



**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:	612316 B.C. Ltd., dba Basque Restaurant and Rendezvous Restaurant 489 Wallace Street Nanaimo, BC V9R 5B7
Case:	EH09-130
For the Licensee:	Paul Manhas
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Place of Hearing:	Written Submissions
Date of Decision	May 26, 2010

## INTRODUCTION

The corporate licensee 612316 B.C. Ltd. is licensed to operate the Basque Restaurant at 489 Wallace Street in Nanaimo, BC. They have recently been operating under the name The Rendezvous Restaurant and have applied for branch approval of a name change. The establishment conducts sales and service of alcohol under Food Primary Liquor Licence No. 302614. The liquor licence includes no endorsements for entertainment. Hours of sale indicated on the liquor licence are 9:00 a.m. to midnight, seven days per week with a licensed capacity of 86 persons. The licensee also operates a liquor primary licensed establishment adjacent to the food primary licensed establishment which is subject of this decision.

The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication "*A Guide for Liquor Licensees in British Columbia*".

## ALLEGED CONTRAVENTIONS AND PROPOSED PENALTIES

The branch alleges that that on November 7, 2009, the licensee contravened the following sections of the *Liquor Control and Licensing Act* and/or the *Liquor Control and Licensing Regulation* and proposes the following penalties:

1. Section 20(1)(d) of the *Act*, and section 11(1) of the *Regulation* by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence. The branch proposes a \$7,500 monetary penalty in accordance with item one of Schedule 4 of the *Regulation*.
2. Section 12 of the *Act* and the terms and conditions of its licence by allowing an entertainer on stage to consume alcohol in view of patrons. The proposed penalty is \$3000 (item 46, Schedule 4 of the *Regulation*).

The licensee admits that the contraventions took place but disputes the proposed penalties. The branch and the licensee agreed that the hearing would take place by way of written submissions.

## **ISSUES**

1. Did the contraventions occur?
2. If so, are penalties warranted under the circumstances?
3. If penalties are warranted, what are the appropriate penalties?

## **EXHIBITS**

The following documents were submitted for consideration:

1. The branch's package of disclosure to the licensee dated March 19, 2010, marked as Exhibit #1.
2. The licensee's submission dated April 5, 2010, consisting of a letter, employee handbook and Heritage House application, marked as Exhibit #2
3. The branch's response to the licensee's submission, dated April 6, 2010, marked as Exhibit #3.

## **EVIDENCE AND SUBMISSIONS**

***The Branch's evidence and submissions are summarized as follows:***

1. *Operate contrary to primary purpose*

It is contrary to the public interest for the branch to allow restaurants to operate as bars. The current liquor licensing process requires public and local government input into licence applications for liquor-primary establishments, but not for restaurants. Obtaining a liquor licence for a restaurant and then operating as a bar circumvents this process.

Restaurants operating as bars tend to be associated with community complaints around noise, intoxication and other behavior contrary to community standards and the public interest. This contravention reflects a shift in the primary focus of a food-primary establishment from the service of food to the service of liquor.

On the night in question, this premise was operating with a primary focus on liquor service. The inspection revealed that liquor service had been occurring long after food service had ceased. Availability of food was not provided for any patrons wishing to dine at the premises beyond 10:00 p.m. while liquor was being consumed and served up to the point of and during the routine inspection. There is no evidence that food service was available before this point as records provided by the licensee indicate no food sales throughout the entire business day. This contravenes the principle that food primary establishments must be primarily engaged in the service of food during all hours of operation.

Restaurants offer liquor service as an accompaniment to food rather than as the primary activity. A contravention occurs if the primary focus of a food primary establishment shifts from the service of food to the service of liquor. On the evening of November 7, 2009, the primary focus was on live entertainment provided by a group of entertainers hired by the licensee. The entertainers encouraged patrons to leave their seats and participate in listening to the entertainment. There was a cover charge in effect that would discourage potential diners from entering the establishment to eat, whether or not food service was available.

The branch submits that the recommended monetary penalty is appropriate and should ensure the licensee's future compliance with the *Act* and *Regulation*. It is the minimum penalty for a first contravention stipulated by Schedule 4 of the *Regulation*.

2. *Contravene a term and condition of the licence*

It is the licensee's responsibility to manage and control the behaviour of patrons and to ensure the safety of staff, patrons, and the community. When the licensee and staff drink liquor while working, their judgement and ability to manage and control the establishment may be impaired. This includes entertainers as patrons may view them to be in a position of authority. Additionally, as entertainers may be viewed as staff members of the establishment, entertainers consuming alcohol on stage in view of patrons presents an appearance of staff consumption. Entertainers that become intoxicated can present a public safety risk to other staff, patrons, and entertainers.

During the inspection, the liquor inspector and police observed an entertainer consuming alcohol while on stage and in view of patrons. The establishment's manager was not present at the time of inspection and was employed at another establishment several minutes' travel away. Staff members were occupied with serving drinks and not demonstrating any management or control of the activities of the entertainers. They heard one of the live entertainers slurring police and advocating not cooperating with police. This presents a safety concern to the Liquor Control and Licensing Branch team, police, patrons, and the community.

The branch submits that the recommended monetary penalty is appropriate and should cause the licensee to ensure future compliance with the *Act* and *Regulation*. It is the maximum listed penalty for a first contravention of this kind in accordance with Schedule 4 of the *Regulation*.

***The Licensee's evidence and submissions are summarized as follows:***

The licensee asserts that while the primary goal of a suspension or monetary fine is to ensure that a licensee will operate in compliance with the *Act* and *Regulation* in the future, the enforcement action to date has already served this purpose and the establishment is 100% in compliance now.

The following actions have been taken to ensure compliance since the issuance of the compliance notice:

1. They have made a management change to the restaurant.
2. The above-mentioned change resulted in no further non-compliance issues.
3. They immediately ceased any entertainment on the restaurant side of the establishment.
4. They have applied for and received approval from city council of Nanaimo for a "Patron Participation Entertainment Endorsement" for the restaurant.
5. They have revised the employee handbook to clear up the misconception that they were promoting liquor sales over food sales on the restaurant side. They have attached a copy of the revised employee handbook.
6. They now close the restaurant side and only keep the lounge open when there is no cook present on site.

The licensee built the restaurant, but before it was completed a third party operator was found to lease and run the establishment. That third party operator completed the application for the liquor licence and that application did not request an entertainment endorsement. The licensee had intended to apply for such an endorsement and was not aware that the endorsement had not been granted. Eventually, the licensee took over operation of the establishment from the third party, and it put in place employee guidelines used in a liquor primary establishment it operates elsewhere. The licensee explains, "It never occurred to us at the time that anyone would interpret the guidelines as promoting liquor sales over food sales."

On the night of the contravention, another party had arranged to host an event in the establishment. That party charged a cover charge at the door and arranged for the entertainment. The restaurant management was not involved in securing or managing the entertainment.

The restaurant and adjacent lounge (with separate liquor primary licence) share a bar, till, floor, entry, serving staff, and kitchen. Accordingly, the liquor to food sales ratio cannot be interpreted as if it was simply from the food primary establishment.

The proposed penalties exceed the combined revenue of the lounge and restaurant for the previous three months, and they assert that penalties of this magnitude would bankrupt an already struggling business.

## **ANALYSIS AND DECISION**

The contraventions have not been contested. The branch's disclosure documents clearly describe detailed and unambiguous facts that lead to the conclusion that the licensee did operate contrary to its primary purpose, and an entertainer did consume liquor on stage and in view of the patrons in contravention of the terms of the licence. I find that each of the contraventions described above did occur as alleged.

## **DUE DILIGENCE**

The licensee is entitled to a defence to 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.

In this case, the evidence suggests that although the principle of the licensee has considerable experience running licensed premises, the manager, was not expected to be present on site at all times as he divides his time among different establishments. The licensee provides evidence that it did not know there was no entertainment endorsement on the licence, and it did not hire or manage the entertainment that was performing at the establishment on the night of the contraventions.

A licensee's ignorance of the terms and conditions of its licence does not demonstrate due diligence. On the contrary, a licensee has an obligation to monitor and supervise the operation of the establishment and have full working knowledge of the limitations on the licence. The licensee should have known that there was no entertainment endorsement on the licence, and should have been aware of the prohibition of entertainers consuming liquor on stage. The licensee should be alert and proactive to the obligation to focus on food service as the primary goal of a food primary licensed establishment and to provide liquor only as an accompaniment to food. The licensee in this circumstance has an obligation to ensure that the operations of the food primary and adjacent liquor primary licenses are kept distinct so as to comply with the different rules in effect for each of the premises.

The licensee either directly or through its directing mind who I find was the manager on the night in question, has an obligation to control the operation of the facility and monitor or supervise any special events or hosted occasions and ensure that all activities comply with the licence obligations. The licensee did not meet that obligation. In conclusion, I find that the licensee failed to put in place reasonable systems for the sound operation of the establishment and failed to monitor the activities taking place on November 7, 2009, in a reasonable fashion. I find the licensee was not 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 the 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 *Regulation*. I am not bound by the maximums and may impose higher penalties when it is in the public interest to do so. I am not bound to order the penalties 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 types for this licensee or for this licence within the year preceding this incident. I therefore find these to be first contraventions. The fact that these are first contraventions and the licensee has no previous compliance history is only one consideration in determining whether penalties are warranted, and if so, what penalties are appropriate.

For operating contrary to primary purpose of the licence, the branch recommends a minimum monetary penalty of \$7,500. The range of penalty for a first contravention of this type in accordance with Schedule 4 of the *Regulation* is ten to fifteen days suspension and/or a monetary penalty of \$7,500-\$10,000. For contravening a term and condition of the licence, the branch recommends a maximum monetary penalty of \$3,000. The range of penalty for a first contravention of this type in accordance with Schedule 4 of the *Regulation* is one to three days suspension and/or a monetary penalty of \$1,000-\$3,000.

The licensee's claims of upgrading systems to address the identified problems for the future, does not persuade me that assessing a penalty is inappropriate. The licensee says it has made a management change. The evidence indicates that the existing manager on November 7, 2009, had his obligations shared between multiple establishments, and he was not responsible for arranging or supervising the entertainment. Indeed the evidence indicates that the licensee, and presumably his manager as well, were not aware that the establishment did not have an entertainment endorsement. I am led to the conclusion that the problem on November 7, 2009, was not a lack of ability of the manager, but the terms of his engagement and his mandate from the licensee. The evidence does not indicate that a management change was required to address the issues.

The licensee says it immediately ceased any entertainment on the "restaurant side" of the establishment. It adds that it received approval from the municipality for a patron participation entertainment endorsement for the "restaurant side". I find that the existence of the appropriate approvals or endorsement for entertainment does not ensure compliance with the obligation to ensure that no entertainer consumes liquor on stage. There is insufficient evidence to establish that systems and checks are in place to ensure compliance with this obligation.

The licensee says that the “restaurant side” is now closed when there is no cook on site. While this sounds to be a step in the right direction, I have insufficient evidence to satisfy me that this entirely eliminates the problem, such that no penalty would be appropriate in order to ensure compliance in the future. The evidence is silent as to what exactly is meant by “closed” when, as the licensee explained, the restaurant shares a “bar, till, floor, entry, serving staff, and kitchen” with the liquor primary establishment. While systemic changes resulting in the impossibility of a future contravention might speak to whether a penalty is warranted (future compliance being the primary objective), in this case I have insufficient evidence to establish that future contraventions of this type cannot occur.

I find the recommended penalty for the contravention of operating contrary to primary purpose of the licence to be reasonable and appropriate.

With respect to the contravention involving the entertainer consuming liquor, the branch argued that the maximum monetary penalty is warranted because it would impress upon the licensee the seriousness of this contravention and the importance of compliance with branch regulation and community standards. It was also pointed out that an entertainer incited resistance against police and the inspection team and that the low level of supervision at the establishment increased the public safety risk. While I agree, I find that the actions of the entertainer and the absence of adequate supervision are the result of the same malfeasance and amount to a single issue to be resolved by appropriate compliance. Based on the licensee’s evidence, I find that the minimum recommended penalty for this contravention will have the desired effect.

Finally, the hardship associated with the imposition of a penalty is something that the licensee should have considered when training and staffing prior to the contravention. The public interest in the enforcement of liquor licence rules is paramount to the economic hardship that an enforcement penalty might bring to the licensee.

I find the following monetary penalties to be appropriate:

1. For operating contrary to primary purpose of the licence (s 20 *Act*, s.11 *Regulation*), a monetary penalty of \$7,500.
2. For contravention of a term and condition of the licence (s.12 *Act*), a monetary penalty of \$1,000.

## **ORDER**

Pursuant to section 20(2) of the *Act*, I order the licensee to pay a monetary penalty of Eight Thousand Five Hundred Dollars (\$8,500) relating to Food Primary Licence No. 302614 in respect of action #EH09-130. The monetary penalty must be paid no later than the close of business on June 26, 2010

*Original signed by*

Sheldon M. Seigel  
Enforcement Hearing Adjudicator

Date: May 26, 2010

cc: Nanaimo RCMP

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

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