



**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: Charles Frederick Friend
dba Café Casablanca
2524 Bridge Street
Victoria, BC V8T 5H3

Case: EH11-090

For the Licensee: Charles Friend

For the Branch: Peter Mior

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: November 2 & 17, 2011

Place of Hearing: Victoria, BC

Date of Decision: December 29, 2011

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

Charles Frederick Friend (the licensee) operates the Cafe Casablanca located at 2524 Bridge St., Victoria BC, V8T 5H3. The licensee holds Food Primary Liquor Licence 301606 for the establishment. The hours for the sale of liquor are from 11:00 a.m. to midnight daily. The capacity is 100 persons. 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.

ALLEGED CONTRAVENTION and PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated August 9, 2011.

The branch alleges that on June 11, 2011, at 10:00 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.

The proposed penalty is a ten 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 first contravention of this type as a licence suspension for 10 - 15 days and/or a monetary penalty of \$7500 - \$10,000.

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 Regulation, B.C. Reg. 244/2002

Food primary licences

11 (1) A food primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on in the establishment is the service of food during all hours of its operation.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and if so what is a reasonable penalty?

EXHIBITS

The following exhibits were presented:

- Exhibit 1:** Branch Book of Documents #1, tabs 1 – 13.
- Exhibit 2:** Pages 1 – 3 Photographs depicting Cafe Casablanca and patrons, page 4 is a printed summary of food and alcohol sales.
- Exhibit 3:** Handwritten food & alcohol sale statements April – October 2011.
- Exhibit 4:** GST/HST return for the period of April 1 – September 30, 2011.
- Exhibit 5:** Email correspondence exchanged between the Branch and the licensee.

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

The branch called three liquor inspectors as witnesses.

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 1, tab 6) 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. She referred to the Guide (exhibit 1, tab 8) which outlines the requirements for operating a food primary licensed establishment. At the time that the establishment received its liquor licence the local liquor inspector responsible for the area completed an interview report with the licensee which outlined the requirements for operating a food primary establishment (exhibit 1, tab 11).

Inspectors A and B testified that they first attended the establishment during the night of May 25, 2011, for the purpose of conducting a covert inspection. It was a quiet night with few patrons present and a decision was made to return on a night when the establishment was in full operation. They attended again the night of June 11, 2011 in a covert capacity (i.e. did not identify themselves as being liquor inspectors) entering at approximately 9:00 p.m., paying a cover charge of \$10 each, ordering drinks from the bar, one alcoholic one non-alcoholic, and taking a seat at a table in the small front seating area. They were not advised that the establishment was a restaurant and that there was an expectation that they would order food. They counted 22 patrons present and taking part in dance lessons. Most patrons were drinking water or pop. The inspectors remained in the establishment for approximately two hours during which time they ordered another drink from the bar, one alcoholic and one non-alcoholic. They testified that during this time they did not observe any food being served nor any evidence that food had been served. There were no menus or cutlery on the tables. The dance lessons continued until 9:40 p.m. following which there was a noticeable shift in the operation of the establishment. More people arrived bringing the total to 55 and there was more liquor service evident. They observed ten beers being sold to patrons during the last one-half hour that they were present. They did not observe any food service.

Inspector A testified that she contacted the licensee on June 13, 2011, and advised him of her observations and that a contravention notice (CN) would be sent to him. She advised him that the establishment had shifted its focus from that of a food primary establishment. He told her that the establishment had always operated in a like manner and the licence permitted him to do so. She offered to hold a compliance meeting with him to assist him in bringing the operation into compliance. He declined the offer.

Inspector A completed a CN and mailed it to the licensee (exhibit 1, tab 5). She completed a NOEA on August 9, 2011, and mailed it to the licensee (exhibit 1, tab 1). In recommending enforcement action she was concerned that the licensee circumvented the licensing processes of the branch. She felt that the licensee was non-cooperative and that a penalty was necessary to achieve voluntary compliance. She recommended a ten day licence suspension, the minimum suspension penalty for a first contravention.

Inspector C testified that during the evening of June 11, 2011 he received a message from inspector A expressing concerns about the operation of the establishment. He attended at approximately 11:10 p.m. He did not immediately identify himself as a liquor inspector. He observed there to be 60 – 70 persons inside, most dancing, some with water and some with bottles of beer. He did not see any food on the tables. He advised the licensee who was behind the bar that he just wished to order some food. He was told that he must pay the cover charge to do so. He identified himself as a liquor inspector and asked the licensee about food service for the night. He was told that four meals had been served. He asked to see the kitchen and followed the licensee into the kitchen area. The stove was cold and dishes were stacked on the grill. There was no evidence of food being prepared. He observed a menu board at the bar listing five or six food items. He advised the licensee that it was required that there be a focus on food during all hours of operation.

EVIDENCE - THE LICENSEE

The licensee in his testimony referred to photographs in exhibit 2. The photos taken over a period of several years showed a consistency in the seating and kitchen areas within the establishment. The photos at exhibit 2-1 show the decommissioned pop cooler now used to store dry foodstuffs. Inspector C did not observe this during his inspection of the kitchen. The photo at exhibit 2-2-8 show the tables in the area where inspectors A & B were seated. From this location they were unable to see the stage

area and the tables below it at photo 2-2-7 which were occupied during the time of their visit on June 11th. Photos at 2-3 were taken June 11th after inspector C had left. They show the freezer with food inside and dirty dishes beside the dishwasher. Inspector C did not observe these during his inspection. The document at exhibit 2-4 is the register print-out for sales for the month of June 2011. Total food sales and tax were \$1915.54. Total liquor sales and tax were \$301.61. The documents at exhibit 3 show food and liquor sales for the months of April to September 2011. The documents at exhibit 4 are Canada Revenue Agency returns for GST/HST. All of the above-noted documents show that food sales are consistently greater than liquor sales.

The licensee presented copies of emails between himself and branch personnel in which he attempted to solicit assistance. The emails were either not responded to or branch personnel failed to provide assistance. He testified that previous branch inspectors were aware of the nature of his operation and did not raise any concerns with him. He asked what to do if patrons just wanted a drink or two without wanting anything to eat and spoke about having a lounge area. He was told not to worry about it as he didn't sell much liquor anyway. There is a cost to obtaining a lounge licence and he didn't want to proceed with an application if it is not necessary. He inquired on one occasion whether a liquor primary licence would be possible but was told that no more liquor primary licences were being issued for the area. Despite this, a pub and a brewery licence have been issued to nearby locations. He does not feel that he has been treated fairly by the branch. On one occasion inspector A arrived at the establishment accompanied by three uniformed police officers. Their presence served to intimidate his patrons.

He testified that he has asked patrons to leave who just wanted to sit and drink all night and did not wish to take part in the dancing. The purpose of the establishment is to offer a location for Latin style dancing and as such it is part of a worldwide community. It is not to operate as a bar. Although they do not sell much liquor, a licence is required as some patrons do wish to order a drink and would not attend if they were not licensed. They sometimes have new patrons attend to see what is happening. They will sit and

have a drink while observing the dancing but will often return for the dancing and become part of the community.

He testified that he did not tally the total amount of food and liquor sales for the night of June 11, 2011, but there was food sold that night, some during the time of the visit by inspectors A and B. The inspectors were unable to see the whole premises from where they were seated. There were four or five meals served the night of June 11th. One was served to a regular patron seated at the bar early in the evening, two would have been served during the time that the inspectors were present but to patrons seated in a location not visible to the inspectors from where they were seated and one or two meals served after the inspectors had left.

BRANCH SUBMISSIONS

The branch advocate's submission is summarized as follows:

Cafe Casablanca is a restaurant holding a food primary licence. The evidence of the liquor inspectors is that for the two hour period that they were present they did not observe any food service but observed at least ten beers being served. Having a "patron participation" entertainment endorsement allowing patrons to dance does not allow a food primary establishment to operate as a liquor primary establishment. The branch inspector offered to meet with the licensee but the opportunity was rejected by the licensee. The proposed penalty is necessary to reinforce to the licensee the need for voluntary compliance.

LICENSEE SUBMISSIONS

The licensee's submission is summarized as follows:

The inspectors' testimony is inaccurate or untruthful. The establishment was licensed and has operated for nine years as a Latin dance cafe with the focus on dancing. The nature of its operation was known to the branch and to the City of Victoria. It is a unique establishment attracting dancers who are mostly non-drinkers. It is not operated as a bar. Only a few persons order an alcoholic beverage. On the night of June 11, 2011, food was available and was served. The inspector offered a compliance meeting not to help the licensee but to change the nature of the business after allowing it to operate for nine years without doing anything. Efforts made by the licensee to get assistance from branch personnel were not successful. The establishment operates as a benefit to many persons without a risk to the community.

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

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 are patrons 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 liquor inspectors A and B. The inspectors entered the establishment and paid the cover charge. They were not told that this was a food primary establishment and that patrons were expected to order food service if they wished to be served alcoholic beverages. The inspectors ordered drinks on two occasions, one alcoholic and one non-alcoholic on each occasion. They were not asked whether they intended to order food. They were not shown to a table but sat themselves and 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 8 at p. 13) 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.” I accept the evidence of the licensee that two meals were served to patrons in the restaurant during the two hour time period that the

inspectors were present. I accept the evidence of the inspectors that ten beers were served during this same time period. 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 license. 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.

On the whole of the evidence, I find on a balance of probabilities that on June 11, 2011, during the time of the inspector's visit, the licensee operated the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the license. 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 has not argued that it has exercised due diligence. The only evidence going towards due diligence on part of the licensee is that he has operated the establishment for nine years without the branch raising any concerns.

I do not accept that it amounts to due diligence.

The licensee needs to have policies in place to guide its operation and a system to ensure that the policies are being followed. Patrons wishing to order alcoholic beverages must be made aware that the establishment is licensed as a food primary establishment that must maintain a primary focus on food.

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 June 11, 2011, 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.

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.

On the whole of the evidence I am satisfied that the branch has provided this licensee with sufficient information to operate his establishment in compliance with the Act and Regulations. Additionally, a branch liquor inspector advised the licensee of what she considered to be problems with the operation of the establishment and offered to meet with the licensee to assist in bringing the operation into compliance. That offer was rejected by the licensee.

In the circumstances of this case, I find that a penalty is necessary to ensure future voluntary compliance.

The range of penalties for a first contravention of this type is a licence suspension for 10 - 15 days and/or a monetary penalty of \$7500 – \$10,000.

In the circumstances of this case, I find that the minimum ten day suspension of the liquor licence as recommended by the branch is appropriate, reasonable and necessary. The establishment may remain open for the sale and service of food, however, the licensee must not permit the sale, service or consumption of liquor in the establishment while the licence is suspended.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 301606 for a period of ten (10) days, to commence as of the close of business on Friday, February 3, 2012, 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. 301606 be held by the branch or the Victoria Police Department from the close of business on Friday, February 3, 2012, 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: December 29, 2011

cc: Liquor Control and Licensing Branch, Victoria Office
Attention: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Vancouver Office
Attention: Peter Mior, Branch Advocate