



**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:	Cush Restaurant & Lounge Ltd. dba Cush Restaurant & Lounge 538 Leon Avenue Kelowna, BC V1Y 6J6
Case:	EH10-057
For the Licensee:	Brenda Wood and Crystal Gay
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	Written Submissions
Date of Decision	September 17, 2010

INTRODUCTION

Cush Restaurant & Lounge Ltd. (the licensee) operates Cush Restaurant & Lounge located at 538 Leon Ave., Kelowna BC, V1Y 6J6. Brenda Wood and Crystal Gay (licensee principals) are shareholders of the licensee. The licensee holds Food Primary Liquor Licence 303821 for the establishment. The hours for the sale of liquor are from 9:00 a.m. to 1:00 a.m. daily. The capacity is 106 persons in the two main areas and 21 persons in the lounge. 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.
- Patio extension permitted as outlined in red on the official plan.
- Patron participation entertainment other than games permitted within the premise.
- Pursuant to Section 12 of the regulations, the licence has been issued with a lounge endorsement.
- All forms of entertainment must end by no later than 12:00 midnight daily.

ALLEGED CONTRAVENTION and PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated June 23, 2010.

The branch alleges that on April 3, 2010, at 11:30 p.m. the licensee contravened section 20 of the *Liquor Control and Licensing Act (the Act)* and section 11 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 a thirteen (13) day suspension of the liquor licence (item 1, Schedule 4 of the *Regulation*).

Item 1 of Schedule 4 of the *Regulation* provides the range of penalties for a first contravention of this type of a licence suspension for 10 - 15 days and/or a monetary penalty of \$7500 - \$10,000.

The licensee does not dispute that the contravention took place, just the penalty proposed. It was agreed that this hearing would take place by way of written submissions.

REVELANT 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:

- (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;

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:

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| Exhibit 1 | Branch's disclosure package and cover email dated August 12 (8 tabs). |
| Exhibit 2 | Licensee's September 2, 2010 submission with attachment and September 2 email. |
| Exhibit 3 | Branch Registrar's August 4, 2010 letter summarizing the pre-hearing conference. |
| Exhibit 4 | Branch Registrar's August 24, 2010 letter outlining the written submission procedure. |
| Exhibit 5 | The waiver and the penalty letter for two of the three contraventions alleged in EH10-057. |

EVIDENCE & SUBMISSIONS

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

On Saturday April 3, 2010 two liquor inspectors entered the establishment at approximately 11:30 p.m. posing as patrons for the purpose of conducting a covert inspection. They each ordered and were served an alcoholic beverage, took a seat at a table and observed the operation of the establishment. There was only a cocktail menu on the table. There was no food being served to patrons in the establishment and the kitchen appeared to be closed. They asked for a food menu and were advised by an employee later identified as being the manager that the kitchen had closed 15 minutes earlier. The inspectors observed a further eight patrons enter the establishment following their entry; all were served what appeared to be alcoholic beverages. At 12:10 a.m. the band commenced playing. One of the band members was observed to be consuming from a bottle of beer. The inspectors identified themselves to and spoke with the manager. They advised him that they had observed several contraventions, namely, permitting an employee (the band member) to consume liquor while on duty, permitting entertainment after 12 midnight contrary to the terms and condition of their licence and operating contrary to the primary purpose of a food primary establishment. The kitchen was required to remain open for food service until such time as liquor service ceased. The manager advised them that his background was in operating a liquor primary establishment. He was told that he was required to cease liquor service and cease the entertainment. The inspectors left the establishment at 12:30 a.m. They observed that liquor service and the entertainment had both ceased.

The contraventions for permitting an employee (the band member) to consume liquor while on duty, and permitting entertainment after 12 midnight contrary to the terms and condition of the liquor licence were both dealt with by way of a waiver of hearing and monetary penalties.

In recommending a 13 day licence suspension for the contravention of operating contrary to primary purpose the branch submitted that this establishment has only been licensed since December 2009. During the licence application process the licensee principals advised the branch that they wished to operate the establishment as a restaurant with entertainment to complement another business that they operated. The kitchen would offer full kitchen service until closing. Prior to receiving the licence the two licensee principals and the manager attended at the branch and were provided with a review of the licensing requirements for a food primary establishment. The branch submits that a penalty by way of a 13 day licence suspension is necessary to bring the establishment and its employees into compliance.

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

The contravention is admitted. Too much trust was put in the manager's knowledge of the food primary rules. Adequate training and support was not provided to him. A penalty is not necessary, once the contravention became known the licensee principals met with the manager and staff and went over the rules with them. Meetings were held to discuss the issues and advise staff of management's no tolerance policy regarding operating within the terms and conditions of the licence. Changes were made to emphasize the primary focus as a restaurant. Promotions and ads were revised to ensure that they promoted the establishment as a restaurant and not as a bar. Menu changes were made to encourage patrons to eat throughout the evening. The establishment has only been in business for seven months. A 13 day licence suspension will create considerable financial strain, a loss of patronage and may result in a failure of the business. A warning for this first contravention will allow them to rectify the mistakes, learn from them and continue to take measures to operate as food primary establishment.

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on April 3, 2010, at 11:30 p.m. the licensee contravened section 20 of the *Liquor Control and Licensing Act (the Act)* and section 11 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.

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. There is no evidence of what training the employees received following the issuance of the liquor licence and prior to the contravention. There is no evidence of what policies and procedures were in place to guide staff in performing their duties. At the time of the contravention the manager and staff on duty did not take sufficient action to prevent the contravention from occurring or continuing.

In conclusion, I find that the licensee has not been duly diligent.

PENALTY

Pursuant to section 20(2) of the *Act*, having found that the licensee has contravened the *Act*, the *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a 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. Following notice of the contravention the licensee has instructed its manager and staff on the requirements of operating the establishment in compliance with the food primary licence. Changes have been made to the operation of the establishment, its promotions and advertisements. A 13 day suspension will create considerable financial strain on the business.

In the circumstances of this case, a branch liquor inspector met with the licensee principals and the manager of the establishment in December 2009 prior to the licence being issued and outlined the requirements for the operation of a food primary establishment. The licensee principals and the manager acknowledged the terms and conditions of the licence and agreed to abide by them. If there were any questions regarding the requirements then or at a later date it was incumbent on the licensee principals or the manager to seek the advice of the local liquor inspector. I am satisfied that the licensing process provided the licensee principals and the manager with sufficient information to operate the establishment in compliance with the food primary licence. Yet, less than four months later, on the night of April 3rd, 2010, at the time of the liquor inspector's visit the establishment was blatantly operating in a manner that did not comply with the requirements of their food primary licence.

It is contrary to the public interest for the branch to allow restaurants to operate as a bar. The licensing and inspection processes differ for each. It is in the public interest that compliance should be voluntarily achieved. Enforcement processes are expensive and time consuming to all parties.

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 licence suspension for 10-15 days and/or a monetary penalty of \$7500-\$10,000. In the circumstances of this case, I find that the 13 day suspension as recommended by the branch is appropriate, reasonable and necessary.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 303821 for a period of thirteen (13) days, to commence as of the close of business on Friday, October 22, 2010, and to continue each succeeding business day until the suspension is completed. "Business day" means a day on which the licensee's establishment would normally be open for business (Section 67 of the *Regulation*).

To ensure this order is effective, I direct that Food Primary Licence No. 303821 be held by the branch or the RCMP Kelowna Detachment from the close of business on Friday, October 22, 2010 until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: September 17, 2010

cc: RCMP Kelowna Detachment

Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager

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