



**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, R.S.B.C. 1996, c. 267***

Licensee:	673269 B.C. Ltd dba Cielo's Restaurant 15069 Marine Drive White Rock, BC
Case:	EH07-090
For the Licensee	Serf Grewal, Counsel
For the Branch	Shahid Noorani, Branch Advocate
Enforcement Hearing Adjudicator	M. G. Taylor
Date of Hearing	November 20, 2007
Date of Decision	December 28, 2007

## INTRODUCTION

657713 B.C. owns and operates Cielo's Restaurant ("the restaurant") in White Rock, under Food Primary Licence No. 160391. The licence stipulates that the hours of sale are from 11:00 a.m. to 1:00 a.m. Monday through Saturday, and to midnight on Sunday. It also stipulates that the licensed capacity is 45 patrons inside the restaurant and 9 patrons on the patio. The licence is subject to terms and conditions, including those contained in the Guide for Liquor Licensees in British Columbia ("Guide").

## ALLEGED CONTRAVENTION

By Notice of Enforcement Action ("NOEA"), dated July 11, 2007, the Liquor Control and Licensing Branch ("branch") alleged that on June 2, 2007, the licensee contravened section 42(4) of the *Liquor Control and Licensing Regulation* ("Regulation"), B.C. Reg. 244/2002, by allowing liquor to be removed from the establishment, and that the licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* ("Act"), R.S.B.C. 1996, c. 267, by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold or served.

The branch proposed penalties, respectively, of a one (1) day suspension and a four (4) day suspension of the liquor licence in accordance with Schedule 4 of the *Regulation*, items 29 and 11.

**RELEVANT STATUTORY PROVISIONS*****Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, s. 43***

**43** (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

(2) A licensee or the licensee's employee must not permit

(a) a person to become intoxicated, or

(b) an intoxicated person to remain in that part of a licensed establishment where liquor is sold, served or otherwise supplied.

***Liquor Control and Licensing Regulation, B.C. Reg. 244/2002, s. 42(4)***

(4) All liquor sold or served in a licensed establishment must be consumed there, and the licensee must not allow liquor, other than the following, to be taken from the licensed establishment:

(a) a bottle of wine that is unfinished by a patron and sealed by the licensee before being taken by that patron from the licensed establishment;

(b) liquor that is sold for consumption off premises in accordance with the Act, this regulation and the terms and conditions of the licence.

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

**Schedule 4**  
**Penalties for Overcrowding**

Item	Contravention	Period of Suspension (Days)			Monetary Penalty
		First	Second	Subsequent	
29	A breach of section 42 (4) of this regulation by permitting liquor sold in the licensed establishment to be taken from the establishment	1-3	3-6	6-9	\$1000-\$3000
11	A breach of section 43 (2) (b) of the Act by permitting an intoxicated person to remain in that part of the licensed establishment where liquor is sold or served	4-7	10-14	18-20	\$5000-\$7000

**ISSUES**

1. Did the licensee permit a patron to remove liquor from the establishment as alleged?
2. Did the licensee permit an intoxicated patron to remain in the establishment as alleged?
3. If either or both contraventions occurred, what is the appropriate penalty, if any?

**EXHIBITS**

Exhibit No. 1: Branch's Book of Documents

Exhibit No. 2: Licensee's Book of Exhibits

## **Preliminary Application**

The licensee made an application for the alleged contraventions to be dismissed due to lack of procedural fairness. The branch inspectors were involved in a covert operation on June 1, 2007, and did not identify patrons at the time of the alleged contraventions, or bring the alleged contraventions to the attention of the licensee. The licensee submitted that the branch is not able to prove the contraventions since both alleged contraventions attach to, and are an incident of, a person and it is not the duty of the licensee to try to identify the patrons after being served with a contravention notice. Further, since the branch did not identify the patrons or bring the alleged incidents to the licensee's attention at the time, the licensee does not have a meaningful opportunity to question the branch's witnesses on the veracity and reliability of their evidence.

I gave an oral determination at the hearing, denying the licensee's application for the following reasons. Even with overt operations, it frequently happens that police officers or liquor inspectors do not identify the patrons or bring the incidents to the attention of the licensee at the time. When the branch notifies the licensee that enforcement action may be taken, the licensee is provided with the date, time and other details that allow the licensee to consult with staff who were on duty. Although it may be more difficult for the branch to prove the alleged contravention when the patrons have not been identified and brought to the licensee's attention at the time, I find that is not fatal to the branch's case. The enforcement officers may testify to what they observed and their testimony can be tested by the licensee in questioning and by presenting other witnesses.

I find that the licensee has not substantiated a denial of natural justice, or procedural fairness and I deny the application to dismiss the alleged contraventions.

## **EVIDENCE**

The branch presented two liquor inspectors (*"Inspector #1 and #2"*) as witnesses. The licensee's evidence was from a patron (*"patron"*) and the owner/manager (*"licensee"*) of the restaurant.

Because of time considerations for the licensee's witnesses, the usual order of witnesses was changed, by agreement. The licensee's patron testified first, followed by Inspector #1, then the licensee, then Inspector #2. I mention this at the outset because there was some difficulty as a result of hearing the patron before the Inspector. I mention this issue later.

### ***Branch Evidence***

Inspector #1 testified that he has been employed with the branch for 14 months and had previously been employed with the RCMP and military police for many years. He testified that he has had extensive training and experience detecting and investigating intoxicated individuals. On June 1, 2007, he was operating undercover in the White Rock area with two other liquor inspectors.

The inspectors first attended this establishment for about eight minutes at 10:50 p.m. They returned at 11:20 p.m., were seated and ordered some refreshments. Inspector #1 testified that his observation from both of his attendances was that the restaurant seemed to have a party atmosphere. He was concerned that it might have been operating outside the class of the Food Primary Licence.

At 11:45 p.m., Inspector #1 saw a man come from the kitchen area, carrying a full bottle of Corona beer with the lime in the neck of the bottle, and he watched him leave through the front door. The inspector followed immediately. He testified that the patron was standing on the sidewalk adjacent to the patio and

his bottle of beer was on a table on the patio. The inspector recalled that there was a railing completely around the patio. He also recalled that there were a couple of people sitting at one table and that the bottle of beer had been placed on an adjacent table. He testified that he did not see the patron speak with the couple at the adjoining table. He also testified that he did not see the patron drink from the bottle of beer.

The inspector and the patron engaged in conversation. The inspector learned that the patron was hoping to find a beach restaurant in White Rock. When the patron finished his cigarette, he picked up his beer and went back inside. The inspector testified that he followed him back inside, but lost sight of him. He recalled seeing him walk toward the men's washrooms.

While he was outside observing that patron on the patio, the inspector had noticed another patron seated on the patio who appeared to be intoxicated. The inspector went back outside and walked along the sidewalk to a position approximately seven feet from this patron. He observed this man for approximately eight to ten minutes while he waited for the other inspectors to join him. He described the man's demeanour as being slumped forward, his elbows on the table, with a glass of beer in front of him. He was unshaven and appeared to be asleep, with his head propped on his hand. He wavered in his chair. When he attempted to converse with his companion, his speech was slurred, non-sensible and garbled. The inspector could not make out the conversation between the patron and his companion. He offered his view that the man's hand/eye coordination was impaired by alcohol intoxication and his eyes appeared glassy. In his opinion, this patron was grossly intoxicated. He acknowledged that the patron's symptoms could be caused by tiredness, or using other drugs, or an injury, but maintained his opinion that they were caused by intoxication. The inspector acknowledged that he did not speak with the patron, smell his breath or perform any sobriety tests.

There were only two or three other patrons on the patio. While he was observing this patron, he observed a male and a female server come onto the patio collecting empty glasses from other tables. Neither of them approached this patron.

Inspector #2 testified that she has worked with the branch for approximately seven years and has had dealings with intoxicated individuals once or twice per month. She is familiar with various levels of intoxication. Regarding the incidents of June 1, 2007, she testified that when she left the restaurant, she met Inspector #1 alongside the patio and he drew her attention to a man on the patio. Inspector #2 observed this patron trying to prop his head in his hand as his head kept falling; she observed his eyes were closing and when he attempted to speak he spoke just one word at a time. She did not observe him stand up or walk. She recalled that there were glasses of wine on that table. She did not see the patron drink. The Inspector testified that although the patron's actions could be symptomatic of being tired and having one or two glasses of wine, in her opinion he was intoxicated. The inspector did not speak with the patron or conduct sobriety tests.

### ***Licensee's Evidence***

The licensee's patron witness is the person who the licensee identified as the probable subject of the alleged contravention of removing liquor from the establishment. The patron testified that he has been involved in the restaurant business for 23 years and is familiar with the legislative requirements. He is frequently at the restaurant.

The patron testified that on June 1, 2007, he arrived at the restaurant about 9:45 pm. He had some beer and tapas at the bar. He went out to the patio to have a cigarette and to speak with some co-workers. He had his bottle of beer with him. He testified that he went out through the front door because the doors



to the patio from the interior were crowded and blocked. He testified that when he went outside he immediately placed his beer bottle on his colleagues' table. The lime was still in the neck of the bottle. He estimated that it was only a matter of seconds between stepping out the front door and setting his beer down. The entrance to the patio is under the archway of the front door. He testified that he stood on the sidewalk to have his cigarette and did not drink from the beer while he was outside. There is no railing or gate between the front door and the patio tables. The railing runs along the sidewalk side.

The patron testified that when he finished his cigarette, the interior entrance to the patio was clear, so he went inside and back onto the patio where he joined his colleagues at their table.

The licensee testified that he has been in the restaurant business for 21 years. He has operated in the White Rock area for about nine years and is familiar with many members of the community and their families. Cielo's Restaurant is a tapas and oysters restaurant although there is also a diverse cuisine menu. He described that restaurant as having an upbeat atmosphere, and attracting clients of the +30 age group. The clients often bring their children who are fascinated by the huge aquarium. Most evenings, the clientele is local residents who know each other.

The licensee testified that he was not aware until this incident that the foyer around the front door and the area between the front door and the patio are outside the red-lined area. He testified that during the winter when it is too cold to open the interior doors to the patio, staff regularly take patrons orders to the patio through the front door.

Concerning the incidents of June 1, 2007, the licensee testified that he identified the allegedly intoxicated patron as probably being someone he has known for nine years, who is now a regular patron at Cielo's. He testified to his knowledge of the patron's usual beverage consumption and stated that he drinks wine. He and his wife share a bottle of wine. He recalled that the patron arrived that evening around 8:00 p.m. with a friend who had just flown in from Saskatchewan. The restaurant was full so he seated them at the bar. During the evening, he spoke with them occasionally. He learned that the patron had been up since 4:00 a.m. arranging plane flights. There is a considerable time difference, thus his early morning work. The patron was on vacation as of the date of the hearing.

The licensee recalled that the two patrons ordered some tapa dishes and some wine. After they finished eating, they moved to the patio where they had wine and dessert. They were on the patio for approximately one and half hours. At the end of the evening, the patron was exhibiting signs that could be taken for intoxication – he was yawning and holding his head in his hand. The licensee testified that when the patron came to request the bill and a taxi, someone viewing him from a distance might have thought he appeared intoxicated. The licensee testified that in fact that patron had only three glasses of wine during the evening. He testified that he believed the patron was just overly tired, not intoxicated. He also produced a receipt which he testified was their bill for the evening, issued at 11:24 p.m., for four tapa dishes, dessert and six glasses of wine.

The licensee produced an affidavit from the patron in which he states that he believed he had consumed three glasses of wine that evening. Further, he states that when his friend left the restaurant to try to locate a taxi, the patron may have fallen asleep briefly. He also testified that he had been up since 4:00 a.m. and was overly tired.

### ***Submissions***

The licensee submitted that the policy rationale behind *Regulation* section 42(4) is to control where alcohol is consumed by preventing patrons from removing alcohol and consuming it elsewhere. The patron and the inspector testified that the patron did not drink any alcohol outside the restaurant and his stated intention in going outside was to have a cigarette. Therefore, the patron did not breach section 42(4) because he did not leave the restaurant with alcohol, and he did not consume alcohol outside of the restaurant.

The licensee submitted that the branch did not submit evidence of any direct contact with the allegedly intoxicated patron and did not submit evidence of the patron having consumed any alcohol. Even if the patron was intoxicated, which the licensee maintained he was not, there was no evidence of continued service; rather, the evidence was that the licensee was assisting the patron to find a taxi.

### **ANALYSIS AND DECISION**

#### ***Permitting liquor to be removed, Regulation s. 42(4)***

Based on a careful review of the evidence, I find that the branch has substantiated the contravention of permitting a patron to remove liquor from the establishment. The plans contained in the exhibits demark the red-lined area. The fact that the licensee was not aware that the foyer and entrance were outside the red-lined area, despite the plans, is not a defence. I do not accept the licensee's argument that the patron's conduct does not amount to breach. It is licensee's actions which constitute the contravention, not the patron's. There was no attempt by the licensee to oversee the patron's actions. The licensee permitted the patron to leave the establishment with a bottle of beer.

There are aspects of the patron's testimony that are at odds with Inspector #1. However, given that the patron testified first, there was no opportunity to put the inspector's version to him. Therefore, although some issues of credibility arise as a result of the discrepancies, I cannot accord much weight to that. I find that those issues would not affect my finding that the licensee permitted the patron to remove liquor from the restaurant.

### Due Diligence

The defence of due diligence is a complete defence to contraventions under the *Act*. 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 (*R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 QL 21; *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)* 2004 BCSC 248; *Aztec Properties Company Ltd. v. General Manager of the Liquor Control and Licensing Branch*, 2005 BCSC 1465).

I find the licensee is the directing mind of the licensee and was present that night. By the licensee's own admission, he did not have policies or procedures in place to ensure that staff did not permit patrons to leave the restaurant with liquor. I have taken into consideration that the licensee's submission is that the patron had no intention of actually leaving, as opposed to going to the patio, or going out for a cigarette. There is nothing in the evidence that suggests the licensee or the staff had monitored this patron's actions or intentions in leaving. I find that the licensee has not established the defence of due diligence.

***Permitting an intoxicated to remain in the establishment, Act s. 43(2)(b)***

The branch's evidence, from the two inspectors, is based on the patron's physical appearance and lack of alertness. Specifically they observed that the patron appeared to be sleeping some of the time, that he slumped forward, wavered in his chair, tried to prop his head in his hand and that his speech was garbled and slow. They were approximately seven to ten feet from the patrons' table and testified that they were not close enough to hear their conversation. The inspectors' testimony of the conversations was based more on their physical, rather than audible, observations. Inspector #1 described the patron's eyes as glassy. Inspector #1 also commented on the patron's poor eye/hand coordination but did not testify what he based that on.

I accept that the inspectors have considerable experience dealing with intoxicated persons and have experience identifying symptoms of intoxication, as distinguished from similar symptoms from other causes. They both acknowledged that the symptoms they observed could be indicative of causes other than intoxication, however, both gave opinions that the patron was intoxicated.

The licensee's evidence includes the sworn statement of the person the licensee identified as probably being the patron in question, to the effect that he had only three glasses of wine and was overly tired. There is also the evidence of the licensee concerning his dealings with the patron that evening and his observations of the patron during the evening and when he went to pay the bill and ask for a taxi. The licensee testified that he has been in the restaurant business for 21 years. He testified that the patron was showing signs that could be interpreted as intoxication. However, based on his experience in the industry, his personal knowledge of the patron and his dealings with the patron on this occasion, he did not believe him to be intoxicated. Additionally, there is the restaurant bill which is corroborative of the evidence of both the patron and the licensee.

There is a discrepancy between the recollections of the inspectors whether the patron had a glass of beer or a glass of wine on the table. Inspector #1 recorded in his notes that it was a glass of beer. Inspector #2 did not make a note about that. Both the patron and the licensee gave evidence that he had wine only. Considering the evidence as a whole, I find that it is more probable than not that the licensee and his friend consumed three glasses of wine each between the hours of approximately 9:30 pm and the time the inspectors observed them.

The role of the general manager in the hearing is to weigh all of the evidence in order to come to a determination based on a balance of probabilities. In this instance, I find that the probabilities weigh in favour of a finding that the patron was exhibiting signs of being overly tired, to the point of falling asleep at the table, and that his condition was exacerbated by three glasses of wine.

I find that the branch has not substantiated the alleged contravention of permitting an intoxicated person to remain in the establishment.

## **PENALTY**

I have found that the licensee has contravened section 42(4) of the *Regulation* by permitting a patron to remove liquor from the establishment.

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.

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 by the minimums set out in Schedule 4 of the *Regulations*. However, 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.

There is no record of prior contraventions, offences or enforcement action of the same type for this licensee or this establishment within the year prior to this contravention. Accordingly, pursuant to the *Regulation*, Schedule 4, Item 29, the range of penalties for a first contravention is a one (1) to three (3) day suspension and/or a monetary penalty of \$1,000-\$3,000.

The licensee's submissions were directed to the conduct of the patron rather than the conduct of the licensee. It may well be that the patron had no intention of contravening the legislation and simply went outside for a cigarette. The point of the contravention, however, is that the licensee permitted him to do that. The licensee admittedly had no control at the door to prevent patrons from walking out with liquor. The licensee says this is because he did not know that the front

door was not part of the red-lined area. The licensee framed this issue around the necessity of having access to the patio other than through the inside access. However, the issue is much broader than that given that the licensee permitted a patron to walk out of the establishment with liquor.

This was not necessarily an isolated incident. The licensee's evidence shows that it was a part of the licensee's mode of operation for both staff and patrons to access the patio through the front door. The licensee was oblivious to the importance of the red-lined area contained in the plans approved by the branch. The result was that a patron walked out of the restaurant with an open bottle of beer. In these circumstances, I find that the imposition of a penalty is warranted. I also find that imposition of a penalty is warranted to ensure voluntary compliance in the future.

I find that a licence suspension is the appropriate penalty and I find that the minimum penalty of one (1) day is appropriate.

## **ORDER**

Pursuant to section 20 (2) of the *Act*, I order the suspension of Food Primary Licence No. 160391 for a period of one (1) day, to commence as of the close of business on Thursday, January 24, 2008, 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*).



I direct that Food Primary Licence No. 160391 be held by the branch or the local Police Department from the first day of the suspension until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

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M. G. Taylor  
Enforcement Hearing Adjudicator

Date: December 28, 2007

cc: White Rock RCMP

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

Liquor Control and Licensing Branch, Surrey Regional Office  
Attn: Shahid Noorani, Branch Advocate