



**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: The Attic Billiards (2008) Corp.
dba The Attic Billiards
9461-120 Street
Delta, BC V4C 6S2

Case: EH09-047

For the Licensee: Jim Sundar & Sandy Ramdayal

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: September 16, 2009

Place of Hearing: Surrey, BC

Date of Decision: October 20, 2009

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Attic Billiards (2008) Corp. operates The Attic Billiards located at 9461-120th Street, Delta BC, V4C 6S2. It is a food primary establishment, i.e. a restaurant, with an adjoining billiards hall. The licensee holds Food Primary Liquor Licence 303330 for the restaurant. The hours for the sale of liquor are from 9 a.m. to Midnight daily. The capacity is 64 persons. The licence contains the following terms and conditions:

- For the sale and consumption of all types of liquor in establishments with a primary focus on the service of food.
- The terms and conditions to which this licence is subject include the terms and conditions contained in the publication 'A Guide for Liquor Licensees in British Columbia' as that publication is amended from time to time.
- Liquor may only be sold, served and consumed within the areas outlined in red on the official plan, unless otherwise endorsed or approved by the LCLB.

ALLEGED CONTRAVENTION and PROPOSED PENALTY

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

The branch alleges that on April 17, 2009, the licensee contravened section 20(1)(d) of the *Liquor Control and Licensing Act (the Act)* and section 11(1) of the *Liquor Control and Licensing Regulations (the Regulations)* by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence.

The proposed penalty is \$7500 (item 1, Schedule 4 of the *Regulation*).

Item 1 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type of a licence suspension for 10 - 15 days and/or a monetary penalty of \$7,500 - \$10,000.

The licensee disputes that the contravention took place.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267

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:

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

Liquor Control and Licensing Regulation, B.C. Reg. 244/2002

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.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and if so what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

Exhibit 1 Branch Book of Documents #1, tabs 1 – 14.

Exhibit 2 Licensee Book of Documents #1, tabs 1 – 10.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Liquor Inspector A testified that he has been employed as a liquor inspector for approximately 11 years and is responsible for the geographical area in which The Attic Billiards is located. He is familiar with the establishment. During the licensing process the principal of the licensee corporation (licensee witness G) attended an information session at branch offices and was given a copy of the branch publication, "A Guide for Liquor Licensees" (the Guide). The Guide outlines the requirements for operating a food primary licensed establishment, including those provisions concerning food primary requirements at pages 1, 5 & 6 and the role of a licensee at page 3 (exhibit 1, tab 8). An interview report was completed at the time (exhibit 1, tab 10). The establishment was licensed in February 2009. The food primary licence for the establishment (exhibit 1, tab 7) states, "For the sale and consumption of all types of liquor in establishments with a primary focus on the service of food."

On February 24, 2009 he received a complaint from an ex-employee of the establishment that it was serving minors and was overcrowding. He made two visits to the establishment the night of February 27th during which time he observed that the establishment had two door security persons at the front entrance, two cooks, two servers and a bartender on duty. At 6:10 p.m. there were no patrons present. At 10:55 p.m. there were approximately 25 to 30 patrons in the food primary licensed area and another 25 to 30 patrons in the unlicensed billiards area where a band was playing. He did not observe any minors or intoxicated patrons. The general atmosphere caused him

to be concerned that the establishment was not being operated properly as a food primary establishment.

An undercover or covert inspection was conducted in order to determine the manner in which the establishment was being operated. On April 17, 2009, liquor inspectors B and C made a covert inspection at the establishment and provided their observations to liquor inspector A confirming that the establishment was not being properly operated as a food primary establishment. He requested and received the licensee's sales receipts for the night of April 17th from 6:00 p.m. to midnight (exhibit 1, tab 6). An analysis of the receipts revealed that the food/liquor ratio for the night was 21.5% food and 78.4% liquor. A Contravention Notice (CN) was issued to the manager of the establishment (exhibit 1, tab 2) on May 5th. While at the establishment the inspector observed an advertisement posted in the establishment promoting it as a "Sports Bar & Night Club" (exhibit 1, tab 12).

The inspector completed the NOEA on May 12, 2009 (exhibit 1, tab 1) for operating contrary to the primary purpose. He was concerned that the licensee circumvented the licensing process that requires local government approval and public input for a liquor primary establishment but not for a food primary establishment. The operation of a liquor primary establishment can have negative impacts on a community and can require significant resources to ensure their proper operation. He recommended a monetary penalty of \$7,500. Operating contrary to primary purpose creates greater profits for a licensee through increased liquor sales. A monetary penalty would approximate the revenue gained.

Liquor Inspectors B & C testified that on April 17, 2009 they were assigned to perform a covert inspection of The Attic Billiards. Prior to commencing the inspection they met with inspector A and received background information concerning the establishment. The project plan called for the inspectors to enter the establishment as patrons and make observations of the manner in which it was being operated. Inspector A would wait outside and communication was maintained through the use of their cell phones.

They were greeted by a doorman/security person at the front entrance and entered the establishment at approximately 10:45 p.m. They noted a sign on the wall, "The Attic Bar & Lounge". There was no host/hostess present and they seated themselves. They described the atmosphere as being similar to that of a nightclub. Music was being played by a disc jockey in the billiards area. It was loud and made conversation difficult. The lights were dim in the food primary area. A disco ball, flashing strobe lights and neon lights lit the billiards area. There were four to five people in the billiards area and approximately 15 people in the food primary area. There was no food on any of the tables, and with the exception of a plate and napkin on one of the tables, there was no indication that food had been served earlier. None of the tables held any condiments, napkins or menus. All of the tables with patrons held drinks of what appeared to be beer, wine and mixed drinks. Patrons from the billiards area would come to the bar in the food primary area, consume what appeared to be liquor and return to the billiards area.

A server approached their table, the inspectors ordered two beers and a plate of nachos. The server advised them that the kitchen was closed. They insisted on the nachos, she said she would see what she could do. The beer was served, the nachos followed a short time later.

While in the establishment the inspectors observed three female patrons enter and seat themselves in the food primary area. They ordered and consumed what appeared to be liquor consisting of two mixed drinks and two shooters each. No food was served and the three patrons left after consuming their drinks, approximately 25 minutes following their arrival.

The inspectors left the establishment at approximately midnight and met with inspector A to report their observations. They each completed notes of their observations (exhibit 1, tabs 4 & 5).

EVIDENCE - THE LICENSEE

Licensee witness D testified that she is the spouse of the principal of the corporate licensee and attended the branch's information session with him. At the time that the liquor licence application was made, they wanted a liquor primary licence but were told that it would take a long time and would require public input. They were advised to get a food primary licence first and then to apply for a change of licence later. They were not told that there was a food/liquor requirement. It was only after receiving the NOEA that they were aware that food sales must exceed all liquor sales and that the billiards receipts were not counted. They hired security staff and installed a security video system at the suggestion of the local police who said that would discourage problem patrons. They joined the restaurant watch program which allows police to make routine patrols of the establishment and escort out any problem patrons. The security staff makes patrols to ensure patrons have not taken liquor into the unlicensed billiards area. Patrons come to play pool, have drinks and eat food. They come into the licensed area for their drinks and return to the unlicensed billiards area to continue their game. Some patrons order liquor and say they will order food later, then, do not. There is nothing that can be done about this.

They comply with the requirements of the Guide at page five for operating a food primary restaurant:

- The kitchen is fully equipped with a grill, two deep fryers, a pizza oven, a convection oven and a dishwasher (exhibit 2, tab 3).
- They have a full menu of food items, which is illustrated on the wall above the bar with copies available for tables (exhibit 2, tab 5).
- They have furnishings suitable for dining (exhibit 2, tab 1).
- They have sufficient cutlery and dishes for food service (exhibit 2, tab 7). Dirty dishes are removed from tables.
- The outside signage advertises the establishment as a "Restaurant-Bar and Billiards" (exhibit 2, tab 1).

She was present the night of the inspectors' visit. She was surprised to learn that the server told them that the kitchen was closed. They pay to have a cook on staff until midnight and food is available. Servers are not to say that the kitchen is closed. The inspectors were served their order of nachos as requested. The advertisement for the "The Attic Bar and Lounge" was placed by the disc jockey, she was not aware of it (exhibit 1, tab 12 p2).

The inspector has recommended a monetary penalty of \$7,500. That is very high. On many nights their total sales are less than \$100. They have made inquiries about obtaining a Liquor Primary licence but were told that it could not be considered until the enforcement process had concluded.

Licensee witness E testified that he is the principal of the corporate licensee. He has owned and operated several businesses including a hotel with a licensed bar and restaurant and has obtained a "Serving it Right" certificate. He hired managers so didn't manage the licensed areas on a day to day basis.

When he first became associated with The Attic he spoke with the local police. They told him that there had been lots of problems with drugs and school kids at that location previously. They advised him to increase the lighting, which was done. They have a doorman/security person to ensure the safety of the patrons. When they first opened for business they developed advertising emphasizing all aspects of the business including their food sales, for example offering a prime rib dinner for \$12.95 (exhibit 2, tab 8). It was not successful. They sold only two such dinners.

The business is a top-of-the-line, new-style pool hall with music and TVs. It is not a restaurant or a bar. People come to play pool. They don't come for meals. There are plenty of restaurants nearby. Patrons are given menus if seated at a table. They order liquor, play pool and leave. They can't be forced to order food and eat. Some patrons may order chicken wings and beer, but the cost of the beer is greater than the cost of the chicken wings. There have not been any problems at the business: no fights, no

minors served liquor, no over-service of liquor. Business has been very poor. A friend offered him free advertising, and he authorized an advertisement to increase business. As noted by inspector A, the ad reads, "Attic Sports Bar & Night Club", "Bollywood Style Asian Nights," (exhibit 1, tab 12 p1). It didn't work, and the ad was not used again.

When they applied for a liquor licence they wanted a licence that would allow them to serve liquor anywhere in the establishment. The licensing clerk told them that it would take too long to obtain and they were advised to apply for a food primary licence and to make changes later.

He was present the night of April 17th at the time of the inspectors' visit but was not working. He was seated in a booth with his wife. A cook was working and "last call" for liquor service was made at 11:20 p.m. in the mistaken belief that all patrons had to be out at midnight. Inspector A has since advised him that patrons can remain for ½ hour after liquor service ends at midnight.

LICENSEE SUBMISSIONS

The licensee submitted that complaints were not made by the police or the public but by an ex-employee. The complaint was unfounded, and there have been no problems with minors or with over-service.

They operate within the guidelines, and food service is available for all patrons. Billiards revenue should be taken into consideration when analysing sales ratios. When they were issued the liquor licence, they were just shown a video; the branch did not explain the requirements of the licence.

The recommended penalty is very high.

REASONS AND DECISION

The regulatory requirements for the licensing of food primary establishments are found at section 11 of the *Regulations*. Section 11(1) provides that: “A food primary license ... may be issued...if the primary purpose of the business carried on in the establishment is the service of food *during all hours* of its operation.” [my emphasis]

Section 11(3) provides that: “The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is...the service of food *during all hours* [my emphasis] 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.

Giving consideration to all of the evidence, I find that The Attic meets the provisions outlined in section 11(3)(a) – (d)(f) and (g). I find that there was a staffed kitchen in a state of readiness to meet the requirements of a menu suitable for a food primary establishment. Furnishings, hours of operation and financial records, insofar as the evidence was presented, were likewise suitable. While the inspectors expressed some concern over the dim lighting and the relatively loud music, I do not have sufficient evidence to determine that they were not within the limits for food primary establishments. No concern was expressed about the entertainment offered.

Concern was expressed over the advertising made on behalf of the establishment. While it started out as a fairly balanced depiction of the class of licence held by the establishment (exhibit 2, tab 8), the nature of the ads changed as the business was proving to be unsuccessful (exhibit 1, tab 12 pp 1 & 2). The Attic was then described as being a "Sports Bar and Night Club" or "The Attic Bar and Lounge". There was no mention of it being a restaurant (exhibit 1, tab 12).

The ratio of receipts for food sales to receipts for liquor sales in the establishment, while not wholly determinative to the issue, is nonetheless an important consideration. Here the evidence is that the establishment operated on the night of April 17, 2009 with a food/liquor ratio of 21.5% food and 78.4% liquor.

Section 11(3)(i) of the *Regulations* allows the general manager to consider "any other relevant consideration that may assist in the determination." In my view it is appropriate to consider evidence of how the establishment was being operated at the time of the alleged contravention. There are several points in the evidence that I am satisfied are relevant and probative to the issue. The first is how patrons are greeted. This is important as it may set the tone for the expectations between the licensee and its patrons. Here the only evidence is that of inspectors B and C. They were not greeted and seated by a hostess. A server approached the table and the inspectors placed a food and liquor order. The server told them that food was not available as the kitchen was closed. While the inspectors did receive their food order, it was only after they had insisted upon it.

It is also relevant and probative, I believe, to consider whether food is being served to all or a majority of patrons. The Guide (exhibit 1, tab 10 at p. 6) provides, "As long as you are running your business properly you may *occasionally* serve liquor to a customer, without food, at any table within the dining area." The evidence here provided by inspectors B and C is that there was little evidence of food service. The inspectors were the only patrons having food. The patrons at all other tables appeared to be consuming liquor. Inspectors observed three female patrons arrive, order and

consume drinks and depart. They were not served any food. I find that this is significantly different than *occasionally* serving liquor to a customer, without food, at any table within the dining area.

On the evidence, I find that during the evening hours of April 17, 2009, particularly the time during which the inspectors were in attendance, the licensee was not operating with a primary focus on food 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 alleged contravention The Attic was owned and operated by a licensee who is a sophisticated businessman with previous experience in the hospitality industry. Although he was not working during the night in question, he was present at the time of the liquor inspectors' visit. There were no measures in place nor did staff take any action to ensure that the requirements of the liquor license were being met.

I do not accept that the licensee was not provided with sufficient information to know the requirements to be met in operating a food primary liquor license. He and his spouse attended an information session that provided an overview of their responsibilities. They were provided with a copy of a Guide specific to their responsibilities in operating a food primary license, excerpts of which have been placed into evidence. I am satisfied that the licensee was provided with sufficient information to allow him to operate within the requirements of the license.

I find that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on April 17, 2007, the licensee contravened section 20(1)(d) of the *Liquor Control and Licensing Act* ("Act"), R.S.B.C. 1996, c. 267, and 11(1) of the *Regulations* by operating in a manner that is contrary to the primary purpose of the business as stated on the licence.

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*. 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 NOEA.

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 are whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to public safety and the well being of the community. Here the licensee, concerned with the financial

viability of his business, wilfully disregarded the requirements of the liquor license in an attempt to increase business. In the circumstances, I am satisfied that a penalty is necessary to achieve voluntary compliance. Any penalty imposed must be sufficient to ensure compliance in the future.

The range for a first contravention of this type is a license suspension for 10 – 15 days and/or a monetary penalty of \$7,500 - \$10,000. In the circumstances of this case I find that the minimum monetary penalty of \$7,500 is appropriate, reasonable and necessary.

ORDER

Pursuant to Section 20 (2) of the *Act* I order the payment of a seven thousand five hundred dollar (\$7500) monetary penalty by the licensee to the general manager on or before Monday November 30, 2009.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: October 20, 2009

cc: Delta Police Department

Liquor Control and Licensing Branch, Surrey Office
Attn: Mike Clark, Regional Manager

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