



DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING 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: 669502 B.C. Ltd. dba, El Furniture
Warehouse Restaurant
989 Granville Street
Vancouver, BC V6Z 1L3

Case: EH08-132

For the Licensee: R. Roderick Anderson

Advocate: Peter Mior

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: April 7, 2009

Place of Hearing: Vancouver, B.C.

Date of Decision: May 5, 2009

INTRODUCTION

The Licensee operates a food primary establishment in the entertainment district of Vancouver. The hours of operation indicated on Food Primary Licence #208637 are 9:30 am to 2:00 am, seven days per week.

The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication *Food Primary Licence Terms and Conditions: Guide for Liquor Licensees in British Columbia* (Guide).

PRELIMINARY MATTER

Counsel for the Licensee made a preliminary application for a bifurcation of the scheduled hearing into two hearings: one to determine whether the contravention occurred, and a second one, if required, to determine the appropriate penalty.

Counsel handed up a three-page submission and casebook containing three cases. His argument was that the Branch's disclosure documents (essentially contained in what would later be exhibit #1) indicate that the Licensee has had a number of prior liquor contraventions, and that information should not be available for the issue of whether or not a contravention occurred. Further, counsel argued that as the contraventions alleged are strict liability offences, it would be contrary to the rules of procedural fairness to conduct a single hearing with respect to both liability and penalty.

Counsel argued that in *Whistler Mountain Ski Corporation v. British Columbia (General Manager Liquor Control and Licensing Branch)*, 2002 BCCA 426, the court concluded that offences under the *Liquor Control and Licensing Act* (Act) are strict liability offences due to their significance to the Licensee and therefore the defence of due diligence was available to matters affecting the substantive

allegation as well as penalty. This, counsel argued, sets the stage for separation of the hearing processes.

He further argued that the cases *Doman v. The British Columbia Securities Commission*, 1998 CanLII 6511 (BCCA) and *Watson v. British Columbia Securities Commission*, 1999 BCCA 625, each stand for the proposition that the general rule should be to hold separate hearings for liability and penalty.

Decision on Preliminary application

Counsel for the Licensee spoke to the authorities. I did not invite the Branch Advocate to do the same.

The *Act*, s.20 empowers the General Manager to take action against a Licensee for contravening the *Act* or *Regulation* with or without a hearing. The action specified includes the imposition of penalties as described in the *Regulation*. Section 20 also empowers the General Manager to control the process of the Liquor Control and Licensing Branch.

The General Manager has chosen to delegate to enforcement hearing adjudicators the exercise of the power the General Manager has with respect to finding contraventions of the *Act* and *Regulation* and imposing penalties in accordance therewith. The General Manager has also chosen to conduct hearings on both culpability with respect to alleged breaches of the *Act* and *Regulation*, and penalty for that culpability within the same hearing.

As an adjudicator so delegated, I have narrow jurisdiction limited to the powers delegated by the General Manager of the Liquor Control and Licensing *Act*. While I do have jurisdiction to ensure procedural fairness, I do not have jurisdiction to challenge the authority that has given me my assigned role. I have

been directed to adjudicate the substantive allegation and to impose penalties if appropriate in accordance with the *Regulation*, and to do so in a single hearing.

Licensee's counsel has provided legal argument challenging the process determined by the General Manager. His position is that the process is unfair. Administrative law gives administrative tribunals the right to determine their own process. Clearly this process has been determined to include both assessment of the facts leading to the alleged contravention, and if appropriate a reasonable penalty for any contravention found.

In this instance the administrative process is determined not by an independent decision-maker, or quasi-judicial administrative tribunal, but by a delegate of the General Manager, in accordance with the *Act*. (s.20). As that delegate, I find that the process in this instance followed the usual protocol. Further, I find that I have insufficient evidence to establish that the process is flawed or fails to follow either the direction provided by the *Act* or any administrative rules that have been presented to me.

I order that the hearing proceed on the issues of the alleged contravention of the *Act* and *Regulation* and penalty if appropriate. Any further challenge of the process, and in particular bifurcation of the hearing must be made to a higher authority.

ALLEGED CONTRAVENTIONS

The Branch made allegations and recommended enforcement action as set out in the Notice of Enforcement Action (NOEA) dated December 10, 2008. The Branch alleges that on November 21, 2008, the Licensee contravened s. 20 of the *Act* and s. 11 of the *Regulation* by operating the establishment contrary to the establishment's primary purpose. The proposed penalty is a ten-day suspension and a change in terms and conditions of the licence, by way of an added term.

RELEVANT STATUTORY PROVISIONS

See Appendix "A"

ISSUES

At the time of the inspection, was the establishment being operated contrary to its primary purpose in contravention of s. 20 of the *Act* and s.11 of the *Regulation*?

If so, is a penalty warranted, and what is the appropriate penalty?

EXHIBITS

- Exhibit #1 is the Branch's Book of Documents. (Branch)
- Exhibit #2 is a set of photocopies of signs. (Licensee)
- Exhibit #3 is a large yellow and black sign. (Licensee)
- Exhibit #4 is a set of copies of a table "tent card". (Licensee)
- Exhibit #5 is a table "tent card". (Licensee)
- Exhibit #6 is a sales chart from Sisco food distributors. (Licensee)
- Exhibit #7 is a menu advertising flyer. (Licensee)
- Exhibit #8 is a menu. (Licensee)
- Exhibit #9 is the Licensee's Employee Manual. (Licensee)
- Exhibit #10 is an advertising card sign. (Licensee)
- Exhibit #11 is a "liquor board inspection sheet. (Licensee)
- Exhibit #12 is a gross transaction report dated Nov 21, 2008. (Licensee)

EVIDENCE

Two liquor inspectors testified. Together they identified the contents of exhibit #1. They each confirmed that they are experienced liquor inspectors, had been in the establishment before November 21, 2008 and were familiar with it. They were in each other's company and together inspected the establishment on the night and at the relevant time.

Inspector #1 testified as follows:

- Looking for public safety issues is an inspector's priority.
- Public safety issues arise when establishments with food primary licenses operate as liquor primary establishments.
- There have been a lot of complaints about food primary establishments operating as liquor primary establishments along the Granville strip.
- The complaints come to the Branch from the Vancouver Police Department.
- The police contact the General Manager or Regional Manager of the Branch and she will assign the premises to be inspected to inspectors.
- The inspectors arrived at the establishment at approximately 11:05 pm November 21, 2008.
- When he arrived at the establishment there was a doorman and a hostess at the door. He found that unusual for a restaurant. He identified himself to the doorman and he asked the doorman what the doorman's job was. The doorman answered; "to check ID." The inspector then informed the doorman that minors are allowed to eat in food primary establishments. The doorman replied: "I am doing what the rules say."
- The music was loud and it was hard to carry on a conversation.
- There was a DJ in the corner.
- It is unusual to have a DJ in a food primary establishment.
- The place looked completely full, and contained about 70 patrons.
- There were enough seats for everyone and there were people standing at the bar area.

- There were sixteen people at the bar, most with drinks. There was only one plate of food on the bar. It contained nachos.
- The restaurant had thirteen tables in total.
- He saw only one table at which there were people eating. They were eating nachos.
- He saw four tables with food on them. Three of those tables had only a single plate of nachos. The fourth had an order of what appeared to be “riblets.” Those tables had liquor including beer and shooters. All of the remaining tables held liquor but no food.
- He saw no waitresses carrying food, though he saw two waitresses.
- He did see employees carrying liquor to patrons.
- He saw no dirty dishes.
- He observed the kitchen for a few minutes. He saw one kitchen employee making nachos and some sandwiches on the grill and one kitchen employee arranging dishes off to one side. He does not recall seeing dirty dishes or any food orders coming into the kitchen. He was at the kitchen entrance for two minutes.
- Normally the kitchen in a food primary establishment is much busier for a crowd of about 70 patrons.
- The inspectors left the establishment just after 11:30 pm November 21, 2008.
- He prepared his notes with the other inspector, just down the road in a coffee shop, immediately after the inspection.

Inspector #2 testified as follows:

- In a food primary establishment the licence requires that food, not liquor is the primary focus. The Licensee is responsible for compliance with the *Act* and *Regulation* and terms of its licence, including the Guide.
- He is the author of the NOEA at tab #1 of Exhibit #1.
- He and the other inspector arrived at 11:05 pm.

- When they arrived they found a doorman and a female employee outside the door. There was lots of noise, but that was the case with establishments all down the Granville strip.
- It is not common for a food primary establishment to have a doorman.
- He identified himself to the doorman and the other inspector spoke with the doorman and the hostess.
- He walked through the establishment and made observations before heading to the kitchen. The music was loud, it would have made a conversation difficult. The lighting was fine and not a problem for having meals.
- In the restaurant he saw liquor pitchers, beer bottles, shot glasses with liquid in them, and bar staff mixing drinks.
- He saw no staff members moving around with food.
- There were thirteen tables occupied with people. He saw only one basket of nachos and one basket of what the manager called riblets on a table. There were no remnants of food on these baskets. There were no dirty dishes on the tables. He saw no other food items on tables.
- The kitchen had two male staff when he was there: one was wiping clean counters and one was filling up condiment trays. The elements of the stove were on but there was no food on them. There were no orders pending when he spoke to the staff. There were no dirty dishes. He did not look in the dishwasher. The appearance of the kitchen was clean.
- He had a discussion with the hostess next. She moved quickly into the restaurant and told many employees that the liquor inspectors were present. The kitchen staff started throwing nacho cheese on nachos and buttering white bread.
- He talked with the manager and informed the manager that he thought the establishment was operating like a bar.
- He requested receipts for the day to the time of the inspection. The manager told the inspector that he could only produce receipts for the patrons that were in the establishment at the time. The manager provided those. Those receipts showed \$700 liquor revenue and \$200 food revenue.

- He recommended a suspension of the food primary license, which would prohibit the sale of liquor during its term rather than a monetary penalty because a previous monetary penalty did not result in voluntary compliance with the Act and Regulation. Further, he believes a suspension of the license would allow the restaurant to stay open to focus on food.
- When he and the other inspector left, they attended a coffee shop and wrote notes about the inspection.
- He was in the establishment about thirty minutes in total. He was in the kitchen for about 30 seconds.
- During the time he was in the establishment no patrons came into or left the establishment.
- He did notice signs all over the establishment. Most of them were funny or had a donkey in them.

The Licensee called five witnesses: A food distributor representative, the head cook, the night manager, the general manager, and a shareholder/representative of the Licensee (Owner).

The food distributor representative testified as follows:

- He has experience in the restaurant business and has a restaurant management degree.
- He sells food products to restaurants. He has thirty accounts including nine on the Granville entertainment strip. Between Robson Street and Helmken Ave on Granville, there are four or five of his customers of similar size. This establishment ranks #3 of 9 in terms of account size.
- He identified the standard velocity (account) report at exhibit #6.
- This establishment orders \$3,400 per week in food.
- He deals with the kitchen manager. The kitchen manager does not order pre-made hamburgers even though there are fifty kinds. The manager does not think they are good enough for the restaurant. The manager makes his hamburger from scratch.

- The kitchen is very large for the size of the restaurant.

The kitchen manager testified as follows:

- He has a lot of experience in food preparation in restaurants.
- He has been in his current position for three years.
- He works five nights per week. He was present on November 21, 2008.
- He is in charge of kitchen output and inventory control.
- The kitchen equipment is extensive, in terms of food storage and preparation.
- The kitchen work is steady but there is a rush from 3:00-5:30 p.m. and on Friday and Saturday nights it is busy from 8:00 pm on, when it is pretty steady until about 1:30 am. There are some down times between 1:30 pm and 3:00 pm otherwise it is pretty steady.
- When there are no orders they clean, do prep work, prepare condiments, etc.
- During the evening there is down time in waves - a hit and then no food orders because everyone has ordered before.
- When the inspectors were there, the kitchen was fully staffed and there was sufficient inventory to prepare any food items on the menu.
- He makes his hamburgers from scratch (described recipe), which includes eight different burger choices.
- All of the food on the menu is available all of the hours that the restaurant is open.
- Nachos are tortilla chips with cheese, salsa, onion, jalapeno peppers, sauce and sometimes meat and other ingredients.

The night manager testified as follows:

- He was present on November 21, 2008.
- The DJ was not a DJ, but a "floating employee who would clear plates and glassware and put on songs if people have requests". He said: "It's just a playlist. There was no dancing".

- There are regular meetings on Wednesdays at which the employees fill in the Owner about what is going on and talk about inventory and food sales. The meetings range from one to two hours in duration.
- The restaurant has daily specials, a comprehensive menu, enough seats for everyone, and enough cutlery and flatware for capacity.
- There are six televisions that play in the restaurant. They play snowboard movies and skateboard movies.
- The facility has signage that says “patrons have to eat”.
- There is an employee manual. Everyone has to read and sign it. It says there is a policy about drinks without food orders: No patron is allowed to order more than two drinks without ordering sufficient foods. He said: To the best of my knowledge that is to protect our license.”
- They do not prohibit minors from entering, but do prohibit minors from ordering drinks.
- The policy is that all patrons must order food.
- Anyone who comes in must eat food after they have had two drinks.
- He said: “Bartenders won’t serve anyone that I have not introduced to them. That’s how we control it”.
- The manual says anyone not complying with the rules about food will be terminated immediately. That was the policy the last time (‘06) we had a contravention for this. Nobody was terminated for that.

The Licensee’s general manager testified:

- He generally reconciles the invoices to ensure that the ratio of food to liquor is appropriate.
- There is no DJ, but there is a person who does bussing and also goes into the DJ booth and puts on music from itunes.
- There is a weekly management meeting.
- There are non-alcoholic beverages available as well as all of the food items on the menu and liquor choices.

- There is no cover charge to enter. The door host checks for ID so that the inside staff doesn't have to identify minors.
- The door person helps keep the gangsters out.
- The manual is updated and the staff has to review it when it has been changed.
- There are lots of *Dez the Donkey* signs that tell the patrons and staff about the policy of no liquor without food.
- The origin of the policy about only two drinks without food was with the Liquor Branch. The old inspector told us that one or two drinks before someone orders food is okay but no more. We enforce this. We only allow them to have one or two drinks and they cannot have more than two drinks without food.
- There were no riblets on the menu on November 21 2008.
- He familiarized himself with the *Act* and *Regulations* in 2004 and has gone over it since.
- He appreciates that knowing the liquor laws is the responsibility of management.
- He knows that the staff has to know the law.
- He was the manager on November 21 2008 and responsible for the staff and their actions.
- He knows the Guide is part of the terms and conditions of the licence and knows it well.
- He knows that the primary purpose of the establishment through all hours of operation is the service of food.
- He created the manual at exhibit #9 (policy manual).
- Page 4 of the manual says, "all patrons must eat food." He ensures this occurs by monitoring the bills.
- The two drink rule is communicated to patrons by staff. Theoretically it is okay for patrons to come in and order two drinks without ordering food. It is not required if they do not go over the two drink limit.

- Training for new staff consists of verbal training and the manual. There are no other materials.

The Owner testified:

- He is a diligent and careful Licensee.
- The establishment is in a complex environment (Granville Entertainment district).
- He said:

It is for me to protect my licence and that is why I came up with the two drink rule; maximum of two drinks before eating. The previous liquor inspector had no problem with it. I designed a third drink rule for customers who are spin-offs from nightclubs and may or may not want to eat when they come in. They get a menu, there was appropriate signage, they would consume one or two drinks before the server said you have to eat and they would refuse and we would offer them a third drink to have some food. If you want a third drink- if that drink cost \$6.00 then we will take \$6.00 off of the menu item... The establishment does not have difficulty ensuring patrons order food. The third free drink rule is just to get people who would otherwise not eat, to eat. We will buy you the third drink. Those people are there to drink.

- Minors are allowed in. The door host position is recommended by the Guide and designed to help keep gangs out of our restaurant and to help identify minors for the bar staff.
- The establishment never has a cover charge, and intoxicated persons are not allowed in.
- The kitchen facilities are large, there is an inventory tracking system, and a full menu. The facility is a restaurant not a bar.
- It is very rare for the restaurant to serve liquor without food at any table in the dining area.

- He said:

Every person must eat means they may enjoy a beverage and they have to eat if they are planning on having more than two drinks. If they try to get a third drink the server would say this is a restaurant and they have to order food. It is a policy that if someone indicates they are not going to eat, the waitress would tell them it is a food primary restaurant and that person would be refused service.
- The Guide says food receipts should exceed liquor sales. This is not possible with his restaurant. A patron could have three drinks and a meal and would be at 75% liquor and 25% food. The ratio is between 20/80 and 40/60, food to liquor.
- After the May 10, 2006 finding of a contravention for the same allegation he did more frequent checks on the servers. There was a time when an undercover inspector had three drinks and no food. Nobody was fired as a result.
- He trained the general manager and he thinks the general manager is capable of running the establishment. The owner is responsible for overseeing the general manager's performance. The general manager is responsible for ensuring that the establishment runs like a restaurant. He is the one responsible for dealing with the liquor inspectors. The employee manual says: *All patrons must eat food*. This is the policy that guides staff to ensure that the place runs like a restaurant. All patrons must eat. The staff is directed to ensure that happens by training and reading the manual and the general manager tells them how to conduct themselves.

SUBMISSIONS

The Branch submitted that the establishment was clearly operating as a bar, and not as a food primary establishment on the date of the inspection. This was confirmed by:

- A doorman and hostess
- Very little food visible on the tables despite many patrons in attendance.
- Considerable quantities of liquor on the tables and in the hands of patrons.
- A number of patrons standing by the bar with only a single plate of food among them.
- Little evidence of patrons consuming food, but plenty of evidence of patrons consuming liquor.
- Very little cooking or food preparation in the kitchen, far below what would be expected of a restaurant with approximately 70 patrons. Sudden preparation of some food explainable by the known presence of liquor inspectors.
- No used or dirty dishes or cutlery on the tables or visible in the kitchen.
- Napkins and cutlery in use for four persons when there were approximately 70 patrons in attendance.
- A food/liquor ratio that heavily favours liquor sales.
- Servers carrying liquor between the bar and patrons but no indication of any wait-staff carrying food.
- Loud music making conversation difficult.
- A person acting as a Disc Jockey
- An adult environment despite the potential for minors being allowed in

The Branch submitted that food primary establishments must be primarily engaged in the service of food during all hours of operation, and that the emphasis is on the word *all* during the hours of operation. The *Regulation* does not contemplate a departure from food service at certain hours of the day such as during the evening periods. Restaurants offer liquor as an accompaniment to food rather than as the primary activity. Consequently, for a food primary establishment the service of food must remain the primary focus during all hours of operation.

The Branch also indicated that a suspension is appropriate for this contravention, particularly because a previous contravention of similar gravity for which a monetary penalty was assessed did not bring about voluntary compliance with the *Act* and *Regulation*.

Finally, the Branch submitted that the defence of due diligence is not available to the Licensee as the directing mind, whether in the person of the owner or the general manager because the general manager was instrumental in developing the offending policy of two drinks without food being acceptable behaviour. Relying on signage, even extensive signage for due diligence, without evidence of prudent application of policy would not satisfy the defence.

The Licensee submitted that the standard of proof to be applied to an examination of whether the contravention occurred is *beyond a reasonable doubt*. In support of this, counsel argues that the Court of Appeal did not explicitly overrule Justice Pitfield's suggestion that the burden of proof should be so defined in *532871 B.C. dba. Urban Well v. General manager Liquor Control and Licensing Branch*, 2004 BCSC 127.

The Licensee also said that targeting food primary establishments late at night in the entertainment district is not fair, as the Branch knows there is going to be more alcohol than food present under those circumstances.

ANALYSIS AND DECISION

The food distributor's testimony provides strong evidence that the establishment is a restaurant for at least part of the time. I am satisfied that the establishment operates as a restaurant most of the time. The relevant question for this investigation, however, is whether it operates at *all times* as a restaurant. The Branch's position is that at some point in the night on some nights when the environment suits, the establishment switches focus and operates as a liquor

primary establishment, which is not allowed under the terms of the regulatory scheme and terms of the license. This witness's evidence supports the operation as a restaurant some of the time, but does not go to the issue of the night the liquor inspectors were present.

The kitchen manager's evidence is not consistent with the corroborated observations of the two inspectors. The kitchen manager said the restaurant was "busy from 8:00 on to 1:30 [and] otherwise pretty steady except for between 1:30 and 3:00. This includes the time of the inspection, at which the restaurant was producing very little food. The kitchen manager indicated that the only downtime described in the evening is following a hit when everyone has their food, and the inspectors saw no such display of food in the front of the house. I find that the kitchen had sufficient facilities and food required to make all of the food items on the menu. There is nothing to the contrary in the evidence. The ability to make and serve food is not determinative of the service that the establishment was actually providing.

The night manager provided more evidence that the establishment acts as a restaurant when it is a restaurant, but he did not provide any evidence that satisfied me that the restaurant did not change its focus at certain times of the night on certain nights of the week such as at the time of the inspection.

I find for the purposes of evaluating the amount of food that was in service, that nachos, as described by the witnesses, is food and not *chips and salsa* as described in the Guide and Regulation.

The establishment did have a disc jockey (DJ). I accept that the DJ had other duties (bussing), however one of his obligations was to put on music at a dedicated music station in the front of the house, take requests from a playlist and manage musical entertainment on a real-time basis. Whether he was called a DJ or not is not the test. The test is a fair and reasonable description of what

he was seen to be doing. On the facts, I find he was acting as a DJ. I note that there is no specific prohibition against having a DJ in a food primary licensed establishment, but it is more customary in a liquor primary establishment, so is one element to consider when determining whether an establishment was operating contrary to its primary purpose.

I find it disconcerting that the owner not only designed the rule that patrons could consume two drinks without the requirement to order food, but that his solution to the danger of operating contrary to primary purpose was to effectively provide a free drink for any patron who wanted a third drink, on the condition that they ordered food. If liquor were indeed as an accompaniment to food, such incentives would neither be necessary nor appropriate.

Counsel for the Licensee submitted that Justice Pitfield's requirement for a burden of proof beyond a reasonable doubt (*Urban Well*) was still the law in Canada. I disagree with that interpretation. The accepted standard of proof in administrative tribunals in British Columbia is the balance of probabilities. This standard was most recently restated in *Liquor Stores Limited Partnership v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2008 BCSC 1264, paragraphs 52-53.]

With respect to the Licensee's argument that the time and place of inspections is relevant to the results, I find that the regulations require that a food primary licensed establishment must be operated as a food primary establishment at all hours of its operation in order to comply with the requirements of its licence. If this is not possible at certain times, the Licensee should avoid operation at those times.

Due Diligence

In order to establish a due diligence defence the Licensee must show that on the night of the alleged contravention, the individuals in authority on site took the steps reasonably to be expected of them that night to prevent operation outside of the primary purpose of the liquor license (*Aztec Properties Company Ltd. dba Bimini Neighbourhood Pub v. General manager of the Liquor Control and Licensing Branch* Sept 12, 2005, Vancouver 36621). The general manager on site was the person in authority, also known in law as the directing mind. He participated in the design of a misguided system that allowed two drinks to be consumed by any patron who did not order food. This is contrary to the expectations of an establishment with a food primary license, and accordingly the Licensee cannot escape culpability based on this defence.

The establishment was, according to the evidence, full of signage. That signage speaks about the inappropriateness of serving liquor without food in the establishment. This does not, however, satisfy any obligation on its own. It must be enforced to have any effect. I find that the establishment's staff did not enforce the rules espoused by the plentiful signs. Although the signs inform patrons that they must eat, the establishment's management and staff, say patrons don't have to eat if they drink less than three drinks.

There is a policy manual that says all patrons must eat food, but it also is not enforced. The staff policy manual was not complied with on the night in question. And the non-compliance appears to originate with protocol from the owner and manager.

There can be no due diligence, when compliance is as easy as the staff advising the patrons that they cannot drink without eating, and then failing to adopt and enforce that simple policy. If the establishment cannot practically sell food after midnight on weekends, then the establishment should not be open at that time.

The licence dictates whether the establishment may operate as liquor primary or a food primary. If the terms of that licence cannot be met at any time, that establishment should not be open at that time. The responsibility for this decision rests with the Licensee. The evidence discloses that the staff of this establishment has no trouble advising minors that they are not permitted liquor. Why then should it be difficult to advise other patrons that they are not permitted liquor unless they order food items concurrently?

Where the evidence of the inspectors and the Licensee's employees were in conflict, I find the evidence of the inspectors to be preferred because of inconsistencies in the testimony of the Licensee's witnesses. I heard that any employee contravening the terms of the policy manual would be summarily dismissed, but that the staff and management responsible for the May 2008 contravention for contravening the policy of *no liquor if no food* were not dismissed. I also heard both that there were no down times at the time of day at which the inspectors were present and that it was very busy then.

The Licensee's general manager said that the two drink policy (before ordering food) originated with a past liquor inspector. I have no evidence to the contrary, and of course that inspector was not at the hearing to testify. However, I find that even in the Licensee's witnesses' testimony, there is a difference between what they say the liquor inspector advised and the policy they have adopted. The general manager said that the inspector advised that one or two drinks before a patron ordered is okay. Of course, once that patron does order food, the danger of non-compliance is averted. The adoption of a policy that allows two drinks but not three without food however is significantly different. The obvious challenge would be to ensure that a patron having already had a drink or two would then order food. The licensee has chosen by the adoption of his policies to risk non-compliance. All that is necessary to ensure compliance is to require a food order before serving liquor to patrons. There is nothing prohibiting a patron from requesting service of her drink before her food. As food has been ordered and

will be served, compliance is assured. If at certain times of the night this is impractical, then the Licensee should cease to operate for those hours, as to do so would be contrary to its primary purpose and the terms of its license.

The Licensee's general manager is the operating mind. He acknowledged that it is his responsibility to ensure the staff acts as required. He wrote the policy manual. He testified that the manual says all patrons must eat food. His testimony indicates that he ensures compliance by statistical analysis of invoices after the fact rather than by proactive direction to staff members. All he need to do to satisfy his own policy is advise staff that patrons may not order drinks without ordering food, and enforce that rule. I have no evidence before me that this would be difficult.

R. v. Sault Ste. Marie [1978] 2 S.C.R. 1299 at p.1325 establishes that the burden of proof *on the balance of probabilities* applies to a Licensee's plea of due diligence as well as the substantive finding of fact. I find that standard has been met by the Branch in establishing the contravention and not met by the Licensee in attempting to establish a defence of due diligence.

I find that at some times, such as the time of the inspection on November 21, 2008, this is not a restaurant (food primary establishment), but a bar (liquor primary) with a two-drink limit. The Licensee's general manager effectively confirmed this, when he testified, "Theoretically it is okay for patrons to come in and order two drinks without ordering food." According to the Act, Regulations, and terms of the License, that conduct is not acceptable. It is a contravention of s.20 of the *Act* and s.11 of the *Regulation* and is operation contrary to the establishment's primary purpose.

I find that the contravention occurred on November 21, 2008, as alleged in the NOEA.

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 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.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act*, *Regulation*, and rules. 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.

The Branch submitted that food primary establishments must have as their primary purpose the service of food during all hours of operation. Restaurants offer liquor service as an accompaniment to food, rather than as the primary activity. It is contrary to the public interest for the Branch to allow restaurants to operate as bars. The current liquor licensing process requires public and local

government input into licence applications for liquor primary establishments but not for restaurants. Obtaining a liquor licence for a restaurant and then operating as a bar circumvents this process. Restaurants operating as bars tend to be associated with community complaints around late night noise, intoxication and other behaviour contrary to community standards and the public interest.

I find a penalty is warranted in order to ensure future compliance. The Licensee has received a monetary penalty for a similar contravention in the past and voluntary compliance was not obtained as a result.

Schedule 4, item 1 of the *Regulation* sets out penalties for a first contravention of this kind including a license suspension of 10-15 days and/or a monetary penalty of \$7,500- \$10,000. The Branch recommended a suspension of ten (10) days.

The Licensee sought a small monetary penalty in the event that a penalty was assessed.

For the contravention of operating the establishment contrary to its primary purpose in contravention of the *Act* and *Regulation*, I find a ten (10) day licence suspension is warranted.

The Branch also sought to have a term added to the license. This term, in language agreed by the parties would be:

Upon request by a liquor inspector or police officer, the Licensee must produce all table receipts for any period of that day of inspection with the break down of food items and liquor items.

I am not persuaded that this recommended provision would change the Branch's current access to documents available under the existing regulatory regime. I have been presented with insufficient evidence of a material difference that

language would make to the status quo and so find the change in terms is not warranted.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Food Primary Licence no. 208637 for a period of ten (10) days to commence at the close of business on Thursday, May 28, 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*).

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 5, 2009

cc: Vancouver Police Department

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

Liquor Control and Licensing Branch, Vancouver office
Attn: Peter Mior, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act

[RSBC 1996] CHAPTER 267

Action against a licensee

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;

(b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;

(c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;

(c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;

(d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;

(e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

(a) [Repealed 1999-36-13.]

(b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

(e) cancel all or any part of the licensee's licence;

(f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

(2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,

(a) impose a monetary penalty under subsection (2) (c) that is greater than the amount provided for in the prescribed schedule of penalties, or

(b) suspend a licensee's licence under subsection (2) (d) for a period longer than that provided for in the prescribed schedule of suspensions.

(2.2) The general manager must, in taking action against a licensee under subsection (2.1), take into account

(a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), and

(b) the particular circumstances giving rise to the taking of action by the general manager.

(2.3) The general manager may not impose a monetary penalty referred to in subsection (2.1) (a) that is greater than the following amounts:

(a) \$50 000 for a contravention of section 38 (1), and

(b) \$25 000 for any other reason referred to in subsection (1) of this section for taking action against the licensee.

(2.4) If a corporation is liable to a monetary penalty imposed under this section in respect of a contravention of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(2.5) A person on whom a monetary penalty has been imposed under this section must pay the penalty whether or not the person

(a) has been convicted of an offence under this Act or the regulations, or

(b) is also liable to a fine for an offence under this Act or the regulations.

(2.6) A monetary penalty imposed under this section must be paid within 30 days after the date on which the notice referred to in subsection (4) (a) is provided to the licensee or within any longer period specified by the general manager.

(2.7) All monetary penalties received by the general manager under this section must be paid into the consolidated revenue fund.

(3) Despite subsection (2) (d), (e) and (f), the general manager must suspend, cancel or order the transfer of a licence held by a person who has been convicted of a prescribed number of prescribed offences under the laws of Canada or British Columbia.

(4) On taking action against a licensee under subsection (2), the general manager must

(a) provide the licensee with written notice of the action in accordance with the regulations,

(b) set out in the notice the reasons for taking the action,

(c) set out in the notice the details of the action including

(i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and

(ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served, and

(d) [Repealed 2002-48-37.]

(4.1) For the purposes of any hearing referred to in subsection (2), the general manager, by summons, may require a person

(a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and

(b) to bring and produce before the general manager all documents, writings, books, deeds and papers in the person's possession, custody or power touching, or in any way relating to, the subject matter of the hearing.

(4.2) A person named in and served with a summons referred to in subsection

(4.1) must attend before the general manager and answer on oath, unless the general manager directs otherwise, all questions touching the subject matter of the hearing, and produce all documents, writings, books, deeds and papers in accordance with the summons.

(4.3) When the general manager exercises a power under subsection (4.1), a person who fails or refuses to comply with subsection (4.2) is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(5) [Repealed 1999-36-14.]

Liquor Control and Licensing Regulation

[includes amendments up to B.C. Reg. 213/2007, June 21, 2007]

Food primary licences

11 (1) A food primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on in the establishment is the service of food during all hours of its operation.

(2) The following terms and conditions apply to a food primary licence:

(a) minors are allowed in the establishment;

(b) liquor must not be served unless the establishment is open for service of a varied selection of food items, including both appetizers and main courses, or their equivalent;

(c) subject to limitation by the general manager, hours of liquor service must start no earlier than 9:00 a.m. and end no later than 4:00 a.m. the next day.

(3) The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is or will be the service of food during all hours of its operation, any or all of the following:

(a) kitchen equipment;

(b) furnishings and lighting;

(c) menu;

(d) type and hours of entertainment and games offered by the licensee;

(e) advertising;

(f) hours of operation;

(g) financial records;

(h) the ratio of receipts from food sales to receipts from liquor sales in the establishment;

(i) any other relevant consideration that may assist in the determination.