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:	The Cambie Malone's Corporation dba Cambie Hotel 314 Cambie Street Vancouver, BC V6B 2N3
Case:	EH07-115
For the Licensee:	Kevin A. McLean Barrister and Solicitor
For the Branch:	Peter Mior
General Manager's Delegate:	Nerys Poole
Date of Hearing:	May 9, 2012
Place of Hearing:	Vancouver
Date of Decision:	June 12, 2012

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee operates the Cambie Hotel at 314 Cambie Street in Vancouver. The establishment consists of a liquor primary licensed area and a food primary licensed area separated on one side by a short picket fence with a gate. This decision relates to Liquor Primary Licence No. 024168.

The hours of sale for the liquor primary licence are from 11:00 a.m. to 1:00 a.m. from Sunday to Thursday and from 11:00 a.m. to 2:00 a.m. on Friday and Saturday.

The licence is, as are all liquor licences issued in the province, subject to the terms and conditions contained in the publication Guide for Liquor Licensees in British Columbia (the “Guide”).

The Cambie Hotel is operated by The Cambie Malone’s Corporation. The principal of the corporation appeared as the licensee’s representative at this hearing.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch’s allegations and proposed penalties were set out in the Notice of Enforcement Action (NOEA) dated August 28, 2007. The branch alleged that on March 22, 2007, the licensee contravened section 12 of the *Liquor Control & Licensing Act* (the Act) and the terms and conditions of the licence when it permitted patrons to take liquor from the red lined area established for that licence. The proposed penalty was a three (3) day suspension of the liquor licence (item 46, Schedule 4 of the *Regulation*). The branch also alleged that on March 22, 2007, 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 was a twelve (12) day suspension of the liquor licence (item 8, Schedule 4 of the *Regulation*).

A hearing was held and on December 12, 2008, the branch issued a decision (the "first decision") imposing a three day suspension for the section 12 contravention and a twelve day suspension for the section 36(2)(b) contravention.

The licensee applied for judicial review of the first decision. The B.C. Supreme Court issued its decision on July 22, 2009 (2009 BCSC 987) and a follow-up Supplementary Reasons for Judgement on August 20, 2010 (2010 BCSC 1175). The B.C. Supreme Court Justice ordered that the first decision on the section 12 contravention be set aside and the matter be remitted to the branch for rehearing before a different delegate. The B.C. Supreme Court Justice upheld the branch decision on the section 36(2)(b) contravention and found the 12 day suspension to be a reasonable penalty.

The licensee appealed to the B.C. Court of Appeal, which issued Oral Reasons for Judgement on October 31, 2011 (2011 BCCA 439). The Court of Appeal dismissed the appeal of the section 12 contravention, except for the Supreme Court's direction that the matter be remitted for hearing before a new delegate, changing that to an order that the matter be remitted to the General Manager for determination in accordance with the *Act* and *Regulation*s. The B.C. Court of Appeal dismissed the licensee's appeal from the finding of contravention of section 36(2)(b) of the *Act* but remitted the matter of penalty for rehearing.

The General Manager has appointed me as her delegate to conduct this rehearing to determine the issue of penalty on the section 36(2)(b) contravention. On April 27, 2012, the branch withdrew the section 12 contravention.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The general manager's delegate found, in his December 12, 2008 decision, that the licensee had contravened section 36(2)(b) of the *Act*. The Supreme Court and the Court of Appeal upheld this finding.

The issue of penalty is the sole matter before me. The delegate in the first decision ordered a 12 day suspension which is in the middle of the penalty range for a first contravention as set out in item 8 of Schedule 4 of the *Regulations*.

On this rehearing, the licensee disputes the imposition of any penalty, the length of the suspension and/or the appropriateness of a suspension over a monetary penalty. The branch says a penalty is warranted for the section 36(2)(b) contravention and recommends a 12 day suspension.

RELEVANT STATUTORY PROVISIONS

Section 36(2)(b) of *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 states:

Prohibition against certain conduct

> **36** (2) A person holding a licence or the person's employee must not authorize or permit in the licensed establishment
>
> (b) any unlawful activities or conduct.

Item 8 of Schedule 4 of the *Liquor Control and Licensing Regulation*, B.C. Reg. 244/2002 sets out the range of penalties for a first contravention of this type, a licence suspension of 10-15 days and/or a monetary penalty of $7500-$10,000.

ISSUE

1. Is a penalty warranted?
2. If so, what is the appropriate penalty?

EXHIBITS

Exhibit 1: Branch's book of documents

EVIDENCE

Findings of Fact - the first decision

The Supreme Court and the Court of Appeal upheld the first decision on the section 36(2)(b) contravention. The B.C. Court of Appeal stated at paragraph 18 (2011 BCCA 439), "I would dismiss the appeal from the finding of contravention of s. 36(2)(b) of the *Act*."

Therefore, I accept the findings in the first decision with respect to the contravention of section 36(2)(b). These findings are relevant to the issue of the determination of the appropriate penalty, if any:

- The language of s. 36(2)(b) specifically relates to the whole of the establishment as distinct from the red-lined area referred to elsewhere in the *Act*;
- The drug dealing occurred within the establishment and is an illegal activity as described by s. 36(2)(b);
- There is insufficient evidence to support the existence of a set of rules relating to this issue that could be called *policy,* and even less evidence of enforcement by dismissal of employees;
- There is no evidence of ongoing training, supervision, or scrutiny of employees with respect to monitoring the establishment for illegal activities. Such effort would be reasonable in the circumstances to ensure compliance with s. 36(2)(b) of the *Act* and is notably absent in management of the liquor primary establishment;

- There was no significant evidence of action to prevent the type of illegal activity that occurred in the establishment;

- The actions of at least one doorman and one bartender indicate at the very least, a passive acquiescence with the sale of drugs in the establishment;

- The licensee did not present evidence to establish that it exercised reasonable diligence under the circumstances;

- The oral evidence was more reliable than the written statements of the licensee and the establishment's general manager (not tested by cross-examination);

- The written statement of the general manager confirms that the licensee knew about illegal activities occurring in the establishment – in particular drug related activities, and that occasionally staff members broke or ignored rules that were in place to deal with those activities;

- The written statement of the licensee offers general indices of cooperation with police, zero tolerance, and good intentions, but insufficient evidence of any detail pertaining to actions taken to put these sentiments to work;

- There is no evidence that the doorman that allegedly quit is one of the doormen that was allegedly complicit in the illegal activity;

- There is no reference in the licensee's statement to steps to be taken in the event of observing illegal activities in the establishment (other than stating that engaging in illegal activities is grounds for immediate dismissal).

Evidence presented at rehearing

Liquor Inspector

The branch inspector testified as to her reasons for recommending a 12 day suspension for the section 36(2)(b) contravention that occurred on March 22, 2007. She testified that she held a compliance meeting with the licensee on January 24, 2006, as a result of reports she received from the police about drugs being sold in the licensee's establishment in late 2005. At the compliance meeting, the licensee stated that he had terminated the employee involved immediately and that he informed all his staff of the zero tolerance policy towards this kind of conduct. He stated he sent out a newsletter to all his staff, which informed them of the incident and reiterated their zero tolerance to such activities. At the compliance meeting, the licensee asked the branch inspector for suggestions as to how to avoid further incidents and she suggested regular staff meetings where they keep a record of the minutes of the meetings and even have staff sign and agree to the licensee's policies about illegal activities and other public safety issues. (Compliance Meeting Report at tab 19 of exhibit 1)

Because of the compliance meeting and the seriousness of the subject matter, she felt that a mid-range penalty for a first contravention was appropriate in the circumstances. Actions such as what occurred on March 22, 2007, put customers and staff at risk and are a serious public safety issue for the branch.

On cross-examination, licensee's counsel asked about the branch inspector's reasons for recommending a suspension over a monetary penalty. She stated that she felt that a suspension was warranted, and that she understood the liquor primary establishment premises would be closed for the length of the suspension. She further stated that if she were recommending a penalty today, she was of "mixed minds" as to whether she would choose a suspension over a monetary penalty because of the effect on staff who were not involved in the 2007 incident.

Licensee's Consultant

The licensee called two witnesses. The first witness began working as a consultant to the licensee (the "licensee's consultant") after the incident in March of 2007. The licensee's consultant is a former member of the Vancouver Police Department with extensive experience in the drug culture in Vancouver. He left the Vancouver Police Department in 2003. He testified that enforcement for marijuana drug use and sale is no longer a priority of the Vancouver Policy Department. When he started working with the licensee in October of 2007, he advised him on staff training and made recommendations about installing cameras to allow management to check doors and activities of staff. He testified about the community involvement of the licensee's principal and his efforts to make the Cambie Hotel a more appealing facility.

Licensee's Principal

The second witness for the licensee was the licensee's principal. He has spent over 40 years in the hospitality business, working first with his parents who operated a restaurant on Davie Street. He referred to his passion for his business and how his businesses sustain his family. He purchased the Cambie Hotel in 1990. He currently operates six businesses: two properties in Vancouver with Liquor Primary and Food Primary licenses, two liquor retail stores in Nanaimo and Esquimalt and two liquor primary pub operations in Esquimalt and Nanaimo. He expressed his dismay at the finding that he is responsible for activities that occur outside the redline area in his establishment. He emphasized that the doorman was never charged in this incident. He immediately terminated the staff member that was involved in the incident that resulted in the compliance meeting in January of 2006.

He recognized that the success of his operations is dependent on keeping good relations with all the regulatory agencies. He stated that his conversion of some of the “drug-infested properties” into full service hostels is a testament to his community mindedness. His reasons for carrying through with the appeals on this matter is that his integrity and reputation are critical to his ability to continue to prosper in this business and that any suggestion that he was complicit in permitting criminal activity was a real affront to everything he stands for.

He stated that a 12 day suspension would be devastating to his business. He is concerned that he will be seen as complicit in illegal activities and this would have a very negative effect on his investors. In addition, a 12 day suspension would have a very negative effect on the current staff as none of them know anything about the contravention in 2007. It would be hard for them to understand why they are being punished for something that happened over five years ago. Because of this outstanding enforcement matter, the Branch has been unable to consider his application to expand the liquor licence until the matter is completed. He is offended that he needs to suffer any more consequences than what he has experienced to date.

He questioned some of the evidence and findings of the previous hearing with respect to reports from the Vancouver Police Department, the fact that no one was charged with drug dealing, the fact that transactions did not take place within the redline area. He is very offended that “a pot dealer” operating outside the redline area should somehow jeopardize his ability to put bread on his table and require him to lay off his staff for 12 days.

When asked on cross-examination whether he approached the branch inspector between January 2006 and February 2007 to discuss his operations or areas of concern, he stated this was a long way back and that he has a continuous dialogue with inspectors but could not recall anything specific from that time. He testified that his relationship with the Vancouver Police Department is constant and continuous – that they come to address staff, that they meet at least once a year and that they talk with the liquor liaison between the branch and Vancouver Police Department at least once every three to six months to discuss ways to be more effective.

SUBMISSIONS

The Licensee submits that no penalty should be imposed for the following reasons:

- Because the Court of Appeal ordered a rehearing on the penalty issue, the rehearing should not merely confirm the previous decision on penalty;
- The Branch has the burden of proving the 12 day suspension is appropriate and the Branch has not done so;
- If the purpose of the penalty is voluntary compliance, then one only needs to view the record of the licensee since the contravention for proof of said voluntary compliance as it relates to the contravention;
- If the sale of illicit drugs is a serious public issue, then why is the sale of narcotics not enforced in the area and why does the executive branch of the government not see the sale of marijuana as a serious issue (the licensee refers to the evidence of the licensee’s consultant);

- There was one compliance meeting with respect to activity related to this contravention, which was held 14 months prior to the date of this contravention. The licensee demonstrated due diligence following this compliance meeting with the installation of a surveillance system and the termination of staff members who complained or failed to comply;

- The Branch has failed to consider the impeccable overall record of the Licensee based on his 40 years in the business and the number of locations;

- The disproportionate nature of the penalty upon the Licensee compared to the "actual convict" who was engaged in the sale of narcotics;

- The lack of consideration for a monetary penalty;

- The negative impact a 1 day suspension will have on the Licensee and its employees;

- The fees, time and energy that the Licensee has spent in defending the contravention;

- The liquor inspector's testimony demonstrates that she is of mixed mind about whether a licence suspension is still appropriate given the passage of time;

- This was the first time such a contravention occurred at the Cambie Hotel.

The licensee, in its submission, also reviewed some of the evidence from the first hearing with respect to the finding that the contravention occurred outside the red-lined area and failure to arrest anyone on staff who it was suggested "ought to have known" of the drug transactions.

The branch submits that the recommended penalty of a twelve day suspension is appropriate for the following reasons:

- Compliance meetings were held with the licensee, specifically the January 24, 2006 compliance meeting, regarding the sale of illicit drugs;
- There is evidence of the branch's efforts to achieve voluntary compliance;
- The seriousness of the contravention and the threat to public safety and well being of the community;
- A 12 day suspension is a mid-range penalty for a first time contravention of section 36(2)(b).

The branch's submission does not provide any reasons for recommending a suspension over a monetary penalty.

REASONS AND DECISION

The B.C. Court of Appeal (2011 BCCA 439) dismissed the appeal from the finding of contravention of s. 36(2)(b) of the *Act.*

> [17] I do not propose to examine in length the submissions of the licensee on the factual findings that underpin the conclusion of a s. 36(2)(b) contravention. I am satisfied that there was an evidentiary basis for the facts found by the Adjudicator. Although the affidavit filed in support of the judicial review petition denies certain evidence having been called, the factual matters to which it now objects were relied upon by the General Manager in written submissions that were filed before the Adjudicator, without dispute by the licensee at that time that such was the evidence before him. Further, notes in evidence of the investigating officers and liquor branch personnel, while sketchy and no doubt expanded in the

> oral testimony, support the conclusion that there was ample evidence of, as the Adjudicator described them, blatant drug transactions such that the transactions would have been obvious to staff at the establishment, particularly the doorman and bartender, both of whom are in controlling positions in a bar. It is trite that facts may be established by both direct evidence, and circumstantial evidence. In this case the record contains sufficient evidence from which the Adjudicator could make the findings of fact which are challenged in these proceedings.
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> [18] Concerning the use of the meaning of "permit", I see no error in the approach taken by the judge. Nor do I see error in the judge's consideration of the issues of due diligence. Accordingly and substantially for the reasons of the judge, I would dismiss the appeal from the finding of contravention of s. 36(2)(b) of the *Act.*

As the General Manager's delegate on this rehearing, I accept the findings of a section 36(2)(b) contravention as set out in the first decision. My task is to review the issue of penalty in accordance with the directions from the Court of Appeal:

> [20] I see no error in the reference to the licensee's presence at compliance meetings – its attendance at compliance meetings, whatever may be encompassed by that term, indicates an awareness of the requirements of the license and is relevant to sanction. However the description of the history of the licensee as including at least one prior allegation of permitting unlawful activities" is, in my view, of a different character. It appears on my reading of the decision that an adverse conclusion was drawn from the fact of the prior allegation, which would have redounded against the licensee in determining the appropriate sanction. It is, I consider, clear that it is an error to consider as a negative fact allegations made but not proven.
>
> [21] For this reason alone I consider the assessment of penalty must be set aside and the matter of penalty remitted for further determination under the *Act* and *Regulations.*

The licensee in its submission attempts to re-argue some of the evidence and the facts around the finding of the section 36(2)(b) contravention. I have not considered these arguments, as it is not my task to reconsider that finding.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the 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 Notice of Enforcement Action.

On the question of penalty, the first delegate referred to the licensee's history as including "at least one previous allegation of permitting unlawful activities in the licensed establishment." The B.C. Court of Appeal found that "an adverse conclusion was drawn from the fact of the prior allegation, which would have redounded against the licensee in determining the appropriate sanction. It is, I consider, clear that it is an error to consider as a negative fact allegations made but not proven." (2011 BCCA 439, para.20) It was for this reason that the Court of Appeal set aside the assessment of penalty and remitted this matter for further determination under the *Act* and *Regulations*.

Exhibit 1 contained no previous allegation with respect to section 36(2)(b). There was no reference to a previous allegation in the evidence at the rehearing. In my consideration of the penalty issue, I have disabused my mind of this unproven allegation, as required by the Court of Appeal directions.

The licensee submits that the branch has the burden of proving that the 12 day suspension is appropriate. This is not correct. This is a regulatory offence, which is determined on the balance of probabilities. Once a contravention has been found by the General Manager (or her delegate), the branch may then impose a penalty and, if a penalty is imposed, is bound by the minimums set out in the Regulation. There is no burden on the branch.

The Branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The General Manager (or her delegate) considers a number of factors when determining penalty. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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.

I conclude that a penalty is warranted in this case. The sale of illicit drugs is illegal conduct and a serious public safety issue. I rely on the findings at the first hearing that "the licensee failed to implement adequate employee training or other systems to prevent the contravention from occurring and failed to take reasonable steps to monitor the performance of its employees and systems to ensure compliance with the Act and the Regulations." Further, the licensee attended a branch compliance meeting on January 24, 2006, relating to illegal drug activity in the establishment and stated his commitment to enforce a zero tolerance policy toward illegal activities in the establishment. The delegate at the first hearing found "that little or no change has resulted" from that commitment, noting the facts around the incident on March 22, 2007.

I reject the licensee's argument that "one only needs to view the record of the licensee since the contravention for proof of said voluntary compliance as it relates to the contravention." The liquor licence enforcement system sets out a schedule of recommended penalties for first contraventions, second contraventions and subsequent contraventions. Given the circumstances of this contravention as set out above in the findings in the first decision, I do not support a "no penalty" option here. Penalties are intended to encourage voluntary compliance from licensees and the prevention of the need for any further enforcement action. The fact that the licensee has changed some of its policies to ensure compliance is the result the branch hopes for when there is any enforcement action. It does not relieve the licensee however from the imposition of a penalty if it is warranted in the circumstances of a particular contravention.

In reaching my conclusion that a penalty is warranted, I rely on the delegate's findings in the first decision:

> I find that at least two of the licensee's employees (one doorman and one bartender) either knew about or participated in illegal activities in the liquor primary licensed establishment on March 22, 2007. I find that other staff members including the floor manager either knew or ought to have known that illegal activities were occurring in the LP licensed establishment on that occasion.

I do not agree with the licensee's submission that, because there may be evidence that the police do not always charge offenders when they observe the use or sale of marijuana, that this therefore means the branch should not consider this illegal conduct as a serious public safety issue. I am bound by the law as it stands. The sale of drugs is illegal conduct. The sale of drugs in a licensed establishment is illegal activity under section 36(2)(b) of the Act and therefore is a contravention and may be subject to a penalty, once a contravention has been found.

The licensee is legally responsible for understanding how the Act, its Regulations and the specific terms and conditions of its licence affect the operation of its establishment and for complying with these terms. (A Guide for Liquor Licensees in British Columbia, tab 10, exhibit 1) The licensee is required to follow the law as a term and condition of receiving the licence, and not to question the wisdom of the law when the branch has found a contravention. An enforcement hearing is not the venue for questioning the social policy underlying the provisions of the *Act* or its *Regulations*.

The licensee's submission on why no penalty should be imposed includes the statements that "the argument that it [sale of marijuana] is a serious public issue fails because the executive branch of the government does not see the sale of marijuana as a serious issue. Specifically, Vancouver is a haven for the sale and distribution of marijuana."

I find that the allegation that the Vancouver police fail to enforce marijuana laws in the area of the Cambie Hotel is irrelevant to the licensee's duty to comply with the *Act* and the *Regulations* and to ensure illegal activity does not occur on its premises.

The licensee submits that he has spent considerable fees, time and energy in defending the contravention and therefore no penalty should be imposed at this late date. I note that it is the licensee's choice (and right) to challenge the General Manager's decision on judicial review and to then appeal the decision of the B.C. Supreme Court, both of which were done in this case. On the section 36(2)(b) contravention, both courts upheld the general manager's delegate's findings of a contravention. The Court of Appeal allowed the appeal only on the question of penalty. I do not agree that the length of time or expense spent on defending against this contravention is a valid reason to not impose a penalty.

As I find that a penalty is warranted, for the reasons set out above, the next question is what penalty is appropriate. There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding 12 months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 8 in Schedule 4 provides a range of penalties for a first contravention of this type: a 10 to 15 day licence suspension or a $7500 to $10,000 monetary penalty.

The branch at the initial hearing recommended a 12 day suspension, a mid-range penalty for a first contravention. At the rehearing, the branch advocate repeated this recommendation. In her testimony at the rehearing, the branch inspector indicated she was of "mixed minds" on the question as to whether a suspension or monetary penalty were preferable, given the passage of time and the effect on those currently employed who were not there at the time of the contravention. One response to this argument is that the licensee could compensate its staff during the time of the suspension so that

the burden of a suspension would fall on the licensee and not on the staff, especially when those staff were not involved in the contravention.

However, it has been five years since the contravention occurred. I recognize that part of the reasons for imposing a suspension is to emphasize to staff and patrons the serious nature of a contravention. I further recognize that some of the effect of imposing a suspension five years after the contravention is lost. I conclude that a monetary penalty is appropriate in the circumstances of this case. I impose a monetary penalty of $10,000 on the licensee. I find that the maximum monetary penalty for a first contravention of section 36(2)(b) is warranted. The reasons for this finding are the serious nature of this offence, the lack of evidence noted in the first decision, of "ongoing training, supervision, or scrutiny of employees with respect to monitoring the establishment for illegal activities", and the findings of fact re: the actions of the licensee's employees on the night in question.

ORDER

Pursuant to section 20(2) of the Act, I order that the licensee pay a monetary penalty in the sum of $10,000 to the general manager of the Liquor Control and Licensing Branch on or before July 11, 2012.

Original signed by

Nerys Poole Date: June 12, 2012
Enforcement Hearing Adjudicator

cc: Liquor Control and Licensing Branch, Vancouver Office
Attn: Donna Lister, Regional Manager

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