



**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: Earl's Restaurant (Langley) Ltd,
dba Earl's Restaurant
600-6339-200th Street
Langley, BC V2Y 1A2

Case: EH09-011

For the Licensee: Michelle Cooke, Restaurant Manager

For the Branch: Olubode Fagbamiye, Branch Advocate

General Manager's Delegate: George C.E. Fuller

Date of Hearing: By way of written submissions

Date of Decision: April 24, 2009

INTRODUCTION

The Licensee, Earl's Restaurant (Langley) Ltd., owns and operates a Langley, BC establishment, known as Earl's Restaurant ("Earl's"), and holds Food Primary Licence No. 144165. According to the terms of the license, Earl's may sell liquor from 11:30 a.m. to midnight on Monday to Thursday, 11:30 a.m. to 1:00 a.m. on Friday and Saturday, and 11:00 a.m. to midnight on Sunday. The licence is, as are all food primary liquor licences in the province, subject to the terms and conditions contained in the publication, *Food Primary Licence Terms and Conditions: A Guide for Liquor Licensees in British Columbia*.

On December 30, 2008, the Licensee had applied for and received a temporary change to its licence for New Year's Eve in order to have a DJ and dancing. This temporary change was approved by the Branch on an expedited basis.

The Licensee and the General Manager agreed to conduct the hearing by way of written submissions.

ALLEGED CONTRAVENTION

The Liquor Control and Licensing Branch ("Branch"), by Notice of Enforcement Action ("NOEA") dated February 12, 2009, alleged that on December 31, 2008 the Licensee contravened Section 20 of the *Liquor Control and Licensing Act* ("Act") and Section 11 of the *Liquor Control and Licensing Regulation* ("Regulation"), by operating the licensed establishment in a manner that was contrary to the establishment's primary purpose. The Branch recommends a 10 day suspension of the liquor licence. Item 1 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type of a licence suspension of 10 to 15 days and/or a monetary penalty of \$7,500 to \$10,000.

The Licensee admits that the contravention occurred as alleged, but provides submissions as to the appropriate penalty.

RELEVANT STATUTORY PROVISIONS

See Appendix A.

ISSUES

1. Did the contravention occur?
2. If so, what penalty, if any, is warranted?

EXHIBITS

Exhibit 1 – Branch's disclosure documents as outlined in a letter, dated March 17, 2009, to the Licensee, including a Notice of Enforcement Action, dated February 12, 2009, and which includes the Liquor Inspectors' and the RCMP officers' evidence and the Branch's reasons for recommended enforcement action and penalty.

Exhibit 2 – letter dated March 22, 2009 from the Licensee to the Branch setting out submissions in support of its position with regard to the recommended penalty.

Exhibit 3 – the Branch's response to the Licensee's submission dated March 27, 2009.

Exhibit 4 – reply of the Licensee to the response of the Branch dated April 2, 2009.

EVIDENCE

A review of the notes taken by the two Liquor Inspectors and the two RCMP officers who attended at the Licensee's establishment, between approximately 10:30 p.m. on December 31, 2008 and 12:30 a.m. on January 1, 2009, indicates that the same are entirely consistent and disclose no material discrepancies with regard to the events which took place. Accordingly, the Branch's evidence is summarized as follows.

As previously indicated, the Manager of the Licensee had applied for a temporary change to the liquor licence for New Year's Eve in order to provide a DJ and dancing. Given the potential to significantly change the focus of operations with this type of entertainment, the Liquor Inspector, on December 30, 2008, called the Manager of the

establishment to discuss the application. The Liquor Inspector specifically advised her of his concerns that the premises would still need to ensure that it was operating as a restaurant, with the focus on food service. The Manager agreed and indicated that she only wanted to provide an option for customers to get up and dance on this particular evening. Following this discussion, the Liquor Inspector approved this change application. This temporary change allowed the DJ and dancing until 12:00 midnight. In view of the fact that it was New Year's Eve, the establishment was able to stay open and provide liquor service until 4:00 a.m., if there was food available.

The two Inspectors attended at the establishment on December 31, 2008, from approximately 10:05 p.m. until 11:05 p.m.

The two Inspectors then proceeded to walk through the restaurant and noted several key observations. Firstly, there was an area in front of the main service bar which had been cleared of tables and was being used for the DJ and dance floor. It is also noted that there was a dessert buffet set up along the wall, opposite the dance floor. In addition to the main service bar, there were two additional temporary liquor service bars set up. One sold "champagne cocktails" and the other sold cider and coolers. All of the service bars were being operated on a self-serve basis.

No plates of food were visible at the tables, or being eaten by patrons. It was noted that there was no cutlery or any condiments on any of the tables. There was no hostess seating the patrons, nor were there any menus on the tables, or food specials being advertised, although every table had drink specials displayed. There was no assigned seating and the patrons were walking about with their drinks.

The Inspectors then met with the Manager and explained their concerns that the establishment was not being operated as a restaurant. One of the Inspectors listed the above-noted observations and reminded the Manager that he had discussed the requirement to operate as a restaurant with her during a phone conversation of December 30, 2008. The Manager indicated that she was sorry, but she had only been

looking to provide an alternative to the nightclubs in the area. She was then advised that she needed to take steps to ensure that individuals had to be consuming food with alcohol service, be seated at tables and that servers be in place to serve both food and drinks. One of the Inspectors then advised that he would be issuing a contravention notice in order to follow up on the inspection.

Upon leaving the establishment, at approximately 11:05 p.m., the Inspectors met with two RCMP officers and the Inspectors advised them of the result of their inspection. The officers said that they would complete a walk-through inspection later in the evening and report back any issues that were noted.

The two RCMP officers carried out a walk-through inspection at approximately 0034 hours on January 1, 2009. The observations made by them at that time were consistent with those made by the Inspectors on their earlier inspection. For example, no menus were noted on any of the tables. The majority of the patrons were gathered around the main bar and the dance floor. It was noted that the kitchen produced only two plates of food during the 15 minutes that the officers were in the restaurant. Furthermore, it was noted that there were half-eaten appetizers on one quarter of the tables and all other tables were littered with what appeared to be alcoholic drinks and beer bottles.

One of the officers was approached by a female patron who advised that she used to work at Earl's and that this scene was not appropriate, referring to the fact that no food was being served and it was like a bar. She further indicated that she and her friends arrived around 8:00 p.m. to get dinner at the establishment and were told that dinner was not being served. She went to another restaurant for dinner and returned around 9:00 p.m. She further indicated that the only time food was being served was when the Liquor Inspectors had entered the establishment. The servers had brought around a plate of appetizers to the tables while the Inspectors were there, however, no food was served after that.

One of the RCMP officers had spent approximately 5 years working for Earl's in Edmonton, Alberta prior to becoming a member of the RCMP. He also had managed a lounge in a major hotel chain and, therefore, felt that he was well versed in the service industry. In his view, based upon all of his experience in the service industry and in 13 years of policing, this mode of operation constituted a bar and not a food primary restaurant. He also noted that dancing was still continuing, although the same was to have ceased as of midnight.

As previously noted, the Licensee admits that the contravention took place and, therefore, is deemed to accept the above version of events. In her letter to the Branch of March 22, 2009, the General Manager of the Licensee stated, "I acknowledge what took place on December 31st and understand the seriousness of our management staff's actions, they did not comply with the guidelines surrounding our food primary license and for this I am truly sorry."

Accordingly, I find that the contravention occurred as alleged.

SUBMISSIONS OF THE BRANCH

The Branch notes the admission of the contravention by the Licensee which confirms that the focus of the establishment shifted from the service of food to service of liquor on the late evening of December 31, 2008 and the early morning of January 1, 2009. The Branch specifically notes that it cooperated with the Licensee's application for a temporary change to its licence for New Year's Eve in order to have a DJ and dancing. This temporary change was approved by the Branch on an expedited basis.

Furthermore, the Branch had advised the Manager on December 30, 2008 that it was the Licensee's responsibility to ensure that its primary purpose did not detract from the service of food during all hours of business and that this occurred just a few hours prior to the contravention.

Accordingly, the Licensee is deemed to have been aware of its obligation but, instead of complying with same, it chose to ignore the terms and conditions of its licence. Furthermore, even after the problem of operating contrary to the primary purpose was raised with the Manager on duty, the evidence discloses that there was no attempt to correct the situation more than two hours later when the RCMP officers conducted a walk-through investigation of the establishment.

The Branch also notes that the Licensee has not pleaded the defence of due diligence, nor would such a defence apply in this case. The Licensee simply did not produce any written policies or procedures demonstrating that it had a system in place to ensure that this contravention would not occur, although it was given an opportunity to do so.

Accordingly, the Branch submits that based upon the particular circumstances of this admitted contravention the recommended penalty of a 10 day licence suspension is warranted.

THE LICENSEE

The Licensee admits that the contravention occurred as alleged and further admits that it understands the seriousness of its management staff's actions in not complying with the guidelines surrounding the Licensee's food primary licence. In order to correct the situation following the contravention, the new General Manager of the Licensee met with the Manager who was on duty at the time of the contravention and discussed with her the serious nature of her actions, or more properly, inactions, on the evening in question and, as a result, that Manager will no longer be planning events for the Licensee. The Licensee advises that the members of the management team no longer work for the establishment. Furthermore, the new General Manager advises that she has made a commitment to the local authorities, the Liquor Control representative, the local community and the staff who work at the establishment, that the Licensee will not be hosting an event of this nature again.

With respect to the appropriateness of the recommended penalty of a 10 day suspension of the liquor licence, the Licensee advises of its concern that the penalty will have a disproportionate, negative financial effect on its servers, kitchen partners and support staff, as opposed to management staff and, therefore, the suspension would have the effect of punishing the wrong people.

The Licensee submits that, in this particular establishment, a \$7,500 fine has a more dramatic effect on the bottom line than a 10-day suspension and, therefore, this magnitude of a fine would be a bigger deterrent to non-compliance. In this regard, the Licensee advises that it would anticipate a reduction in sales of \$30,000 during a 10-day period, which would translate into lost profits of \$4,980.

Finally, the Licensee submits that while the salaries of management staff will not be affected, their bonuses will be. Although a suspension would have some impact on management bonuses, it will have a huge impact on the part-time staff of the establishment, who are paid hourly, causing significant financial hardship to those individuals.

ANALYSIS AND DECISION

The Licensee has admitted to the contravention. Having considered all of the evidence, I find that, on December 31, 2008, the Licensee contravened Section 20 of the *Act* and Section 11 of the *Regulation*, by operating contrary to the establishment's primary purpose as stated on its licence.

The Licensee is entitled to a defence to the allegations of the contravention, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contravention from occurring. The Licensee must not only establish the existence of procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

Here, there is virtually no evidence upon which I can find that the Licensee was duly diligent. In fact, the evidence is to the contrary. In this regard, I note that in the Licensee's letter of April 2, 2009, being Exhibit 4 in these proceedings, the Licensee states that "we have developed a plan to improve the education of staff and the staff who are responsible have been disciplined" and, further, that "I have already committed to [the Liquor Inspector] my intention to comply and to be pro-active by developing systems and procedures to ensure compliance, regardless of the outcome of these proceedings."

Accordingly, the only inference to be drawn from these statements is that, although systems and procedures would be developed in the future, no such systems or procedures existed at the time of the contravention. I find, therefore, that the Licensee has not been duly diligent.

PENALTY

Pursuant to Section 20(2) of the *Act*, having found that the Licensee has contravened the *Act*, the *Regulation* 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 a 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 a monetary penalty is warranted, I am bound by the minimums set out in Schedule 4 of the *Regulation*. 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*, the *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 public safety and the well being of the community.

Food Primary establishments must have, as their paramount focus, the service of food during all hours of operation. Restaurants offer liquor service as an accompaniment to food, rather than as the primary activity. It is contrary to the public interest for the Branch to allow restaurants to operate as bars. The current liquor licensing process requires public and local government input into licence applications for liquor primary establishments, but not for restaurants. Restaurants operating as bars tend to be associated with community complaints around late night noise, intoxication and other behaviour contrary to the community standards and the public interest.

What is particularly concerning about this contravention is its blatant nature. The Branch had cooperated in processing, on an expedited basis, the Licensee's request for a change of operations for New Year's Eve. As a result of his concerns regarding this special arrangement, the Liquor Inspector took the opportunity to specifically advise the Licensee of the Branch's expectations with regard to the mode of operation of the restaurant the following evening. Notwithstanding this prudent caution, the Licensee proceeded to operate the establishment in a manner that was specifically contrary to its undertakings.

There is no previous proven contravention of the same type for this Licensee within the year preceding this incident. Schedule 4, Item 1 of the *Regulation*, sets out penalties for a first contravention of this kind, which includes a license suspension of 10 to 15 days and/or a monetary penalty of \$7,500 to \$10,000. The Branch recommended a suspension of the license for a period of 10 days, which is the minimum penalty for this contravention.

The Licensee has submitted that the appropriate penalty in the circumstances would be a monetary penalty in the sum of \$7,500. The Licensee bases this proposition on the assertion that a suspension will work a disproportionate hardship on non-management staff, as compared to members of management. This is a rather curious argument. Surely the party that is responsible for creating the contravention, that is, the Licensee, is the one that should be charged with the responsibility to cure any collateral damage that emanates from the contravention. In short, the Licensee should not have placed the financial position of its staff in jeopardy by allowing the contravention to have occurred in the first place. It is the Licensee who is charged with the responsibility of ensuring that the establishment's operations are fully compliant with the provisions of the *Act* and the *Regulation*. If the Licensee is concerned, it could compensate its non-management staff by making them whole for the losses occasioned by the contravention. This solution would have the benefit of placing the responsibility for the loss suffered by staff squarely where it belongs – on the Licensee.

I am also not persuaded that a monetary penalty would have the same impact as a suspension, in pursuance of the goal of voluntary compliance. In my view, the advice to patrons that liquor service is not available and the posting of notices at conspicuous places at the Licensee's premises, for patrons to observe, will have a far greater impact than the assessment of a monetary penalty.

In the circumstances of this contravention, I find that a 10 day suspension is necessary, appropriate and reasonable.

ORDER

Pursuant to Section 20(2) of the *Act*, I order a suspension of Food Primary Licence No. 144165 for a period of 10 days, to commence at the close of business on Tuesday, May 26, 2009, 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*).

To ensure this Order is effective, I direct that the liquor licence be held by the Branch, or the RCMP Langley Detachment, from the close of business on Tuesday, May 26, 2009, until the Licensee has demonstrated to the Branch's satisfaction that the suspension has been served.

Original signed by

George C.E. Fuller
Enforcement Hearing Adjudicator

April 24, 2009

cc: RCMP Langley Detachment

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

Liquor Control and Licensing Branch, Surrey Office
Attn: Olubode Fagbamiye, Branch Advocate

APPENDIX A

Liquor Control and Licensing Act [RSBC 1996] Chapter 267**Action against a licensee**

20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

- (a) the licensee's contravention of this Act or the regulations or the licensee's failure to comply with a term or condition of the licence;
- (b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;
- (c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;
- (c.1) a failure by the licensee to take reasonable measures to ensure that the operation of the establishment is not contrary to the public interest and does not disturb persons in the vicinity of the establishment;
- (d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;
- (e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

- (a) [Repealed 1999-36-13.]
- (b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

- (c) impose a monetary penalty on the licensee in accordance with the prescribed schedule of penalties;
- (d) suspend all or any part of the licensee's licence in accordance with the prescribed schedule of licence suspensions;
- (e) cancel all or any part of the licensee's licence;
- (f) order the licensee to transfer the licence, within the prescribed period, to a person who is at arm's length from the licensee.

(2.1) The general manager may, if he or she is satisfied that it is in the public interest to do so,

- (a) impose a monetary penalty under subsection (2) (c) that is greater than the amount provided for in the prescribed schedule of penalties, or
- (b) suspend a licensee's licence under subsection (2) (d) for a period longer than that provided for in the prescribed schedule of suspensions.

(2.2) The general manager must, in taking action against a licensee under subsection (2.1), take into account

- (a) the licensee's entire compliance history in respect of the matters referred to in subsection (1), and
- (b) the particular circumstances giving rise to the taking of action by the general manager.

(2.3) The general manager may not impose a monetary penalty referred to in subsection (2.1) (a) that is greater than the following amounts:

- (a) \$50 000 for a contravention of section 38 (1), and
- (b) \$25 000 for any other reason referred to in subsection (1) of this section for taking action against the licensee.

(2.4) If a corporation is liable to a monetary penalty imposed under this section in respect of a contravention of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(2.5) A person on whom a monetary penalty has been imposed under this section must pay the penalty whether or not the person

- (a) has been convicted of an offence under this Act, or
- (b) is also liable to a fine for an offence under this Act.

(2.6) A monetary penalty imposed under this section must be paid within 30 days after the date on which the notice referred to in subsection (4) (a) is provided to the licensee or within any longer period specified by the general manager.

(2.7) All monetary penalties received by the general manager under this section must be paid into the consolidated revenue fund.

(3) Despite subsection (2) (d), (e) and (f), the general manager must suspend, cancel or order the transfer of a licence held by a person who has been convicted of a prescribed number of prescribed offences under the laws of Canada or British Columbia.

(4) On taking action against a licensee under subsection (2), the general manager must

- (a) provide the licensee with written notice of the action in accordance with the regulations,
- (b) set out in the notice the reasons for taking the action,
- (c) set out in the notice the details of the action including
 - (i) if a monetary penalty is imposed, the amount of the penalty and the date by which the penalty must be paid, and
 - (ii) if a suspension is imposed, the period of the suspension and the dates on which the suspension must be served, and
- (d) [Repealed 2002-48-37.]

(4.1) For the purposes of any hearing referred to in subsection (2), the general manager, by summons, may require a person

- (a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and

(b) to bring and produce before the general manager all documents, writings, books, deeds and papers in the person's possession, custody or power touching, or in any way relating to, the subject matter of the hearing.

(4.2) A person named in and served with a summons referred to in subsection (4.1) must attend before the general manager and answer on oath, unless the general manager directs otherwise, all questions touching the subject matter of the hearing, and produce all documents, writings, books, deeds and papers in accordance with the summons.

(4.3) When the general manager exercises a power under subsection (4.1), a person who fails or refuses to comply with subsection (4.2) is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(5) [Repealed 1999-36-14.]

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

Food primary licences

11 (1) A food primary licence in respect of an establishment may be issued, renewed or transferred if the primary purpose of the business carried on in the establishment is the service of food during all hours of its operation.

(2) The following terms and conditions apply to a food primary licence:

(a) minors are allowed in the establishment;

(b) liquor must not be served unless the establishment is open for service of a varied selection of food items, including both appetizers and main courses, or their equivalent;

(c) subject to limitation by the general manager, hours of liquor service must start no earlier than 9:00 a.m. and end no later than 4:00 a.m. the next day.

(3) The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is or will be the service of food during all hours of its operation, any or all of the following:

- (a) kitchen equipment;
- (b) furnishings and lighting;
- (c) menu;
- (d) type and hours of entertainment and games offered by the licensee;
- (e) advertising;
- (f) hours of operation;
- (g) financial records;
- (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment;
- (i) any other relevant consideration that may assist in the determination.