



**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: 0791979 B.C. Ltd. dba
Tony Masala's Grill
1065 Granville St.
Vancouver, BC V6Z 1L4

Case: EH08-125

For the Licensee: Harpreet Hayer, Gurdev Dhaliwal and
Gurpreet Dhaliwal, managers

For the Branch: Olubode (Bode) Fagbamiye

General Manager's Delegate: Kathleen McIsaac

Date of Hearing: February 19, 2009

Place of Hearing: Vancouver, BC

Date of Decision: April 3, 2009

INTRODUCTION

The licensee, 0791979 BC Ltd., operates as Tony Masala's Grill ("restaurant") in Vancouver, BC. It holds Food Primary Licence, No. 166881, with liquor sales from 12:00 noon to 12:00 midnight, seven days a week. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "Guide for Liquor Licensees in British Columbia."

ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The branch's allegations and proposed penalties are set out in the Notice of Enforcement Action ("NOEA") dated November 21, 2008. The branch alleges that on November 1, 2008 (the business day of October 31, 2008) the licensee contravened **Section 44(3)** of the *Liquor Control and Licensing Regulation* ("Regulation") by allowing consumption of liquor beyond ½ hour after the time stated on the licence for the hours of liquor service. Item 26 of Schedule 4 of the Regulation provides a range of penalties for a second contravention of this type: a licence suspension of 10-14 days. The branch recommends a 14-day suspension of the liquor licence.

The branch also alleges that the licensee contravened **Section 44(1)(b)** of the Regulation by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service. Item 25 of Schedule 4 of the Regulation provides a range of penalties for a first contravention of this type: a licence suspension of 4-7 days or a monetary penalty of \$5-7,000. The branch recommends a monetary penalty of \$5,000.

The licensee disputes both allegations.

RELEVANT STATUTORY PROVISIONS

Regulation 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).

(2) Unless otherwise authorized by the general manager, if a licensee has been issued a licence, other than a food primary licence, in respect of an establishment, the licensee must not allow patrons to enter the licensed establishment during the hours when liquor service is not allowed by the licence.

(3) Unless otherwise authorized by the general manager, a licensee must not allow a person to consume liquor in the licensed establishment beyond 1/2 hour after the time stated on the licence for the hours of liquor service.

(4) A person must not consume liquor in a licensed establishment beyond the time allowed for consumption under subsection (3) in that licensed establishment.

(5) A reference to time in this regulation or in a licence is a reference to the local time observed at the place of the licensed establishment.

ISSUES

1. Did the licensee allow patrons to consume liquor in the establishment after 12:30 a.m., that is, ½ hour after the time stated on the licence for the hours of liquor service?
2. Did the licensee take liquor from patrons by 12:30 a.m., that is, within ½ hour after the time stated on the licence for liquor service?
3. If the answer to either or both questions is yes, what penalties, if any, are warranted?

EXHIBITS

EXHIBIT 1 Branch's Book of Documents

EXHIBIT 2 Four written witness statements (letters) in support of the Licensee

EVIDENCE

I heard evidence from three liquor inspectors and three managers representing the licensee.

BRANCH'S EVIDENCE

Liquor Inspector #1 testified that on the evening of October 31, 2008, at approximately 9:00 p.m., he and the Branch's regional manager visited the restaurant to issue a contravention notice to the licensee for failing to notify the branch of a structural change. The inspectors also had a lengthy discussion with one of the managers regarding the responsibilities of a food primary licence holder. On previous visits the inspector had been concerned about the amount of food sold compared with liquor sales. The inspector was confident the manager understood their responsibilities with respect to a food primary licence.

Later that evening, at 12:15 a.m., two liquor inspectors joined liquor inspector #1 and the regional manager. As they stood across the street from the establishment, they heard loud music coming from inside the premises. They also observed a group of young people standing by the front door. A young female was speaking on her cell phone and as she was speaking, the front door opened and the group entered the establishment.

The inspectors left, returning to the establishment at 12:45 a.m. Inspector #1 was certain the time on his wristwatch was accurate as it was timed to his cell phone, which was timed to the atomic clock. He observed brown shades covering the windows and glass door of the establishment. The music was loud and it sounded like a party was going on inside. The inspector knocked loudly on the door and eventually a young female pulled aside the window covering and looked directly at the inspector. She immediately looked away, past him, as if she had not seen him. In the two to ten seconds the window covering was pulled aside, the inspector observed two males seated on chairs, drinking bottled beer that he recognized as Molsen Canadian. He also observed a third male sitting just beyond them drinking a bottle of Molsen Canadian beer. The three males, in their early to mid 20's, had dark skin, short hair and were casually dressed. Under cross-examination, the inspector remained confident that he had a clear, unobstructed view into the premises and observed three males holding bottles of beer, putting them to their lips and consuming the alcohol.

When the young woman moved away from the window, the inspector heard a voice inside that sounded like a loud whisper saying, "inspectors, inspectors".

The inspector pounded on the door with his foot but there was no response. He briefly moved over to a locked glass door to the left, several feet from the front door, that provided common access to the building and observed people leaving the establishment through a back door.

Close to 1:00 a.m., one of the managers opened the front door and allowed the inspectors inside the establishment. The restaurant was almost empty except for staff and maybe one or two others. The inspector was unable to identify the patrons he observed drinking as they had left. When he informed the manager he had observed three male patrons drinking beer, the manager denied it. After denying once again that anyone had been drinking, the inspector informed the manager there would be no further discussion and that he would issue a contravention notice for failing to clear liquor and allowing patrons to consume liquor after liquor service hours. The inspectors left shortly after 1:00 a.m.

The inspector acknowledged that he visits this establishment on a regular basis and expressed a concern with food primary establishments that tend to push more liquor than food. On September 8, 2008, he conducted a compliance meeting with the licensee for a contravention similar to the present, and the licensee signed a waiver on September 9, 2008.

Liquor Inspector #2 testified that when the four inspectors arrived at the establishment at 12:45 p.m. she heard loud music and observed the coverings on the windows and door. She also set her digital watch with her cell phone for accuracy. When Inspector #1 banged on the door, a young woman with a cell phone opened the blinds. The inspector thought it was strange that the woman looked out, but not directly at the inspectors. She estimated the window covering was opened for approximately three to four seconds. The inspector could not see into the restaurant, as she was further back on the sidewalk. After the young woman replaced the blinds, no one opened the door. The inspector then moved over to the glass doorway to see if there was another entrance. At the end of a lit hallway she observed people exiting the establishment through a back door. She counted 41 people leaving. At approximately 1:03 a.m. the inspectors were allowed into the premises and she observed about six males inside and no food or liquor.

The inspector checked the rear door, and across the hall were stairs leading out to an alleyway where a group of people were congregated. Inspector #2 testified she had dealt with the restaurant before and expressed a concern regarding public safety when food primary establishments operate as a bar.

Liquor Inspector #3 testified that when they tried to gain access to the restaurant at 12:45 no one could hear them banging on the door because of the loud music. The inspector, standing right behind inspector #1, observed a woman with shoulder length brown hair and wearing a white blouse, pull the window shade aside. The inspector then joined inspector #2 at the glass doorway to the left of the front door. She observed one of the managers, dressed in a suit, ushering people out the back door. When they entered the establishment, she observed about five people inside.

LICENSEE'S EVIDENCE

Manager #1 testified that all three managers share the responsibilities of the establishment equally. There is a cook who has recently returned to his native country and two waitresses who each work one night per week. There are no servers.

At the end of each night, it is their normal practise to have last call at 12 midnight and it is a strict rule that at 12:15 a.m. the chef comes out of the kitchen and help clear tables of liquor. They will reimburse a patron for their drink if it is taken without being finished. At 12:30 a.m. to 12:35 a.m. patrons are escorted out through the back door so that people cannot enter by the front door. Patrons are usually gone by 12:30 a.m. or 1:00 a.m.

October 31st was a busy night and the front door was locked at 12:15 a.m. to stop people from entering the premises. Brown shades were pulled down on the front door window and adjacent window to discourage friends from trying to get in and to prevent the managers from seeing who was at the door, especially friends. After clearing the tables people were ushered out the back door at 12:35 a.m. Manager #1 was at the back door because people from the upstairs studios were trying to enter the premises.

The managers used hand receipts to record sales as their usual system had broken down and they could not afford to repair it. Although the surveillance cameras would have clearly shown the activity inside the premises that evening, it was not available as tapes are recorded over after two weeks. The manager remembered the inspector saying he would issue a contravention notice but the video of that evening was not retained because they did not receive the notice for three weeks.

Manager #2 testified that the inspector could not have observed patrons drinking Molsen Canadian beer as they ran out of all bottled beer including Molsen Canadian beer between 10:45 p.m. and 11:00 p.m on October 31st. They decided it was too late to purchase more beer, especially as there were too many people on the street. The managers take turns as lead manager and that person purchases the liquor and supplies before the shift begins. Manager #2 could not remember who bought the liquor on October 31st and they did not keep a record of the purchases for that night. The manager said he was surprised to receive the contravention notice as he did not think they had done anything wrong that night.

Manager #3 testified that he usually keeps track of the time and they always make sure liquor is only served until 12:00 midnight. He was on crowd control on the evening of October 31st and he estimated there were 30 people in the premises at 12:30 a.m. They cleared people out at 12:45 a.m.

Manager #3 first testified he was clearing glasses when he heard banging on the door and opened it for the liquor inspectors. Later in the hearing the manager clarified that he was not clearing glasses but just making sure there were no glasses left on the tables.

The four letters submitted by the licensee (Exhibit 2) provide little assistance to my determination. The writer of the first letter left the establishment at 12:30 a.m.; nothing is said in the second letter about the clearing of alcohol and the writer of the third letter states only that their drinks were cleared by 12:30 a.m. The fourth letter, by email and dated February 18, 2009, states that liquor was cleared by 12:30 a.m. However, I give it little weight as only the first name of the writer is given, it is written nearly four months after the incident, no phone number is provided and the writer was not available for questioning by the branch.

SUBMISSIONS

The managers firmly maintained they did nothing wrong on October 31st, 2009. Having grown up in the same community, they work well together and have never been in trouble. The manager submitted they were in the process of taking over responsibility for the establishment.

REASONS AND DECISION

I found the three liquor inspectors' testimonies straightforward, consistent and reliable. They are experienced inspectors whose job it is to objectively enforce licensees' compliance with the liquor laws. I also found the three managers consistent and forthright in their testimonies. However, despite their unwaivering confidence that they had done nothing wrong, I find the evidence indicates otherwise.

Contrary to their normal practise of clearing tables of liquor at 12:15 a.m. and escorting patrons out of premises at 12:30 a.m. or 12:35 a.m., at 12:45 a.m. on October 31st, there were over 40 patrons in the premises. Although the managers submit some of the people were from upstairs studios trying to get into the restaurant, the inspectors were confident the people were exiting the restaurant. As well, at 1:00 a.m., whether one of the managers was clearing or checking for glasses, it was well beyond ½ hour after the time stated on the licence for liquor to be cleared.

I find that when the young woman opened the blinds (and this was neither confirmed or denied by the managers) she recognized the inspectors, particularly as the inspector's badge was held up for her to see. The fact that the inspectors observed at least 40 people exiting the back door of the premises immediately after the woman's appearance at the window, leads me to conclude that the inspector's arrival was likely communicated to the managers who quickly ushered the patrons out the back door before allowing the inspectors inside 15 minutes later.

I also find, on a balance of probabilities, that in the few seconds the window covering was pulled aside, inspector #1 had a clear, unobstructed view into the premises and observed three male patrons consuming beer from a bottle. I find the bar, at 42", was not so high as to obstruct the inspector's view into the premises. That the inspector could not remember the strip of frosting on the side of the glass is not significant as he was focused on the activity inside the premises.

Given the evidence, I find it unlikely the restaurant ran out of bottled beer earlier in the evening. The manager did not provide any corroborating evidence that in my view was reasonably available, such as receipts of the day's purchase of bottled beer to compare with the evening's sales of bottled beer. The managers could not even remember who bought the beer for that night. The surveillance video that, according to the managers, could have given a clear view of the premises, was not retained even though they knew the liquor inspector was going to issue a contravention notice for allowing patrons to consume alcohol beyond the time for liquor service. Given the importance of this information, I conclude this evidence was not disclosed as it may not been in their favour.

Having considered all the evidence, I find, on a balance of probabilities, the licensee contravened s.44(3) of the Regulation by allowing consumption of liquor beyond ½ hour after the time stated on the licence for the hours of liquor service, and s.44(1)(b) of the Regulation, by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

The defence of due diligence may excuse a licensee from having contravened the Act or Regulation if it is demonstrated, on a balance of probabilities, that the person involved in the contravention was not the directing mind of the licensee and that it took all reasonable steps to prevent the contravention. In this case, as the managers were clearly the directing mind of the licensee on the night of the contravention and were involved in the contravention, the defence of due diligence is not available to the licensee. (*Plaza Cabaret v. General Manager Liquor Control and Licensing Branch*, [2004] BCSC, para 25)

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 may do any one or more of the following:

- 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 to follow the minimums set out in Schedule 4 of the Regulation. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and 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 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.

In this case, the history of the enforcement action, warnings and discussions with liquor inspectors over the past year satisfy me that the licensee and managers knew and understood their responsibilities with respect to the hours of liquor service.

In September 2008, the licensee signed a waiver for allowing patrons to consume liquor beyond ½ hour after liquor service hours. Although the managers submit they were not involved as managers at that time, I note one of the managers was bartending at the time of the contravention. After the September contravention the liquor inspector conducted a compliance meeting with the owner of the establishment to ensure the licensee understood his duties with respect to alcohol service. The licensee is responsible for properly informing and training those employees in management positions regarding liquor laws. At a subsequent routine inspection the liquor inspectors re-enforced with the owner and management what their duties were with respect to liquor service. Earlier in the evening of October 31st, the liquor inspectors visited the establishment and discussed the terms and conditions of their food primary licence with one of the managers.

While I understand it may have been difficult to resist the pressure from people, especially friends, wanting to enter the restaurant after hours, the licensee and those in management had a legal duty to end liquor sales and consumption of alcohol at the time set out in the food primary licence. I find the contravention on the night of October 31st is serious in that the managers not only failed in their duties, but continued to firmly maintain their position that they had done nothing wrong. This indicates to me a disregard for liquor laws that reflect community standards of safety and wellbeing.

Given the evidence, I find penalties are warranted to encourage voluntary compliance.

The branch recommends a 14-day suspension for the contravention of s. 44(3) of the Regulation. This is the maximum penalty for a second contravention of this type. The reasons, provided in the NOEA, include the following:

- The hours when a licensed establishment may sell liquor are determined, in part, by community standards. Patrons who consume liquor and leave an establishment after the licensed hours of liquor service may disturb nearby residents and businesses.
- Enforcement action is required to encourage the licensee to voluntarily comply with the terms and conditions of the licence, as compliance meetings and education sessions have not been successful in achieving voluntary compliance.
- The maximum penalty is being recommended given the blatant disregard for the terms and conditions.

The branch recommends a monetary penalty of \$5,000.00 for the contravention of s.44(1)(b) of the Regulation. This is the minimum penalty for a first contravention of this type. The reasons, provided in the NOEA, include the following:

- The hours during which a licensed establishment is open for the sale of liquor are determined, in part, by community standards. In particular, hours of liquor sales affect the surrounding residents and businesses in the community. The failure by the licensee to take liquor from patrons in a food-primary licensed establishment gives patrons the opportunity to continue consuming liquor while the restaurant remains open, even though the hours of liquor service have ended. This, in turn, can result in a shift in focus in the establishment's operation.

- Enforcement action is required to encourage the licensee to voluntarily comply with the terms and conditions of the licence, as compliance meetings and education sessions have not been successful in achieving voluntary compliance.
- As this is the first time enforcement has been recommended, a minimum \$5,000.00 fine is being recommended as the next step to hopefully bring this establishment into voluntary compliance.

In the circumstances, I find that a 14-day suspension for the contravention of s.44(3) of the Regulation and a \$5,000 penalty for the contravention of s.44(1)(b) of the Regulation, are appropriate.

ORDER

For the contravention of s. 44(3) of the Regulation I order a suspension of food primary licence #166881 for a period of fourteen (14) days to commence at the close of business on Thursday, April 30, 2009 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 liquor primary licence #166881 be held by the branch or the Vancouver Police Department from the close of business on Thursday, April 30, 2009, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

A suspension sign notifying the public that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

For the contravention of s. 44(1)(b) of the Regulation, I order that the licensee pay a monetary penalty of five thousand dollars (\$5,000) to the general manager of the Liquor Control and Licensing Branch on or before April 30, 2009.

Original signed by

Kathleen McIsaac
Enforcement Hearing Adjudicator

Date: April 3, 2009

cc: RCMP Vancouver Detachment
Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attn: Olubode Fagbamiye, Branch Advocate