



**DECISION OF THE
GENERAL MANAGER
LIQUOR CONTROL AND LICENCING BRANCH**

IN THE MATTER OF

A hearing pursuant to Section 20 of

The Liquor Control and Licensing Act RSBC c. 267

Licensee: Mackenzie Junction Enterprises Ltd.
Dbas Fraser Lake Inn
111 Chowsunket Street
Fraser Lake, BC V0J 1S0

Case: EH10-031

For the Licensee: Alison Latimer
Arvay Finlay Barristers

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: November 10, 2010

Place of Hearing: Vancouver

Date of Decision: January 13, 2010

INTRODUCTION

Mackenzie Junction Enterprises Ltd. (Licensee) holds food primary licence 078014 for an establishment located in the Fraser Lake Inn in Fraser Lake B.C. The Licensee also holds two other licences in the hotel, for a liquor primary establishment and for a licensee retail store.

Food primary licence 078014 stipulates that the hours of liquor sales are from 11:00 a.m. to 1:00 a.m. Monday through Saturday and 11:00 a.m. to midnight on Sunday. The licence is subject to terms and conditions, including those contained in the *Guide for Liquor Licensees in British Columbia (Guide)*.

The licensed capacity of the food primary is 40, 64, and 105 patrons in three areas, which I will refer to as areas 1, 2, and 3, respectively. Area 1 is a banquet room. Area 2 is a coffee shop. Area 3 may have been used as a banquet room many years ago, but was leased to a second-hand store that was operating when the Licensee took possession of the establishment in May 2008.

There were some irregularities in this licence prior to the alleged contravention including modifications to the floor plan that effectively severed area 3 from area 2, and the use to which area 3 was put. The modifications were done by both the previous owner and the Licensee and should not have been undertaken without the approval of the Liquor Control and Licensing Branch (Branch). A lease to a second-hand retail store is not an approved use of a licensed premise and, if known to the Branch, would have resulted in the cancellation of the licence. These irregularities were not brought to the Licensee's attention either on the initial food primary inspection interview with the Branch or in subsequent inspections by the liquor inspector.

The occupant of area 3 had financial difficulties and abandoned its lease some months after the Licensee took possession of the hotel. The Licensee installed S.O. as manager of the whole of the property. S.O. advertised the vacant space (area 3) and eventually leased it to tenants, the identities of which were not disclosed during the hearing. The tenants constructed a marijuana grow operation in the leased space. Police discovered the grow operation and notified the Branch.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

By Notice of Enforcement Action (NOEA), dated October 12, 2010, the Branch alleged that on March 4, 2010, the Licensee contravened section 36(2)(b) of the Act by authorizing or permitting in the licensed establishment unlawful activities or conduct. The proposed penalty is a cancellation of all three of the liquor licences held by the Licensee corresponding to establishments within the Fraser Lake Inn.

RELEVANT STATUTORY PROVISIONS

See Schedule A, attached.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty warranted under the circumstances?
3. If a penalty is warranted, what is the appropriate penalty?

EXHIBITS

Exhibit 1 - Branch's book of documents (submitted by Branch)

Exhibit 2 – Statutory Declaration of R.A.G. (submitted by Licensee)

Exhibit 3 – Notice of Suspension of all three licences dated March 16, 2010 (submitted by Licensee)

Exhibit 4 – Notice of Reinstatement of a Suspended Licence (Liquor Primary) dated November 5, 2010 (submitted by Licensee)

Exhibit 5 - Notice of Reinstatement of a Suspended Licence (Licensee Retail Store) dated August 25, 2010 (submitted by Licensee)

EVIDENCE

Mr. Christopher Cho appeared at the hearing with counsel. I note that Mr. Cho had counsel throughout the enforcement process. Mr. Cho identified himself as the primary shareholder and officer of all three of the licensed establishments in the Fraser Lake Inn.

During the enforcement process the Branch issued three NOEAs: the original, an Amended NOEA, and a Further Amended NOEA. Only the Further Amended NOEA dated October 12, 2010 was entered into evidence.

Both the Branch advocate and the Licensee's counsel are signatories to an Agreed Statement of Facts dated November 5, 2010. The critical content of that statement includes the following:

- At all relevant times (August 2009 to March 4, 2010) S.O. was the manager and controlling mind of the operation acting on behalf of the Licensee with respect to all three licences.
- On March 4, 2010, the Royal Canadian Mounted Police Fraser Lake Detachment (RCMP) executed a search warrant at the Fraser Lake Inn.
- Inside area 3 of the food primary establishment the RCMP located approximately 700 marijuana plants in various stages of production and commercial quantities of gardening supplies and equipment.
- The marijuana found was identified by analysis to be a controlled substance under the *Controlled Drugs and Substances Act*, Schedule II.
- The expert opinion of the RCMP investigation unit was that the grow operation was in three stages: one crop had been harvested, one crop was half way to being mature, and one crop was freshly planted.
- The RCMP estimated that the grow operation was in existence from December 2009 to March 2010.
- The Licensee admits that the following violation took place: permit unlawful activities or conduct, namely permit a marijuana grow operation in the licensed establishment, contrary to section 36(2)(b) of the *Liquor Control and Licensing Act*. The word permit has been interpreted by the BC Supreme Court in *Cambie Malone's Corporation dba Cambie Hotel v, General Manager*, 2009 BCSC 987 at paragraph 52.
- The Licensee admits that it did not exercise due diligence in respect to the above.
- S.O. has made a statement to the RCMP that he had knowledge of the grow operation at least as early as February 2010 and he did not do anything about it because he was

allowing the individuals responsible for the grow operation to finish so they could pay their outstanding bill owing to the Licensee for food and lodging.

The liquor inspector testified that all three licences are under one roof. His opinion is that the illegal activities that occurred in area 3 and the staff servicing all three areas “transcended all of the licences under the one roof.” He said there was no delineation of duties between the food primary, liquor primary and licensee retail store. He said that he believes a clear message needs to be sent to the Licensee that can only be sent by cancelling all three licences. He emphasized that the three businesses are being run as one and so the licences should be cancelled as one. As to the risk to the public attending the licensed establishment, he said that the risk from chemical, electrical, structural, and criminal elements is a risk to the public in all three establishments. The Licensee is responsible for all three sets of patrons. The inspector testified that the Licensee chose to put all potential patrons at risk by failing to manage the establishments in a safe and responsible manner.

The inspector said that he reviewed the Liquor Distribution Branch purchases for the whole of the Fraser Lake Inn. He concluded that all of the purchases of liquor for all three establishments were typically made under the liquor primary licence. He indicated that there were few purchases made over a period of six months for either the food primary or the licensee retail store. He said this is highly unusual and speaks to the oddity of the nature of the operation in light of the illegal activities and the three licences operating as one entity, as the liquor bought through the LP was being funnelled to the food primary establishment and the licensee retail store.

CL testified that she worked as a waitress in the coffee shop in the hotel for approximately two years. She said she never worked in the liquor store or in the bar, and that she did not know there was a grow op in the hotel until after the drug bust.

R.G. testified that he lives in the Fraser Lake Inn and works there as the cook. He did not testify as to whether he cooks for the liquor primary establishment but he did make reference to preparing food that CL carried into the coffee shop. He said he never went into [area 3] and

although he was told that there was a marijuana smell coming from the area on one occasion, he did not notice it himself and found no reason to report that to his manager.

The statutory declaration of R.A.G. indicates that the author worked as a cook under the management of S.O. at the Fraser Lake Inn, he knew nothing of the renovation of area 3, and had very little contact with Mr. Cho. He said Mr. Cho was rarely present and was not actively involved in the operation of the hotel.

Mr. Cho testified that he lived in Coquitlam at all relevant times and that his home is a ten or twelve hour drive from Fraser Lake. He said that his motivation to purchase the Inn was that the mine announced that they were going to spend millions of dollars in the next decade, and he thought the town's economy would improve. He said that right after he purchased the business, the economy went down and the mine changed their plans to invest. He said it was hard to operate the hotel with so little revenue coming in from the local economy. Accordingly he decided to stay in Coquitlam for financial reasons and to continue to work at his other occupation.

Mr. Cho said that he had no idea that area 3 was part of the food primary licence until long after the drug bust. He said that no representative of the Branch ever brought the irregularities of the layout or the wall dividing the licensed area into area 2 and area 3 to his attention. He testified that he travelled to Fraser Lake a couple of times to fish with a relative, and a couple of times to deliver cheques to his manager, S.O. He said that those were the only times he went to the Fraser Lake Inn after purchasing it, and then he only stayed overnight to sleep and "take a quick look around."

SUBMISSIONS

The Branch submits that although the grow operation was contained in the food primary establishment, all three licences should be cancelled and this Licensee should not be able to maintain liquor licences and carry on liquor businesses in the same building in which that illegal activity was permitted. In support of that proposition, the Branch asserts that section 20(1)(d) identifies a licensee rather than an establishment as the object of an action for a contravention

of the *Act*, section 16(3) bars the General Manager from issuing or renewing a licence if it would be contrary to the public interest to do so, and section 20(2) empowers the General Manager to act to suspend or cancel any part or all of a licence. The Branch also submits that all three licences were transferred together to Mr. Cho when he purchased the hotel and all three licences are likely to be transferred together on when he sells the hotel. The Branch submits that as all three licences are intimately connected and have always been operated as one during the Licensee's ownership, cancellation of all three licences is warranted. The Branch also submits that anything short of removing all liquor licences from the hands of the Licensee would not be in the public interest.

The Licensee made no submissions against cancellation of the food primary licence but submits that the other two licences held by the Licensee in the Fraser Lake Inn should not be cancelled.

ANALYSIS AND DECISION

Although only the Further Amended NOEA dated October 12, 2010 was entered into evidence, both the Branch and the Licensee made submissions relating to earlier NOEAs. None of these submissions in my view are germane to the material issue to be determined. I find the Further Amended NOEA dated October 12, 2010 and identified as exhibit 1, tab 1 to be the only relevant NOEA. I am satisfied that the Licensee had adequate notice of, and chance to respond to, the allegation and proposed penalty contained in the Further Amended NOEA.

Some of the *viva voce* evidence provided by the witnesses, appeared to undermine or limit the effect of statements made in the Agreed Statement of Facts of November 5, 2010. To the extent that any of that evidence was inconsistent with the Agreed Statement of Facts, I accept the content of the Agreed Statement of Facts over the testimony. I find that the Branch and the Licensee were entitled to rely on the statements agreed to in advance of the hearing.

It is not necessary to wait until a resolution of the criminal matter in order to determine whether an unlawful activity has occurred in the establishment. While the burden of proof in a criminal matter is beyond a reasonable doubt, in this forum the balance of probabilities is sufficient for any finding. I must only determine that it is more likely than not that a particular event occurred.

I am satisfied from the agreed statement of facts and the documentary evidence provided in exhibit 1, particularly concerning the grow operation and the floor-plan of the establishment, that an unlawful activity or conduct has occurred in the licensed establishment. I am satisfied with the Licensee's admissions in paragraphs 18 and 19 of the Agreed Statement of Facts that the Licensee or its employee permitted the unlawful activity or conduct to occur and did not exercise due diligence.

I find that the contravention of s. 36(2)(b) of the *Act* occurred on March 4, 2010 as alleged.

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 NOEA.

Section 20(2)(e) of the *Act* provides the General Manager with the authority to cancel a licence in appropriate circumstances. Schedule 4 of the *Regulation* under the *Act* provides a range of penalties in addition to the specific authority of the General Manager to cancel a licence. Schedule 4, Item 8, of the *Regulation* stipulates that the range of penalties for a first contravention of s. 36(2)(b) of the *Act* is ten (10) to fifteen (15) days suspension and/or a

monetary penalty of \$7,500-\$10,000.

The Branch recommends that the licence be cancelled and says in support of that recommendation that the activity at the establishment constitutes a severe threat to public safety. The Licensee, at minimum, failed to identify the unlawful activity that was occurring in the food primary establishment. The Branch submits that failure calls into question the Licensee's ability to safely and effectively operate a licensed premise.

The contravention occurred in the food primary licensed establishment. Section 36(2) of the *Act* refers to activities or conduct in the *licensed establishment*. The grow operation was located entirely within the food primary licensed establishment. There is no doubt that the unlawful activity of a drug grow operation is a threat to public safety. In the interest of protecting the public I am left with no reasonable option but to cancel the food primary licence 0787014.

The remaining issue is what penalty, if any, is warranted against the other two licences attached to the Fraser Lake Inn. In my view, it is too broad an interpretation of the *Act* to say that because the action is permitted against a *licensee* in s. 20(1) of the *Act*, the action is not limited to the licence corresponding to the licensed establishment where the contravention occurred. In section 20(1) the language used is "the licence" or "the establishment." The use of the definite article "the" relates to a specific licence or establishment and by context clearly the one in which the issue arose. A fair and reasonable reading of s. 20 of the *Act* does not disclose an intention on the part of the legislature to allow enforcement activities related to a particular licence to be transferred to another licence. This interpretation is further supported in Schedule 4 of the *Regulation*, s. 1(1)(b) where the legislative drafters also used the definite article in the phrase "that establishment" when describing how to determine if a contravention is a first, second, or subsequent contravention.

The Branch renewed all of the licences in the Fraser Lake Inn after the allegation of the contravention of s. 36(2)(b) occurred. The Licensee submits that the language of s. 16 is instructive and provides no discretion to the General Manager. The General Manager *must* not issue, renew, or transfer a licence if contrary to the public interest. The Licensee submits that

as the Branch renewed the licences, it has already determined that the Licensee is fit and proper and that renewing those licences was not contrary to the public interest. I agree that the statute provides no discretion to the General Manager if she decides renewing a licence is contrary to the public interest. However, the Licensee's position does not take into account the status of this enforcement process at the time of the renewals. At the time the licences were renewed, it had not been determined that doing so was contrary to the public interest. By submitting to a comprehensive administrative process culminating in this decision, the Branch allowed the Licensee the full range of its administrative rights and entitlement under the principles of Natural Justice. The Branch's current position is not compromised by having renewed the licences.

Section 20(1)(d) by reference includes s.16 of the *Act* as defining additional circumstances for which the General Manager may take action. Section 16 of the *Act* is the provision under which the General Manager is authorized to decide if an individual is fit and proper and whether it is in the public interest to let them hold a liquor licence. As an enforcement hearing adjudicator I have no inherent jurisdiction. Under the authority of the *Act*, the General Manager has delegated the power to conduct and decide enforcement hearings to me, but I have not been delegated the authority to make a determination under section 16 of the *Act*. Therefore I find that I have no jurisdiction to consider the issue of whether the Licensee is a fit and proper person for the purposes of s. 16 of the *Act*. Furthermore, a licensee should be provided with unambiguous advance notice that he is participating in a hearing to determine whether he is fit and proper to be a licensee under the *Act*. I find that statements in the enforcement materials of this action indicating that the Branch seeks to cancel all of the Licensee's licences are insufficient notice of a fit and proper hearing.

In *Cambie Hotel* (EH07-115, LCLB March 12, 2008 pp. 7-9) the General Manager held that s. 36(2)(b) of the *Act* had been contravened. In that case, "blatant drug transactions" were taking place in the liquor primary establishment, the transactions were observed by staff members on several occasions, and the staff members failed to intervene. Although there was some fluidity between the food primary and liquor primary licences, the adjudicator limited the penalty to the establishment in which the contravention occurred. I have been shown no authority supporting

the General Manager's power to cancel a licence for an establishment other than one at which a contravention occurred at an enforcement hearing without a fit and proper determination.

In conclusion, while I find that cancellation of the food primary licence 078014 is reasonable and appropriate, I do not find that a penalty is warranted against the Licensee's other two licences, namely liquor primary licence 025753 and licensee retail store licence 195394.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the cancellation of food primary licence 078014 effective the date of this decision. To ensure this order is effective, I direct that the liquor licence be taken into possession by a liquor inspector or a police officer and returned to the Branch.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: January 13, 2011

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Michael Clarke, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attn: Peter Mior, Branch Advocate

Schedule A***Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267*****Duties and powers of general manager**

6 The general manager must, subject to this Act and the regulations,

- (a) issue, renew, amend, transfer, suspend or cancel licences as provided under this Act,
- (b) specify which regulations apply to a licence so granted,
- (c) supervise the conduct and operation of licensed establishments,
- (d) [Repealed 1999-36-2.]
- (e) appoint or designate any person he or she considers advisable as an analyst for the purposes of this Act,
- (f) authorize employees to issue licences and permits under this Act, and
- (g) perform all other acts required to properly and efficiently administer his or her responsibilities as defined by the minister and under this Act.

Issue of licence prohibited

16 (1) A licence must not be issued, renewed or transferred if, in the general manager's opinion, the applicant

- (a) is not a fit and proper person,
- (b) is not the owner of the business carried on at the establishment or the portion of the establishment to be licensed,
- (c) is not the owner or lessee of the establishment or the portion of the establishment to be licensed, or
- (d) is disqualified under this Act or has not complied with the requirements of this Act or the regulations.

(2) In deciding if a person is fit and proper for the purposes of subsection (1) (a), the general manager

- (a) must consider convictions of the person under the laws of Canada or a province or the bylaws of a municipality or regional district in British Columbia, and
- (b) may consider
 - (i) administrative penalties levied against the person under a law of Canada or a province,

- (ii) the financial integrity of the person, and
- (iii) other factors the general manager believes are relevant to the consideration.

(2.1) The general manager may at any time, on the general manager's own initiative, if the general manager thinks it necessary or desirable, determine whether a licensee is a fit and proper person.

(2.2) The general manager may conduct an investigation that the general manager considers is or may be necessary for the purpose of determining whether a person or licensee is fit and proper.

(3) A licence must not be issued, renewed, transferred or amended if, in the general manager's opinion, it would be contrary to the public interest.

(4) Without limiting subsection (3), the general manager must consider whether

- (a) the applicant is the holder of, has an interest in or is applying for another licence under this Act, or
- (b) the applicant is qualified under this Act or has complied with the requirements of this Act or the regulations.

(5) A licence, other than a special occasion licence under section 7, must not be issued, renewed or transferred except to

- (a) a person who is a resident of British Columbia or a Canadian citizen or is lawfully admitted to Canada under the *Immigration and Refugee Protection Act* (Canada) for permanent residence, and is not a minor,
- (b) a partnership, of which each member is a resident of British Columbia or a Canadian citizen or is lawfully admitted to Canada under the *Immigration and Refugee Protection Act* (Canada) for permanent residence, and is not a minor, or
- (c) a corporation whose agent or manager selected by the corporation to carry on its business in the licensed establishment is a resident of British Columbia or a Canadian citizen or is lawfully admitted to Canada under the *Immigration and Refugee Protection Act* (Canada) for permanent residence, and is not a minor.

(6) A special occasion licence must not be issued except to a person who is not a minor and who

- (a) is a resident of British Columbia or a Canadian citizen or is lawfully admitted to Canada under the *Immigration and Refugee Protection Act* (Canada) for permanent residence, or
- (b) although not a resident of British Columbia or a Canadian citizen or lawfully admitted to Canada under the *Immigration and Refugee Protection Act* (Canada) for permanent residence, is approved for a special occasion licence by the general manager.

(7) [Repealed 1999-36-9.]

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;

...

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

(a) [Repealed 1999-36-13.]

(b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

(e) cancel all or any part of the licensee's licence;

(f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

(c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;

(d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;

(e) cancel all or any part of the licensee's licence;

(f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

Prohibition against certain conduct

36 (1) [Repealed 2010-21-132.]

(2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment

(a) drunkenness or violent, quarrelsome, riotous or disorderly conduct, or

(b) any unlawful activities or conduct.

(c) [Repealed 2010-21-132.]

(3) [Repealed 2010-21-132.]

Liquor Control and Licensing Regulation B.C. Reg. 244/2002

Schedule 4

[am. B.C. Regs. 437/2003, s. 3; 205/2005, s. 13; 19/2007, s. 2; 133/2007, s. (c); 213/2007, ss. 2 and 3.]

Enforcement Actions

Interpretation

1 (1) For the purposes of this Schedule,

(a) a contravention is of the same type as another contravention if each contravention is described by the same Item of this Schedule, and

(b) a contravention by a licensee is

(i) a first contravention if the contravention was committed at or in respect of an establishment and the licensee has not committed a contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention,

(ii) a second contravention if the contravention was committed at or in respect of an establishment and the licensee has committed one contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention, and

(iii) a subsequent contravention if the contravention was committed at or in respect of an establishment and the licensee has committed a second contravention of the same type at or in respect of that establishment within the 12 month period preceding the commission of the contravention.