



**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:	673269 B.C. Ltd dba Cielo's Restaurant 15069 Marine Drive White Rock, BC
Case:	EH05-084
For the Licensee:	J. David Houston
For the Branch:	Sonja Okada
Enforcement Hearing Adjudicator:	Sheldon M. Seigel
Date of Hearing:	October 26, 2005
Place of Hearing:	Surrey, BC
Date of Decision:	November 4, 2005

## **INTRODUCTION**

The licensee operates a small family run restaurant and Tapas bar in White Rock, BC on the beach strip. On May 28, 2005, the Compliance and Enforcement Officer (C&E officer) attended at or near the deadline for the clearing of liquor at the end of the business day. He believed a contravention had occurred and issued a Licence Premise Check (LPC) to the licensee.

## **ALLEGED CONTRAVENTION**

The alleged contravention is "fail to clear liquor within ½ hour after liquor service hours, contrary to Section 44(1)(b) of the *Liquor Control and Licensing Regulation (Regulation)*. The Branch (the branch) recommended a \$5,000 monetary penalty.

## **RELEVANT STATUTORY PROVISIONS**

*Regulation:*

44(1) Unless otherwise authorized by the general manager,

- (b) food primary licensees must ensure that liquor is taken from patrons within ½ hour after the time stated on the licence for the hours of liquor service, unless the liquor is a bottle of wine that is sealed in accordance with section 42(4)(a).

## **ISSUES(S)**

1. Was there a contravention of Section 44(1)(b) of the Regulation?
  2. Is the defence of due diligence available to the licensee?
  3. If the contravention was committed, is the branch's recommended enforcement action appropriate?
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**EXHIBITS**

## Exhibit No.1 Branch's Book of Documents

**EVIDENCE**

The branch called the C&E officer. He testified as follows:

- He is an experienced inspector and is familiar with both the neighbourhood and Cielo's.
- The neighbourhood consists of a commercial strip with a number of licensed premises and a dense residential neighbourhood adjacent.
- On the night of the alleged contravention, he attended at Cielo's after observing "persons on the patio" at 1:40 a.m.
- He confirmed the time indicated by his watch by using the clock in his car.
- He entered Cielo's and was seated at the bar. He observed one other patron at the bar- who left immediately, a party at a table in the dining area and "a couple seated near the entrance".
- He observed "glasses of wine, and people consuming".
- The kitchen appeared to be closed and was being cleaned.
- He counted 13 patrons in the establishment and several drinks on the tables.

The C&E officer identified all of the documents in Exhibit No. 1, which confirm that the licence stipulates a closing time of 1:00 a.m. on the day of the alleged contravention, and the process through which the current enforcement action was taken. The Exhibit also contains a copy of a previous police issued LPC dated August 8, 2004, and the report of a Compliance Meeting dated October 6, 2004.

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The C&E officer also testified that:

- The licensee was aware of the requirement to clear liquor within ½ hour after service has terminated in accordance with the licence.
- The issuance of the previous police LPC in 2004, led to a Compliance Meeting relating to the issue of Section 44(1)(b) of the *Regulation*, and the licensee attended the meeting and fully cooperated.
- No enforcement action was taken with respect to the police LPC because the evidence of contravention was "somewhat weak".
- With respect to the current allegation, the liquid in the glasses looked like wine, but he was not sure. He did not ask the patrons what they were drinking.
- He was not sure if glasses were being cleared before 1:30 a.m., as he was not there at the time.
- He arrived at the premises at 1:40 a.m. and was there for ten minutes only.

Two shareholders of the licensee testified. They provided the following evidence:

- They are co-proprietors.
  - The establishment is small- 33 feet frontage, with 9 seats in the patio, 36 seats in the restaurant, and 9 bar stools. The majority of their liquor business is wine by the glass.
  - At the time of the alleged offence there were four staff in Ceilo's. They included the two proprietors, one kitchen staff and one server.
  - At 1:00 a.m. last call was announced as per usual. Empty glasses were removed at that time. People started to leave.
  - Between 1:00 and 1:30 a.m., two patrons requested taxis, and one of the proprietors called for the taxis.
  - The proprietors "broke down the bar", were cleaning up, preparing places for the next business day, and clearing the tables as patrons finished.
  - The server advised one of the proprietors that one of the patrons was being disorderly. The proprietor began to deal with that patron. Another
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- patron, a regular customer, was growing impatient that the taxi had not come in twenty minutes since being ordered. He demanded the attention of the proprietor- who went to the patio to satisfy him.
- One proprietor saw the C&E officer attend and watched him as he wrote up the LPC. When the C&E officer handed it to the proprietor, the proprietor looked at the kitchen clock and noticed that it was 1:37 a.m. The notice said 1:40 a.m. The proprietor told the C&E officer and suggested that the C&E officer might have been mistaken- that he had been there since before 1:30 a.m. That the proprietors were doing all that could be done to clear the remaining few glasses- while settling the customers about the late taxis, dealing with the uncooperative customer and removing the glasses from the one large group.
  - The other proprietor saw the C&E officer come in at 1:31 or 1:32 a.m. and said that the C&E officer was only in the restaurant for a couple of minutes. When the C&E officer completed the LPC, the proprietor noticed that on her watch the time was 1:34 a.m. She said so and the other proprietor advised her not to argue with the C&E officer.
  - One proprietor said that while the C&E officer counted 13 glasses, some of those were empty, and some were not in front of patrons.
  - The clock in the kitchen is synchronized with the point-of-sale computer system in the premises. They use the clocks to check billing time vs. order requisition time and the clocks are checked regularly.

A patron testified for the licensee. He said:

- He is a regular patron.
  - He requested a taxi of the proprietor at approximately 1:00 a.m.
  - At 1:20 a.m. the taxi had not arrived and he called the proprietor outside to settle his frustration. They talked for three to five minutes before the proprietor interrupted to attend to the C&E officer.
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- He made it hard for the proprietor to walk away from him during that discussion. It was not yet 1:30 a.m. when the C&E officer required the proprietor's attention.
- Before 1:30 a.m., the lights were going up, people were waiting for taxis, and the servers were shutting things down.
- He understands that the C&E officer supposedly attended at 1:40 a.m. He testified that is ... "not realistic. That is just far past the time when it all happened."
- He habitually checks his watch carefully. It is because he works to a tight schedule at work. He asked for the taxi at 1:00 a.m. and it was 1:20 a.m. when he went outside to the patio.

Another patron testified for the licensee. He said:

- At 12:55 a.m. he ordered his last glass of wine in response to last call.
- At around 1:25 a.m. the wine glass was removed from in front of him.
- Before 1:30 a.m., the bar was closing, and empty glasses were being picked up. All of the staff was cleaning up- resetting tables and taking things to the kitchen.
- At around 1:32 or 1:33 a.m., the C&E officer came in and "did a quick circle of the restaurant" and then began to do paperwork.
- The C&E officer had a conversation with the proprietors for about 4 or 5 minutes and he left the restaurant at about 1:37 or 1:38 a.m.
- He knew the time because he carries a cell -phone with a clock on it.

The next witness was the server. He testified as follows:

- He was advised to make last call shortly before 1:00 a.m. and he did so.
  - All drinks ordered were served before 1:00 a.m. Shortly after that he started telling patrons; "we are closing and starting to clean up."
  - At 1:20 a.m. he had removed all of the empties and had just one table left to clear. There were 13-14 people in that party. He told them that he had to clear the table.
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- At 1:25 a.m., glassware was put on the tray at the table and brought to the kitchen. Then he came back out. The proprietor was with the C&E officer. He removed the last glassware from the table and brought it to the kitchen.
- He first saw the C&E officer at 1:34 a.m. or 1:35 on exiting the dishwasher area. The C&E officer left at approximately 1:36 a.m.
- He knew the time because he wears a watch on his wrist and consults it regularly to do his job properly. He also testified as to the presence of a kitchen clock on the wall.

The last witness was another patron. He testified that:

- He was part of the large group. The group consisted of approximately 10 people. They arrived at 12:30 a.m. They all work at another bar down the block.
- The server did last call before 1:00 a.m., and they ordered some drinks then.
- The server told them to drink-up as he had to have the tables cleared by 1:30 a.m. Five minutes later, the server started clearing drinks off of the table in front of them. It was "1:20 a.m. or so."
- He left Cielo's before 1:30 a.m. He knew the time because he looked at his cell-phone for the time.
- He did not see the C&E officer arrive. He waited outside for a taxi and at some point did see the C&E officer talking to the proprietor.

## **SUBMISSIONS**

The advocate for the branch submitted that the licensee failed to clear all liquor within ½ hour as required by the *Regulation*.

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The C&E officer confirmed this by his observation of glasses on tables, wine-like substance in glasses, and checking both his watch and the clock in his car to ascertain the time.

The advocate submitted that the licensee is aware of this particular requirement of the *Regulation* and has already had a LPC issued for a similar alleged offence. Further, the licensee had attended a Compliance Meeting with the branch for the purpose of education and confirmation of an undertaking to comply with this provision of the *Regulation*.

The advocate submitted that the licensee did not display due diligence, as the effort to clear the tables in a timely fashion was inadequate, and there was nothing in the evidence which would support such a defence.

The licensee submitted the following:

1. There is no evidence that the glasses observed by the C&E officer contained liquor.
  2. No offence was committed, as all liquor was cleared by 1:30 a.m.
  3. In the alternative, the licensee exercised due diligence by doing all that could reasonably be expected of them in clearing the liquor. There were only four people on duty for the licensee at the time. They were all working at clearing the liquor and patrons and closing up. One of them a proprietor, was taken from those duties by a patron who required attention and this attention was proper and required in the performance of his duties as proprietor.
  4. If a contravention is found, a penalty should not be imposed due to the insignificant nature of the alleged factual contravention and the very short time frame in which the events had occurred.
  5. The previous allegation of contravention was not pursued by the branch because the evidence was poor, and this was supported by the direct evidence of the C&E officer. Therefore, no contravention had occurred
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and no adverse inference should be made with respect to the licensee's compliance history.

6. Finally, if a contravention is found, and penalty assessed, a four-day suspension in accordance with the penalty schedule is available and would be more appropriate under the circumstances.

## **ANALYSIS AND DECISION**

I find that there is no relevant compliance history. I accept the evidence of the C&E officer that the 2004 LPC historical allegation was without adequate evidence, and so discard it.

I find all of the witnesses to be credible. Their evidence differs by very little more than the perceived time of day. There is nothing to choose from among the witnesses' testimony to assess veracity or accuracy. I find that the evidence does not support one view of the events over another.

I find that the licensee knew of his obligations under the *Regulation*. I find that the licensee was intending to clear all liquor by 1:30 a.m. as required. The issue is whether he had done so.

The issue turns on determining the time to an accuracy of approximately ten minutes. The evidence discloses no less than ten sources of reference; four watches, two cell phones, a kitchen clock, an automobile clock, and a computer.

The evidence does not provide any objective reference by which I can accurately find at what time the liquor was indeed cleared. The evidence also does not provide any objective reference by which I can accurately find at what time the C&E officer arrived in the licensed establishment or made his observations.

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The C&E officer testified that there were glasses in view, that there was substance appearing to be wine in some glasses, and that there were patrons in the establishment. The licensee's witnesses testified that there were empty glasses in view and that the patrons had begun to leave at the relevant times. I accept all of this evidence and find that there is no inconsistency in it. The evidence does not clearly establish that there was liquor in glasses in front of or in the possession of patrons at the time of the C&E officer's observations. There could indeed have been wine in glasses at seats that had been vacated and empty glasses in front of patrons still in place.

Having considered all of the evidence, I find that on the balance of probabilities, the contravention has not been proven.

*Original signed by*

Sheldon M. Seigel  
Enforcement Hearing Adjudicator

Date: November 4 2005

cc: R.C.M.Police White Rock Detachment

Liquor Control and Licensing, Surrey Regional Office  
Attn: Mike Clark, Regional Manager

Liquor Control and Licensing Branch, Vancouver Regional Office  
Attn: Sonja Okada, Branch Advocate

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