



**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: Do Re Mi Enterprises Ltd.
dba Fuku San Izakaya Japanese Restaurant
1150-4380 No. 3 Road
Richmond BC V6X 2C3

Case: EH08-141

For the Licensee: Angus Liu, Mike and Selina Nakano,
principals of the corporate licensee

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: February 27, 2008

Place of Hearing: Vancouver, BC

Date of Decision: March 25, 2009

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

Do Re Mi Enterprises Ltd. dba Fuku San Izakaya Japanese Restaurant holds a Food Primary Licence number 165976. Food Primary liquor licenses are issued for the sale and consumption of all types of liquor in establishments with a primary focus on the service of food. The hours of sale of liquor for this establishment are from 11:00 a.m. to midnight seven days a week. The person capacity is 111 divided between several private dining/karaoke rooms and a central dining area. The licence is, as are all liquor licences 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)*. The establishment is located in Richmond, BC.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated January 12, 2009.

The branch alleges that on December 24, 2008 at 1:15 a.m. (the business day of Tuesday December 23/24), the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing 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 proposed penalty is the cancellation of the liquor licence (Section 20(2)(e) of the *Act*).

The licensee admits the contravention but disputes the proposed penalty.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 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;

(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:

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

Liquor Control and Licensing Regulation

44 (1) Unless otherwise authorized by the general manager,

(b) food primary licensees must ensure that liquor is taken from patrons within 1/2 hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42 (4) (a).

ISSUES

1. Whether the licensee contravened the *Act* as alleged by the Branch.
2. If so, what penalty if any, is appropriate?

EXHIBITS

1. LCLB Book of Documents, tabs 1 – 31.

EVIDENCE - The Liquor Control and Licensing Branch

A **branch liquor inspector testified** that he is the liquor inspector responsible for the geographical area in which the establishment is located. His primary responsibilities are to ensure that licensees operate in compliance with the terms and conditions of their liquor license and to conduct inspections of licensed establishments. He received a report from the RCMP together with the police officers' hand-written notes advising that during an inspection of the establishment by police officers at 1:15 a.m. on December 24, 2008 liquor was observed on several of the tables occupied by patrons. The observations were made well after the time permitted under the licence, 12:30 a.m. (exhibit 1, tab 2). The officers took photographs of their observations which were included with the report (exhibit 1, tab 4). On December 31, 2008 the inspector sent a letter to the licensee requesting videos and receipts for the time of the alleged contravention. He received a letter dated January 9, 2009 from the licensee providing copies of receipts and explaining that the videos were not available (exhibit 1, tab 8). He subsequently prepared a Contravention Notice (CN) which was mailed to the licensee (exhibit 1, tab 3). He prepared a Notice of Enforcement Action letter that subsequently led to the enforcement proceedings for this hearing. He recommended that the liquor license be cancelled (exhibit 1, tab 1).

The Inspector testified that he is responsible for maintaining the Branch records for this licensed establishment. He referred to copies of documents from Branch files and found within exhibit 1:

- Tab 5 - The Food Primary Liquor Licence issued to the establishment is for the sale and consumption of liquor in establishments with a primary focus on food. Licensing hours are from 11:00 a.m. to 12:00 midnight. It is subject to specific terms and conditions: patron participation entertainment is permitted including karaoke, the entertainment must end by no later than 12:00 midnight; video cameras must be installed and must retain two weeks of data with the video records produced to police or liquor inspectors upon request, if the video equipment is not working

patrons are not permitted into the establishment. It is also subject to the terms and conditions contained in the branch publication, "Guide for Liquor Licensees".

- Tab 7 - The Guide in effect at the time of the alleged contraventions. The branch operates on the principle of voluntary compliance. The guide is used to educate licensees on the rules governing their license. The inspector referred to an excerpt from the Guide dealing with "Hours of Sale" which contains the requirement: "All liquor (in bottles or glasses) must be removed from the tables within half an hour of liquor service ending" (p.9). A copy of the Guide has been provided to all licensees.
- Tab 6 – Floor plan for the establishment.
- Tab 9 – License application documents and Interview form acknowledging that the liquor license requirements are understood, signed by Selina Nakano prior to the license being issued in May 1995.
- Tab 10 - Licensed Premises Check form (LPC) issued by the RCMP and Branch warning letter regarding the service of liquor without food on November 12, 1995.
- Tab 11 – LPC issued by a branch inspector and warning letter regarding afterhours consumption of liquor on January 15, 2000.
- Tab 12 – LPC issued by the RCMP regarding afterhours service of liquor and liquor without food on February 28, 2000.
- Tab 13 – CN regarding failing to clear liquor and allowing consumption of liquor afterhours on January 10, 2003.
- Tab 14 – CN regarding failing to clear liquor and allowing consumption of liquor afterhours on March 1, 2003.
- Tab 15 – CN regarding failing to clear liquor and allowing consumption of liquor afterhours and intoxicated persons on April 6, 2003.
- Tab 16 – Compliance meeting held June 26, 2003 with the manager of the establishment regarding afterhours consumption of liquor and failing to clear liquor. The contraventions were discussed with the manager and a commitment for compliance obtained.
- Tab 17 – CNs regarding the improper purchase of liquor during November 2003.
- Tab 18 – Compliance meeting held November 18, 2003 with licensee Mike Nakano and the manager of the establishment regarding the improper purchase of liquor and operating

outside the primary purpose of a food primary establishment. A commitment was made to comply with the requirements of the license.

- Tab 19 - CN regarding failing to clear liquor, allowing consumption of liquor afterhours, and operating contrary to primary purpose on December 20, 2003.
- Tab 20 - Compliance meeting held on January 13, 2004 with licensee Mike Nakano and the manager of the establishment regarding failing to clear liquor, allowing consumption of liquor afterhours and operating outside to the primary purpose of food primary establishment. A commitment was made to comply with the requirements of the license.
- Tab 21 – LPC issued by the RCMP for failing to comply with Responsible Beverage Service requirements and serving liquor without food on January 3, 2005.
- Tab 22 - CN issued for failing to request identification from a person apparently under 25 year of age on January 8, 2005.
- Tab 23 - CN regarding failing to clear liquor, and operating contrary to primary purpose on September 15, 2006. Documentation for enforcement proceedings leading to a suspensions of four and ten days respectively for the contraventions. Suspensions served November 9 – 14, 2006.
- Tab 24 - CN regarding failing to clear liquor and operating contrary to primary purpose on August 4, 2007. Documentation for enforcement proceedings leading to a suspensions of 14 and 30 days respectively for the contraventions. Suspensions served September 28 to November 12, 2007. The inspector testified that he advised Mike and Selina Nakano that the lengthy suspensions were a last resort before he would be recommending the cancellation of the liquor license.
- Tab 25 – Branch letter to the licensee dated January 16, 2008 approving a change of name.
- Tab 26 – Branch letter to the licensee dated February 5, 2008 approving structural changes to the establishment and recommending terms and conditions be added to the license requiring video equipment be installed with records available to police officers and liquor inspectors upon request.
- Tab 27 - CN regarding failing to clear liquor, and contravening a term and condition of the license on June 29, 2008. Documentation for enforcement proceedings leading to a suspensions of 14 and three days respectively for the contraventions. Suspensions served

July 25 to August 12, 2008. The inspector testified that he discussed the matter with Mike and Selina Nakano. Following the previous suspensions they had closed the restaurant for a lengthy period of time. Structural changes were made and a new manager hired. He advised them that because of the changes made he did not recommend the cancellation of the license on this occasion however he would have no alternative should there be further contraventions.

- Tab 28 – Inspection Interview sheet completed following the approval for the structural changes. The inspector recommended that Selina Nakano and the new manager take a branch remedial education presentation. This was done on July 23, 2008.

The inspector testified that he was informed that the new manager of the establishment had become a shareholder in the corporate licensee. He advised him that he would need to complete an application to the branch for a change to the share structure of the corporate licensee. The inspector subsequently received a letter requesting the change but not a completed application. He testified that he is unaware of any request by the licensee for an extension to the hours of sale of liquor for the establishment nor is he aware of any such request having been received at the branch head office in Victoria.

He testified that he has tried in every way possible, through compliance meetings, conversations with the licensee representatives, license suspensions and allowing structural changes, to bring about voluntary compliance by this licensee. Following this latest contravention on December 24, 2008 there are no further proposals that he can make short of recommending the license cancellation. The establishment has continually failed to comply. Maintaining inspections takes up municipal, police and branch resources. Continued non-compliance could lead to safety concerns for the staff and patrons of the establishment and enforcement officials.

EVIDENCE - The Licensee

Angus Liu testified that he has been a shareholder in the corporate licensee since November 2007 and has been the manager since it reopened following structural

changes made in early 2008. Since that time changes have been made to the operation of the restaurant and they have worked hard to comply with the license requirements. He was working the evening/early morning hours of December 23/24, 2008. He opened the restaurant at 5:00 p.m. with only the cook and himself present, the server scheduled had been unable to come to work due to the inclement weather. He anticipated a slow business night due to weather conditions and was confident that he and the cook could handle the business. There were two parties pre-booked, others had cancelled and he didn't anticipate any walk-ins. As it turned out the restaurant was busier than expected with eight tables in the main dining area and five karaoke rooms in use. He thought that he could handle it by himself but at a point he became overwhelmed and didn't accept any more customers. Last call for food was made at 11:00 p.m. last call for drinks was 11:30 p.m. with liquor service ending at 12:00 midnight. He asked the cook to stay past his usual quitting to assist him in cleaning up however he was unable to do so as he had another job where he was scheduled to start at 6 AM the following morning and he left just before midnight. At the time of the police officers arrival at 1:15 a.m., he, the manager had cleared the tables in the main dining room and two of the karaoke rooms. He was continuing to clear tables and believed he could have completed doing so in 15 minutes or less. He did not intentionally contravene the regulatory requirements.

He testified that in November of 2008 he sent a letter to the liquor inspector with information about the change in share structure for the corporate licensee and also making a request to extend the liquor service hours from 12:00 midnight to 2:00 a.m. If this had been approved they would not have been in contravention on December 24th. Customers of the restaurant have told them that they would like to see the hours extended and a local municipal council member has recommended that they apply for an extension of their hours.

SUBMISSIONS – The Licensee

The licensee submitted that they have operated a restaurant at that location for the past 14 years offering karaoke entertainment. They completed renovations last year decreasing the number of karaoke rooms and enlarging the kitchen. They are trying to comply with the license requirements. Since the last contravention occurring in June 2008 there have been no other contraventions other than that of December 24, 2008 which was unintentional and occurred because the adverse weather conditions prevented staff from arriving to work. Restaurants operating in Richmond are required to cease liquor sales and service at midnight, which has given rise to unlawfully, operated non-licensed premises. They exist outside the authority of the Liquor Control and Licensing Branch and can't be controlled by the police. Many of the licensee's customers work at other restaurants and would like to have somewhere to go after work. They have signed a petition in favour of the establishment getting extended hours. The licensee has tried to obtain a different form of liquor license or to have their hours extended but have been unsuccessful. They are trying their best to operate within the rules. A suspension would be sufficient penalty. Cancellation of the liquor license is not necessary.

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on December 24, 2008 at 1:15 a.m. (the business day of Tuesday December 23/24), the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing 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.

DUE DILIGENCE

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal

with problems, it must ensure that those procedures are consistently acted upon and problems dealt with.

Here, there is little evidence upon which I can find that the licensee was duly diligent. At the time of the contravention, the manager who is also a principal of the corporate licensee was operating the establishment. He was at the time the directing mind of the corporate licensee. He fully understands the regulatory requirements and is aware of the past contraventions at the establishment and the liquor inspector's concerns and proposed course of action should contraventions continue to occur. He knew that he was short of staff yet made a decision to open the restaurant. He had two parties pre-booked but didn't anticipate any walk-in clientele because of the inclement weather. When walk-in clientele appeared he accepted them as patrons until such time that he realized that he was overwhelmed and couldn't keep up with his responsibilities. That, in my opinion was fully foreseeable. The manager had alternatives. He could have kept the restaurant closed when he knew he would be short of staff or he could have just catered to the two pre-booked parties and refused further patronage. He did neither and put himself in the position of not being able to meet his responsibilities. At the time of the police visit there were patrons inside three of the karaoke rooms, liquor was present in each room. Patrons in one of the rooms were still engaged in karaoke singing.

I find that the licensee has not been duly diligent.

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 license or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a license

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 *Regulations*.

The branch's primary goal in bringing enforcement action is to achieve voluntary compliance. The *Act* at Section 6(a) directs that the general manager must supervise the conduct and operation of licensed establishments. The general manager carries out this responsibility thru branch staff, particularly those appointed as liquor inspectors and investigators. The branch issues in excess of 9,000 liquor licences per year. It employs 35 liquor inspectors and 3 investigators located throughout the province. Police agencies throughout the province assist the branch by making regular inspections of licensed establishments within their jurisdiction and reporting any irregularities to the branch. It is obvious that the general manager must greatly rely on licensees to voluntarily comply with the requirements of the *Act*, *Regulations* and the terms and conditions of the liquor licence. Education and guidance is available and provided to licensees needing assistance.

In this case, the licensee has demonstrated an inability to operate the establishment properly and has compiled a considerable history of non-compliance. This has occurred despite repeated efforts and assistance by branch staff. The liquor inspector responsible for the area has taken all reasonable measures to bring the operation of the establishment into compliance without success. Commitments by the licensee in the past to operate in compliance have not been successfully carried out. The licensee has provided no reason to believe that it can be more successful in complying with the requirements in the future than it has in the past. In the circumstances, I am satisfied that future compliance by this licensee is unlikely. A licensed establishment that

continually fails to comply with the requirements of the *Act and Regulations* can create nuisance in the community and safety risks to its staff and patrons as well as police and regulatory officials. There is a public interest in ensuring that an establishment operates within the requirements.

In the circumstances, I am satisfied that the cancellation of the liquor license is necessary, reasonable and appropriate.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the cancellation of Food Primary Licence number 165976 effective as of the date of this decision. To ensure this order is effective, I direct that the Liquor Licence be taken into possession by a liquor inspector or a police officer and returned to the branch.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: March 25, 2009

cc: RCMP Richmond Detachment

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

Liquor Control and Licensing Branch, Surrey Office
Attention: Peter Mior, Branch Advocate