



**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

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| Licensee: | Cactus Café Victoria Ltd., dba Cactus Club Café 1125 Douglas Street Victoria BC V8W 3L7 |
| Case: | EH08-128 |
| For the Licensee: | Randy Olafson |
| For the Branch: | Olubode Fagbamiye |
| General Manager's Delegate: | George C.E. Fuller |
| Date of Hearing: | February 12, 2009 |
| Place of Hearing: | Victoria, BC |
| Date of Decision: | March 18, 2009 |

**Ministry of Housing
& Social
Development**

Liquor Control and
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INTRODUCTION

The corporate Licensee operates an establishment known as Cactus Club Café, in the City of Victoria, British Columbia, with Food Primary Licence No. 301148. The establishment has no history of contraventions. A food primary inspection was conducted on November 10, 2008. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication *Food Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia (Guide)*.

ALLEGED CONTRAVENTION(S) AND PROPOSED PENALTY

The Branch alleges that on November 10, 2008, the Licensee contravened Section 42(4) of the *Liquor Control and Licensing Regulation* (Regulation), BC Reg. 244/2002, by allowing liquor sold in the licensed establishment to be taken from the establishment. The proposed penalty is a two-day suspension of the liquor license, in accordance with Schedule 4, item 29 of the Regulation.

As a result of his observations and discussions following the events of that evening, the Liquor Inspector issued a contravention notice (CN). In due course, the Branch issued a Notice of Enforcement Action (NOEA) to the Licensee.

The Licensee responded to the allegations by acknowledging that the contravention occurred, but disputes that the recommended suspension of the license is an appropriate penalty. The Branch and the Licensee have provided evidence and submissions with respect to the contravention and the appropriateness of a penalty.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation, BC Reg. 244/2002.

Consumption of liquor in licensed establishments.

Section 42(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 license.

ISSUES

As the Licensee has conceded that a contravention occurred and does not seek to invoke defence of due diligence, the sole issue which remains to be determined is what penalty, if any, is appropriate in all the circumstances of this case.

EXHIBITS

The following Exhibits were reviewed and considered in the course of this adjudication:

Exhibit 1

Branch Book of Documents, tabs 1 – 15.

Exhibit 2

Licensee document entitled “Activities for Mondays and Tuesdays – All Liquor Sales – Lunch Dinner 8 Days”.

Exhibit 3

Licensee document entitled “Cactus Club – Location Counts – Seats LCLB etc”.

EVIDENCE – THE LIQUOR CONTROL AND LICENSING BRANCH

The Representative of the Licensee admitted that the alleged contravention had taken place and acknowledged the accuracy of the written testimony of the Liquor Inspector, as set out under the heading “Summary of Evidence”, attached to the Notice of Enforcement Action found in Exhibit 1 at tab 1 of the proceedings. He also stated that the Licensee was not raising the defence of due diligence. A summary of the Liquor Inspector’s testimony is as follows:

The Cactus Club Café is located at the corner of Douglas Street and Fort Street in the City of Victoria. The Licensee’s Food Primary Licence Number is 301148, which also has a lounge endorsement. The Licensee is comprised of a chain of 17 restaurants throughout British Columbia and Alberta and, according to its website, it is the leading casual fine dining restaurant concept in Canada.

At approximately 22:40 hours on November 10, 2008, the Liquor Inspector attended at the Licensee’s premises in order to conduct a routine liquor inspection. He noted that the lounge interior was quite busy and a count was conducted in the lounge, as he noted a large private function being held in this area of the restaurant.

At approximately 22:45 hours the Liquor Inspector returned to the main entranceway where he had initially entered the restaurant. There he observed at least two employees standing at the front hostess counter within Patron Area 01. He was unsure of the number of employees, as it is not always easy to identify patrons from servers and hostesses where there are no uniforms and no name tags to distinguish them.

From the hostess counter he observed through the clear glass doors, a Caucasian female standing just outside the main entranceway. She was approximately 25 years of age, 5’6”, medium build with brunette hair, wearing a black, knee high dress. She was standing off to one side of the fully closed doors, holding and consuming what appeared to be a martini in a large, clear martini glass. As it was apparent to him that she was outside of the establishment, he exited onto the Douglas Street entranceway and

approached this female. Before identifying himself to her, the Liquor Inspector asked her what she was drinking, to which she stated, "an Apple Sour Martini". He then asked her if there was liquor in the drink, to which she responded in the affirmative. He then identified himself to her as a Liquor Inspector and asked her to return the drink to the inside of the restaurant, which she promptly did. She entered through the main doors and placed the drink on the hostess counter. He then asked her to return outside with him to discuss the matter.

She identified herself as an off duty employee of the Licensee. At the same time the Night Manager exited the restaurant so that the three of them could briefly discuss the matter privately. They returned inside and the Inspector was then approached by both the General Manager and the Regional Manager of the Licensee. They went outside onto the Fort Street entrance via the patio exit, to discuss, in private, the Liquor Inspector's observations, as well as some other housekeeping matters.

At approximately 22:50 hours the Liquor Inspector advised the Regional Manager that he would be issuing a Contravention Notice to the Licensee and that he would be in contact with the General Manager on Wednesday, November 12th to issue it. At 22:55 hours he concluded his observations and conversations with the managers and left the Licensee's premises to return to his office where he completed in his notebook the details of his observations concerning the contraventions he had detected.

Prior to this incident, on November 6, 2008, a routine Legal Entity Change Inspection Interview Sheet had been completed between the General Manager and the Liquor Inspector at the LCLB office. During that interview, the General Manager viewed the LCLB produced Food Primary PowerPoint Presentation and then discussed in detail the LCLA and the Terms and Conditions as they pertained to food primary establishments.

On November 14, 2008, the General Manager of the Licensee attended the LCLB offices and was issued a Contravention Notice (C/N) B001084. This C/N was then

amended to C/N B001085 on November 17, 2008 and reissued to the General Manager at the Licensee's premises.

In addition to this documentary testimony, the branch advocate also called the Liquor Inspector as a witness in order to provide supplementary, *viva voce* evidence. That testimony largely repeated and confirmed the Liquor Inspector's documentary testimony, however, it did disclose some interesting information for consideration, particularly the cross-examination of that testimony.

With respect to the actual position taken up by the offending employee, the Liquor Inspector referred to the pictures at Exhibit 1, tab 11, indicating that she was standing on the right side of the doorway under the word "Café" beside the white pillar. In this position, she would have been approximately one to two feet outside the establishment and because of the recessed design of the entrance, she would have been shielded from the immediate view of pedestrians travelling north on the Douglas Street sidewalk. He acknowledged, on cross-examination, that she was so close to the entranceway, that if the door had been opened, she would have been compressed behind it. In his conversation with the offending employee regarding the contravention, he advised that she immediately admitted to consuming liquor outside of the red line and was most apologetic for doing so.

The Liquor Inspector explained that he had conducted a compliance meeting with the General Manager of the Licensee on December 10, 2008 in order to bring the Liquor Inspector and the Licensee together to discuss the alleged contravention and develop methods of preventing further contraventions in the future. The purpose of these meetings is to, ultimately, gain compliance by the Licensee voluntarily. At this meeting, the Liquor Inspector advised that the Licensee had committed to review with its employees the purpose of the red line area and ensure that no one would step outside of that area. At that same meeting, the Liquor Inspector stated that the Licensee did not provide him with any written policies with respect to this contravention, nor did it submit

any incident log book, or minutes of any staff meetings, with respect to the contravention.

The Liquor Inspector also confirmed that he had met with the General Manager of the Licensee on November 6, 2008, for the purpose of dealing with a Legal Entity Change, as a result of a transfer of ownership within the corporate structure of the Licensee. He explained that, at that time, he also showed the General Manager of the Licensee a presentation on both food primary liquor licenses and the Serving It Right program. At the conclusion of that presentation, the General Manager signed on behalf of the Licensee, indicating that he would comply with the *Act* and *Regulations*.

When asked why he had selected the penalty of a two-day suspension, which was between a one and three-day suspension recommended as enforcement action for a first offence of this nature, the Liquor Inspector responded by stating that, firstly, he had reviewed the PowerPoint presentation with the General Manager only a few days prior to the alleged contravention and, therefore, the General Manager should have known that removing liquor outside of the establishment was a contravention.

Secondly, it was an employee of the establishment and not a patron who was consuming liquor outside of the establishment. Finally, there were other employees at the hostess counter who could have dealt with the situation and they ought to have known it was a contravention and acted upon it.

The Liquor Inspector went on to say that in considering an appropriate penalty, between a suspension and a monetary penalty, he chose the former as, in his view, it would have a greater impact in order to gain compliance. Finally, he stated that although it had been a few months since the contravention, he did not feel that there was any reason to change his recommended penalty at this date.

On cross-examination by the Representative of the Licensee, the Liquor Inspector indicated that he believed that one prior contravention notice had been issued to the

Licensee but when pressed, and in light of Appendix B to the NOEA, he agreed that the Licensee had no prior compliance history.

When asked whether he had revisited the Licensee's establishment since the alleged contravention and, if so, what his experience had been, the Liquor Inspector responded that he had been back to the Licensee's establishment many times and, furthermore, offered that on each visit he had found that the Licensee had been very good from a compliance perspective and that there had been no further compliance problems. When asked whether he believed that the Licensee was a responsible Licensee he answered in the affirmative with no hesitation. Finally, when it was suggested to him that the Licensee had taken the matter seriously the Liquor Inspector responded "I'm very pleased with the position that the Cactus Club has taken since the incident".

EVIDENCE AND SUBMISSIONS OF THE LICENSEE

The Representative of the Licensee stated that the Licensee was a good corporate citizen and had been designated as one of the best restaurants in British Columbia to work for. Employees can get any job in the industry as a result of the company's training programs. He is the consultant to the company on all liquor related matters and conducts regular seminars regarding liquor procedures and, in particular, the requirements of the Serving It Right program.

In his view, it is the intention of the *Act* and *Regulations* to discourage those companies that don't take seriously the responsibilities given to them as licensees. In his opinion, the Cactus Club was definitely not such a licensee and he believed that the contravention occurred solely as a result of a severe lapse of judgment, allowing an off duty employee to breach a section of the *Regulations*. He stressed, as the employee had noted in her statement, it was a momentary lapse of judgment on her part. She was off duty and talking with friends and had expected that her boyfriend was going to briefly stop in and give her something as he was not intending on staying at the restaurant, and that's what caused her to step just outside the door.

He did not believe that this incident was a direct reflection on the management and staff of the Licensee and offered that the owner of the Licensee was mortified at the thought of a suspension. Accordingly, he was of the view that the suspension was not warranted in this case, as the past history of all of the Cactus Club establishments showed a clean balance sheet, as far as infractions under the *Act* and *Regulations* are concerned. In this case, the liquor which she carried with her was outside of the premises for mere moments and her intent was not to remove the liquor from the establishment.

The Representative of the Licensee filed Exhibits 2 and 3 in these proceedings indicating that a two-day suspension would amount to a fine of \$10,866.00, which was 2 ½ times the monetary guideline of \$3,000.00 set out in the *Regulations*.

The Representative of the Licensee stated that his client was a very compliant and responsible Licensee and that since the offence the Liquor Inspector had returned on many occasions and had indicated to staff that in his opinion the Licensee has a strong desire to stay compliant with the *Regulations*. Furthermore, the manner in which the Licensee has responded to the contravention, by way of the compliance meeting, additional staff seminars, senior management meetings within the company, and a change to the general policy of the Cactus Club Operations Manual, that a suspension was not required in this case to bring the Licensee into compliance. He pointed out that the maximum monetary fine for this offence is established to be a \$3,000.00 fine, and he submits that such a penalty in this case would be a reasonable penalty in order to conclude this enforcement procedure.

On cross-examination by the branch advocate, the Representative of the Licensee agreed that he had not produced any record of signing off for staff training, but stated that the Cactus Club went further in its training. He agreed that employees were not required to submit to written tests with regard to liquor related matters and that he had not produced evidence of all staff members with regard to the Serving It Right program. He agreed that although the Cactus Club had written policies, he had not produced

sign-off sheets signed by employees. In response to a question as to how long after the incident he had addressed employees of the Licensee, he indicated that he had flown to Victoria two days after the event and had conducted a staff meeting with regard to the issues involved in the alleged contravention.

The Representative of the Licensee submitted that the characterization of the Licensee as a less than satisfactory operator was very misleading and says that the past history of compliance is certainly relevant to the assessment of an appropriate penalty. He says that a daily log book is kept and that weekly management meetings occur in every unit throughout the chain. In his view, the Branch was attempting to make an example of the establishment and was singularly determined to seek a suspension of the licence in this case.

The Representative of the Licensee submits that the Licensee has been swift and precise and has responded appropriately to the contravention.

With respect to the allegation that certain documentary evidence was not presented at the hearing, the Licensee submits that, although the same were not placed into evidence, the establishment did have policy and procedure manuals, an incident log book, and conducted regular staff meetings where minutes were taken. In closing, it was submitted that the infraction was not taken lightly and was acted upon appropriately. The Licensee submits that it is absolutely inappropriate for a suspension to be administered, given all of the circumstances of this case.

SUBMISSIONS OF THE BRANCH

The branch advocate states that the facts are undisputed and disclose that liquor was removed from the Licensee's establishment by an off duty employee on November 10, 2008 and, therefore, the central issue is the appropriateness of the penalty. As this Licensee did not have the right to transact off sales, the contravention was contrary to the terms and conditions of the Licensee's licence. In the event that liquor is removed from the establishment, it is not a defence that the Licensee has put in place written

policies which were not effective in preventing the contravention. It would also not be a defence that the Licensee has no previous compliance history.

Turning to the issue of the appropriateness of the penalty, the branch advocate submits that the recommended penalty in the NOEA, found at Exhibit 1, tab 1 filed in these proceedings, of a two-day suspension is warranted. The branch advocate says that the fact that there has been no prior compliance history with regard to this licensee is not a reason to transmute the proposed penalty to a monetary penalty.

In conclusion, the branch advocate submits that the proposed penalty of a two-day licence suspension is warranted as it will reinforce the need for the Licensee to fall into voluntary compliance. It will also reinforce the need for the Licensee to put in place intervention measures which would have been a way to demonstrate that it is taking effective steps to ensure compliance with the terms and conditions of its licence.

ANALYSIS AND DECISION

I have now reviewed and considered all of the evidence, both documentary and *viva voce*, proffered by the parties in these proceedings, the submissions of the branch advocate and the authorities referred to me by the branch advocate. As previously noted, the contravention has been admitted and the Licensee has elected not to raise the defence of due diligence. Even if such defence was raised, there is insufficient evidence here to justify its application. I find, therefore, that the contravention occurred as alleged. The Licensee disputes the Branch's recommended two-day suspension and, therefore, the issue remaining to be determined is the nature of the penalty, if any, to be imposed.

I have no hesitation in accepting that the contravention which has been admitted is serious, particularly given the fact that the Licensee operates under a food primary licence, as minors could easily be exposed to, and be influenced by, the consumption of alcohol in and around public sidewalks and thoroughfares. Accordingly, I must now determine whether there are mitigating factors which would operate so as to militate

against the Branch's recommendation of a two-day licence suspension. I will now turn to an examination and consideration of any such factors.

To begin with, I find that the compliance record of an offending licensee is an important factor in fashioning an appropriate penalty. Clearly, a repeat offender is deserving of a more elevated penalty, than a licensee who is a first offender. In this case, the Licensee has no previous contraventions.

Secondly, on all of the evidence, the events constituting the contravention were momentary, or fleeting. Furthermore, the offending employee was standing immediately outside the establishment and was partly shielded from view by the recessed design of the entrance, to the point that the Liquor Inspector agreed that if the door had been opened, the offending employee would have been compressed into the doorway. The contravention here resulted from a momentary lapse of judgment on the part of an individual, as opposed to constituting a flagrant, public violation, or a wanton disregard for the rules. On the evidence of the Liquor Inspector, the offending, off duty, employee, was open and honest about her actions and was not uncooperative or difficult in any way, nor were any other of the company representatives. The offending employee was immediately contrite and quickly apologized for her actions.

The fleeting nature of the contravention also significantly reduces any weight that I might otherwise give to the submission of the branch advocate, that the two employees at the hostess counter should have witnessed the contravention and intervened. It may very well be that those employees could have had the opportunity to view the contravention, but there is no evidence that they actually did. If they had actually observed the contravention, then I would have expected them to have been called as witnesses in these proceedings to establish that fact.

Furthermore, I have great difficulty in reconciling the Liquor Inspector's endorsement of the Licensee's favourable level of compliance, particularly on the many subsequent occasions that he visited the establishment, with his statement at the hearing that he

still felt that a two-day suspension of the licence was appropriate. Surely this positive experience both before, and particularly after, the contravention, is relevant in determining the appropriate measures which are required in order to bring the Licensee into voluntary compliance.

The failure of the Licensee to produce certain documents and records regarding policies and procedures, minutes of staff meetings, incident reports and Serving It Right certificates, would, ordinarily, allow me to draw a negative inference against the Licensee as to its vigilance with respect to liquor licensing matters. I find, however, that, once again, the Liquor Inspector's very positive *viva voce* evidence, elicited through cross examination, regarding the Licensee's more than satisfactory observance of licensing requirements, would neutralize any negative inference that I might otherwise draw.

Management of the Licensee also appears to have taken the matter very seriously. Within two days, the Representative of the Employer was dispatched from Vancouver to Victoria and held a staff meeting to specifically discuss the issues surrounding the contravention.

In light of all of the above, I am not convinced that it is necessary to impose a license suspension in order to bring the Licensee into compliance. In my view, the inadvertent actions of an off duty employee, in very briefly and thoughtlessly stepping outside of the establishment into a partially shielded alcove, did not constitute a threat to public safety or the well being of the community. In view of the fact that the Licensee here has no compliance history and that the Liquor Inspector has revisited the establishment many occasions since the contravention and has been completely satisfied that it has been compliant since the contravention, I find that it is probable that the Licensee has already been brought into compliance and, therefore, a monetary fine should suffice in this case.

PENALTY

The range of penalties for a first contravention of Section 42(4) of the *Regulation*, and in accordance with Schedule 4, item 29, is a one to three-day licence suspension and/or a monetary penalty of \$1,000.00 to \$3,000.00 for a first contravention.

The Branch's primary goal in bringing enforcement action and in determining the appropriate penalty is to encourage voluntary compliance. Considerations in determining an appropriate penalty include the past history of compliance, the seriousness of the contravention, the threat to public safety and the well being of the community.

Imposing any penalty is discretionary. However, where a monetary penalty is warranted, I am bound by the minimum as 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. Accordingly, for the contravention of allowing liquor sold in a licensed establishment to be taken from the establishment, I find that a monetary penalty of \$3,000.00 to be appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the Licensee to pay a monetary penalty of \$3,000.00 relating to Liquor Primary Licence No. 301148 in respect of Notice of Enforcement Action No. EH08-128. The monetary penalty must be paid no later than the close of business on April 17, 2009

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: March 18, 2009

cc: RCMP Victoria Detachment

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

Liquor Control and Licinsing Branch, Victoria Office
Attn: Olubode Fagbamiye, Branch Advocate