



**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:	Ellen Margaret Macara dba Trails End Pub 109 South Shore Road Lake Cowichan, BC V0R 2G0
Case:	EH07-141
For the Licensee:	Ellen Margaret Macara
For the Branch:	Sonja Okada, Branch Advocate
Enforcement Hearing Adjudicator:	M. G. Taylor
Date of Hearing:	January 9, 2008
Date of Decision:	January 18, 2008

INTRODUCTION

The licensee has owned and operated the Trails End Pub (“the pub”) in Lake Cowichan under Liquor Primary Licence No. 146471 since approximately January 25, 2007. The licence stipulates that the hours of sale are from 10:00 a.m. to Midnight Monday through Thursday, 11:00 a.m. to 1:00 a.m. Friday and Saturday, and 11:00 a.m. to midnight on Sunday. It also stipulates that the licensed capacity is 65 patrons inside the pub and 20 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 November 5, 2007, the Liquor Control and Licensing Branch (“branch”) alleged that on September 16, 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.

The branch proposed a penalty of a three (3) day suspension of the liquor licence in accordance with Schedule 4 of the *Regulation*, item 29.

RELEVANT STATUTORY PROVISIONS

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

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

ISSUES

1. Did the contravention occur as alleged?
2. Is the licensee able to substantiate the defence of due diligence?
3. If the contravention occurred and the licensee is not able to substantiate the defence of due diligence, what is the appropriate penalty, if any?

EXHIBITS

- Exhibit No. 1: Branch's Book of Documents
- Exhibit No. 2: Registered Mail Trace Sheet
- Exhibit No. 3: Licensee's mock-up drawing of the parking lots

EVIDENCE

The branch presented one liquor inspector and an RCMP officer as witnesses. The licensee's evidence was from the bar manager and the owner who I will collectively refer to as the "licensees".

Branch Evidence

The liquor inspector testified that he attended the pub just before 1:00 a.m. on September 16 (business day of September 15). He sat at the bar and ordered a beer which he did not drink. He observed approximately 22 patrons inside, 12 patrons outside and three patrons on the unlicensed patio. He observed some patrons playing pool and noticed at one point that three of them had gathered outside on the non-licensed patio. One of the men was drinking from a bottle of Corona beer. The inspector testified that he did not see the serving staff monitoring that area to ensure liquor was not being removed.

The inspector left and met up with the RCMP constable who accompanied him in the inspector's vehicle to the pub. They parked outside the pub to observe closing time. Both the inspector and the constable testified to observing patrons leaving the pub with cans of beer in their hands. They both testified that one male patron had a clear bottle that they presumed was a bottle of beer. The patron was standing beside a truck that was parked next to the inspector's

vehicle. The patron consumed the beer and threw the bottle into the bushes by the vehicles. The inspector and the constable located an empty bottle of Corona beer in the bushes. They testified that the bottle contained a fresh wedge of lime, that there was no contamination in the bottle, and that they believed it to be the bottle the patron threw away.

The inspector and the constable acknowledged that they were parked facing the street at some distance from the pub entrance. However, they testified that they were able to see the front of the pub. The inspector testified that he made some of his observations while he was standing outside the vehicle and that he wrote his notes immediately after. In response to the licensees' contention that they do not sell cans of beer, the inspector said that his perception was that the people were carrying liquor and that they had come from the pub.

The inspector and the constable differed in their recollections of how many people they observed, when the inspector was outside the vehicle, and how long it took to retrieve the bottle from the bushes.

Licensees' Evidence

The licensees described the area around the pub. Adjacent is a public park which is the cause of considerable noise and disturbance in Lake Cowichan. Young people, starting about age 12, congregate there as there is very little else to do. The park is notorious for under-aged drinking and related problems. The bar manager testified that he is a member of the Town's Lakeside Committee and a director of the Chamber of Commerce. Everyone in the town is aware of the problems caused by the park. Recently, the town has hired a retired RCMP member to patrol the park on Friday and Saturday nights. The licensees noted that there is a retirement community across from the park and that the residents deserve quiet.

Regarding the close proximity to the park, the licensees testified that the parking lot for the pub is behind the pub. The parking lot in front, where the inspector and the constable parked, is part of the public parking lot. They testified that they are aware that some patrons stow cans of beer in the park before coming into the pub. They are also aware that some patrons return to the park to continue drinking after leaving the pub. However, they contend that they cannot take responsibility for all the activity that occurs outside their establishment.

The licensees testified that they do not sell cans of beers. Therefore, if the inspector and the constable saw people with cans of beer in the parking lot, they did not come from the pub.

The licensees testified that they have always had difficulty monitoring patrons leaving the pub because there were numerous exits. There was no division between the licensed patio and the unlicensed patio and there was a door directly from the pool table area to the main entrance which was not visible from the bar. Additionally, there is a stairway from the licensed patio to the back parking lot. They explained that the licensed patio is approximately three feet below the level of the main pub, which means that servers cannot observe patrons from inside; frequently, patrons would leave from the patio to the parking lot without being noticed.

Since this incident, the licensees have put a divider between the two areas of the patio, blocked the patio stairway, and blocked off the door from the pool table. They have discontinued having bands playing and are doing everything they can think of to make the pub a quiet place. They testified that these actions will result in decreased clientele and income for the pub.

The licensees testified that during the busy summer months they employ five or six servers. They consider the two servers who were working on the night in question to be highly experienced and trusted employees who "have never let us down." During the winter, these servers work elsewhere and the licensee did not ask them to come to the hearing. Neither of the licensees was working that night, but the bar manager was present in the pub. He testified that he did not see any problems.

The licensees testified that they ensure that staff are aware of the problems of patrons leaving with liquor and train them to watch the doors. They hold informal meetings and call meetings when issues arise. There is a log book where incidents are recorded; there were no incidents recorded for this night.

Submissions

The licensees submitted that the branch witnesses gave inconsistent evidence, sometimes contradictory, as to how many patrons they observed and their own actions during their surveillance. They stressed that any concerns about cans of beer have nothing to do with their establishment and, since the branch did not produce the bottle of beer the inspector found in the bushes, there is no evidence that it came from the pub. If it had been produced, the serial number could have verified where it came from. Further, the licensees submitted that the branch witnesses were parked facing the street and that visibility would have been limited, and they could not see inside the pub to know whether the staff were monitoring patrons as they left.

The licensees further submitted that even if a contravention occurred on this night, the licensee cannot be held responsible because they had done everything they could to ensure that patrons did not leave the premises with liquor, including having experienced, trusted staff.

ANALYSIS AND DECISION

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

In determining whether a contravention has occurred, I am required to make findings based on a balance of probabilities – that is, to determine what probably happened.

Having considered the totality of the evidence, I find that one of the pool players left the pool room with his beer and consumed the beer on the non-licensed patio, outside the pub. Regarding the later incidents outside the pub, the evidence is that the inspector and the constable saw a man, who they believed had just left the pub, drink from a clear bottle, which they assumed to be a beer bottle, and toss that bottle into the bushes. The inspector and the constable found an empty, clear bottle of Corona in the bushes, with a lime inside.

The purport of the licensees' submissions is that the inspector and the constable were in a public parking lot where, they testified, they saw people with cans of beer, which could not have come from the pub and, therefore, the correct inference is that the people they saw in the parking lot did not come from the pub. The licensees drew attention to inconsistencies in the testimony of the inspector and the constable and their limited visibility to see the pub entrance, thus raising issues of credibility about the witnesses' evidence.

Having considered the evidence and submissions as a whole, I find that the bottle retrieved by the inspector and the constable had a wedge of lime in it and was reasonably clean. The fact that it had a lime inside suggests that, more probably than not, it came from the pub. Given the proximity of the inspector and the constable to the person who threw a similar bottle into the bushes, I find that the bottle retrieved was the same bottle. I also find that the man who threw the bottle away had brought it with him from the pub, and was still consuming beer from that bottle while he was in the parking lot.

I have given consideration to the licensees' concerns about the inconsistencies between the evidence of the inspector and the constable. I find that both the inspector and the constable were truthful and forthcoming. I find that their differing recollections do not materially detract from the substance of their testimony, which tended to be corroborative of the main facts each other recalled.

I have taken into consideration the licensees' submission that the inspector did not verify by the serial numbers that the bottle came from the pub. This did not come up during the inspector's testimony and, therefore, I did not hear any evidence from him about that. As indicated above, based on the evidence before me, I am satisfied that the bottle did come from the pub.

I find that the branch has substantiated that two contraventions of section 42(4) of the *Regulation* occurred on this occasion.

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 and the bar manager act as the directing minds of the licensee and that neither was working that night. There was no suggestion from the licensees that either server was acting in a management capacity; I find that neither server working that night acted in the capacity of a directing mind. Therefore, the issue is whether the licensee can demonstrate that it had implemented adequate training and other systems to prevent the contravention and that it had taken reasonable steps to ensure the systems were operating effectively.

By the licensees own admissions, there has been an ongoing problem of patrons taking liquor out of the pub. Although they trained their staff to be vigilant, they acknowledged that as long as there were two exits, no division between the patios and an exit from the licensed patio, it was virtually impossible to prevent patrons removing liquor. I find that those admissions run counter to the licensees' contention that they had been duly diligent and had done everything possible to prevent patrons taking liquor away from the establishment. As the licensees have demonstrated since this enforcement action was taken by the branch, it was possible to take steps to reduce the possibility of contraventions occurring.

I find that the licensee has not demonstrated that its systems were adequate to prevent contraventions from occurring. Accordingly, I find that the licensee permitted liquor to be removed from the establishment, contrary to section 42(4) of the *Regulation*.

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.

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 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.

The liquor inspector testified that he conducted a final inspection interview with the licensee on January 25, 2007. Part of that interview included discussion about the requirements of ensuring that patrons do not remove liquor from the establishment. On April 29, 2007, the Lake Cowichan RCMP issued a Police Licensed Premises Check (LPC) to the licensee for alleged contraventions relating to failure to clear patrons and liquor, and consumption of liquor after the

hours of service. On May 31, 2007, the liquor inspector held a compliance meeting with the licensee to discuss the alleged contraventions. During that interview, the inspector reviewed the *Act* and *Regulations* and the terms and conditions of the liquor licence. On the interview form, the inspector noted commitments made by the licensee during the interview, including a commitment to ensure that no liquor would be removed from the red-lined area, meaning the area of the pub in which liquor may be sold. The inspector noted on the interview form that future non-compliance could result in enforcement action.

The inspector had received other concerns from the RCMP in Lake Cowichan about this pub. This prompted him to do an inspection, which resulted in this hearing in which two contraventions have been found.

In deciding on whether a penalty is required, I consider the previous alleged contraventions not as evidence of contraventions, but as indication that areas of concern have been brought to the licensee's attention, either through the police or the branch. In this instance, the liquor inspector had two previous discussions with the licensee about ensuring the patrons did not remove liquor from the pub. This indicates to me that the licensee knew the branch was concerned about that type of behaviour. Further, the licensee advised me that it has been an ongoing problem.

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.

In these circumstances, I find that a penalty is warranted and that a licence suspension is the appropriate penalty. In considering the length of the suspension, I have taken into consideration the renovations the licensee has

made since this contravention and the licensee's evidence of what she has changed at the pub to ensure that it attracts a quieter clientele. I find that the licensee has taken some steps to ensure that the impugned behaviour does not continue and I find that the licensee has incurred expenses both for renovations and in anticipated lost revenue. In part the licensee's steps are directed to reducing the threat to the public safety and enhancing the well-being of the community. There will still have to be enforced vigilance by the licensees and their employees, but I find the licensee has taken positive steps towards voluntary compliance. In my view, the branch's goals in taking enforcement action and imposing penalties can be achieved with the minimum licence suspension of one (1) day.

ORDER

Pursuant to section 20 (2) of the *Act*, I order the suspension of Liquor Primary Licence No. 146471 for a period of one (1) day, to commence as of the close of business on Friday, February 22, 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 Liquor Primary Licence No. 146471 be held by the branch or the local Police Department from the close of business Friday, February 22, 2008, until the licensee has demonstrated to the branch's satisfaction that the suspension has been served.

[ORIGINAL SIGNED]

M. G. Taylor
Enforcement Hearing Adjudicator

Date: January 18, 2008

cc: Lake Cowichan RCMP

Liquor Control and Licensing Branch, Victoria Regional Office
Attention: Gary Barker, Regional Manager
Vancouver Island/Okanagan/Kootenay

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