



**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:

Earl's Restaurant (Whistler) Ltd.
dba Earl's (Whistler)
4295 Blackcomb Way
Whistler, BC V0N 1B4

Case:

EH08-014

For the Licensee:

Kevin Wallace

For the Branch:

Tania Cogan

Enforcement Hearing Adjudicator:

Sheldon M. Seigel

Date of Hearing:

May 7, 2008

Place of Hearing:

Whistler, BC

Date of Decision

May 16, 2008

INTRODUCTION

The licensee operates a restaurant in Whistler Village with a Food Primary Licence. The hours of operation indicated on FP No. 208967 are 11:00 a.m. to 1:00 a.m. seven days per week.

On the business day of Saturday, January 26, 2008, at approximately 1:30 a.m. (on Sunday 27th) two liquor inspectors attended at the establishment to complete a licensed premise check. As a result of the inspection, the establishment was served with a contravention notice. That notice included an allegation that the licensee allowed liquor to be taken from the establishment contrary to the *Liquor Control and Licensing Regulation (Regulation)*.

ALLEGED CONTRAVENTIONS

The Liquor Control and Licensing Branch (Branch) made allegations and recommended enforcement action as set out in the Notice of Enforcement Action (NOEA) dated March 14, 2008. The branch alleges that on January 26, 2008, the licensee contravened s. 42(4) of the *Regulation* by allowing liquor to be taken from the licensed establishment.

RELEVANT STATUTORY PROVISIONS

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

Consumption of liquor in licensed establishments

42 (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.

(5) A licensee who seals an unfinished bottle of wine in accordance with subsection (4) (a) must inform the patron of the requirements of section 44 of the Act.

ISSUES

1. Did the licensee allow liquor to be taken from the establishment in contravention of s. 43(2)(b) of the *Act*?
2. If so, is a penalty warranted, and what is the appropriate penalty?

EXHIBITS

Exhibit No.1: The branch's book of documents

Exhibit No.2: Two statements provided by the licensee

Exhibit No.3: Two pages of the licensee's "How we do it" document

EVIDENCE

A liquor inspector, an executive of the corporate licensee, the licensee's night manager, and a server testified. The licensee also presented documentary evidence in the form of two statements signed by employees of the establishment (Exhibit No. 2), and two pages of an operations manual (Exhibit No. 3).

The liquor inspector testified that she attended the establishment, as indicated on the NOEA, to conduct a licensed premise check. Her intention was to wait outside the door until 1:30 a.m., and then enter in order to confirm that liquor was cleared by 1:30 a.m., as required.

Just as she was prepared to enter, the inspector saw a patron exit the establishment with a *rock type glass* filled with amber liquid. She asked the patron what he was carrying. He replied: "Oh, am I not allowed to take the drink out with me?"

The inspector entered the establishment and spoke with two female staff members, who indicated that there had been a large group of foreign tourists seated at one of the tables in the establishment. The tourists did not speak English very well and the staff at the establishment had some difficulty communicating with them. The night manager, one of the females with whom the inspector spoke, said that the server had trouble clearing their drinks because of the communication problem.

The inspector witnessed the patron who had left the establishment with his drink return the drink to the bartender.

The inspector testified that the branch had conducted a compliance meeting on October 7, 2007, with the licensee, in which the branch indicated its concern over drinks being taken from the establishment. The licensee made commitments to ensure that the door was staffed at all times to ensure that liquor was not removed.

The inspector also testified that she asked the night manager where the doorman was, and the night manager indicated that the doorman had been off duty for fifteen minutes.

The inspector identified all of the documents in Exhibit No. 1, including the record of the compliance meeting in which the licensee committed to ensure door staffing.

The night manager testified that she relieved the doorman when he went off duty, and remained at the door until all patrons had departed in accordance with the establishment's practice. She said that the tourist patron might have hid the glass of liquor and secreted it out of the door.

She also confirmed that she spoke to the liquor Inspector.

Both the night manager and the server testified that a patron did remove liquor that he purchased in the establishment from the establishment as alleged. They both also testified that the establishment made "big changes" after this allegation was made to ensure the contravention did not occur again.

The officer of the licensee testified that the patron did leave the establishment with liquor that the patron had purchased there, in the early morning of January 26, 2008. He also testified that the licensee made significant changes after the allegation to address "the issue" of drinks being taken from the establishment.

The licensee presented the two statements marked as Exhibit No. 2, and the excerpts of Earl's routine description marked as Exhibit No. 3.

SUBMISSIONS

The branch submitted that the contravention occurred as alleged, and that the communication problems that the staff had with the tourists, and the resulting difficulty in clearing liquor from the patrons, should have alerted the staff to the need for more diligence in monitoring the door as those patrons departed.

The branch also submitted that the establishment has a history of non-compliance with the *Act* and *Regulations*, and notwithstanding commitments made at a compliance meeting to address corrective measures, failed to follow through on its commitment to prevent liquor from being removed by diligent monitoring of the door.

The licensee acknowledged that the patron removed liquor as described in the allegation, and agreed that a contravention had occurred. The officer stated his remorse and indicated that the licensee takes full responsibility for the contravention.

The licensee submitted that contraventions cannot all be "lumped into one bundle." The officer of the licensee indicated that the establishment's compliance record relates to matters unconnected to issues of public safety and that the establishment has a good record of compliance with public safety issues.

Finally, the licensee submitted that a fine of \$1,000 would better reflect the nature of the contravention and the reality of operating in the challenging environment that the Whistler ski village presents to a busy restaurant.

ANALYSIS AND DECISION

I find that the contravention occurred as alleged in the NOEA.

Although there was some discussion during the hearing relating to the date of the contravention and particularly the way the date was referenced in the NOEA, I find that the branch and the licensee were aware at all relevant times of the time and date that the relevant facts occurred. The contravention occurred at approximately 1:30 a.m. on Sunday January 27, 2008, during the business day of Saturday January 26th.

As the evidence unfolded with acknowledgements by the licensee's witnesses that the contravention occurred as alleged, the only issue remaining is penalty.

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 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.

The branch's primary goal in bringing enforcement action and imposing penalties is to achieve voluntary compliance with the *Act*, Regulation, and Rules. 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.

This establishment has a record of compliance issues relating primarily to advertising matters. Although I understand the licensee's submissions that some issues may be more directly related to public safety than others, I do not endorse the principal that a licensee is able to decide what contraventions are or are not related to public safety. The legislative scheme sets out the obligations of a licensee, and the regulations set out the penalty schedule for each contravention. It is clear that the drafters had directed their attention to the varying significance of different contraventions.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee or this establishment within the year preceding these incidents ("compliance history"). Accordingly, pursuant to *Liquor Control and Licensing Regulation*, Schedule 4, section 1(1)(b), this is a first contravention. Schedule 4, Item 29, sets out the range of penalties for a first contravention of this type as one (1) to three (3) days suspension and/or a monetary penalty of \$1,000 - \$3,000.

The branch recommended the minimum suspension of one (1) day. The licensee indicated its preference for the minimum monetary penalty of \$1,000.

The licensee committed at a previous compliance meeting to do a better job of monitoring the establishment's door against the removal of liquor, yet liquor was removed under circumstances that I find to be not unusual. The licensee's witnesses indicated that changes were made subsequent to the contravention to better monitor the door against liquor being removed. The time for the changes was before the contravention occurred.

I feel that a penalty is appropriate in this circumstance and I feel the appropriate penalty is a one (1) day suspension.

ORDER

Pursuant to section 20(2) of the *Act*, I order a suspension of the Food Primary Licence No. 208967 for one day to commence at the close of business on Friday June 20, 2008, and to continue throughout the business day of Saturday June 21, 2008.

Original signed by

Sheldon M. Seigel
Enforcement Hearing Adjudicator

Date: May 16, 2008

cc: Whistler RCMP

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

Liquor Control and Licensing Branch, Vancouver Regional office
Attn: Tania Cogan, Branch Advocate