



**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: Powder Springs Inn Inc. dba
Powder Springs Inn (The Last Drop)
Revelstoke, BC

Case: EH10-015

For the Licensee: Brydon Roe

For the Branch: Olubode Fagbamiye

General Manager's Delegate: George C.E. Fuller

Place of Hearing: By way of written submissions

Date of Decision: October 27, 2010

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee, Powder Springs Inn Inc. owns and operates a Revelstoke, BC establishment, known as The Last Drop which is within the Powder Springs Inn. It holds food primary licence number 017915. According to the terms of the licence, the Licensee may sell liquor from 11:00 am to 1:00 am, daily with the exception of Sunday, when liquor service is from 11:00 am to midnight. The licence is, as are all food primary liquor licences 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*".

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 '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 Liquor Control and Licensing Branch ("the Branch"), by Notice of Enforcement Action (the "NOEA") dated June 4, 2010, alleges that on January 27, 2010 the Licensee contravened Section 20 of the *Liquor Control and Licensing Act* ("the Act") and Section

11 of the *Liquor Control and Licensing Regulation* (“*Regulation*”), by operating the establishment in a manner that was contrary to the establishment’s primary purpose. The Branch recommends a ten day suspension of the liquor licence. Item 1 of Schedule 4 of the Regulation provides a range of penalties for a first contravention of this type of a licence suspension of ten to fifteen days and/or a monetary penalty of \$7,500.00 to \$10,000.00.

The Licensee admits that the contravention occurred as alleged, but provides submissions as to the appropriate penalty.

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, RSBC 1996, c. 267

Action against a licensee

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 what is a reasonable penalty?

EXHIBITS

The following documents were submitted for consideration:

- Exhibit 1 – Branch's disclosure documents as outlined in a letter, dated August 23, 2010, to the Licensee, including a Notice of Enforcement Action letter dated June 4, 2010, and which includes the liquor inspector's and the RCMP officers' evidence and the Branch's reasons for recommended enforcement action and penalty.
- Exhibit 2 – an e-mail communication dated September 9, 2010, from the Licensee to the Branch setting out submissions in support of its position in regard to the recommended penalty.
- Exhibit 3 – the Branch's response to the Licensee's submission, dated September 14, 2010.
- Exhibit 4 - e-mail communication of the Licensee, dated September 23, 2010 in response to the Branch's submission.

EVIDENCE

As previously noted, the Licensee does not dispute that the contravention occurred and, therefore, is deemed to accept the facts as put forward by the Branch with respect to the issue of whether a contravention occurred. The Licensee has, however, made submissions in respect to the appropriateness and fairness of the penalty which the Branch has recommended.

As a result of the liquor inspector's observations during a routine inspection carried out at the establishment on January 22, 2010 and his concerns that the Licensee was operating contrary to the terms of its food primary licence, the liquor inspector requested that the RCMP conduct a walk-through inspection. Accordingly, on January 27, 2010, a lead RCMP officer and his partner attended at the establishment on two occasions on the evening of January 27, 2010 and the early morning of January 28, 2010, and conducted uniformed inspections, each of which were approximately five to ten minutes

in length, which was enough time to walk in, make a lap of the restaurant, talk to staff members and patrons, make notes and exit the premises.

The officers first attended at approximately 10:55 pm and upon entry immediately noted a very loud live band performing. The band was, apparently, so loud that the music could be heard in the parking lot. The lead RCMP officer further noted that no one was eating and, in fact, there were no menus, condiments, cutlery, nor any semblance of food service visible. Although there were servers going in and out of the kitchen, no food was being transported.

In addition, all tables in the establishment were occupied with drinks and all food and all items related thereto had been removed from the tables. There was also a group of approximately thirty to forty patrons standing in front of the service bar and most of them had drinks in hand.

At approximately 1:00 am, a second walk-through inspection was conducted by the same RCMP officers. At that time the bar was closed and staff members were attempting to remove patrons from the establishment. The music was turned off and the doorman was preventing patrons from regaining access to the establishment. Customers were finishing their drinks and the tables appeared to be in the same state as the previous visit by the two RCMP officers that evening. During both walk-throughs the officers could not detect the smell of food and could not hear food preparation taking place.

Subsequently, the liquor inspector obtained copies of the daily, hourly sales summary for the evening of January 27, 2010. Those records indicated that from 9:00 pm to 1:00 am, the liquor to food ratio was 29:1, or \$4,629.89 to \$160.15. Also, the difference in liquor sales compared to food sales, from 11:00 am to 1:00 am, on January 27 and 28, 2010, was \$5,985.89 (liquor) and \$1,920.27 (food).

Furthermore, the data also indicated that liquor purchased by the establishment increased from \$4,388.36 in September of 2009, to \$18,775.54, in December 2009.

Submissions of the Branch:

The Branch notes the admission of the contravention by the Licensee which confirms that the focus of the establishment had shifted from the service of food, to service of liquor on the late evening of January 27, 2010 and the early morning of January 28, 2010.

The Branch further notes that the significant difference between food and liquor sales on the night of the alleged contravention cannot be explained away by the reasons put forth by the Licensee. Specifically, the Branch points out that the Licensee's statement that "it is clear to everyone that most people eat dinner before 9:00 pm, and thus sales after late hours will largely be in liquor and thinking otherwise is not realistic" amply demonstrates that the Licensee considered it inevitable, if not normal, to change the focus of the business at certain hours of the night.

The Branch says that operating in such a manner is a clear violation of the Terms and Conditions Guide which provides that, under operating hours, a food primary licensee must operate as a restaurant at all times. In other words, an establishment cannot shift their operation to become a bar during certain hours of the day.

Furthermore, the Branch says that the responsibility for operating the establishment in compliance with the terms and conditions of its licence, as a restaurant, is the primary responsibility of the Licensee. Accordingly, the Licensee is obligated to operate its licensed establishment in compliance with the *Act*, the *Regulations* and terms and conditions of its licence, with a view to averting contraventions and to working towards voluntary compliance. The Branch states that it is likely that the contravention occurred due to the fact of the Licensee's lack of familiarity with the requirements of a food primary licence. Accordingly, this attitude is a compelling reason why the recommended penalty should be applied with respect to this particular contravention.

Finally, the Branch submits that the absence of a compliance history does not minimize the seriousness of this admitted contravention. It is contrary to the public interest to allow restaurants to operate as bars. Moreover, the possibility of exposure to and consumption of liquor by minors is particularly high in a food primary establishment where minors' access to the restaurant is not prohibited. Accordingly, a ten day licence suspension is warranted.

Submissions of the Licensee:

The Licensee admits that the contravention occurred, but says that it naively went about operating in a fashion that it thought was morally correct and just, however, under the Branch's regulations it was, in fact, in contravention. The Licensee wishes to stress the point that it did not commit the contravention intentionally. The Licensee further submits that it has not had any further complaints in any aspect of its operation of the establishment since the contravention, at that point some eight months ago.

The Licensee seeks leniency concerning the eventual penalty and bases this on the fact that the Licensee is, in fact, a good operation which made an honest mistake and that once it learned of this mistake it promptly moved to address the concerns and operate according to the licence. Furthermore, the Licensee says that it has had nothing but support from the community and it has had no issues arising with community members or community authorities.

In light of the above, and in light of the fact that the Licensee now fully understands the nature of its contravention, and the fact that the establishment has already made adjustments in compliance, it feels that a penalty would be unnecessary. In the alternative, however, if a penalty were to be implemented in October, it would ask for the minimum closure. In the event that the penalty were to be implemented any time between November and April, however, the Licensee would ask for the minimum monetary penalty to be paid in instalments over a three month period. To do otherwise, would have a serious impact on the financial liability on its operation.

ANALYSIS AND DECISION

The Licensee has admitted to the contravention. Having considered all of the evidence, I find that, on the late evening of January 27, 2010 and the early morning of January 28, 2010, the Licensee contravened Section 20 of the *Act* and Section 11 of the *Regulation*, by operating contrary to the establishment's primary purpose, as stated on its licence.

The Licensee is entitled to a defence to the allegations of the contravention, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The Licensee must not only establish the existence of procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

Here, there is virtually no evidence upon which I can find that the Licensee was duly diligent. In fact, the evidence is to the contrary. In this regard, I note the Licensee has pleaded that it was not aware of its obligations under the *Act*, the *Regulation*, or the terms of its licence and, therefore, it did not intentionally commit the contravention. Ignorance of the law, of course, is not a defence and even though the Licensee claims that it has learned from its mistake and has promptly moved to address the Branch's concerns and is operating in accordance with its licence, this does not qualify the Licensee to successfully claim a defence based on due diligence.

PENALTY

Pursuant to Section 20(2) of the *Act*, having found that the Licensee has contravened the *Act*, the *Regulation* 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 by 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 penalty proposed in the Notice of Enforcement Action.

The Branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act*, the *Regulation*, and terms and conditions of the licence. 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.

Food primary establishments must have, as their paramount focus, the service of food during all hours of operation. Restaurants offer liquor service as an accompaniment to food, rather than as the primary activity. 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. Restaurants operating as bars tend to be associated with community complaints around late night noise, intoxication and other behaviour contrary to the community standards and the public interest.

There is no previous proven contravention of the same type for this Licensee within the year preceding this incident. Schedule 4, Item 1 of the *Regulation*, sets out penalties for a first contravention of this kind, which includes a licence suspension of ten to fifteen days and/or a monetary penalty of \$7,500.00 to \$10,000.00. The Branch recommended a suspension of the licence for a period of ten days, which is the minimum suspension penalty for this contravention.

In the circumstances of this contravention, I can see no reason to disturb the Branch's recommendation. In fact, that is precisely the penalty sought by the Licensee in its e-mail communication to the Branch of September 23, 2010 (Exhibit 4), wherein it states that "if the penalty were to be implemented in October, we would ask for the minimum closure." Accordingly, in all of the circumstances of this contravention, I find that a ten day suspension of the Licensee food primary licence is appropriate, necessary and reasonable in order to bring the Licensee into compliance.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of food primary licence number 017915 for a period of ten days, to commence the close of business on Tuesday, November 2, 2010, and to continue each succeeding business day until the suspension is completed. I have purposely not provided for much lead time for the commencement of the suspension in recognition of the Licensee's desire to serve the suspension in October, as opposed to later in the winter season. "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 number 017915 be held by the branch or the RCMP Revelstoke Detachment from the close of business on Tuesday, November 2, 2010 until the Licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

George C.E. Fuller

General Manager's Delegate
2018

Date: December 19,

cc: RCMP Revelstoke Detachment

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

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