



**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:	QB Habitat Resources Inc. dba The Habitat 248 Leon Avenue Kelowna, BC V1Y 6H9
Case:	EH09-098
For the Licensee:	Lyndon A. Best & Quinn Best
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	January 19, 20 & 27, 2010
Place of Hearing:	Kelowna & Victoria, BC
Date of Decision	February 22, 2010

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

QB Habitat Resources Inc. (the licensee) operates The Habitat located at 248 Leon Ave., Kelowna BC, V1Y 6H9. Quinn Best (licensee principal) is the principal shareholder of the licensee. The licensee holds Food Primary Liquor Licence 302570 for the establishment. The hours for the sale of liquor are from 9:00 a.m. to midnight daily. The capacity is 133 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.
- Patron participation entertainment other than games permitted within the premise.

ALLEGED CONTRAVENTION and PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated November 16, 2009.

The branch alleges that on September 10, 2009, at 11:00 p.m. 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 license.

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 \$7,500.00 - \$10,000.00.

The licensee disputes the contravention.

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 Regulations (the Regulations)

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 – 22.

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

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

The branch entered a book of documents (exhibit 1) and called three witnesses consisting of two police officers (A and B) and a liquor inspector.

Police officer A testified that he has been a member of the Royal Canadian Mounted Police (RCMP) stationed at the Osoyoos detachment for approximately a year and three months. During that time he has conducted several hundred licensed premise checks and has participated in two undercover operations involving licensed establishments. On September 10, 2009, he was on duty dressed in plainclothes and was taking part in undercover inspections of licensed establishments in the Kelowna area with another police officer and a liquor inspector. In that capacity, he entered The Habitat at approximately 10:53 p.m. The doorman was not paying attention as he proceeded inside. Shortly thereafter he realized that he had forgotten his cell phone in the vehicle so he left to retrieve it. Upon his return he was greeted by the doorman and paid an eight-dollar cover charge to enter. He observed that there were approximately 35 other patrons in the establishment seated at several tables drinking from beer bottles and what appeared to be glasses of beer and glasses of liquor. None of the tables held any napkins, cutlery, dishes, menus or food items. A band was playing, the music was loud. The lighting was dim, similar to a normal bar atmosphere.

He took a seat at the bar. There were two employees, a male and a female. The female was serving glasses of beer and other drinks to patrons seated at tables. She approached him. He told her that he was waiting for friends and asked for a menu. He was told that the kitchen was closed. He asked for an appetizer menu and was told that the kitchen was "completely closed". She offered to bring him a drink. He ordered and was served a rum and coke. From where he was sitting he could see into the kitchen area, two persons were counting cash, one person was cleaning the floor and later emptied the dishwasher. The female server brought a glass containing what appeared to be beer to one of the persons counting the cash. The officer did not observe any food being prepared, cooked or served. He later asked the male bartender if any food was available and was advised that the kitchen was closed. The bartender recommended a nearby restaurant as a good place to eat. Patrons were still present at tables with drinks of beer in mugs and bottles.

The officer left at approximately 11:45 p.m., the band had announced that they were playing the last song and patrons were beginning to leave. Outside he observed the liquor inspector and the other police officer standing talking to a male person outside of the establishment. He prepared notes of his observations the following day (exhibit 1, tab 10).

In cross-examination the officer agreed that he was not familiar with the terms and conditions of the liquor licence issued to The Habitat. The liquor inspector told him that it was a restaurant or a food primary establishment and that they were looking for food related contraventions. He testified that he was not aware of the "patron participation" endorsement on the licence allowing for dinner and dancing, bands or comedians. He agreed that he might have been mistaken where the liquor and draft beer dispensers were located at the bar. He agreed that what appeared to be mixed drinks containing liquor may in fact have been only soft drinks. The drinks that he believed to be beer he felt was beer by its appearance and the type of glasses it was served in. He agreed that all of the patrons that he observed in the establishment could have eaten there

previous to his arrival with the remnants of their meal having been cleared from the tables and were now consuming after-dinner drinks.

Police officer B testified that he has been a member of the RCMP for approximately nine years and is currently stationed at the Penticton detachment. He is familiar with the operation of licensed establishments and has conducted hundreds of walk-thru inspections. On September 10, 2009, he was involved in the inspection of licensed establishments in the Kelowna area providing back up to another police officer and a liquor inspector. He was in plainclothes with a marked "police" vest. He arrived in the vicinity of the Habitat at approximately 11:05 p.m. He remained outside before entering through a side door at approximately 11:45 - 11:50 p.m. Inside he remained near the entrance. He observed approximately 20 – 30 patrons inside, some sitting and drinking at tables, some walking about with drinks in their hands. The patrons had an assortment of drinks consisting of what appeared to be beer in bottles and glasses and what appeared to be mixed drinks in typical liquor glasses. He did not see any evidence of food having been served or consumed. The band had finished playing and was in the process of removing their equipment. He left the establishment after approximately ten minutes.

A **Liquor Inspector** testified that he has been employed as a liquor inspector for approximately two years and was a police officer for 30 years previous. He has conducted over a thousand inspections of licensed establishments. He is currently the liquor inspector responsible for the geographical area in which The Habitat is located and is familiar with the establishment. The food primary licence for the establishment (exhibit 1, tab 3) states: "For the sale and consumption of all types of liquor in establishments with a primary focus on the service of food." Reviewing the branch file for the establishment he has determined that during the licensing process the principal of the licensee corporation 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 and the roles of the

licensee, liquor inspector and the police at pages 1 - 6 (exhibit 1, tab 6). The local liquor inspector responsible for the area at the time completed an interview report (exhibit 1, tab 5) and the licensee viewed a branch computer based program for food primary licensees (exhibit 1, tab 8).

On July 10, 2008, the licensee attended a compliance meeting with the local liquor inspector then responsible for the area. The meeting was held to discuss the restaurant operating contrary to its primary purpose; it was a restaurant operating as a bar (exhibit 1. Tab 16). The licensee committed to operating the establishment within the terms and conditions of the licence.

The inspector testified that on September 10, 2009, he was conducting covert inspections of several licensed establishments in the Kelowna area with two police officers. They arrived at The Habitat at approximately 10:53 p.m. and officer A entered the establishment while he and officer B remained in the vehicle. Shortly after 11:00 p.m. he left the vehicle to determine if the loud music he could hear was coming from The Habitat or another nearby establishment. He determined that it was emanating from the Habitat. At approximately 11:45 p.m. he and officer B entered The Habitat through a side door which had been left propped open. The main entrance was open with people congregating outside. The band was packing up, 30 – 40 patrons were milling around or seated at tables. Many were consuming from beer bottles, from glasses of what appeared to be beer and from glasses of what appeared to be mixed drinks. There was no evidence of food having been served nor napkins, menus or utensils on the tables. He entered the kitchen and spoke with the licensee principal. There was no evidence of food being prepared. He asked the licensee principal if liquor was still being served and was told that it was not. He asked when the kitchen had closed down. The licensee principal said that it was not closed, if the liquor inspector were to order food it could be prepared.

The inspector then spoke with officer A about his observations following which he spoke with the licensee principal again. He asked who was in charge of the establishment that night. The licensee principal said that he was present only as a patron to have dinner and to watch the show and that the male bartender was in charge. The inspector requested that the licensee principal provide him with copies of the food and liquor receipts for the period of September 1 - 10, 2009. The inspector made notes of his observations at the establishment prior to completing his shift (exhibit 1, tab 9). The request for documents was followed up in writing the following day (exhibit 1, tab 17). The receipts and other documents subsequently requested were later received (exhibit 1, tab 18).

The inspector completed a Contravention Notice (CN) and mailed it to the licensee on September 29, 2009 (exhibit 1, tab 2). He completed the NOEA and delivered it to the licensee on November 16, 2009 (exhibit 1, tab 1) for operating contrary to the primary purpose. In recommending enforcement action 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 licensee had received previous CNs, attended a compliance meeting, as well as the initial licensing information session. He felt that a penalty was necessary to achieve voluntary compliance and recommended the minimum monetary penalty of \$7,500.00.

In cross-examination the inspector testified that at the time he was completing the NOEA for enforcement proceedings, he was of the mistaken belief that a food primary licence with a patron participation entertainment endorsement did not require input from local government. He is now aware that such input is required.

In completing the NOEA he considered the CNs contained in the branch database and found at Appendix A of the NOEA (exhibit 1, tab 1). He testified that the first CN, "Operating contrary ..." on September 10, 2009, is the subject of this hearing. The second CN, "Employee consume ..." on September 10, 2009, does not exist and the entry is in error. The next two CNs were subject of NOEAs subsequently withdrawn by the branch. None of the remaining CNs resulted in a found contravention.

He testified that in reviewing the licensee's past history prior to commencing enforcement action, he researched only the branch's Kelowna office file and did not research the branch's Victoria file, nor speak with the licensing case manager responsible for the licensing of the establishment. He felt that all relevant information was in the local file and that further research was unnecessary. In his view, the establishment held a food primary licence and thus should operate as a restaurant. He was not aware of there being a licensing designation for an "events centre". It was his view that the establishment was operating as a cabaret type of establishment holding a liquor primary licence with an emphasis on entertainment, rather than on food as required for a food primary licensed establishment.

He testified that he had reviewed the documents received from the licensee concerning the food/liquor ratio. His analysis showed that there was more liquor than food sold during that period. He agreed that if he were to factor in the food served during a wedding celebration held during that time period, it would result in a greater percentage of food than liquor sold during that period.

He was questioned regarding the delays from the date of the alleged contravention on September 10, 2009, to the issuance of the CN on September 29 and the issuance and delivery of the NOEA on November 16. He denied that the delay in the issuance of the CN was to ensure that the licensee could not retrieve the surveillance videos that were automatically erased after 14 days and thus prejudice the licensee from defending the alleged contravention. The delay in issuing the NOEA resulted from the process of having it approved by his regional manager and other branch staff in Victoria. It was not

done to prejudice the licensee. He testified that he hand delivered the NOEA to the licensee. This was not an unusual practice. They were normally either delivered or sent by registered mail. He did not deliver it to facilitate the RCMP who were opposing a rezoning for the property of the establishment, and for which a municipal council meeting was to be held. The RCMP was aware of the issuance of the CN and that enforcement action may be underway.

EVIDENCE - THE LICENSEE

The licensee entered a book of documents (exhibit 2). The licensee did not call any witnesses.

BRANCH SUBMISSIONS

The branch advocate's submission is summarized as follows:

The Habitat is a restaurant holding a food primary licence. It is not an events centre. This was made clear to the licensee in correspondence from the branch. The evidence of the witnesses is that at the time of the inspection the establishment was open for business and beer was being served and consumed from glasses and bottles. The kitchen was closed and there was no evidence of food being served to patrons. The Guide allows for the "occasional" service of liquor without food "as long as you are running your business properly, as a restaurant." This does not allow for a shift in focus to a preponderance of liquor service and no food service. Having a "patron participation" entertainment endorsement does not allow a food primary establishment to operate as a liquor primary establishment. The level of music was similar to that of a cabaret type of establishment. In conclusion, the evidence supports the alleged contravention.

There were sufficient communications between the licensee and the liquor inspector commencing on the night in question to place the licensee on notice to preserve evidence, and thus there was no prejudice to the licensee.

The licensee has not proven the defence of due diligence. While it has policies to prevent the service of liquor without food, it did not enforce the policies with its employees. The branch advised the licensee of its concerns with the operation of the establishment through correspondence and meetings; however the licensee failed to address those concerns. This resulted in the contravention occurring on September 10, 2009. The licensee could have provided more training to its staff on how to enforce the food requirement and could have provided training to its managers to enforce the policies.

The licensee “permitted” the contravention by failing to exercise sufficient diligence.

The proposed penalty is necessary to reinforce to the licensee the need for voluntary compliance.

LICENSEE SUBMISSIONS

The licensee advocate’s submission is summarized as follows:

At the time of its inception, The Habitat operated by way of special occasion licenses (SOLs). In 2007 it was required to apply for a permanent liquor licence as a result of police concerns with SOLs being issued. It was not permitted to obtain a liquor primary licence because of city restrictions for the area in which it is located. A food primary licence with a patron participation entertainment endorsement was obtained. This required the approval of city council, which was obtained.

The real issue is that The Habitat is not a restaurant. It is an events centre which holds a food primary licence with a patron participation entertainment endorsement which allows for dine and dance, live bands and other forms of entertainment. That is made clear in documents including The Habitat's business plan, the letter of intent, the business licence issued by the City of Kelowna, as well as correspondence with the city and in media reports. The branch knew when the licence was issued that the establishment was an events centre. The branch later characterized the operation in enforcement proceedings as being that of a bar or cabaret, while being licensed as a food primary establishment. The operation of The Habitat is not that of a bar or cabaret, it operates as a food primary establishment with a patron participation endorsement. The licensee wrote to the branch requesting guidelines for its operation as a food primary establishment with a patron participation endorsement. Nothing was forthcoming and the branch commenced enforcement proceedings that were later withdrawn.

The licensee has been prejudiced in presenting its case because of the delay in the issuance of the CN and the NOEA and the delay in advising the licensee of the undercover investigation. This resulted in the video surveillance records for the establishment not being available to the licensee and its staff having little recollection of the night of September 10, 2009.

The night of September 10, 2009 was a dine and dance night at the establishment. Receipts show that 25 bills were issued for food to 45 different patrons, that is more than the number of patrons present at the time of the inspection. Patrons came early for dinner and stayed late for the show. The evidence put forth by branch witnesses does not establish the alleged contravention. Officer A is a young inexperienced officer who admitted that he was wrong in his testimony regarding where the beer and liquor dispensers were located. Officer B was not involved in the investigation but was present only to provide back-up. The liquor inspector failed to follow branch protocol requiring that he interview employees present that night and request the surveillance video be produced. He was uninformed about branch licensing processes and the

information he provided in the NOEA about CNs issued for The Habitat was incorrect. The branch's evidence is not credible. The licensee made its best efforts to obtain a senior staff member of the branch as a witness to provide evidence on the issues, but was refused by the branch. An adverse inference should be drawn.

The licensee has submitted evidence that there was no contravention:

- food feature sheet and menus for The Habitat (exhibit 1 tab 18 r, s & t);
- all documents requested by the branch including food and liquor sales for the period of September 1 – 10, 2009 showing that food sales exceeded liquor sales (exhibit 1, tab 18 g & h)
- bills for food sales of \$725.91 for September 10, 2009 (exhibit 1, tab 18 e);
- the liquor inspector in his testimony admitted that the licensee offered to prepare food for him, if requested to do so;
- statements from employees working the night of September 10, 2009 (exhibit 1, tab 19, section 4, part 1, p1 & 2; tab 18 c);
- there was no shift in focus. At the time of the inspection the establishment was in the process of closing down for the night, there was no need for napkins, cutlery or menus to be displayed, the kitchen was operative, the kitchen manager present, neither food or liquor was being served;
- there were no public complaints regarding the volume of the music, officer A had no problem having a conversation with the bartender.

There is no definition of "primary purpose". The branch position is that the primary purpose for a restaurant is the sale of food and the primary purpose for a bar is the sale of liquor. The branch's position doesn't take into account places like hockey arenas, dine and dance establishments and billiard halls. The branch cannot control the nature of a business that is done by the city by way of a business licence. It is wrong for the branch to take the position that a food primary establishment with a patron participation entertainment endorsement must act like a restaurant. The branch is wrong in its position that patrons cannot continue to consume liquor after they have eaten, it is permitted under the terms and conditions of the licence.

The licensee has exercised due diligence. There has been extensive communication with branch staff in an attempt to resolve the issues identified by the branch. The licensee has made application for a rezoning of the property to allow for the issuance of a liquor primary licence that would permit the licensee to carry on its business and resolve the issues between the branch and the licensee:

- following the compliance meeting with the liquor inspector on July 10, 2008, the licensee principal instituted changes in their operation to bring about compliance; all employees were required to sign-off on the new instructions (exhibit 1, tab 19, section 4, part 2, pp 9 - 12);
- the licensee principal travelled to Victoria on August 14, 2008, and met with the Deputy General Manager of Licensing (DGML) and followed up with a letter dated August 16th (exhibit 1, tab 14) seeking clarification regarding branch policies for a food primary establishment with a patron participation endorsement. The DGML did not respond until October 28th (exhibit 1, tab 15);
- letter of December 5, 2008 (exhibit 1, tab 19, section 5, p 7) to the branch following the commencement of enforcement proceedings (later withdrawn) proposing that, as this is the first time that this type of contravention has been alleged against a food primary establishment with a patron participation endorsement, the issue be determined by reference to an adjudicator without a penalty being imposed. This would allow for direction and guidance to this and other licensees. The letter provided summaries of the discussion with the liquor inspector at a compliance meeting held on July 10, 2009 (pp 10 – 17);
- an application for a lounge endorsement to the food primary licence was initiated in the fall of 2008 to bring the operation into compliance. The branch held up the application process;
- letter of December 30, 2008 (exhibit 1, tab 19, section 4, part 2, p1) to the branch advocate outlining steps taken to obtain a suitable licence to alleviate branch concerns to be addressed in a forthcoming enforcement hearing;

- letter of February 14, 2009, to the branch advocate expressing frustration that the enforcement hearing into an alleged contravention was not occurring in a timely matter and the branch was withholding the processing of an application for a lounge endorsement pending the outcome of the hearing. The enforcement action was later withdrawn and the hearing did not proceed;
- letter of April 6, 2009, to DGML (exhibit 1, tab 19, section 4, part 1, p 46) requesting that the application for a lounge endorsement be processed. Response received dated May 8th (exhibit 1, tab 19, section 4, part 1, p 50). The lounge endorsement was subsequently approved on August 27, 2009 (exhibit 1, tab 19, section 4, part 1, p 44);
- a development application was made to the City of Kelowna on May 7, 2009 (exhibit 1, tab 19, section 4, part 1, p 3) to rezone The Habitat property. This would allow an application for a liquor primary licence, which if issued, would solve the problems for the branch and the licensee. The development application is proceeding favourably through the city process, but is being held up by the branch pending the outcome of the current enforcement process;
- letter of December 22, 2009 (exhibit 1, tab 19, section 4, part 1, p 38) received from the DGML outlining the options available to the licensee under a liquor primary licence at The Habitat;

If a contravention is found, there is no need for a penalty to be imposed. The process of having the property rezoned to allow The Habitat to hold a liquor primary is underway and nearing a successful conclusion. The licensee has made application to the branch for a liquor primary licence and has discussed the application with branch staff. If granted this will meet the requirements of the branch and licensee.

If a penalty is imposed it should be the minimum suspension penalty. A monetary penalty of \$7500.00 would have serious consequences for a small business licensee.

REASONS AND DECISION

Introduction

Very little of the evidence before me was provided *viva voce* by witnesses appearing at the hearing. That evidence dealt primarily with the circumstances surrounding the inspection carried out the night of September 10, 2009. The majority of the evidence before me is that of documents dealing with the extensive interaction between branch staff and the licensee and documents related to the licensee and staff of the City of Kelowna. In reaching my decision, I have considered the evidence of the witnesses and the evidence within all of the documents that the parties have chosen to place before me. I have considered the submissions of the branch and of the licensee.

Operating Contrary to Primary Purpose

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 licence ... 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, my findings related to each of the enumerated items are:

- (a) kitchen equipment – while the evidence is that of a kitchen suitable for a food primary licence, I find that at the time of the alleged contravention it was essentially closed and not available for food preparation. An employee was in the process of cleaning the kitchen and the server and the bartender both told officer A that the kitchen was closed. That the licensee principal offered to make something for the inspector does not determine that the kitchen was open and available for food service to patrons.
- (b) thru (g) – insofar as the evidence presented, the items listed under these headings were all suitable for a food primary establishment with a patron participation endorsement.
- (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment –the evidence here is inconclusive. The evidence related to food and liquor sales for the period September 1 – 10, 2009 is that of greater liquor sales. That, however, may not include food served at a wedding banquet during that period which would change the ratio. There is evidence of substantial food sales for September 10. There is evidence of liquor being sold; however there is no evidence of the amount of liquor sales for that date.

Section 11(3)(i) 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 are patrons being 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 police officer A. He was first greeted by a doorman who collected the eight dollar cover charge to enter the establishment. He was not told that this was a food primary establishment and that patrons were expected to order food service. He sat by the bar and was approached by a server. The server told him that food was not available as the kitchen was closed. The bartender later confirmed this.

It is also relevant and probative to consider the evidence of food and liquor service to 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.” Here officer A was refused food service. He ordered and was served a rum and coke. The evidence provided by the police officers and the liquor inspector is that there was no evidence of food service to any of the patrons. The evidence is that the establishment continued the service of liquor to officer A and other patrons, despite the kitchen being closed and food service being refused to officer A. While officer A may have been mistaken in his evidence where the beer and liquor dispensers were located and was uncertain whether spirits liquor was being served, I accept his evidence that what appeared to be beer in glass containers continued to be served by the female server during his time in the establishment. In reaching this conclusion, I am satisfied that beer in glasses has a unique appearance and is readily distinguishable from other beverages. It was the evidence of both police officers and the liquor inspector that patrons in the establishment were consuming what appeared to be beer from glasses and bottles during their time in the establishment. This was not contradicted by evidence for the licensee. The establishment is licensed for the sale of all types of liquor including beer. I find on a balance of probabilities that

beer was served and consumed by patrons in the establishment during the time of the alleged contravention. I find that continuing to sell and serve liquor after food service is no longer available is not what is contemplated by the provision that a licensee may *occasionally* serve liquor to a customer, without food, at any table within the dining area.

The licensee has argued that what the officers and the inspector observed was an establishment in the process of closing with patrons finishing their drinks before leaving. That is not consistent with the evidence of police officer A. He was admitted to the establishment, a cover charge was collected, a band was performing, he ordered and was served liquor and he observed the service of liquor (beer) to other patrons. I find that the establishment was not in the process of closing at the time of the alleged contravention.

The licensee has argued that there is no definition of “primary purpose” and that the branch’s position that the primary purpose for all food primary establishments is the sale of food, does not take into account places like hockey arenas, dine and dance establishments and billiard halls. The licensee argues that the branch cannot control the nature of a business; that is done by way of a business licence issued by the city.

In my view, and I so find, primary purpose relates to the focus of the business and the class of licence that has been issued. For a food primary establishment, that is the service of food; and that requires the service of food at all times during the operation of the licence. As I understand the branch’s mandate, it is not to control the nature of a business through the liquor licence. What the branch does control is the type of businesses eligible for a liquor licence and the particular class of liquor licence. It sets terms and conditions appropriate to the class of licence and the activities permitted in the establishment.

The licensee has argued that The Habitat is not a restaurant and was never intended to be. It is an events centre and was so described at the time of its initial liquor licence application. It is recognized by the City of Kelowna in its business licence as being such. While the licensee takes this position in its submissions, I find in going through the documentary evidence, several instances where the licensee refers to the establishment as a restaurant (this will be evident in excerpts from the documents to follow). Further, I find that the establishment has been licensed as a restaurant that holds a patron participation entertainment endorsement that permits certain types of entertainment. A municipal business licence is neither determinative of the class of liquor licence issued by the branch, nor the terms and conditions for the operation of the license.

The licensee argues that it is wrong for the branch to take the position that a food primary establishment with a patron participation entertainment endorsement must act like a restaurant. In my view, and I so find, a patron participation endorsement allows for certain types of entertainment to take place in the establishment during the licensing hours. The endorsement does not change the primary purpose, which is the service of food.

The licensee has argued that the branch is wrong in its position that patrons cannot continue to consume liquor after they have eaten; it is permitted under the terms and conditions of the licence. The licensee did not provide any evidence to support this position. My reading of the licence issued to this establishment and the "Guide" which forms the terms and conditions of the licence, does not support the licensee's position. In my view, and I so find, allowing patrons to have dinner early in the evening then to remain in the establishment for the remainder of the night and consume liquor is not in keeping within the terms and conditions of the licence. To do so, moves the primary purpose away from the service of food.

On the whole of the evidence, I find on a balance of probabilities that on September 10, 2009, at 11:00 p.m. the licensee operated the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence. That on its face is contrary to 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)*.

Due Diligence

The defence of due diligence is a complete defence to contraventions under the *Act* and *Regulations*. The onus is on the licensee to demonstrate, on a balance of probabilities, that it implemented adequate systems to prevent the contravention and took all reasonable steps to ensure the effective operation of the system. The licensee must also establish that the employee connected to the contravention was not the directing mind of the licensee. The existence of policies is not sufficient to demonstrate due diligence if the directing mind on site at the relevant time ignores them, or makes no effort to see that they are enforced.

The licensee argues that it has exercised due diligence and that there has been extensive communications with branch staff in an attempt to resolve the issues identified by the branch. That the licensee has made application for a rezoning of the property to allow for the issuance of a liquor primary licence that would permit the licensee to carry on its business and resolve the issues between the branch and the licensee.

In reviewing the evidence presented, it is my understanding that commencing in 2005 the licensee operated for a period of time by way of Special Occasion Licenses (SOL). SOLs are meant to permit to sale of liquor in unlicensed premises for private functions such as wedding or birthday celebrations, or public functions such as fundraising events for a charitable purpose. SOLs are not meant as a means of by-passing liquor licensing requirements by commercial ventures such as an entertainment promoter or owner of

an unlicensed premise who wish to provide liquor service in an unlicensed premise during concerts or other forms of entertainment.

When the SOLs were no longer available, the licensee sought a liquor licence for its unlicensed premises. It was prevented from obtaining a liquor primary licence because The Habitat was located in a restricted zone in the City of Kelowna. The issuance of liquor primary licence is dependent upon a recommendation to the branch by local government. The city of Kelowna had made it clear that it would not recommend the issuance of any further liquor primary licenses in the subject area. Consequently an application was made for a food primary licence with a patron participation entertainment endorsement. The application materials included a letter outlining the proposed entertainment and the restaurant food sales (exhibit 1, tab 19, section 4, part 1, p1). The licensee principal attended an interview with the local liquor inspector, viewed a presentation on the requirements of the licence and received a copy of the "Guide" which outlined the terms and conditions of the licence on February 20, 2007 (exhibit 1, tabs 5, 6 & 8). The license was issued June 18, 2007 (exhibit 1, tab 5).

The licensee principal attended a compliance meeting with the local liquor inspector on July 10, 2008. The reason for the meeting was "Operate contrary to primary purposes – restaurant operating as a bar" (exhibit 1 tab 16). Following the compliance meeting, the licensee principal convened a staff meeting on July 15, 2008. The document for the meeting is found at exhibit 1, tab 19, section 4, part 2, pp 9 – 12. I have excerpted those portions that I find to be relevant and of probative value:

- At page 9:

I recently met with ... our local liquor inspector, to find out a bit more of these Licensed Premises Checks and to clarify a few things.... Inspector... also gave us several suggestions on what he thought we could improve on so we have some policy changes.

- At page 10:

Encouraging the Purchase of Food [original emphasis] Any customer that wishes to purchase alcoholic beverages must order food. It is not sufficient for a large group to share one appetizer. Each customer must order a sufficient amount of food as to be considered a meal for that customer.
- At page 10:

Refusing Service [original emphasis] If a table or customer is unwilling to order food then the service staff will politely explain that they will not be able to serve them any alcoholic beverages. The service staff will explain the policies as best they can and will ask for the manager to speak with a customer if necessary.... Restaurant licensing regulations state that an occasional customer may be served an alcoholic beverage with ordering food. However this is the exception to the rule and it is recommended that staff do not make this option available to customers unless necessary. Always consult the shift manager if there are any questions.
- At page 11:

Food Service and Entertainment [original emphasis] Habitat is a restaurant with a patron participation endorsement which allows for several different forms of entertainment in the restaurant in which customers can participate....

The licensee met with the DGML on August 14, 2008, to address some questions concerning the operation of the establishment and followed up with a letter dated August 16, 2008. The DGML responded on October 28, 2008 (exhibit 1, tab 15). I have excerpted those portions that I find to be relevant and of probative value:

At the meeting on August 14, 2008, my colleagues and I discussed with you the regulatory requirements you must meet in order to hold a food primary licence, namely, that you must be primarily engaged in the service of food at all times that the establishment is open. Even when patron participation is endorsed on a food-primary licence, the establishment cannot shift its focus to that of a liquor primary.

We advised you that the model of how you are currently operating is more properly a liquor primary licence. The primary purpose of a liquor primary business is beverage service, entertainment or hospitality.

My colleagues and I explained in our meeting that the onus is on licensees to ensure that they are operating according to the terms of your licence. Further, Inspector ... explained the requirements of a food primary with you and/or your husband during a compliance meeting in July of this year.

Following the commencement of enforcement proceedings (later withdrawn) the licensee proposed that, as this was the first time that this type of contravention has been alleged against a food primary establishment with a patron participation endorsement, the issue be determined by reference to an adjudicator without a penalty being imposed. This would allow for direction and guidance to this and other licensee. The licensee's letter provided summaries of the discussion with the liquor inspector at a compliance meeting held on July 10, 2009 (exhibit 1, tab 19, section 5, pp 10 – 17). I have excerpted those portions that I find to be relevant and of probative value.

Suggestions from [Liquor Inspector] on how to improve on issues addressed

[Liquor Inspector] reinforced the fact that since Habitat is a restaurant people have to come with the intention to eat and that everyone who orders alcoholic drinks has to eat. It is not sufficient for a table of 10 to share one appetizer. All patrons have to consume a reasonable amount of food with their alcoholic beverages. If patrons are not consuming alcohol then they do not necessarily have to order food. Most restaurants will bring one round of drinks to a table and then take a food order. This is appropriate and at that time, if someone does not want to order food then you cannot bring them another alcoholic drink. It does not matter if patrons eat and then stay at the restaurant for a long time. This is the nature of a dinner and dance type atmosphere, patrons will come for dinner and then stay to listen, watch or dance.

I pause to note that there is no indication in the above excerpt that the inspector said that patrons may continue to purchase and consume liquor.

The licensee made application for a lounge endorsement for the establishment in the fall of 2008. A lounge endorsement to a food primary licence allows a licensee to set aside a small defined area in the establishment where the sale and consumption of liquor without any food service requirements is permitted. The application was held in abeyance by the branch while enforcement proceedings were in process. The proceedings were subsequently withdrawn and the licensee wrote to the DGML on April 6, 2009, requesting that the application process be completed (exhibit 1, tab 19, section 4, part 1, p 46). The DGML responded on May 8, 2009 (exhibit 1, tab 19, section 4, part 1, p 50). I have excerpted those portions that I find to be relevant and of probative value:

The Regional Manager of the Compliance and Enforcement Division..., has advised me that the enforcement action initiated against your establishment is being withdrawn due to administrative difficulties. Despite a withdrawal of the enforcement proceedings, we have continuing concerns about the manner in which your establishment is operated.... The Regional manager will be contacting you soon in order to set up a compliance meeting to discuss how your establishment must operate at all times under its food primary licence.

The lounge endorsement was subsequently approved on a temporary basis for a period of six months. The DGML wrote to the licensee advising of the approval on August 27, 2009 (exhibit 1, tab 19, section 4, part 1, p 44). I have excerpted those portions that I find to be relevant and of probative value:

My colleagues..., Regional Manager, and ..., Manager of investigations, met with you on June 4, 2009, to discuss in detail how the establishment must be operated in order to comply with the terms and conditions of your food primary licence. As they advised you, it is critical that a food primary have as its focus

the service of food at all times of its operation. It is not acceptable conduct or within the terms of the licence to focus on food during some hours and liquor at others. It is not acceptable to have people have their dinner in the early part of the evening and remain in the establishment for the whole of the night thereafter to sit and drink. This does not fit within the mandate of a food primary licence. If you wish to operate your establishment in this manner, you will require a liquor primary licence.

The licensee provided documentation regarding its rezoning application with the City of Kelowna. This process commenced with the development application filed on May 7, 2009. The licensee says that it is proceeding favourably and it is expected that it will be successful. The licensee has made application for a liquor primary licence on that basis.

I have considered the licensee's arguments and the documentation supporting it. I do not accept that it amounts to due diligence. My analysis leads me to believe that from the commencement of the licensee's business to the present, the licensee's communications have not been toward operating the establishment in compliance with the requirements of the liquor licence, but of attempting to impose its business requirements on the liquor licence provisions. The licensee has been repeatedly advised by branch staff of the requirements necessary to operate its establishment in compliance with the terms and conditions of its licence and has failed to do so. In my view, the rezoning and new licence applications are definitely a positive move in the right direction. They do not however exempt the licensee from the requirement of operating its establishment in compliance with the terms and conditions of its current licence.

The licensee has policies in place to guide its employees as noted above (see the excerpt from exhibit 1, tab 19, section 4, part 2, pp 9 – 12). The policies do not go far enough. They do not instruct employees that patrons ordering a meal early in the evening cannot remain and consume liquor for the remainder of the evening. Further, staff were not following the policies. The kitchen was closed and not available for food preparation, yet liquor service continued. The bartender who was the person in charge of the establishment at the time of the inspection, and may be considered the directing mind of the licensee, was not enforcing the policies. The licensee principal was also on site at the time of the inspection. Although present only as a patron, he took no action to ensure that the establishment was being operated in compliance with the licence requirements.

On the whole of the evidence, I find that the licensee has not been duly diligent and consistent with the finding in *Ed Bulley Ventures Ltd.*, the licensee has “permitted” the contravention.

In conclusion, I find on a balance of probabilities that on September 10, 2009, at 11:00 p.m. 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.

Administrative Fairness

The licensee has argued that it has been prejudiced in presenting its case because of the delay in the issuance of the CN and the NOEA and the delay in advising the licensee of the undercover investigation. This resulted in the video surveillance records for the establishment not being available to the licensee and its staff having little recollection of the night of September 10, 2009.

The evidence is that the inspection and alleged contravention took place late night September 10, 2009. The liquor inspector spoke with the licensee principal at the time of the inspection and requested documents for food and liquor sales for the period of September 1 – 10, 2009. This request was followed up in writing on September 11, 2009. A CN was issued and mailed to the licensee on September 29, 2009, as well as a request for further documents. A NOEA was completed and hand delivered to the licensee on November 16, 2009.

Delay may be a factor to be considered in determining if there has been administrative fairness. Any delay should not be unreasonable or be prejudicial to the licensee. Here, the delay from the date of the alleged contravention to the issuance of the CN was 18 days. While there may be room for improvement, I do not find that it is unreasonable. The evidence obtained at the time of the inspection as well as that obtained from the documentation received from the licensee by way of letter on September 16, 2009, has to be reviewed and considered before the CN is issued.

The investigation continued with the request for further documents, which were received by way of letter dated October 12, 2009. Once again the information has to be reviewed and considered. The branch process, as provided in the inspector's evidence, requires that he receive authorization from the regional manager before proceeding to enforcement. This obviously takes time. Authorization was subsequently received and a NOEA prepared and delivered on November 16, 2009. In the circumstances of this case, I do not consider that the delay has been unreasonable.

The licensee argued that the delay created prejudice to the licensee. The security video, available only for a period of 14 days was no longer available upon receipt of the CN. The employees working the night of September 10, 2009, had little recollection of the occurrences that night. The licensee did not provide any evidence of what evidence would be provided by the video or the employees. I note that three of the employees provided undated statements of their observations made the night of the alleged contravention. They were not presented as witnesses and their recollection of the events of the night tested.

If there was prejudice to the licensee it was preventable by the licensee. The licensee principal spoke with the liquor inspector on the night of the alleged contravention and made a request for documents, which was followed up in writing the next day. The licensee at that date had been made aware on several occasions of the branch's continuing concerns with the operation of the establishment. The licensee should have known that the liquor inspector's interest on that night was not without purpose. The licensee could have either made a direct inquiry with the inspector or taken steps to do its own due diligence.

On the evidence, I find that the delay was not unreasonable, nor in itself, responsible for prejudice to the licensee.

I pause to note that the licensee in its submissions, and in several of the documents placed into evidence, has made complaints about the actions of branch staff and police officers. I make it clear that the purpose of a hearing into an alleged contravention is not to oversee the conduct of branch staff or police officers. An adjudicator is without jurisdiction. I note that the branch and police authorities both have an interest in ensuring that licensed establishments operate properly. The operation of a licensed establishment can have an adverse effect on a community and impact policing in the community. The branch has a mandate to supervise the conduct and operation of licensed establishments. Branch staff and police officers often work together to meet their responsibilities.

After considering the evidence presented I find that there has not been a denial of administrative fairness in this case.

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 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 is: 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.

The licensee has argued that there is no need for a penalty to be imposed. The process of having the property rezoned to allow The Habitat to hold a liquor primary is underway and nearing a successful conclusion. The licensee has made application to the branch for a liquor primary licence and has discussed the application with branch staff. If granted this will meet the requirements of the branch and licensee.

As I have noted above, the rezoning and new licence applications are definitely positive moves in the right direction. They have not as yet been successfully completed. Any licence issued to the licensee will contain requirements that will have to be complied with and which may impact the manner in which the licensee conducts its business.

In the circumstances of this case, a branch liquor inspector met with the licensee principal prior to the licence being issued and outlined the requirements for the operation of a food primary establishment. Following the issuance of the licence, a branch inspector conducted a compliance hearing with the licensee principal and discussed the requirements for the operation of a food primary establishment. On several subsequent occasions the licensee principal met with senior branch staff and was advised then, and in writing, that the operation of the establishment did not comply with the terms and conditions of the licence. That did not have the desired effect, leading to the contravention of September 10, 2009.

On the whole of the evidence, I find that a penalty is necessary to ensure future voluntary compliance.

The range of penalties for a first contravention of this type is a license suspension for 10 – 15 days and/or a monetary penalty of \$7,500.00 - \$10,000.00.

The licensee has argued that if a penalty is imposed it should be the minimum suspension penalty. A monetary penalty of \$7500.00 would have serious consequences for the licensee of a small business.

I have concerns that given the history of the relationship between the licensee and the branch, the imposition of a suspension penalty could lead to further tensions. Any suspension imposed must take place on days when the establishment is ordinarily open for business (Regulations, section 67). As I understand it, this establishment only operates when there are events planned. A suspension would require the branch to determine which dates the establishment will be ordinarily open for business. I expect that determining which dates the establishment is operating is going to be disputatious. It may draw out the suspension and slow down the application process for a new licence.

In the circumstances of this case, I find that the minimum monetary penalty of \$7,500.00 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 (\$7,500) monetary penalty to be paid by the licensee to the general manager on or before Monday, March 22, 2010.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: February 22, 2010

cc: RCMP Kelowna Detachment

Liquor Control and Licensing Branch, Victoria office
Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria office
Attn: Olubode Fagbamiye, Branch Advocate