



**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: Victoria Fresh Bakery and Bistro Inc.
dba Fresh Bakery and Bistro
3115 Cedar Hill Road
Victoria, BC V8T 3J4

Case: EH11-006

For the Licensee: Randy Bourke

For the Branch: Bode Fagbamiye

Enforcement Hearing Adjudicator: Sheldon M. Seigel

Date of Hearing: June 13, 2011

Place of Hearing: Victoria, BC

Date of Decision: July 11, 2011

INTRODUCTION

On January 5, 2011, the Licensee was operating Fresh Bakery and Bistro located in Victoria, BC under Food Primary Licence 303580. The hours of sale are 9:00 a.m. to 12:00 a.m. seven days per week. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia*" (*Guide*).

In March of 2011, a little over two months after the events that are the subject of this hearing, the Branch approved a change to the establishment name, the licence name, and the licensee name (from Fresh Bakery and Bistro to Sliders).

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (NOEA) dated March 7, 2011. The Branch alleges that in the evening of January 5, 2011, the Licensee contravened section 6(4) of the *Liquor Control & Licensing Regulation* (Regulation) by permitting more persons in the licensed establishment than the person capacity set by the General Manager, and the number of persons in the licensed establishment exceeded the occupant load.

The proposed penalty is a \$5,000 monetary penalty in accordance with Schedule 4 of the *Regulation*. Item 15 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type: a licence suspension of four to seven days and/or a monetary penalty of \$5,000 - \$7,000.

RELEVANT STATUTORY PROVISIONS

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

Capacity

6 (1) Before the general manager

- (a) approves the issuance of a licence,
- (b) approves a structural alteration of or a change to the size of any area of a licensed establishment,
- (c) approves a transfer of a licence under section 21 (3) of the Act, or
- (d) approves an application for an increase in the person capacity of a licensed establishment,

the general manager must set the person capacity of the establishment, having regard to the public interest and the views of a local government or first nation if provided under section 10 or 53 of this regulation.

(2) Once the general manager has set the person capacity of an establishment in accordance with subsection (1), the general manager must refuse to issue, amend or transfer a licence for that establishment if the occupant load of the establishment is not equal to the person capacity.

(3) Despite subsection (2), if the occupant load of an establishment is less than the person capacity of the establishment set under subsection (1), the general manager may issue, amend or transfer the licence for that establishment after reducing the person capacity to equal the occupant load.

(4) It is a term and condition of a licence that there must not be, in the licensed establishment at any one time, more persons than the person capacity set under subsection (1) or (3).

(5) This section does not apply to a U-Brew, U-Vin, licensee retail store, distillery, brewery or a winery without a winery lounge endorsement.

ISSUES

1. Did the contravention occur?
2. In the event that the contravention is found to have occurred, can the Licensee establish a defence of due diligence?
3. If the contravention is proven, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

Exhibit 1: Branch Book of Documents

Exhibit 2: Licensee's Book of Documents

EVIDENCE

Liquor inspector #1 testified that he has considerable experience and has counted hundreds of liquor establishments during his career. He described his usual manner of counting patrons with a mechanical counter.

He testified that on January 5, 2011, after 8:00 pm he attended at the licensed establishment, "zeroed" his mechanical counter and tested it, and then "zeroed" it again. He said:

On entering, I observed many people, suspected the establishment was overcrowded, walked through to bar, and assessed the main area. I discussed with [the other liquor inspector] that I thought [the establishment] was overcrowded and said I would do a count and she said she would do one also. I walked through and then back to the main entranceway and then started to count. I moved right to left and was able to survey the entire establishment. Visibility while I counted was excellent. The vast majority of people were seated. There was very little movement of patrons and I could count very easily.

He said he did not count staff in the kitchen (he did not enter the kitchen) and did not count any staff that he could identify as such in the main dining area. He said he counted 81 persons and that the count took less than two minutes to conduct. He recorded his count and then told the second inspector his result and began a second count. On the second count the inspector counted 83 people. He followed the same route through the establishment and again did not count anyone in the kitchen or identifiable staff. He said he understands that the capacity for liquor purposes and for occupant load is 65 persons. He said he told the establishment manager and Mr. Bourke that the establishment was overcrowded and the number of people inside had to be reduced to 65 persons immediately. He added that his instructions were not followed.

The inspector also testified that the licence in effect on January 5, 2011, is the one shown at tab 3 of Exhibit #1. It is dated August 31, 2010. The inspector also identified two other licences at tab 4 of Exhibit #1 (dated January 28, 2011, and March 21, 2011) as being licences which were issued after the date of the contravention.

The inspector described the floor plan of the establishment at tab 5 of Exhibit #1 and identified the City of Victoria occupant load stamp signed by a City building official and dated July 21, 2009. The stamp indicates an occupant load of "65 persons."

A second liquor inspector testified that she attended the establishment at the same time and date as the first inspector and that she did two independent counts in the establishment. She counted 82 persons in each case. She testified that she has been a liquor inspector for seven years and has conducted hundreds of patron and person counts in that time. Inspector #2 said that she and the other inspector brought the counts to the attention of both the restaurant manager and Mr. Bourke at the conclusion of those counts. Mr. Bourke neither conducted his own count, nor provided any evidence from door staff or employees of any different number of persons in the establishment. She said that neither the establishment's manager, nor Mr. Bourke requested a recount and that despite being told to reduce the number of persons in the establishment, she saw no indication of any attempt to do so by management.

Mr. Bourke testified that at the time of the alleged contravention, the establishment had a lounge endorsement of 13 people. He said that prior to January 5 he asked a liquor inspector why his licence document did not reflect the lounge endorsement for 13 persons and he was advised to contact the Branch. He said he contacted the Branch on December 14, 2010, and was advised that the licence was wrong and that he did indeed have a lounge endorsement for 13 people. Mr. Bourke testified that the Branch representative on the phone told him they would correct the error and send out a new copy of the licence. He pointed to the copy of the licence at Exhibit #1, tab 4, p. 1, dated January 28, 2011, as that corrected licence and notes that it allows for a lounge capacity of 13 and a main area capacity of 65 persons. He said that it apparently took the Branch a few weeks to get around to sending out the corrected document.

Mr. Bourke also testified that he met with the architects when he was considering the seating plan for the establishment and was advised that the occupant load should be 100 persons.

SUBMISSIONS

The Branch submits that each of the components of the contravention has been established and there is no reasonable evidence to the contrary. The Branch submits that the recommended penalty is reasonable as exceeding the occupant load is a safety issue and can lead to public complaints as well as fire and emergency access difficulties. The Branch says that the establishment is in an area that is primarily residential and the neighbours are entitled to peace and quiet, and it is the responsibility of the restaurant to take this issue seriously. The Branch says that a monetary penalty is more appropriate than a suspension as it would have a more significant effect on the future activities of the Licensee, and in light of the public safety issue, this is warranted.

The Licensee submits that according to the licence at tab 4, p.1, dated January 28, 2011, 78 persons are allowed by the licence into the dining establishment (65 + 13). The Licensee also submits that his architects advised that the occupant load should be 100 persons. The Licensee says that whether or not that information is ultimately correct, he should be able to rely on it as a reasonable standard and he should only be held to that standard. The Licensee says that as there are two penalties for overcrowding, less than and more than occupant load, the penalty should be for less than occupant load.

The Licensee also says that four businesses operate out of the building with two addresses. They comply with all fire codes and safety issues and there exists several clearly marked fire exits. The Licensee says it is the inspector's job to suggest that the manager or licensee count with the inspector, and that had they done that together, the count would have been 78, not 81 (excluding Mr Bourke, the manager, and another manager)

REASONS AND DECISION

I accept the evidence of two liquor inspectors that there were more than 80 persons in the establishment. This is confirmed by a total of four counts utilizing mechanical counters. I note that as well as all counts exceeding 80 persons in total, both of the inspectors indicate that their counts exclude at least some persons (staff) and neither count includes anyone who might have been in the kitchen. There is no numerical evidence to the contrary provided by the Licensee. There is no evidence that anyone working for the Licensee conducted a count while the inspectors were in the establishment.

Page 21 of Exhibit 1, tab 7 is part of the Guide, which is included by reference in the licence conditions. That page states:

Your liquor licence tells you the maximum number of patrons or the maximum number of persons (patrons and staff) that you may allow in your premises at one time (see the definitions of “patron capacity” and “person capacity” at the beginning of this guide).

It is important for you to know the type of capacity for which your establishment is licensed and to make sure you stay within this limit. You must have controls at each entry point to your establishment, and you must be able to count the number of people entering and leaving.

Local building/fire authorities also establish a maximum capacity or occupant load that may differ from your liquor licence maximum capacity... If fire and building officials have each calculated an occupant load for your establishment, or if an engineer or architect has, and the numbers are not the same, the lower number is the one you must use.

The Licensee says that he was provided with an occupant load from his architects larger than that indicated on the floor-plan by the City of Victoria stamp. However, I find that the evidence is clear that the smaller of the numbers, which in this case is 65 persons, is the applicable occupant load.

The Licensee also says that the Branch advised him by telephone before the inspection of January 5, 2011, that he was entitled to a lounge endorsement of 13 persons. The licence that stated this arrived weeks later.

I find that the permitted person capacity is that which is on the face of the licence in effect at the time of the alleged contravention. The Licensee's claim that he was entitled to 65 in the main area plus 13 in the lounge is based on the licence that was issued on January 28, 2011. However, I find that until that licence was issued, the licence dated August 31, 2010, was in effect.

I find that the person capacity of the establishment on January 5, 2011, was 65 persons as indicated on the licence of August 31, 2010. I find that the occupant load for the establishment on January 5, 2011, was 65 persons as indicated on the floor-plan at Exhibit 1, tab 5. I find that with more than 80 persons in the establishment on January 5, 2011, the establishment was both over person capacity and occupant load and therefore that the contravention has been established.

DUE DILLIGENCE

The licensee is entitled to a defence to the allegations of the contraventions if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions from occurring. The licensee must not only establish procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems dealt with. There is no evidence in the documents before me that tend to support a defense of due diligence. The onus is on the Licensee to provide evidence of this defence if it is to rely on it. There is a paucity of evidence of adequate systems or training in place to prevent the contravention from occurring. Furthermore, there is evidence that once notified that the establishment was overcrowded and that there was a positive obligation to act to reduce the number of persons in the establishment, the Licensee still did not act to comply with the *Regulation*. There is no evidence of door staff or of any employee having knowledge of the count of persons in the establishment at the relevant time. I find no evidence of due diligence relating to this contravention.

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 may do any one or more of the following:

- 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, and 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 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 type for this licensee or this establishment within the year preceding this incident. The range of penalties for a first contravention of section 6(4) of the *Regulation* pursuant to Schedule 4, item 15 is four to seven days and/or a monetary penalty of \$5,000 - \$7,000. The Branch recommended a penalty of \$5,000 and provided reasons for their recommendation. I find the recommended penalty appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order that the licensee pay a monetary penalty of Five Thousand Dollars (\$5,000) to the general manager of the Liquor Control and Licensing Branch on or before August 9, 2011.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: July 11, 2011

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

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