taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service, contrary to section 44(1)(b) of the *Regulation*. Therefore, the issues are:

1. Whether the defence of due diligence can exonerate the licensee from a contravention under section 44(1)(b) of the *Regulation*, and, if not,
2. What penalty, if any, is appropriate in the circumstances

EXHIBITS

Exhibit No. 1: Branch's book of documents

EVIDENCE

I heard the testimony of the licensee and two liquor inspectors that attended the Hanoi restaurant at the time of the contravention. The following are the relevant facts as I have determined.

On May 12, 2007, at 02:50 hours, three liquor inspectors and four R.C.M.P. officers (the "team") arrived at the Hanoi restaurant to conduct a routine inspection. A plain clothes officer went by elevator to the establishment on the second floor and the rest of the team followed up the stairs. As the plain clothes officer entered the premises, he observed the licensee pouring beer into a glass for a patron who was seated at a table. When the licensee noticed the team entering, he immediately picked up three glasses containing beer and walked quickly to the kitchen. The licensee admits that he panicked and was going to pour the beer down the sink before the police stopped him.

On another table, the liquor inspectors observed three short clear glasses containing a mixture of Chivas Regal whiskey and green tea, and two shot glasses full of a liquid that smelled like tequila. The licensee acknowledges there was liquor on the tables.

There were at least 15 patrons in the Hanoi and when the police officers and liquor inspectors arrived they left the premises immediately.

One of the liquor inspectors discussed with the licensee the business receipts for the day. Although not itemized on the receipts, the word "other" and "pitcher/other, GT Jug" was used to itemize the whiskey and green tea mix. The inspector observed two cases marked Chivas Regal Whiskey on the floor behind the bar. They held 12 x 1.5 litre bottles of Chivas Regal Whiskey. One case was unopened and the other was empty. The licensee admitted he sold whiskey to

patrons. He said if there is a large party and 10 jugs are ordered, he gives a 20% discount for customer appreciation.

LICENSEE'S SUBMISSION

The licensee admits that liquor was not taken from patrons within ½ hour after 2:00 a.m. However, he submits there were mitigating circumstances. He usually starts clearing tables at 2:10 a.m., but that night he was just late. The licensee submitted that he was in the process of closing and was pouring the beer into glasses so that patrons would finish before he took their glasses away. The lights were fully up and there was no music playing. Patrons were leaving and the police officers and liquor inspectors had full access to the premises. He said staff is usually very good, but they were not “on the ball” that night and he was not paying attention.

The licensee said he had difficulties in the beginning saying “no” to customers who wanted him to serve liquor after hours. The liquor inspector assisted him by advising him not to let the customers control his business. The licensee submits that since his 31-day suspension, he has complied and is trying his best. The licensee submits that a penalty is not necessary and if one is imposed, 10 days is more than adequate.

ANALYSIS AND DECISION

The defence of due diligence is available to a licensee and, if successful, is a complete defence to a contravention under the *Act* and *Regulation*. The onus is on the licensee to establish that:

1. The employee involved in the contravention was not the directing mind of the licensee;
2. It exercised all reasonable care by implementing adequate training and other systems to prevent the contravention; and,
3. It took reasonable steps to ensure the effective operation of the system.

(see: *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299, p. 1325; *Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, 2004 B.C.S.C. 248)

The licensee was present at the time of the incident and was the person in charge. Given the evidence, I am not persuaded that the systems in place and the steps taken by the licensee on the night of the incident were sufficient to prevent the contravention.

I find the licensee's explanation that he was late not credible and an excuse for failing to adhere to the terms of his licence. Though the closing time on the licence for selling liquor is 2 a.m., with a ½ hour allowance for removal of the liquor, there was liquor on the tables well after this time and the licensee poured beer into a patron's glass at 2:50 a.m. The number of patrons in the establishment and the presence of liquor on the tables well after the time for clearing liquor do not indicate he was late, rather that he was ignoring his responsibilities. His panic and attempt to dispose of the liquor indicates to me he was fully aware that he was doing something wrong.

The licensee knew and understood the importance of following the terms set out on his licence. He has had several discussions with the liquor inspector about serving liquor after hours and the inspector advised him when he started, not to allow his customers to interfere with his legislative obligations.

Since opening in 2005 and before this incident, the licensee has contravened this section of the *Regulation* twice, and his 31-day suspension within the last year included a 14-day suspension for failing to remove liquor from patrons.

Given the evidence, I find that the licensee took a chance and allowed liquor to be served beyond the time stated on his licence, thus showing a flagrant disregard for the importance of this legislative requirement.

Therefore, I find, on a balance of probabilities, the licensee has failed to establish the defence of due diligence and find that he has contravened section 44(1)(b) of the *Regulation*.

There was a disagreement about whether patrons exited from the front or back stairs. The liquor inspectors say they did not observe anyone exiting by the front and assumed that patrons were leaving by the back stairs. The licensee was adamant that patrons exited by the front elevator and stairs and not by the back stairs, however, he acknowledged that damage to the back stair's wall was caused by patrons indicating that patrons had, on occasion, used the back stairs. Given the layout of the premises and the location of the front and back stairs (Tab 9, Exhibit 1) and that seven police officers and three liquor inspectors were on the premises, I find that patrons leaving by the front exits would probably have been noticed by the team.

There was also some discussion about the doors to the establishment being locked on a previous occasion so that police officers had to call the restaurant to gain access to the premises. The licensee acknowledged there had been previous discussions about the importance of unobstructed access and the licensee had promised that the door would be open so that police and inspectors did not have to call before having access to the premises. The licensee said the suggestion that he was operating after hours with the doors locked, was

speculative and he was being treated unfairly. He said the authorities were prejudiced toward him because of their experience with previous owners and the extensive history of the establishment.

Whether the licensee was treated unfairly regarding access to the premises is beyond the scope of this hearing and in this case it is not an issue. On the night of the incident, the elevators were open. The door to the stairs opens from the inside and officers and inspectors were able to access the stairs due to a patron exiting by the stairs.

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 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;
- impose a monetary penalty;
- order a licensee to transfer a licence.
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Imposing any penalty is discretionary. However, if I find that either a licence suspension or monetary penalty is warranted, I am bound by the minimums set out in Schedule 4 of the *Regulations*. However, I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is to achieve 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 or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

Ownership of the Hanoi was transferred to the licensee on May 19, 2005. On November 9, 2005, the licensee attended the food primary terms and conditions seminar and signed a declaration that he fully understood the terms and conditions of the licence. On November 13, 2005, a contravention notice was issued to the licensee for failing to clear liquor within ½ hour after liquor hours. The final inspection on November 16, 2005, was also a compliance meeting and the licensee again committed to comply with the legislative requirements in the future. The licensee received a second contravention notice on December 2, 2005 for failing to clear liquor within ½ hour and his licence was suspended for four days. On June 18, 2006, the licensee received a 31-day suspension for contraventions that included a 14-day suspension for failing to clear liquor within ½ hour after liquor hours.

I find the licensee's continued contravention of this section of the *Regulation* to be serious. Although he has had sufficient opportunity to understand his responsibilities under the *Act* and *Regulation*, and has had clear instructions from the liquor inspector, the licensee has failed to meet his legal obligation to remove liquor from patrons within ½ hour of the time on his licence for the end of liquor sales. This most recent contravention, within one year after a 14-day suspension for failing to clear liquor, leads me to conclude the licensee does not take seriously the terms and conditions of his licence.

This is considered a second contravention as the licensee has committed the same type of contravention within the 12 month period preceeding this contravention. Pursuant to Schedule 4, Item 25 of the *Regulation* the range of penalty for a second contravention of section 44(1)(b) of the *Regulation* is a 10-14 day suspension of the licence.

I find a 14-day suspension is an appropriate penalty in the circumstances to encourage future voluntary compliance.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 181982 for a period of fourteen (14) days to commence at the close of business on Thursday, January 24, 2008, 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 *Regulations*).

The suspension sign, notifying the public, shall be placed in a prominent location by a Liquor Inspector or Police Officer. To ensure this order is effective, I direct that the liquor license be held by the branch or the Richmond detachment of the R.C.M.P. from the close of business on Thursday, January 24, 2008, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

"Kathleen McIsaac"
Enforcement Hearing Adjudicator

Date: December 20, 2007

cc: Richmond RCMP

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Donna Lister, Regional Manager

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