



**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:	Solomon Samuel Alexander Seigel dba Solomon's 542 Herald Street Victoria, BC V8W 1S6
Case:	EH09-102
For the Licensee:	Solomon Samuel Alexander Siegel
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	George C.E. Fuller
Place of Hearing:	Written Submissions
Date of Decision	March 5, 2010

INTRODUCTION

The licensee, Solomon Samuel Alexander Siegel, owns and operates a Victoria, BC establishment, known as Solomon's Restaurant (Solomon's) and holds Food Primary Licence Number 303068. According to the terms of the licence, Solomon's may sell liquor from 9:00 a.m. to midnight on Monday to Sunday. The licence is, as are all liquor licenses issued 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."

ALLEGED CONTRAVENTION(S) AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated October 22, 2009.

The Branch alleges that on September 19, 2009:

1. 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 one-half hour after the time stated on the licence for the hours of liquor service. The proposed penalty is a four-day suspension of the liquor licence (item 25 of Schedule 4 of the *Regulation*).
2. And, the licensee contravened section 42(3) of the *Regulation* when an employee consumed liquor while working in the licensed establishment. The proposed monetary penalty is \$1,000 (item 27, Schedule 4 of the *Regulation*).
3. And, the licensee contravened section 42(4) of the *Regulation* by allowing liquor to be taken from the licensed establishment. The proposed monetary penalty is \$1,000 (item 29, Schedule 4 of the *Regulation*).

The licensee does not dispute that the contraventions occurred as alleged, but disputes the proposed penalties. The licensee agreed that this matter could proceed by way of written submissions.

RELEVANT STATUTORY PROVISIONS

42 (3) A licensee, and the employees of the licensee, must not consume liquor while working in the licensed establishment.

(4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

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. Did the contraventions occur?
2. If so, what penalties, if any, are warranted?

EXHIBITS

Exhibit 1 – Branch's disclosure documents as outlined in a letter dated December 2, 2009, to the licensee, including a Notice of Enforcement Action, dated October 22, 2009, and which includes the liquor inspector's and the branch's reasons for recommended enforcement action and penalty.

Exhibit 2 – email dated December 21, 2009, from the licensee to the branch setting out submissions in support of its position with regard to the recommended penalty.

Exhibit 3 – Branch's response to the licensee's submission dated January 8, 2010.

Exhibit 4 – reply of the licensee to the response of the branch dated January 8, 2010.

EVIDENCE AND SUBMISSIONS

As previously indicated, the licensee does not dispute that the contraventions occurred as alleged. Accordingly, in view of the fact that the facts alleged are unchallenged, the evidence can be summarized as set out below.

The licensee's establishment is located amongst heritage style condos at 542 Herald Street in Victoria. On September 14, 2009, the branch had received a complaint from a member of the public who resides near the establishment. Specifically, the complaint alleged that persons were being served liquor well after the liquor service hours permitted. The complainant indicated that, on one occasion, he had been served liquor at 2:00 a.m. As a result of that complaint, the two inspectors attended the establishment on September 19, 2009 at 12:40 a.m. Under the terms of its licence all liquor was required to be removed from the tables by, at the latest, 12:30 a.m. Upon entering the establishment, the inspectors noted a large table which had approximately 9 persons seated at it. At least one patron at this table was consuming a glass of wine that was $\frac{1}{4}$ full.

In addition, there was a smaller group of patrons in the bar area with red wine in glasses that were $\frac{1}{4}$ full and were still being consumed. The inspectors sat at a table approximately halfway into the establishment. The inspectors were then advised by the bartender (who was later determined to be the principal of the corporate licensee), that they could not be served as the establishment was closing up for the night. The inspectors departed the establishment, but were intent on continuing their inspection in order to determine whether liquor service had actually ceased.

Approximately one hour later, at about 1:35 a.m., the inspectors re-attended the establishment and observed that there were three persons standing outside of the establishment, just beyond the front door alcove area on the sidewalk, drinking beer from stemmed glasses. Each of those glasses was approximately $\frac{1}{2}$ full of the golden amber liquid, with a foamy head, which was confirmed to be beer. At this location, the persons were outside of the red line area; therefore, it is considered liquor removed from the establishment.

These three persons were determined to be staff members of the establishment who were still working, as they were still providing service to the two patrons on the premises. The inspectors then identified themselves and directed the staff members back into the restaurant. There was no manager on duty at this time as apparently Mr. Siegel had left earlier. The individuals indicated that they were just outside having a staff drink. The inspectors then re-entered the establishment and noted that there were two new patrons seated at the table which the inspectors had previously occupied. The inspectors identified themselves to these two patrons and confirmed that the glasses, which were approximately $\frac{3}{4}$ consumed, contained apple cider. Upon reviewing the receipt for that table, it was determined that the two ciders had been purchased at 1:10 a.m. (see exhibit 1). Notwithstanding the fact that receipt was time stamped at the time of payment and not at the time of service, the fact that those persons had entered and been served after 12:40 a.m., when the inspectors had previously attended, could only mean that those patrons had entered the premises after 12:40 a.m. and had been served liquor.

Upon questioning the staff members, it became clear that they were aware that liquor service was to stop at 12:00 midnight. In fact, one of the staff advised that the establishment often continued to serve patrons if there were large parties in attendance.

It is also clear that the staff who were still on duty were also consuming liquor at 1:35 a.m.

As a result of the inspection conducted on September 19th at 1:35 a.m., the branch is recommending a four-day suspension to the licensee. I have concluded that, on that occasion, three staff were drinking beer and two patrons inside the establishment were drinking cider. Furthermore, the staff were questioned about their knowledge of the liquor licence and not only indicated that they were aware of the terms and conditions but, nonetheless, admitted to service after hours on occasions when there were large parties in the establishment.

The inspection and the complaint received are consistent with the allegation that the establishment has been operating past its licensed liquor service hours. The branch submits that when a food primary establishment continues to serve liquor outside of its licensed liquor hours, it can result in the shifting of the primary purpose from food to liquor and have the potential to negatively impact the community by contributing to late night noise and disturbances. Accordingly, for the contravention of failing to take liquor from patrons as required by section 44(1)(b), the branch submits that a suspension of four days is warranted. This recommended suspension penalty falls within the penalty range set out in Schedule 4 of the *Regulation* for a first contravention.

With regard to the contravention of section 42(3) of the *Regulation* prohibiting consumption of liquor while working, the branch submits that a minimum of \$1,000 penalty is appropriate. In the instant case, not only were staff consuming alcohol while they were still on shift, but they were flagrantly doing so at 1:35 a.m., which was more than an hour after any consumption should have ceased. Accordingly, the monetary minimum penalty of \$1,000 is being recommended in order to reinforce to the licensee the seriousness of staff consuming liquor while on shift.

With respect to the contravention of allowing liquor to be removed from the establishment, the branch notes that, on this occasion, the staff had poured their drinks while still on shift and had removed it from the red line area in order to go outside with their drinks and socialize with co-workers. As this particular inspection had resulted from a community complaint regarding noise, the branch says it was important to impress upon the licensee the need to ensure that its own employees would not be potentially contributing to the noise factor. Accordingly, enforcement action was required in order to ensure community standards and compliance.

The licensee's evidence and submissions are summarized as follows:

The licensee submits that it has, basically, been the victim of groundless complaints by one individual who occupies a condo in the vicinity of the establishment. Having not received any satisfaction from the police, the licensee alleges that the complainant has now brought its case to the branch for resolution. The licensee denies that the complainant had ever been served liquor at 2:00 a.m. The licensee explains that, although it was fully aware that its licence requires sales to be cut off at 12:00 a.m. and drinks to be finished by 12:30 a.m., it was allowing patrons to imbibe past 12:30 a.m., in the belief that it was more responsible to allow slower consumption of alcohol, instead of patrons having to "chug" their drinks. Since the inspection, however, the establishment has strictly complied with the 12:30 a.m. "no drinks on the table" rule.

With respect to removing alcohol from the premises, the licensee said that all three of the staff members had informed him that they remained in the alcove while they were imbibing and apparently this is not outside the red line. The licensee further submits that it has terminated the senior staff member who was on duty during the inspection and has taken other practical steps to comply with the legislation and regulations. The licensee advises that it is a small, locally owned, restaurant which has had negative cash flow from the beginning, but that it has an excellent track record regarding patrons' behaviour and that it is not aware of any other complaints against the establishment from its surrounding neighbours. The licensee, therefore, asked for relief against the monetary penalties and suspensions recommended by the branch.

REASONS AND DECISION

The licensee has admitted the contraventions. Having considered all of the evidence, I find that on September 19, 2009, the licensee contravened sections 44(1)(b), 42(3) and 42(4) of the *Liquor Control and Licensing Regulation* by failing to take liquor from patrons by the time required, allowing the consumption of liquor while employees were working, and allowing liquor to be removed from the establishment.

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 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. To the contrary, by its own admission, the licensee preferred to allow its patrons to continue to drink after 12:30 a.m. in order that they might enjoy their drink rather than forcing them to “chug” the same. In other words, the licensee has chosen to prefer business considerations over compliance with the *Act* and/or *Regulations*.

There is no evidence of what training employees received and there is no evidence of what policies and procedures were in place to guide staff in performing their duties. In conclusion, I find that the licensee had 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 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, or both, is warranted, I am bound to follow the minimums set out in schedule 4 of the *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so, and I am not bound to order the penalty proposed in the Notice of Enforcement Action.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is: whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this Licensee for this license within the year preceding this incident. I, therefore, find these to be first contraventions.

Any penalty imposed must be sufficient to ensure compliance in the future. Section 4 of the *Regulations* provides a range of penalties for first contraventions of these types. For contraventions regarding sections 42(3) and 42(4) of the *Regulation*, the range of the period of suspension is one to three days, and/or the monetary penalty range of \$1,000 - \$3,000. For a contravention regarding section 44(1)(b) of the *Regulation*, the period of suspension range is four to seven days, and/or a monetary penalty range of \$5,000 - \$7,000. The branch recommended a four-day suspension regarding the contravention of section 44(1)(b) of the *Regulation*, a \$1,000 penalty with regard to the contravention regarding section 42(3) of the *Regulation*, and a \$1,000 penalty with regard to the contravention regarding section 42(4) of the *Regulation*, all of which are minimal penalties for these contraventions.

What is particularly disturbing in this case is the attitude of the principal of the licensee with respect to the need to strictly comply with the *Act* and *Regulations* as a term and condition of the granting of a liquor licence. I refer specifically to his comments concerning his preference to allow patrons to continue to consume liquor rather than forcing them to "chug" their drinks. Surely, this is simply a matter of managing the expectations of guests when liquor is ordered at late hours.

In the circumstances, therefore, I find that the recommended penalties of the Branch are necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order the payment of \$2,000 by the licensee to the general manager on or before Thursday, April 1, 2010. I further order the suspension of Food Primary Licence Number 303068 for a period of four days, to commence at the close of business on Thursday, April 1, 2010 and to continue each succeeding business day until the four-day suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*). In order to ensure this order is effective, I direct that the liquor licence be held by the branch, from the close of business on Thursday, April 1, 2010, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

Date: March 5, 2010

cc: Victoria Police Department

Liquor Control and Licensing Branch, Victoria Office

Attn: Gary Barker, Regional Manager

Liquor Control and Licensing Branch, Victoria Office

Attn: Olubode Fagbamiye, Branch Advocate