



**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:	Tri-Cities Wine Kitz 4A – 2773 Barnet Hwy Coquitlam, BC V3B 1C2
Case:	EH11-068
For the Licensee:	Dario Gigliotti
For the Branch:	Bode Fagbamiye
General Manager's Delegate:	Sheldon M. Seigel
Date of Hearing:	August 30, 2011
Place of Hearing:	Surrey, BC
Date of Decision:	September 23, 2011

**Ministry of Public
Safety & Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

The Licensee operates a UBrew/UVin under the name of Tri-Cities Wine Kitz in Coquitlam, B.C. under UBrew/UVin Licence No. 209741. 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*").

The licensee acknowledges that the contravention took place but takes the position that a penalty is not warranted or appropriate in the circumstances.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (NOEA) dated May 12, 2011. The Branch alleges that on April 15, 2011, the licensee contravened section 23(1) of the *Liquor Control & Licensing Regulation* (Regulation) when it failed to ensure that a customer performed the required tasks when producing or manufacturing beer, wine or cider. The proposed penalty is a four-day licence suspension (item 41, Schedule 4 of the Regulation).

RELEVANT STATUTORY PROVISIONS

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

Role of the customer in the production process

23 (1) Subject to subsections (2) and (3), a licensee must ensure that the customer performs the following tasks in producing or manufacturing beer, wine or cider in the U-Brew or U-Vin:

(a) combining or mixing ingredients with any of the following:

- (i) beer wort;
- (ii) fruit;
- (iii) wine or cider juice;
- (iv) concentrate;
- (v) fermentable liquids;

(b) if enzymes or yeast are required to begin the fermentation process, adding the enzymes or yeast to the materials referred to in paragraph (a) or to any other raw material of beer, wine or cider;

(c) removing or defacing commercial labels and sterilizing bottles in preparation for bottling;

(d) placing the beer, wine or cider in bottles;

(e) labelling, corking, capping or shrink wrapping the bottles of beer, wine or cider;

(f) removing the bottled beer, wine or cider from the U-Brew or U-Vin.

(2) The customer may be accompanied by one or more persons to assist the customer in performing the tasks described in subsection (1) as long as those persons are not associated with the operation of the U-Brew or U-Vin.

(3) The licensee or his or her employees may also assist the customer in performing the tasks described in subsection (1) but each of those tasks must be primarily performed by the customer unless the customer is physically incapable of performing that task alone.

ISSUES

1. Did the licensee contravene the Regulation as alleged?
2. If the licensee did contravene the Regulation as alleged, is a penalty warranted?
3. If a penalty is warranted, what penalty is appropriate?

EXHIBITS

Exhibit No. 1: Branch Book of documents

EVIDENCE

Liquor Inspector

The liquor inspector testified that on February 10, 2011, she attended at the Licensed establishment in a covert capacity. She met with the licensee and introduced herself as a potential customer who had not ever used the services of a UVin. She asked how the process works and was advised that she could choose a variety of wine from a catalogue and then would be required to mix the components of the wine together to begin the fermentation process. Ultimately, she was told, she would be required to return to the establishment to sterilize bottles, bottle the wine, and remove it from the establishment after paying the fee indicated in the catalogue.

She testified that she chose a wine from the catalogue and was advised by the licensee that her choice was not available on site and would have to be brought in. The licensee then told her that she would be required to come back to start the fermentation process. The Inspector told the licensee that she was very busy and the second visit would be inconvenient. The licensee advised her that many of his customers are busy and for regular customers he routinely starts the fermentation process for them. He said that she did not have to attend to do this step because he would do it for her. He also indicated that it is a step that the liquor branch requires the customer do, but as she was busy he would do it for her as he often does for his good customers. The inspector paid for the wine and signed an acknowledgement that she was required to start the fermentation process as requested, and then left the establishment.

On April 13, 2011, the inspector spoke to the licensee on the telephone. The licensee indicated that her wine was ready and she should come in and bottle it. The inspector attended at the establishment on April 15, 2011. She was again informed that her wine was ready for bottling and she was shown the sterilizing and bottling process. She sterilized bottles, poured and corked the wine and then accepted delivery of 30 bottles of Merlot and removed them from the establishment. She obtained a receipt for the wine.

The inspector testified that at no time did she pitch the yeast, add fruit juice or water, or take any steps required to start the fermentation process.

The Licensee

The licensee testified that he informed the undercover inspector on February 10, 2011, that if the kit she desired was not in stock she would have to return to start the wine. He said she chose a wine, paid for it, and signed the declaration to say she was present. He says the inspector told him she had to call her husband and when the licensee returned, she said she preferred a Merlot (that he did not have in stock). The licensee says he informed her that the Merlot was not in stock and he would have to order it and she would have to return to start the wine. According to the Licensee, the inspector said it would be difficult for her to return at another date, so he offered to start the wine for her. The licensee said he sees now that was an error in judgement and he would not do it again in the future.

SUBMISSIONS

The Branch submits that the licensee knew his obligations under the terms of his licence, specifically that the customer had to start the fermentation process, and he failed to do ensure that this happened. The Branch says the licensee knew he was circumventing the required process when he asked the inspector to sign the required

acknowledgement that she did start the fermentation process. The licensee willingly did what his licence requires he insist the customer to do.

The licensee says that he made an error in judgement on February 10, 2011, and will not do so again. He also says that the NOEA is incorrect in that it alleges that the date and time of the contravention was April 15, 2011 at 1:15 p.m, the date and time at which the inspector picked up the wine. He argues that on April 15, 2011, the inspector did what she was supposed to do by washing and sterilizing the bottles and corking the wine and boxing it up and taking delivery, and that no activity that the customer was supposed to do was done by him on April 15, 2011.

REASONS AND DECISION

The licensee was obligated to require that the customer start the fermentation process by mixing the appropriate components of the wine kit together. The licensee is not allowed to perform this task. Indeed, if the customer is physically unable to perform the task, the licensee is required to assist only minimally, and to recommend that the customer re-attend with someone who could help her. These requirements are necessary to differentiate between services provided by a UBrew/UVin and the production process of a wine or beer producer, which requires a different licence.

In this instance, the licensee failed to ensure that the customer, who was a liquor inspector working in a covert capacity, performed the required tasks in accordance with the Regulation. There was no indication that the inspector told the licensee that she was physically incapable of starting the fermentation process herself or required assistance, only that she found it inconvenient to return at a later time to do so. Not only is the evidence clear that the inspector was not made to perform any of the required tasks related to the commencement of the fermentation process, but also that the licensee was accustomed to performing this task for some of his regular customers.

I find that the inspector (customer) did not require assistance, and by beginning the fermentation process the licensee failed to require the customer to start the wine contrary to the requirements of his licence and s. 23 of the Regulation. The licensee said that he made an error in judgement, and I agree.

The licensee argued that although a contravention occurred, it is not the contravention described in the NOEA due to the fact that he did nothing wrong on the date indicated as the date of the contravention. The Branch replied that April 15, 2011, was the date the product was delivered or made available to the inspector.

The evidence discloses that the wine production commenced on February 10, 2011, when the inspector purchased a wine kit that was not yet in stock and concluded on April 15, 2011, when she removed the bottled product from the licensee's establishment. I have no evidence before me to indicate when exactly the ingredients required to start the wine fermentation process were combined. The licensee asserts that this did not take place on April 15, 2011, and the branch does not dispute that. It cannot be a requirement that the Branch fictionalize a date on which the inspector did not start the fermentation process. On April 15, 2011, the inspector finalized the wine production by sterilizing the bottles, filling and corking them and then removing the bottled wine from the establishment. I find that the date of these final steps, in a wine production process that was improperly commenced, serves as a reasonable indicator of the date of the contravention for the purposes of this enforcement action.

I find that the contravention occurred as alleged.

DUE DILIGENCE

The licensee is entitled to a defence to 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, but it must ensure that those procedures are consistently acted upon and that problems are dealt with in a timely fashion.

Here, there is no evidence upon which I can find that the licensee took steps to prevent the contravention. In fact, the evidence is to the contrary. The licensee has admitted that he knowingly contravened when he told the inspector that she did not have to combine the ingredients for the wine and that he would do it for her. Accordingly, I find that the licensee in this case is not entitled to successfully avail himself of the defence of 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 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 23(1) of the Regulation pursuant to the Regulation, Schedule 4, is a suspension of four to seven days or a monetary penalty of \$5,000- \$7,000.

The inspector said she chose a four-day suspension because she thought it would have the least impact on the licensee's business and that it would be a step sufficient for him to understand the importance of complying with the Regulation and that customers have to perform the duties stipulated therein.

I find a penalty is appropriate in this instance and I find that a four-day licence suspension is reasonable under the circumstances.

ORDER

Pursuant to section 20(2) of the Act, I order a suspension of Uvin/UBrew Licence No. 209741 for a period of four (4) days to commence at the close of business on Thursday, October 27, 2011, 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).

During the licence suspension, the licensee may allow existing customers to bottle their product if required to maintain product quality. The licensee may also oversee the fermentation, filtration, racking and aging of the product to get it ready for bottling. However, the licensee must not let anyone start a new batch. At the end of the suspension, the licensee must deliver all of its sales records and receipts for the suspension period to its liquor inspector.

To ensure this order is effective, I direct that Uvin/UBrew Licence No. 209741 be held by the branch or the Coquitlam detachment of the RCMP from the close of business on Thursday, October 27, 2011, until the licensee has demonstrated to the branch's satisfaction that the suspensions have been served.

Signs satisfactory to the General Manager showing that the licence is suspended will be placed in a prominent location in the establishment by a branch inspector or a police officer, and must remain in place during the period of suspension.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: September 23, 2011

cc: Liquor Control and Licensing Branch, Surrey Office
 Attn: Michael Clark, Regional Manager
 Liquor Control and Licensing Branch, Victoria Office
 Attn: Bode Fagbamiye, Branch Advocate