



**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:	Garfinkel's Whistler Enterprises Ltd. dba Garfinkel's, Whistler BC
Case:	EH02-99 and EH02-110
Appearances:	
For the Licensee	David Houston, Legal Counsel Bert Hick, Consultant
For the Branch	Peter K. Jones
Enforcement Hearing Adjudicator	Edward W. Owsianski
Date of Hearing	February 10, 2003
Place of Hearing	Victoria, B.C.
Date of Decision	March 18, 2003

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

Garfinkel's Whistler Enterprises Ltd. (dba Garfinkel's) holds liquor license #177866. The hours of sale are Monday - Saturday, 7:00 P.M. - 2:00 A.M. and Sunday, 7:00 P.M. – 1:00 A.M. The patron capacity is 350 in area 1. This establishment is located in Whistler, B.C.

ALLEGED CONTRAVENTION AND RECOMMENDED ENFORCEMENT ACTION

The Liquor Control and Licensing Branch has alleged:

1. that on October 3, 2002, the licensee contravened section 10(2) of the Regulations to the *Liquor Control and Licensing Act*, and has recommended a suspension of the liquor license for one (1) day to be served on a Thursday.
2. that on October 17, 2002, the licensee contravened section 35 of the *Liquor Control and Licensing Act*, and has recommended a suspension of the liquor license for one (1) day to be served on a Wednesday.

Section 10(2) of the Regulations to the *Liquor Control and Licensing Act* states as follows:

Employees

10(2) No employee of a licensee shall consume liquor while working on the licensed premises.

Section 35 of the *Liquor Control and Licensing Act* states as follows:

Minors on licensed premises

35 A person who holds a licence under this Act or who sells liquor under the *Liquor Distribution Act*, or the person's employee, must not authorize or permit a minor to enter on or to be on premises where liquor is sold or kept for sale except.

ISSUES

The licensee admitted the contravention. The issue for the hearing is whether the recommended penalties are appropriate penalties in the circumstances.

EXHIBITS

The following exhibits were presented:

- Exhibit A** Book of Documents
- Tab 1** Notice of Enforcement Action letter of October 16, 2002, with appendices, regarding the contravention of Section 10(2) of the *Regulations*.
 - Tab 2** Contravention Notice No. A012657 regarding the contravention of Section 10 (2) of the *Regulations*.
 - Tab 3** Notice of Enforcement Action letter of October 31, 2002, with Appendices, regarding the contravention of Section 35 of the *Liquor Control and Licensing Act*.
 - Tab 4** Contravention Notice No. A012661 regarding the contravention of Section 35 of the *Liquor Control and Licensing Act*.
 - Tab 5** Copy of the Liquor Licence No. 177866
- Exhibit B** Written submission for speaking to penalty, prepared by Branch Advocate, Peter K. Jones

EVIDENCE

The representatives for the licensee agreed that the contraventions as alleged by the branch did occur. No Agreed Statement of Facts were presented during the hearing. The evidence then is as contained in the Exhibits.

Finding of Fact

I find that the licensee contravened Section 10(2) of the Regulations to the *Liquor Control and Licensing Act (the Act)*, and Section 35 of the *Act*.

SUBMISSIONS**Liquor Control and Licensing Branch**

The branch Advocate in his written submission first addressed the contravention of Section 10 of the Regulations, namely, an employee consuming liquor while on duty. He advised that the nature of this contravention is detrimental to the control of the establishment and hence the safety of patrons and staff. Pursuant to Schedule 4 of the Regulations the recommended suspension of one day is the minimum suspension for this contravention. The minimum fine of \$1,000.00 was not chosen as it would not serve the purpose of addressing the need of the community to be aware of contraventions of the Act and Regulations occurring in licensed establishments, particularly those concerning public safety.

The advocate's written submission also addresses the contravention of Section 35 of the Act, permitting a minor on the licensed premises. He advises that although the minor was not found consuming liquor there is an assumption that that was the purpose for which the minor entered the establishment. Minors consuming liquor presents a public safety concern both for the minor and the community. The minimum penalty is a one day suspension or a \$1,000.00 fine. The recommendation of the one day suspension was made as it would serve the purpose of making the community aware of a contravention of the Act in a licensed establishment concerning public safety.

The Advocate in his oral submission referred to the Liquor Appeal Board (LAB) case of Dell Hotel (1965) and Flamingo Hotel (1958) Ltd. (dba Colony Motor Inn) and General Manager Liquor Control and Licensing Branch, November 23, 1992, a case which also dealt with permitting a minor on the licensed premises. The LAB found that there is a special responsibility on licensees to take extra precautions and vigilance to keep minors out of the their establishments.

The Advocate noted that, while the owner of the establishment attended at the request of the Branch following the two contraventions and fired the manager and the employee consuming, there were a number of previous incidents occurring at the establishment as outlined at Tab 1, p.6. He submitted that the time for the owner to take action was following those incidents and prior to the contraventions occurring in October, 2002.

The Licensee

The Consultant advised that the licensee has been a client concerning liquor licensing matters for several years. The licensee, upon learning of the contraventions engaged his services to ensure the problems did not recur. The licensee, himself, went to Whistler and met with the Branch Regional Manager and the Liquor Inspector responsible for the Whistler area. He subsequently terminated the employment of the General Manager of the cabaret, a bartender and two door staff. A new General Manager, experienced in operating cabarets was hired and the cabaret was voluntarily closed for a ten day period at the end of October to allow the new General Manager to hire and train new staff. During the closure a new video security system and point of sales system were installed and the back door of the cabaret was closed off. An interior designer was hired and non-structural renovations were undertaken. The Consultant submitted that as the contraventions occurred in October which is off-season for the Whistler area, any suspensions should also be set for the off-season, perhaps during May or June.

Legal Counsel for the licensee submitted that the enforcement process is meant to bring about compliance. Enforcement action to be taken could be by way of a warning, an enforcement meeting or a fine as prescribed by regulation. The circumstances must be considered in each case. The licensee upon being advised of the contraventions could have agreed to take the recommended suspensions and served them while closed. The action taken by the licensee has solved the problem. There is no evidence that the minor found within the premises had consumed liquor. He submitted that contrary to the opinion expressed by the branch Advocate there is no connection between youth

crime and minors in licensed establishments. The licensee has admitted liability and has taken great care and expense to deal with the matter. These circumstances should be considered.

Counsel argued that the action taken by the licensee is penalty enough, however if a penalty must be imposed it should be monetary as the licensee has already undertaken a closure.

Counsel referred to several previous cases where monetary penalties rather than suspensions were imposed for contraventions involving minors in premises or employees consuming while on duty. He advised that he was unable to obtain the circumstances of each case or reasons why a monetary penalty was imposed rather than a suspension penalty. He submitted that if the license is suspended it would be unfair and disproportionate to impose it during the high season of February or March. In addressing the branch Advocate's position that the licensee should have taken action earlier, Counsel referred to the comments of the cabaret's Manager that he would be fired as a result of a minor being found on the premises. The action that would be taken by the licensee was known to staff.

REASONS AND DECISION

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 license or rescind or amend existing terms and conditions
 - impose a monetary penalty
 - order a licensee to transfer a license
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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*.

In the circumstances, I find that a licence suspension penalty is appropriate. A warning may be seen by some as condoning the contravention and a monetary penalty may be seen as the cost of doing business. A suspension penalty will affect both the licensee and its staff and should encourage future voluntary compliance. While dismissing the offending staff members from employment may have solved the problem, absentee licensees are required to incorporate systems that provide day to day supervision. The previous incidents, as outlined at Tab 1, p.6, although not proven contraventions should have alerted the licensee that greater supervision was necessary.

Given the time frame for the Hearing, the date of this decision and the normal practice of setting suspension dates approximately six weeks following the date of the decision, the issue of whether the suspension should occur during the high season, as identified by the consultant and legal counsel, need not be addressed.

The recommended suspension penalty for each contravention is the minimum within the range set out in Schedule 4 to the *Regulations* for first incidents of the alleged contraventions. I find that the minimum license suspensions are appropriate for these contraventions.

ORDER

Pursuant to section 20(2) of the *Act*, I order the suspension of liquor licence #177866 for a total of two (2) days starting as of the close of business Tuesday, April 29, 2003, and continuing on successive business days until the suspension is completed. "Business Day" means a day on which the licensee's establishment would normally be open for business (section 54(1) of the *Regulations to the Liquor Control and Licensing Act*).

Since I do not know whether the establishment would normally be open 7 days per week as of April 17, 2003, I do not know what the "business days" will be. To ensure that this order is effective, I direct that the liquor licence #177866, be held by the Branch or the Whistler Detachment of the R.C.M. Police from the close of business Tuesday, April 29, 2003, until the licensee has demonstrated to the Branch's satisfaction that the licensed establishment has been closed for two (2) business days.

The suspension sign notifying the public shall be placed in a prominent location by a Liquor Inspector or Police Officer. A member of the R.C.M. Police Whistler Detachment will be requested to attend the premises, take possession of the liquor license and hold it in safekeeping during the term of the suspension.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: March 18, 2003

cc: R.C.M. Police Whistler Detachment

Liquor Control and Licensing Branch, Vancouver Office
Attention: Lee Murphy, Regional Manager

Liquor Control and Licensing Branch, Victoria Office
Attention: Peter Jones, Branch Advocate
