



**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:	Liquor Stores Limited Partnership dba Cold Beer and Wine to Go Pub 101 3131 29 th Street Vernon, BC V0T 5A8
Case Number:	EH07-143
For the Licensee:	Ray Schachter
For the Branch:	Tanya Cogan
Enforcement Hearing Adjudicator:	K. McIsaac
Date of Hearing:	February 14, 2008
Place of Hearing:	Vancouver, BC
Date of Decision:	April 24, 2008

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Liquor Stores Limited Partnership, operates the Cold Beer and Wine to Go Pub (pub) under Liquor Primary Licence No. 012545. The pub, located in Vernon, BC, is licensed to sell liquor Monday to Saturday from 9:30 a.m. to 11:30 p.m., and Sunday from 11:00 a.m. to 11:30 p.m. It has a licensed capacity of 60. The licence includes an endorsement for off premises sales and 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 (NOEA) dated December 10, 2007, the Liquor Control and Licensing Branch (branch) alleged that the licensee contravened section 20 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 (Act) and section 8 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 (Regulation) by operating the pub contrary to its primary purpose. As a result of a routine inspection on September 5, 2007, the branch concluded the licensee was operating the Cold Beer and Wine to Go Pub primarily as a take-away service rather than a pub.

The branch recommends a monetary penalty of \$7,500. This is the minimum penalty for a first contravention of this type as set out in Schedule 4, Item 1, of the *Regulation*.

RELEVANT STATUTORY PROVISIONS

Section 20(1)(a) of the *Act* states:

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:

(a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

Section 8 (1) and (2) of the *Regulation* states:

8 (1) A liquor primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on the establishment is beverage service, entertainment or hospitality.

(2) For the purposes of subsection (1), the primary purpose of the business carried on in the following establishments is not beverage service, entertainment or hospitality:

- (a) a facility frequented predominantly by or directed at minors and other young persons;
- (b) a theatre as defined in the *Motion Picture Act*;
- (c) a restaurant;
- (d) a take-away service;
- (e) a motor vehicle;
- (f) a video games arcade.

Section 9 (c) of the *Regulation* states:

(9) The following terms and conditions apply to liquor primary licences and liquor primary club licences

(c) unless exempted by the general manager, food and non-alcoholic beverages must be available at reasonable prices to the patrons.

ISSUES

1. Did the licensee operate the pub primarily as a take-away service contrary to its primary purpose, thus contravening section 20 of the *Act* and section 8 of the *Regulation*?
2. If so, what is the appropriate penalty, if any?

EXHIBITS

- Exhibit No. 1: Branch's book of documents
Exhibit No. 2: Licensee's book of documents
Exhibit No. 3: Affidavit of clerk, dated February 12, 2008

EVIDENCE

I heard the testimonies of the following witnesses: the liquor inspector and the licensee's director of BC liquor stores, district manager, manager of the liquor retail store, clerk of the pub and a liquor consultant.

The liquor primary licence (LP) for the Cold Beer and Wine to Go Pub was transferred to the licensee on June 26, 2007, just before it opened on July 7, 2007. The endorsement for off premises sales, originally added to the licence in 1987, continued. Before the transfer, the branch approved structural changes to the establishment that included the removal of some patron seating to allow for the installation of large stand-alone coolers for off premises sales. The branch also approved the reduction of the person capacity from a maximum of 80 patrons to 60. The licensee was involved in the planning of the structural changes and reduction of capacity (Exhibit 2, Tab 4). When the licence was transferred, the licensee also received its Liquor Retail Store licence for a store at a separate location.

On September 5, 2007, a liquor inspector conducted a routine inspection of the pub. The inspection was prompted by a complaint that the pub was only selling off sales and was not selling liquor for consumption. The inspection consisted of a conversation with the clerk on duty and the inspector's observations during the conversation. The inspector was in the pub for approximately six minutes and made notes of the inspection immediately afterward. As the notes are relevant to this determination they are reproduced below (Exhibit 1, Tab 4).

- off sales only; no kitchen-pop, coffee; no in-house liquor sales; clerk operating since July 10th; no licence or floor plan; Various bottles of hard liquor – Vodka etc. under counter; No beer taps; not serving liquor; When I said “I know they “Liquor Depot” aren’t interested in the pub aspect” [clerk] said “I know”; the bar (counter) area is set up for off sales only. There is no bar – it is a sales counter with coolers set behind for off sales only

After the inspection the liquor inspector formed the opinion that the pub was operating primarily as a liquor take-away service and was not selling liquor for consumption and issued a contravention notice to the licensee.

On September 24, 2008, the liquor inspector wrote a letter to the licensee outlining his reasons for the contravention notice (Exhibit 1, Tab 5). There is no evidence of further communication between the parties until the NOEA was issued to the licensee on December 10, 2007.

In the NOEA, the liquor inspector states that the clerk advised him the pub was not operational and she was selling off sales only. He says there were several stand up coolers displaying various types of beer, wine and coolers behind the sales counter. The inspector states that the clerk also informed him the kitchen was not operational and that liquor was not available by the glass. No food, snacks or non-alcoholic beverages were available. He states the clerk informed him the establishment had been operating in this manner since it opened on July 10, 2007. The inspector states there were no beer taps and no display of spirits as normally displayed behind other bars in pubs. He observed several unopened bottles of spirits under the counter and the clerk advised him they were not for sale and were going to be moved out. The liquor inspector states that when he told the clerk that he thought the licensee was not interested in running a pub, she responded, "I know". When he asked to see the liquor licence and floor plan the clerk was unable to find them.

At the hearing, the liquor inspector confirmed the information in his notes and the NOEA and said he was confident of what the clerk told him regarding liquor sales.

Licensee's evidence

A consultant, retained by the licensee to assist with its applications for licences to operate the pub and liquor retail store, testified. He assisted the previous licensee in relocating the pub and the present licensee with the transfer of the licence. He said he understood the pub would open as a pub with on premises consumption and feature off sales.

The consultant testified that he also understood that food in a liquor primary licence establishment could mean snack food such as nuts and this was in line with several other liquor primary licences that did not have an operating kitchen and did not serve food.

The district manager for the licensee testified. She has been the district manager since 2001 and is responsible for the operation of the licensee's liquor stores in BC. The district manager testified that in 2007 she was directed to open the pub and understood it was to be a neighbourhood pub selling spirits in the glass and off sales. She was responsible for purchasing equipment and liquor, and making sure the pub operated according to the legislation. The licensee informed her the pub would not be selling spirits, and the bottles of hard liquor remained unopened. The district manager testified she purchased peanuts and pretzels for the pub and said there was a menu, but did not bring a copy to the hearing. She also testified that the pub had an accounting system that tracked sales.

The district manager said it was her understanding that non-alcoholic beverages would be sold in the pub, however, acknowledged they were not available in the pub prior to September 2007.

The manager of the licensee's liquor store in Kamloops testified. She has been with the company for three years. The manager said she was asked to assist with the opening of the retail store and was responsible for purchasing liquor for both the retail store and the pub. The manager said she was also responsible for training the clerk and instructed her in the operation of the computer and till, and how to order, sell and keep the pub clean. The clerk also completed the Serving it Right course.

The manager testified she visited the store once or twice a week. She said there were dishes with peanuts however, could not recall seeing a menu with food options and was not aware if there was a written policy and procedure manual in the pub.

The manager testified that she was not aware that the pub was required to sell non-alcoholic beverages and did not instruct the clerk she was to sell non-alcoholic beverages. She also had no knowledge of the proportion of on-site consumption sales to off-site sales.

The licensee's director of BC store development testified. He is responsible for acquiring liquor licences and creating liquor stores. He said he is involved in 200 liquor stores and 30 liquor primary licences in BC. The director testified that the licensee operated the liquor primary establishment because it was required in order to operate the liquor retail store. He said that if a liquor primary licence was not required he would only operate the liquor retail store. The director testified that he intended to operate a neighbourhood pub and understood that off sales could not be the primary purpose or exclusive component.

The director testified that before the pub opened, he had discussions with the liquor inspector who assisted him in minimizing the operation of the liquor primary establishment by suggesting that single cans or bottles of alcohol could be served rather than using glasses. He said that as a result of this conversation the licensee decided not to sell spirits. The director said the liquor inspector was also satisfied with the floor plan of the pub and was aware that the kitchen would not be used.

The director testified that the district manager had been in charge of opening the pub and the employees were aware of the regulations. He said there was music, menus with beverage prices on the tables, stools and a waitress in the pub.

The director initially testified that the pub had sold non-alcoholic drinks from the beginning, however, under cross-examination, conceded that non-alcoholic beverages were not sold. He said it was only after receiving the contravention notice that he became aware that non-alcoholic beverages were not available in the pub.

The director testified that the licensee keeps separate accounts of liquor sales in the pub and the take-away service. He said he did not bring any records because they were not requested and did not think they would be required. He said he has seen the accounts but made a decision based on the inspection not to bring them to the hearing.

The clerk swore an affidavit for the purpose of the hearing. Although it is undated, she testified that it was prepared on February 12, 2008, two days before the hearing.

In her affidavit, the clerk states that she has been an employee of the pub since July 2007, just prior to its opening. As an employee of the pub, she is responsible for all day to day operations including serving individuals who order beverages, operating the cash register, ordering inventory and paperwork. The clerk states that she understood that the pub was to be developed as a little neighbourhood pub and based on her experience as a patron of pubs, to have a welcoming and pub like atmosphere in the pub. When patrons walk in the door and ask about the pub, she said she informs them that they are operating a pub and they are welcome to sit down and have a cider, beer, cooler or soft drink.

In her affidavit, the clerk states that when the liquor inspector inspected the pub on September 5, 2007, he asked her if hard alcoholic beverages were sold and she replied no, because there were no glasses to serve those types of drinks and no dishwasher. She said he did not mention or ask about coolers, beer, cider or individual service or food service apart from noting the kitchen equipment was not in use. The clerk confirmed that nuts and other snacks were available to patrons free of charge and that they were normally on the tables. She says that since opening the pub they have experienced an increasing number of regular customers who order coolers, beer or cider.

At the hearing, the clerk testified by teleconference. She testified that non-alcoholic beverages had been available in the pub since July 2007, and that many patrons had consumed soft drinks before the contravention was issued. The clerk denied she informed the liquor inspector that the pub operated as a retail store and that no alcohol was served. The clerk testified that she could not remember her conversation with the liquor inspector, or whether she told the liquor inspector that no food was offered or that the pub was not operational.

SUBMISSIONS

Counsel for the licensee submits that the licensee concedes that non-alcoholic beverages were not sold in the pub until after the contravention notice was issued on September 5, 2007, and submits this was an oversight and does not bear on the actual alleged contravention.

Counsel submits the branch must prove its case and it was up to the liquor inspector to request any accounting records. He submits the records would serve no useful purpose as it was a start up operation and there is nothing in the branch's policy that would indicate the records would be of value in determining the pub's primary purpose.

Counsel for the licensee submits that on a balance of probabilities it was a misunderstanding. The clerk was an unsophisticated server who was confronted and questioned by a person in authority. Counsel suggests that the liquor inspector might have thought the clerk said no liquor was sold, when in fact she said no hard liquor was sold. He submits the director's evidence is more credible than the liquor inspector's because he gave a full discussion of his meeting with the liquor inspector before being licensed, whereas the liquor inspector had a poor recollection of the meeting.

ANALYSIS AND DECISION

I will first discuss the phrase "primary purpose" as there seemed to be some question as to its meaning.

Primary Purpose

Section 8(1) of the *Regulation* reads:

A liquor primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on the establishment is beverage service, entertainment or hospitality.

I find the primary purpose of the business that is to be carried on in the pub is beverage service, rather than entertainment or hospitality. There is no dispute the licensee acquired the LP to operate a pub, to serve alcoholic beverages to patrons. The previous name, Trax Tavern, and the present name of the establishment, indicate the establishment is a pub. A letter dated August 16, 2006, regarding the transfer of the LP to another location indicates the establishment is a pub offering beverage service (Exhibit 2, tab 1). The licensee's witnesses also confirmed the intention was to operate a neighbourhood pub. Although there was some suggestion that the pub's primary purpose was hospitality rather than beverage service, no reasons were given and no evidence was presented to support this assertion. The legislation also states that if the primary purpose is a take-away service, it is not beverage service (*Regulation* s.8 (2)(d)).

There was also a suggestion that as there is no requirement for a specific percentage or ratio of beverage service to the take-away service, the main business of the establishment may not have to be beverage service for it to qualify as its primary purpose. In fact, the establishment may only have to show the ability to provide on-site consumption.

The meaning of "primary purpose" may be understood by looking at the definition of the words within the context of section 8 of the *Regulation*. The courts have provided some guidance in this respect.

The Supreme Court of Canada has held that the fundamental rule of statutory interpretation is that,

. . . the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

Re Rizzo and Rizzo Shoes Ltd., [1998] 2 S.C.R. 27 at paragraph 21; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at paragraph 8.

In British Columbia, section 8 of the *Interpretation Act*, requires that legislation be interpreted so as to “best ensure the attainment of its objects”. See ***Haida Nation v. Minister of Forests*** (1998), 45 B.C.L.R. (3d) 80 (C.A.) per Esson, J.A. at paragraph 16. In *Haida Nation*, the court also expressed the opinion that the context in which the disputed words appear include the immediate context of the specific section or subsection, as well as the general context of the whole enactment.

The dictionary defines “primary” as: of the first importance; chief; fundamental; basic; ranked as most important; essential or basic to something. The word “purpose” is defined as: thing intended; object to be attained; intention to act; reason for which something is exists, or for which it has been done or made; the goal or intended outcome of something (on-line Oxford English and Merriam-Webster dictionaries).

In this case, applying the plain and ordinary meaning to the words “primary purpose” in the context of section 8 of the *Regulation*, I interpret this to mean that the LP in respect of the pub was transferred to the licensee on condition that the most important reason for the business carried on in the establishment was beverage service. Within the context of the Liquor Control and Licensing legislation in general, I interpret “primary purpose” to mean more than the intention to operate a beverage service or merely the ability to operate a beverage service. The words “carried on” in section 8 imply a continuing reason or purpose. Otherwise, if LP establishments were not actually required to operate as a pub, it would render the section meaningless. The beverage service must in fact be the most important business that is carried on in the establishment and this can be determined by several factors such as physical layout, menus, functioning of kitchen, as well as whether a reasonable person entering the pub would conclude that beverage service is the most important business that is carried on.

Evidence of primary purpose

The physical layout and set up of the establishment on September 5, 2007, was essentially the same as when it opened on July 7, 2007. The kitchen and dishwasher were not operational, there was no beer on tap, or glasses to serve beverages, and coolers had been installed. At the time the establishment opened, the liquor inspector was satisfied with the physical set up and that the establishment would operate as a pub. The bottles of spirits under the counter were unopened due to the licensee’s decision to not use glasses, and I accept this decision may have been made at least partly due to the licensee’s discussion with the liquor inspector about simplifying the operation. While the physical set up of the pub may indicate the licensee was not interested in the business of beverage service, it is not necessarily determinative of whether or not beverage service was the primary purpose of the establishment.

The conversation between the liquor inspector and clerk in this case is, however, as important, as it was after this conversation the liquor inspector formed the opinion that the establishment was operating as a take-away service contrary to its primary purpose.

The licensee submits the liquor inspector misunderstood the clerk to say “no liquor sales” when in fact she said “no hard liquor sales”. I find this was likely not the case for the following reasons.

The liquor inspector made notes immediately after the conversation on September 5, 2007. He made three notations regarding the operation of the business, “off sales only”; “no in-house liquor sales”; and “not serving liquor.” This indicates to me that he clearly understood from his conversation with the clerk that no liquor was available in the pub. The liquor inspector’s testimony and written summary in the NOEA are consistent with his notes and, during the hearing; he testified he was confident about what the clerk told him. For these reasons, I find the liquor inspector’s evidence reliable and credible.

I find the clerk’s evidence unreliable and inconsistent. The clerk recorded her recollections of her conversation with the liquor inspector in an affidavit deposed on February 12, 2008, eight months after the conversation. She testified that she had not made notes before that date. In her affidavit the clerk provided details of the conversation, for example, that the inspector asked her only about “hard alcoholic drinks” rather than alcoholic beverages in general, and he did not ask about food service. However, during the hearing two days later, she admitted that she could not remember the conversation, or whether she told the inspector if the pub served food or was operational.

In her affidavit she also states that soft drinks were available and testified during the hearing that many patrons consumed soft drinks. Given the licensee's admission that no non-alcoholic beverages were available before September 5, 2007, her evidence is clearly false. The clerk may have felt nervous by the liquor inspector's visit and questions on September 5th, however, she had been the only employee since the pub opened and was familiar with the pub's operations. I find her responses to the liquor inspector's questions, being spontaneous and without time to consider the consequences to her employer, were likely truthful.

I find it surprising that the licensee failed to provide non-alcoholic beverages as this is a basic requirement of a liquor primary licence. Section 9(c) of the *Regulation* makes it a condition of the licence that food and non-alcoholic beverages must be available at reasonable prices to the patrons. The licensee submits this was an oversight but given the knowledge and experience of those involved in setting up the establishment, I find this omission more likely indicates that this part of the business was not taken seriously. Further evidence that the licensee did not take beverage service in the pub seriously include; the several inconsistencies in the evidence regarding menus and snacks, the absence of a policy and procedure manual, and the fact that the clerk could not locate the licence and floor plan.

Although no records were produced, the accounts of the in-house liquor sales and off premises sales may be evidence in determining if the licensee was operating the pub contrary to its primary purpose. Taking into account the business was starting up and would be in the process of building its customer base, the pub's liquor sales, even over a two month period, would presumably indicate what the relationship was between the two parts of the business and specifically whether the number of in-house sales was disproportionately less than the number of take-away sales.

The director of the licensee testified he had seen the accounts of liquor sales in the pub, but chose not to bring them to the hearing. When questioned about the proportion of in-house to off premises sales, I found him to be evasive and he was not forthcoming. I also find it not credible that the manager who instructed the clerk in managing the computer and till and who visited the pub once or twice a week, had no knowledge about sales in the establishment. I conclude the absence of this evidence and reluctance to provide it, when it would indicate the main business being conducted in the pub, is likely because the information will establish that the Cold Beer and Wine to Go Pub was operating primarily as a take-away service.

Given all the evidence I find, on a balance of probabilities, the licensee contravened s. 20 of the *Act* and s. 8 of the *Regulation* by operating the Cold Beer and Wine to Go Pub contrary to its primary purpose.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act* and *Regulation*, 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.

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 *Regulation*. 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.

Schedule 4 of the *Regulation* establishes prescribed penalties. For a first contravention of this type, the range of penalty is 10 to 15 days licence suspension and /or a monetary penalty of \$7,500-\$10,000.

The branch's primary goal in bringing enforcement action and imposing penalties 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 the public safety and the well being of the community.

I find this is a serious contravention. The licensee showed a disregard for Liquor Control and Licensing legislation that is based on community standards of safety and the well being of the community. Although the licensee was focused on the retail liquor store business it had an obligation to operate the Cold Beer and Wine Liquor Store to Go Pub according to the terms and conditions of its licence.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents.

I find in the circumstances a penalty is warranted to ensure voluntary compliance in the future and find the branch's recommended minimum monetary penalty of seven thousand and five hundred dollars (\$7,500) appropriate in the circumstances.

ORDER

Pursuant to section 20(2) of the *Act*, I order the licensee to pay a monetary penalty of seven thousand and five hundred dollars (\$7,500). The penalty must be paid no later than the close of business May 23, 2008.

Original signed by

K. McIsaac
Enforcement Hearing Adjudicator

Date: April 24, 2008

cc: Vernon RCMP Detachment

Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Tanya Cogan, Branch Advocate