



**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:	Space Lounge Inc. dba Space Restaurant 1149 Granville Street Vancouver, BC V2Z 1M1
Case:	EH09-112
For the Licensee:	Hamid Babaei & Sam Babaei
For the Branch:	Peter Mior
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	February 4, 2010
Place of Hearing:	Vancouver, BC
Date of Decision	March 2, 2010

INTRODUCTION

Space Lounge Inc. (the licensee) operates Space Restaurant located at 1149 Granville St., Vancouver BC, V2Z 1M1. Hamid Babaei is the principal shareholder (licensee principal) of the corporate licensee. The licensee holds Food Primary Liquor Licence 302928. The hours for the sale of liquor are from 9 a.m. to Midnight daily. The capacity is 85 persons in the main area and 21 persons in the lounge interior. 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.
- Pursuant to section 12 of the *Regulations*, the licence has been issued with a lounge endorsement.

ALLEGED CONTRAVENTION and PROPOSED PENALTY

The branch's allegation and proposed penalty is set out in a Notice of Enforcement Action (the "NOEA") dated October 21, 2009.

The branch alleges that on October 18, 2009, the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing Regulation* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

An eighteen (18) day suspension of the liquor licence is proposed (item 25 of Schedule 4, *Liquor Control and Licensing Regulation*). The contravention is being treated as a third contravention of the same type for the purposes of penalty.

Item 25 of Schedule 4 of the *Regulation* provides a range of penalties for contraventions of this type: for a first contravention, a licence suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7,000; for a second contravention, a licence suspension for 10 – 14 days; for subsequent contraventions, a licence suspension for 18 – 20 days.

The licensee disputes that the contravention took place.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Regulation

[includes amendments up to B.C. Reg. 289/2009, December 2, 2009]

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 contravention occur?
2. If so, is a penalty warranted, and what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

- Exhibit 1: Branch Book of Documents #1, tabs 1 – 18.
- Exhibit 2: Decision of the General Manager dated January 12, 2010 regarding Space Lounge Inc. dba Space Restaurant.

EVIDENCE – THE LIQUOR CONTROL AND LICENSING BRANCH

The branch called three liquor inspectors as witnesses:

Liquor Inspectors A, B & C testified that during the late night/early morning hours of October 17/18, 2009, they were conducting inspections of licensed establishments in the downtown area of Vancouver. At approximately 2 a.m., walking past the Space Restaurant they noticed persons sitting inside appearing to be consuming liquor. The door was locked, they knocked and were permitted entry. Inside, music was playing, the lights were dim and there were eight or nine females sitting at two tables in the rear of the restaurant. On the tables were a glass partially filled with what appeared to be red wine, one partially full bottle of beer, empty beer bottles and other glasses that appeared to contain water.

Inspector A spoke with one of the females who told him that the glass contained red wine and it was hers. The inspector spoke with the owner of the restaurant (the licensee principal) who told him that the restaurant was closed. He said that the females were friends and a cousin and a niece and that he was making a meal for them. The inspector advised the owner that this was not permitted and a Contravention Notice (CN) would be mailed to him (exhibit 1, tab 5).

Inspector B spoke with one of the other females who said that the partially full bottle of beer was hers. She said that she worked at the restaurant as a bartender and was not aware that it was illegal to consume liquor in the restaurant after it had closed, and she had done it on previous occasions.

Inspector C spoke with one of the females who told her that she was a cousin of the owner of the restaurant. The inspector testified that she believed the female to be very inebriated.

The inspectors left the establishment at approximately 2:10 a.m. They each completed notes of their observations (exhibit 1, tabs 2 - 4).

Liquor Inspector A testified that he is responsible for the geographical area in which The Space Restaurant is located and is familiar with the establishment. During the licensing process the licensee principal was interviewed and attended an information session at branch offices (exhibit 1, tab 10). He 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 and forms the terms and conditions of the licence (exhibit 1, tab 9). The establishment was licensed in March 2008.

He referred to copies of documents from the Branch file:

- Exhibit 1, tab 6; the food primary licence in effect at the time of the alleged contravention. It includes the hours of sale permitted.
- Exhibit 1, tab 8; floor plan for the establishment.
- Exhibit 1, tab 11; a CN was issued to the establishment for "staff consuming liquor" on October 25, 2008. This resulted in a compliance meeting being held with the licensee principal on November 25, 2008, and a compliance meeting form completed. The licensee principal made commitments to operate in compliance with the requirements.

- Exhibit 1, tab 12; a CN was issued to the establishment for “supply liquor to a minor” on August 2, 2009. This resulted in a compliance meeting being held with the licensee principal on September 21, 2009, and a compliance meeting form completed. The licensee principal denied the allegation.
- Exhibit 1, tab 13; a CN was issued to the establishment for “fail to clear liquor within ½ hour” and “allow to consume beyond ½ hour” on May 18, 2009. This resulted in a compliance meeting being held with the licensee principal on June 18, 2009, and a compliance meeting form completed. The licensee principal made commitments to operate in compliance with the requirements.
- Exhibit 1, tab 14; a CN was issued to the establishment for five alleged contraventions including “licensee or employee consuming” and “allow to consume beyond ½ hour” on August 1, 2009. This resulted in a compliance meeting being held with the licensee principal on September 11, 2009, and a compliance meeting form completed. The licensee principal made commitments to operate in compliance with the requirements.
- Exhibit 1, tab 16; a CN was issued to the establishment for “fail to clear liquor within ½ hour” on August 15, 2009.

The inspector completed a NOEA on October 21, 2009, outlining the alleged contravention and recommending an 18 day suspension penalty be imposed (exhibit 1, tab 1). He testified that there had been previous contraventions of the same type for this licensee. A penalty is necessary for the licensee to understand the seriousness of the contraventions and to bring about voluntary compliance.

EVIDENCE - THE LICENSEE

The licensee called four employees and the manager/co-owner of the establishment as witnesses.

Licensee witnesses D, E, F, & G testified that they are employees of Space Restaurant and were working the night of October 17/18, 2009. The restaurant was closed prior to the liquor inspectors' arrival. They had cashed out and had cleaned the premises and were sitting inside visiting with the owner (licensee principal), manager and two visiting female family members of the owner. None of the employees were drinking.

Witness D testified that the owner was drinking a glass of red wine which he had left on the table while he went into the kitchen to prepare some food. The manager was drinking from a bottle of beer at the table.

Witness E testified that she had had a sip of the manager's beer just prior to the inspectors' arrival.

Witness H testified that he is the manager and co-owner of Space Restaurant. He was present on October 17/18, 2009, at the time of the inspectors' arrival. The restaurant was closed and the door locked. He let the inspectors in when they knocked and told them that there were no customers present. The only persons inside were the employees who had worked that night, two visiting family members of the owner (licensee principal), and the owner and himself. They were being careful to stay within the rules because of the previous suspensions. He was consuming a beer and was the only person drinking. He was aware that patrons were not permitted to consume liquor following ½ hour after licensing hours, but believed that the owners of a licensed establishment were permitted to consume liquor in their own establishment.

BRANCH SUBMISSIONS

The branch advocate submitted that the branch has identified problems with the operation of the licensed establishment since 2008 and has held several compliance meetings with the licensee to make him aware of his responsibilities. The evidence of the three liquor inspectors is that during the early hours of October 18, 2009, liquor remained on the table well beyond the ½ hour after the hours for sale. The liquor was being consumed by employees following their shift. This is not permitted. Off duty employees are considered to be patrons. There have been two previous contraventions of the same type occurring on July 31, 2009 and August 14, 2009 (exhibit 2). The minimum penalty for a third contravention of the same type is an 18 day licence suspension.

LICENSEE SUBMISSIONS

The licensee submitted that at the time of the inspectors' visit the only persons in the establishment were five employees, the owner (licensee principal), the manager and two family members of the owner. The only liquor present was that of the owner and the manager who is also a co-owner. He did not believe that it was against the law for them to have the liquor at that time. If it is found to be against the law it is the first time that it has occurred and an 18 day licence suspension is too harsh. If a penalty is to be imposed it should not occur during the Olympics or Para Olympics, as it would be more severe during those time periods.

REASONS AND DECISION

The evidence is clear that at approximately 2 a.m. on October 18, 2009 liquor (red wine and beer) remained on the tables of the establishment. This is well beyond the ½ hour period following the hours of sale. I accept the evidence that the liquor belonged to the owner (licensee principal) and manager/co-owner. I do not accept the argument that the terms and conditions found in the Guide prohibit only patrons from having liquor after the time limits and thus permits an owner to have liquor after the time limits. The Guide addresses this at pages 11 and 17:

Hours of sale

“You may sell or serve liquor only during the hours indicated on the face of your licence. All liquor (in bottles or glasses) must be removed from patrons within half an hour of liquor service ending (i.e., the time specified on your licence). Consumption of liquor is not permitted after this point.”

Employee conduct Liquor consumption

“You and your employees may not consume liquor in your establishment during working hours. This includes breaks, meal periods and between shifts on the same day. After work, you and your employees may consume liquor, provided:

- You do not offer liquor to employees at a reduced price, or in lieu of wages or as a bonus.
- Your employees are of legal drinking age.
- You are serving and consuming the liquor during the hours of sale indicated on the face of your licence.
- You - as the licensee - are not treated differently from a regular patron.”

I find on the evidence that liquor was not taken from patrons within ½ hour following the hours for sale. This on its face is a contravention of section 44 (1)(b) of the *Liquor Control and Licensing Regulation*.

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 branch had conducted several meetings with the licensee to ensure that he was familiar with the requirements of the liquor licence, particularly as they applied to the necessity of removing all liquor from the tables and ensuring that there was no after-hours liquor consumption. At best the licensee failed to take the time to understand the requirements, or to make inquiry of what was permitted. He was provided with a copy of the Guide specific to the responsibilities in operating a food primary licence, excerpts of which have been placed into evidence.

I find that the licensee has not been duly diligent.

In conclusion, I find on a balance of probabilities that on October 18, 2009, the licensee contravened section 44 (1)(b) of the *Liquor Control and Licensing Regulation* by failing to ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service.

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. Here the licensee was counselled on several occasions on the requirements of his liquor licence and the need to operate within the requirements. The licensee has repeatedly failed to operate in compliance with the requirements. 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.

This is the third contravention of the same type within a 12 month period and is considered a subsequent contravention pursuant to section 1(1)(b)(iii) of Schedule 4 to the *Regulations*. The range of penalty for subsequent contraventions of this type is: a licence suspension for 18 – 20 days.

In the circumstances of this case, I find that the minimum licence suspension for 18 days is appropriate, reasonable and necessary.

ORDER

Pursuant to Section 20 (2) of the *Act* I order a suspension of Food Primary Licence No. 302928 for a period of eighteen (18) days, to commence as of the close of business on Friday, April 2, 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 the liquor licence be held by the branch or the Vancouver Police Department from the close of business on Friday, April 2, 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: March 2, 2010

cc: Vancouver Police Department

Liquor Control and Licensing Branch, Vancouver Office

Attn: Donna Lister, Regional Manager

Liquor Control and Licensing Branch, Vancouver Office

Attn: Peter Mior, Branch Advocate