



**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:	QB Habitat Resources Inc. dba The Habitat 248 Leon Avenue Kelowna, BC V1Y 6H9
Case:	EH10-058
For the Licensee:	Quinn Best
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	August 17 & 18, 2010
Place of Hearing:	Kelowna, BC
Date of Decision	September 9, 2010

**Ministry of Housing
& Social
Development**

Liquor Control and
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INTRODUCTION

QB Habitat Resources Inc. (the licensee) operates The Habitat located at 248 Leon Ave., Kelowna BC, V1Y 6H9. Quinn Best (licensee principal) is the principal shareholder of the licensee. The licensee holds Food Primary Liquor Licence 302570 for the establishment. The hours for the sale of liquor are from 9:00 a.m. to midnight daily. The capacity is 106 persons in the main area and 27 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.
- 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.

ALLEGED CONTRAVENTION and PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated May 13, 2010.

The branch alleges that on April 3, 2010, at 8:50 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 branch is treating this contravention as a second for the purposes of penalty, and the proposed penalty is a 25 day licence suspension (item 1, Schedule 4 of the *Regulation*). Item 1 of Schedule 4 of the *Regulation* provides the range of penalties for a second contravention of this type as a licence suspension for 20 - 30 days.

The licensee disputes the contravention.

RELEVANT 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 Regulations (the Regulations)

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 exhibits were presented:

- Exhibit:1** Email correspondence exchanged between the branch and the licensee from August 4th to 12th, 2010, regarding the disclosure of documents.
- Exhibit 2:** Licensee undated memorandum titled, "Issues to Address regarding documents".
- Exhibit 3:** Canada Post "Delivery Notice" dated August 5, 2010.
- Exhibit 4:** Branch Book of Documents #1, tabs 1 – 16.
- Exhibit 5:** DVD video disc titled, "Video @ Habitat".
- Exhibit 6:** CD audio disc titled, "Council audio May 25/2010".
- Exhibit 7:** Licensee correspondence dated August 4, 2010, with one page attachment.

Preliminary Issue regarding disclosure of documents

At the time of the preliminary hearing conference on June 16, 2010, the branch registrar determined that the final date for the disclosure of documents and of witnesses' names was to be August 4, 2010 (exhibit 4, tab 16). On August 4th the branch advocate sent an email to the licensee principal advising that the branch's book of documents and a DVD video recording were being forwarded to the licensee via Canada Post (CP) overnight delivery. CP attempted delivery to the licensee on August 5th without

success. The licensee principal likewise was unsuccessful in picking up the items from the CP depot on that date. The licensee principal was away from his residence following that date with the result that the materials did not reach him until the morning of the hearing (August 17th). The licensee principal requested that as a result of the late disclosure the book of documents be excluded from evidence.

Discussion revealed that the only items in the branch's book of documents not previously known to the licensee principal were notes, photographs, and a DVD video made/taken by the liquor inspectors during the course of their inspection at the time of the alleged contravention. The licensee principal was given the opportunity to peruse the items and invited to then request adjournment of the hearing if he felt it was warranted. The licensee principal elected to proceed with the hearing as scheduled.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

The branch called two liquor inspectors as witnesses.

Liquor Inspectors, A and B testified that on April 3, 2010, they were assigned to make unannounced covert inspections of licensed establishments in the Kelowna area. In this capacity they enter an establishment posing as a regular patron and observe how the establishment is being operated. A list of establishments to be inspected was drawn up in conjunction with the local liquor inspector who was not part of the inspection team on that night. During the course of their inspections contraventions were noted at two of the establishments, The Habitat and one other. Enforcement proceedings were undertaken for both contraventions.

The inspectors entered The Habitat at approximately 8:50 p.m. A sign advertised, "Salsa Dance Night". They were greeted by a woman at the front door, paid a \$7 cover charge and were given a gold coloured wristband. A sign at the door read that if patrons purchased more than one drink they must order a meal. Inspector B asked the woman at the door if the sign meant that she had to order food because she had had dinner and just wanted a drink. The woman replied, "I don't know anything about that, you can order drinks."

Inside, they proceeded to the liquor service bar where inspector A purchased two drinks from the bartender, a glass of red wine for herself and a vodka cooler for inspector B. They were not asked whether they were ordering something to eat. They had no further interaction with staff and were not directed to any particular area of seating within the establishment. They took seats at a high table in front of the bar overlooking the dance floor. The table is within the area designated as the lounge in the authorized floor plan for the establishment (exhibit 4, tab 4).

The atmosphere was one of persons having fun. Music was playing and the lighting was appropriate. There were about 60 - 70 patrons in the establishment. Dance instructions and demonstrations were given on the stage area with some couples dancing on the dance floor and others either watching or chatting among themselves. Many of the patrons were consuming drinks consisting of wine, beer, cocktails or water. Liquor was being served to patrons at the bar by the bartender and at tables by a server. About half of the tables held a menu and cutlery. Inspector A perused the menu; it appeared to be acceptable for a food primary establishment. She took some photographs (exhibit 4, tab 11) and short video clips of patrons in the establishment (exhibit 5). The inspectors testified that they were unaware of where the kitchen was located in the establishment. Normally it is obvious as a result of food being carried from the kitchen area to patrons at tables. Here, there was only one order of food served during their time in the establishment. It consisted of an order of flatbread and dip (photo at exhibit 4, tab 11c). None of the other tables held any remnants of food having been served. The inspectors spent about 70 minutes in the establishment,

leaving at approximately 10 p.m. They walked to their vehicle and wrote up notes of their observations.

Inspector A in her testimony identified copies of documents taken from the branch file for this establishment. The food primary licence for the establishment (exhibit 4, tab 3) states, "For the sale and consumption of all types of liquor in establishments with a primary focus on the service of food." It is subject to the terms and conditions contained in the branch publication "Guide for Liquor Licensees" (the Guide). Patron participation entertainment other than games is permitted. It has a lounge endorsement. A designated lounge area is a separate area within a restaurant where patrons may order a drink without the intent of ordering a meal.

She referred to the Guide (exhibit 4, tab 7) which outlines the requirements for operating a food primary licensed establishment, including those provisions concerning food primary requirements (pages 10 & 11) and the roles of the licensee and the liquor inspector (pages 8 & 9). The local liquor inspector responsible for the area at the time that the establishment was licensed completed an interview report (exhibit 4, tab 5) and the licensee viewed a branch presentation for food primary licensees (exhibit 4, tab 9). On July 10, 2008, the licensee attended a compliance meeting with the local liquor inspector then responsible for the area. The meeting was held to discuss the restaurant operating contrary to its primary purpose; it was a restaurant operating as a bar (exhibit 4, tab 6). The licensee committed to operating the establishment within the terms and conditions of the licence.

Inspector A testified that she and the local inspector, who did not appear as a witness, requested that the licensee principal provide them with copies of business documents including the food and liquor receipts for the night of April 3, 2010, and food and liquor sales for the period between March 19 and April 20, 2010 (exhibit 4, tab 12). The receipts and other documents were received (exhibit 4, tabs 12 & 13).

Inspector A conducted an analysis of the food and liquor sales from the documents received from the licensee:

- Sales summary for the period of business from March 19th to April 20th the ratio of food & non-alcoholic beverage sales to liquor sales was 40% food and non-alcoholic beverages to 60% liquor (exhibit 4, tab 13a at page 2).
- Sales summary for April 3rd the ratio of food and non-alcoholic beverage sales to liquor sales was less than 10% food and non-alcoholic beverages to greater than 90% liquor (exhibit 4, tab 13b at page 13).
- Sales receipts for April 3rd (exhibit 4, tab 13c). These receipts were at odds with the above-noted sales summary provided by the licensee for that date. The receipts show a considerable amount of food sold; whereas the above-noted summary shows only \$42 sales for food for that date. The receipts do not include the red wine and vodka cooler purchased by the inspectors, or the flatbread and dip served to a nearby table.

As a result of her investigation the inspector believed that the establishment was being operated contrary to its primary purpose and completed a contravention notice (CN) on April 21, 2010 and mailed it to the licensee (exhibit 4, tab 2). She completed a NOEA on May 13, 2010, and mailed it to the licensee (exhibit 4, tab 1). In recommending enforcement action she was concerned that the licensee circumvented the licensing processes of the branch. The licensee had received previous CNs and attended a compliance meeting regarding the same type of contravention. The licensee principal had attended the initial licensing information session. The licensee had a previous contravention of operating contrary to primary purpose on September 10, 2009, for which a monetary penalty of \$7500 was ordered. She felt that a penalty was necessary to achieve voluntary compliance and recommended a 25 day licence suspension, a mid-level suspension penalty for a second contravention.

During the course of presenting her evidence, at the request of the licensee principal, Inspector A listened to an audio clip (exhibit 6) of the general manager LCLB addressing the City of Kelowna mayor and council. The general manager explained that food primary licensed establishments with a patron participation endorsement, which includes music and dancing, must be referred to local government for comment. This is because such establishments can shift their focus from being a food primary establishment and have an impact on the community. The mayor advised the general manager that the Kelowna city council did not wish to comment on whether a licensed establishment was permitted dancing as a form of entertainment.

EVIDENCE - THE LICENSEE

The licensee called five witnesses.

Licensee witness C testified that he is the owner of a Latin dance studio. The studio, through an agreement with the licensee, holds Salsa Nights at The Habitat for the purpose of demonstrating Latin dancing to patrons, most of whom are students of the dance studio. During the Salsa Nights at the Habitat his mother and two dance studio staff assist him. The habitat opens at 6 PM and patrons may come for dinner before the dance instructions or may eat later during the night. The music commences at 7 p.m. and the dance instructions begin at 8 p.m. Latin dancing continues until 10 p.m. From the 6 p.m. opening until 10 p.m. dance studio personnel collect the cover charge at the front door. Habitat staff takes over after 10 p.m.

On April 3rd his mother was assisting him as a volunteer and was collecting the cover charge from patrons at the front door. On hearing that The Habitat faced enforcement action, he wrote a letter outlining his mother's involvement the night of April 3rd (exhibit 7). At the time his mother was not familiar with all the rules for the Habitat. She has since been made aware of the requirements and instructed that if she has any questions, she is to contact a Habitat employee.

Licensee witness D testified that she is the mother of witness C and often assists him as an unpaid volunteer on Salsa nights at the Habitat. She arrives at 6 p.m. and collects the cover charge and provides wristbands to patrons coming for Salsa Night. Many patrons ask where they should sit and she tells them to choose any table they like. Some order meals right away, some eat later, some order drinks right away. Habitat employees provide the food and drink service. Menus are always on the tables. A water station is set up for patrons to drink during the dancing activities. She does not recall specifically the night of April 3rd. She was at the front door collecting money and providing wristbands to patrons. One of the dance studio employees usually assists her, she is seldom alone. A Habitat employee takes over later in the night. She does not recall anyone asking her about the sign near the front door.

Licensee witness E testified that she holds a "Serving It Right" (SIR) certificate and has been an employee of the Habitat for almost two years. She is the assistant manager and as such is the floor manager and bartender/server. Her duties are outlined in The Habitat Employee Handbook Policies and Training at page 26 (exhibit 4, tab 13f). She was working in that capacity the night of April 3, 2010, and was in charge of the operation of the establishment. The night was without incident and she had left the establishment by 12:30 a.m. There were three other employees working that night, a server who started at 6 p.m. (witness F), a kitchen employee who started at 5 p.m. (witness G) and a doorman who started at 9 p.m. It was Salsa Night with patrons coming for dinner and dancing. They opened the establishment at 6 p.m. with persons coming early for dinner. Some patrons ate later. Dance studio staff were in attendance and were at the door until 10 p.m. when the doorman took over. Dance lessons began around 8:30 p.m. During the lessons there are more non-alcoholic drinks served than alcoholic drinks and a water station is set up. She testified that the summary of sales for that night showing total food sales of \$42 was incorrect. They were having software problems with their record system. The sales receipts (exhibit 4, tab 13c) show more than \$42 worth of food sold that night.

On Salsa nights most patrons obtain their liquor from the bartender at the bar rather than from servers at their tables as the patrons are moving throughout the establishment during the course of the night. The drinks in the photographs (exhibit 4, tab 11) show both alcoholic drinks and water in both bottles and glasses. All tables are set with menus that are removed from the table after the food order is taken. This lets staff know that those persons have been served food. There are signs at the front door area and at the bar and on the tables that patrons must purchase food if they wish to order more than one alcoholic drink.

Staff meetings are held most weeks to discuss events of the previous week and plan for the following week. Staff job descriptions (exhibit 4, tab 13g) are posted in the employee area of the establishment. Staff evaluations are regularly completed. A meeting was held with personnel from the dance studio following the notification from the branch about April 3rd to advise the studio staff of The Habitat business requirements.

Licensee witness F testified that he has a SIR certificate and has worked at The Habitat for the past four years as the creative director and on occasion as a server. The Habitat posts notices on their Facebook page and website to notify clientele about forthcoming events (exhibit 4, tab 13d). Salsa Nights are held on Saturday nights with dinner and dancing. Patrons are encouraged to come early at 6 p.m. for dinner. Dance lessons take place between 8 & 9 p.m. There is very little food service during the dance lessons. He is familiar with the Habitat Employee Handbook (exhibit 4, tab 13f) and read through it about a year ago and recently with some new revisions. The handbook requires that liquor service staff must have a SIR certificate and stay up to date with service standards. Regular staff meetings are held. He created the sign at the front door about a year ago to identify to patrons that the Habitat is a restaurant and patrons wanting to order multiple drinks will have to order food. He was working the night of April 3rd as a server; it was a Salsa Night with dancing and dance lessons. Photographs taken during the night depict alcoholic beverages and water being served (exhibit 4, tab 11).

Licensee witness G testified that she has worked at the Habitat since March of this year. She is in charge of the operation of the kitchen and is responsible for maintaining inventory and preparing food orders. She was working the night of April 3rd, Salsa night. She started about 6 p.m. doing about an hour of prep work prior to opening at 7 p.m. Salsa nights usually have an older clientele ordering platters and appetizers. There is normally a lull in food orders between 8:30 and 10 p.m. when the dance lessons are taking place. She will sometimes try to introduce new food items by preparing free samples for the customers. She does not recall the events of April 3rd but was informed that there were liquor inspectors in attendance. She is familiar with the employee handbook (exhibit 4, tab 13f). Staff meetings are held and staff evaluations completed.

BRANCH SUBMISSIONS

The branch advocate's submission is summarized as follows:

The Habitat is a restaurant holding a food primary licence. The evidence of the liquor inspectors is that at the time of the inspection the establishment was open for business; alcoholic beverages (liquor) were being served and consumed by patrons in the establishment. With the exception of one order of flat bread and dip there was no evidence of food having been/being served. The Guide allows for the "occasional" service of liquor without food "as long as you are running your business properly, as a restaurant". This does not allow for a shift in focus to a preponderance of liquor service and no food service. Having a "patron participation" entertainment endorsement does not allow a food primary establishment to operate as a liquor primary establishment. The licensee's sales summaries for the period of March 19th to April 20 show that the establishment operates with a 40% food to 60% liquor ratio. The summary for April shows a ratio of over 90% liquor. The licensee says that this summary was in error. The licensee should have corrected the error prior to the hearing. In conclusion the evidence supports the alleged contravention.

The licensee has not proven the defence of due diligence. While it has policies to prevent the service of liquor without food it did not enforce the policies with its employees. The licensee has a previous history of operating the establishment contrary to its primary purpose. The branch advised the licensee of its concerns with the operation of the establishment however the licensee failed to address those concerns. The licensee could have provided more training to its staff on how to enforce the food requirement and could have provided training to its managers to enforce the policies.

The proposed penalty is necessary to reinforce to the licensee the need for voluntary compliance.

LICENSEE SUBMISSIONS

The licensee principal's submission is summarized as follows:

The liquor inspectors failed to follow proper investigative steps during the inspection. They sat in the establishment and did not attempt to collect evidence by engaging in conversation with patrons or staff. They did not investigate to determine where the kitchen was located and whether it was open for service. There is no evidence that food was not served to patrons prior to the inspectors' arrival. The level of liquor service is not documented clearly. There is no ratio of drinks of liquor and those of water. The inspectors did not get a receipt for their liquor purchases. The evidence in the photographs is not proof of the contravention. They contain little evidence of liquor except for that served to the inspectors within the lounge area where food service is not required. There is no evidence of liquor served in the main dining area. The person at the door at the time of the inspectors' arrival was not an employee of the licensee. Licensee's staff was available if the inspectors had a question, but they chose not to speak to them. The signs in question have been in the establishment for over a year and have not been questioned by the local inspector. The one drink rule is acceptable under the terms and conditions in the Guide. Patrons can order a drink prior to ordering

their food. A menu is placed on each table and removed when the patrons have ordered food.

The establishment was not operating as a liquor primary establishment. Patrons came for the night, had dinner and took part in the dance lessons. Food was available throughout the night. There were no public safety issues with the operation of the establishment.

The licensee does practice due diligence, otherwise there would be complaints from the city or the police. The licensee complied with the branch's request for documents even after the CN had been issued. The licensee has a handbook for its employees in which it has incorporated feedback received from the branch. All employees are evaluated on their performance.

The sales summary for April 3rd showing only \$42 worth of food sold was incorrect and unrealistic. Had the branch provided timely disclosure of documents the mistake in the document could have been corrected.

Witnesses were challenged to recall events occurring five months previous. Delay is a recurring problem within the branch. The licensee witnesses were able to articulate the processes followed the flow of the evening and that the establishment was operating as a food primary establishment with a patron participation endorsement.

The proposed 25 day suspension penalty is inconsistent with the 14 day suspension for the other establishment for the same contravention on the same night. The Habitat recently paid a \$7500 monetary penalty. There should be a grace period given to the Habitat in order that an application for a new liquor primary licence can be approved. The issuance of the licence has been delayed as a result of the enforcement proceedings. The new licence will allow the Habitat to operate in compliance.

REASONS AND DECISION

The regulatory requirements for the licensing of food primary establishments are found at section 11 of the *Regulations*. Section 11(1) provides that: “A food primary licence ... may be issued ...if the primary purpose of the business carried on in the establishment is the service of food *during all hours* of its operation.” [my emphasis]

Section 11(3) provides that: “The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is ... the service of food *during all hours* [my emphasis] of its operation, any or all of the following:

- (a) kitchen equipment;
- (b) furnishings and lighting;
- (c) menu;
- (d) type and hours of entertainment and games offered by the licensee;
- (e) advertising;
- (f) hours of operation;
- (g) financial records;
- (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment;
- (i) any other relevant consideration that may assist in the determination.”

Giving consideration to all of the evidence, my findings related to each of the enumerated items are:

- (a) kitchen equipment – at the time of the alleged contravention the kitchen was staffed, operative and available for food service to patrons.

(b) thru (h) – insofar as the evidence presented, the items listed under these headings were all suitable for a food primary establishment with a patron participation endorsement.

(g) financial records; and (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment – the evidence here is not reliable. At least one of the summaries of food and liquor sales was incorrect. While there are receipts for substantial food and liquor sales for April 3rd there is evidence that these receipts did not include two known sales, namely the inspectors' drinks and the food order depicted in photograph at exhibit 4, tab 11c. [I pause to note that all of the records introduced are those of the licensee which were provided to the branch during April and May, 2010. The responsibility for the authenticity and the explanation for any errors is entirely that of the licensee.]

Section 11(3)(i) allows the general manager to consider, “any other relevant consideration that may assist in the determination.” In my view it is appropriate to consider evidence of how the establishment was being operated at the time of the alleged contravention. There are several points in the evidence that I am satisfied are relevant and probative to the issue. The first is how patrons are being greeted. This is important as it may set the tone for the expectations between the licensee and its patrons. Here the evidence is that of the liquor inspectors and licensee witness D. The inspectors were first greeted by licensee witness D who collected the cover charge to enter the establishment. The inspectors were not told that this was a food primary establishment and that patrons were expected to order food service. One of the inspectors asked about the meaning of a sign and whether it was necessary for her to order food. Witness D advised her that she did not know what the sign meant, but that the inspector could order drinks. Witness D in her evidence did not recall the conversation, but admitted that she was not familiar with the establishment's policies regarding food and liquor service. The inspectors proceeded to the liquor service bar and each ordered an alcoholic drink (liquor). They were not asked whether they intended to order food. They were not shown to a table and chose to seat themselves in the designated lounge area as it allowed for a clear view of the establishment.

They could just as easily have chosen to sit in the main area. They were not approached by service staff during their stay.

It is also relevant and probative to consider the evidence of food and liquor service to patrons. The "Guide" (exhibit 1, tab 10 at p. 6) provides "As long as you are running your business properly you may *occasionally* serve liquor to a customer, without food, at any table within the dining area." The evidence of the liquor inspectors is that liquor service was being provided to patrons at the liquor service bar and to patrons seated throughout the establishment. There was no evidence of food service to any of the patrons seated in the main dining area. There was only one food order delivered and it was to a table within the lounge area. This was not contradicted by evidence for the licensee. I find that the evidence is not consistent with the provision that a licensee may *occasionally* serve liquor to a customer, without food, at any table within the dining area.

Primary purpose relates to the focus of the business and the class of licence that has been issued. For a food primary establishment, that is the service of food. The service of food must remain the primary purpose at all times during the hours of the liquor licence. A patron participation endorsement allows for certain types of entertainment to take place in the establishment during the licensing hours. The endorsement does not change the primary purpose.

In my view, and I so find, allowing patrons to have dinner early in the evening then to remain in the establishment for the remainder of the night and consume liquor is not in keeping within the terms and conditions of the licence. To do so moves the primary purpose away from the service of food.

On the whole of the evidence, I find on a balance of probabilities that on April 3, 2010, at 8:50 p.m. the licensee operated the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence. That on its face is contrary to section 20(1)(d) of the *Liquor Control and Licensing Act (the Act)* and section 11(1) of the *Liquor Control and Licensing Regulations (the Regulations)*.

Due Diligence

The defence of due diligence is a complete defence to contraventions under the *Act* and *Regulations*. The onus is on the licensee to demonstrate, on a balance of probabilities, that it implemented adequate systems to prevent the contravention and took all reasonable steps to ensure the effective operation of the system. The licensee must also establish that the employee connected to the contravention was not the directing mind of the licensee. The existence of policies is not sufficient to demonstrate due diligence if the directing mind on site at the relevant time ignores them, or makes no effort to see that they are enforced.

The licensee argues that it has exercised due diligence. It has developed an employee handbook that has incorporated the feedback it has received from the branch. All employees are evaluated on their performance. The establishment has signs throughout advising patrons of the one drink rule. They have not received any complaints about their operation from the police or the City of Kelowna. They provide a safe place for their clientele. The photographs depict more water than liquor being served.

I have considered the licensee's argument. I do not accept that it amounts to due diligence. The licensee has been advised by branch staff of the requirements necessary to operate its establishment in compliance with the terms and conditions of its licence and has failed to do so.

The licensee has policies in place to guide its employees. The policies do not go far enough. They do not instruct employees that patrons ordering a meal early in the evening cannot remain and consume liquor for the remainder of the evening. Further, staff were not following the policies. The person in charge of the establishment at the time of the inspection, who may be considered the directing mind of the licensee, was herself not enforcing the policies nor supervising staff to ensure that they enforced the policies. The person responsible for greeting patrons as they entered was not

instructed about the policies or how to implement them. The signage regarding the one drink rule standing by itself is misleading. It gives the impression that patrons can attend the establishment and so long as they restrict their consumption to one alcoholic beverage there is no requirement to order food. Patrons need to be made aware that they are in a dining establishment. If they are intending to order food they may be served an alcoholic beverage beforehand, but a food order must be made before a second drink order is taken. Patrons may be advised that a small lounge area is available for those patrons who would like an alcoholic beverage but do not wish to eat. It is important that this advice be given to patrons in an establishment such as the Habitat particularly on Salsa Nights where the majority of patrons are coming for dance instruction and dancing.

On the whole of the evidence, I find that the licensee has not been duly diligent and has “permitted” the contravention.

In conclusion, I find on a balance of probabilities that on April 3, 2010, at 8:50 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.

Administrative Fairness

The licensee has argued that it has been prejudiced in the delay by the branch in bringing the issue to a hearing. Witnesses were challenged to recall the events of the night and an application for a liquor primary licence has not proceeded.

The evidence is that the inspection and alleged contravention took place April 3, 2010. Requests for documents were made on April 6th & 19th and on May 3rd. A CN was issued on April 21st and a NOEA on May 13th. A pre-hearing conference was held on June 16 with the hearing dates of August 16th & 17th agreed upon by the parties.

Delay may be a factor to be considered in determining if there has been administrative fairness. Any delay should not be unreasonable or be prejudicial to the licensee. Here the enforcement process moved along at a reasonable rate of progress. The licensee had timely notice that the branch was investigating the operation of the licensed establishment for the night of April 3rd and could have taken written statements from persons associated with the operation of the establishment on that night to assist their recall at a later time. That the liquor primary licence application is being held in abeyance during the enforcement process is in my view, and I so find, a reasonable policy on the part of a regulatory agency responsible for the issuance and oversight of liquor licenses.

On the evidence, I find that the delay was not unreasonable, nor in itself, responsible for prejudice to the licensee.

The licensee has argued that another licensed establishment inspected on the same date had the enforcement process completed prior to this hearing being held and received a 14 day licence suspension, a lesser penalty than that recommended in this case. I am not privy to that enforcement process. It is my experience that some hearings proceed in less time than others. There can be a variety reasons for this including the complexity of the investigation, availability of witnesses and the ability of a licensee to waive the holding of a hearing. Penalties differ on different fact patterns. Each case is judged on its own merits. In this instance, this is a second contravention for operating contrary to primary purpose, the minimum suspension penalty, if one is imposed, is a 20 day suspension. A 14 day suspension is not an option for the branch or the adjudicator.

In conclusion, I find that there has not been a denial of administrative fairness in this case.

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. The licensee has made application to the branch for a liquor primary licence, which if granted, will allow the licensee to operate in compliance with the requirements of the licence.

In the circumstances of this case a branch liquor inspector met with the licensee principal prior to the licence being issued and outlined the requirements for the operation of a food primary establishment. Following the issuance of the licence a branch inspector conducted a compliance hearing with the licensee principal and discussed the requirements for the operation of a food primary establishment with the terms and conditions of the licence. A previous enforcement hearing held in January of this year found that there had been a contravention of operating contrary to the primary purpose of the licence and a monetary penalty was imposed to bring about voluntary compliance. That did not have the desired effect, leading to the contravention of April 3, 2010. Should this licensee continue to hold this or any other form of liquor licence, compliance with the licence requirements is required. 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 second contravention of this type is a licence suspension for 20-30 days.

In the circumstances of this case, I find that the 25 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. 302570 for a period of twenty (25) days, to commence as of the close of business on Friday, October 15, 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. 302570 be held by the branch or the RCMP Kelowna Detachment from the close of business on Friday, October 15, 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 9, 2010

cc: Kelowna 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