



**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: Snow Riders Holdings Ltd. dba Raakel's
Ridge Restaurant & Lounge
Whiskey Jack Road
Big White, BC V1X 6A6

Case: EH10-050

For the Licensee: Paul Lysak

For the Branch: Peter Mior

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

Place of Hearing: By way of written submissions

Date of Decision: November 2, 2010

INTRODUCTION

The Corporate Licensee, Snow Riders Holdings Ltd., ("the Licensee") owns and operates an establishment known as Raakel's Ridge Restaurant & Lounge in Big White, BC. The Licensee holds liquor primary licence number 121017. According to the terms of the licence, the Licensee may sell liquor from 11:00 a.m. to 1:00 a.m. Monday through Saturday and 11:00 a.m. to midnight on Sunday. The licence is, as are all liquor licences issued in the Province, subject to the terms and conditions contained in the publication, "*A Guide for Liquor Licensees in British Columbia*".

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The Liquor Control and Licensing Branch's ("the Branch") allegation and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated July 26, 2010.

The Branch alleges that on March 27, 2010, the Licensee contravened section 43(2)(b) of the *Liquor Control and Licensing Act* ("the Act") by permitting an intoxicated person to remain in that part of the licensed establishment where liquor was sold, served or otherwise supplied. The proposed penalty for this contravention is \$5,000 (item 11, of Schedule 4, of the *Liquor Control and Licensing Regulation*).

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

RELEVANT STATUTORY PROVISIONS

Liquor Control and Licensing Act, RSBC 1996, c. 267

Drunkenness

43(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.

ISSUES

1. Did the contravention occur?
2. If so, is a penalty appropriate and what is a reasonable penalty?

EXHIBITS

The following documents were submitted for consideration:

- Exhibit 1 – Branch's disclosure documents as outlined in a letter, dated September 1, 2010, to the Licensee, including a Notice of Enforcement Action dated July 26, 2010, and which includes the liquor inspector's evidence and the Branch's reasons for recommended enforcement action and penalty.
- Exhibit 2 – a letter dated September 16, 2010, from the Licensee to the Branch setting out submissions in support of its position in regard to the recommended penalty.

EVIDENCE

As previously noted, the Licensee does not dispute that the contravention occurred and, therefore, is deemed to accept the facts as put forward by the Branch with respect to the issue of whether a contravention occurred. The Licensee has, however, made submissions in respect to the appropriateness and fairness of the penalty which the Branch has recommended.

The evidence can be summarized as follows:

At approximately 9:00 p.m. on March 27, 2010, the liquor inspector noted that a female patron, who was having trouble standing, pulled up another chair and placed her feet up on it. She then slumped in her chair and passed out. Even though the bar was well over half full, the lights in the room were on, a UFC fight was being telecast on the television, the volume on the television was relatively loud and patrons were cheering, the patron remained passed out.

A short time later, the patron fell off the chair and landed on the floor, looking up at the ceiling. The patron then pushed herself up to a sitting position and passed out for approximately fifteen minutes. The liquor inspector got up and went outside and re-entered the bar where he clearly observed the female passed out. The liquor inspector sat back down with a fellow inspector and they observed a female waitress carrying a tray of drinks and making her rounds. The waitress stopped as she approached the passed out patron and looked at her on the floor but made no attempt to assist her or remove her from the premises. Also, no other staff offered assistance.

A short while later the patron rolled to one side and, with difficulty, attempted to stand. She spoke with two males whom she was apparently accompanying. Then she staggered through the bar toward the patio door where she exited, having been in the establishment for approximately fifty (50) minutes.

The patron then recovered a snowboard, staggered away and disappeared from the liquor inspector's observation.

Submissions of the Branch:

The Branch says that in order to avoid the possibility of further liquor consumption and avoid any harm to other patrons or staff, the Licensee must not permit a person who is intoxicated to remain in the part of the establishment where liquor is served. For the purpose of ensuring their safety, an intoxicated person may remain in an unlicensed area of an establishment while waiting for assistance or a ride home. When staff simply walk around a patron who is passed out on the floor and make no effort to ensure that he or she is safely removed, it confirms that the Licensee has not successfully or sufficiently stressed upon its employees the need to fully and conscientiously carry out their duties; thus a penalty is necessary to ensure future compliance.

The Branch observes that the recommended penalty of \$5,000 falls within the guidelines as set out in the *Liquor Control and Licensing Act Regulations*, found in item 11, Schedule 4 of the *Act*. A penalty is recommended to make it clear to the Licensee,

the employees and the community that the Branch takes this public safety matter seriously. The \$5,000 monetary penalty is recommended as the establishment is located on a ski hill and the customer base is seasonal, and therefore, a monetary penalty would be a more effective deterrent than a licence suspension.

Submissions of the Licensee

The Licensee says that he was unaware of the alleged contravention on the night of March 26, 2010 and that the incident had not been reported to him by his staff. Furthermore, the first indication that the alleged incident had taken place came long after the date of the occurrence, and the first notice he received was marked "Void". Accordingly, the Licensee assumed that the contravention notice was only a warning as it was marked "Void"; therefore, he did not anticipate any further action on the part of the Branch.

The Licensee theorizes that the intoxicated patron had been on the mountain prior to arriving at the Licensee's premises. At that time the patron was observed to be unsteady on her feet and came into the premises and sat down. The Licensee further theorizes that once the intoxicated patron was in a warm, relaxed and comfortable environment, she naturally started to doze off.

The Licensee also blames the contravention on poor observation by a staff member who did not notice the intoxicated patron's apparent plight and did not make a proper judgment call to assist her. For that omission, the Licensee admits that the waitress was negligent in her duties. Furthermore, the Licensee rues the fact that, because he did not witness the scene, he could not intervene himself.

The main point of the Licensee's submission is that the patron was not served alcohol in its establishment, therefore, the intoxication was induced elsewhere. The Licensee surmises that the intoxicated patron merely stopped on her way home, for fifteen to twenty minutes. She received no alcoholic beverages and she left.

As a substituted remedy, the Licensee submits that a written notification should be provided to all staff members regarding the standards required with respect to intoxicated patrons; however a \$5,000 penalty is not warranted because the Licensee was not the perpetrator who served alcohol to this patron. He also notes that his bar staff apparently needs to exercise more individual accountability in these types of situations as they are the first to witness what occurs.

The Licensee also submits that, due to the fact that it is only a five month business, a monetary penalty in the amount recommended by the Branch would cause serious economic harm to this short-seasoned enterprise.

Finally, the Licensee states that it sincerely regrets the incident and that it will go to any lengths in the future to prevent an occurrence of this nature.

ANALYSIS AND DECISION

The Licensee has admitted to the contravention. Having considered all of the evidence, I find that on March 27, 2010, the Licensee contravened 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, served or otherwise supplied.

DUE DILIGENCE

The Licensee is entitled to a defence to 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, but must also 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. Ironically, in its own submission, the Licensee admits that as a substituted remedy, written notification should be given to all

staff members and that bar staff members needed to have more individual accountability in these types of situations.

Given the gravity of the evidence here and in particular the fact that a server actually chose to skirt around the patron who was passed out on the floor and no other employee sought to assist her in any way, I am compelled to conclude that the Licensee's employees had not received adequate, or any, training at least with respect to the circumstances of this contravention. In my view, these are clear indications that at the time of the alleged contravention the Licensee had not taken adequate steps to prevent the contravention from occurring, nor had it established procedures to identify and deal with these types of problems. As a result, I find that the Licensee has not met the test for due diligence.

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 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 *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 terms and conditions of

the licence. 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.

The facts of this contravention are particularly troubling. There is the spectacle of a seriously intoxicated patron who passes out in a chair and is undisturbed by the relatively loud bar, who then wakes up and falls off her chair, and who then sits up and passes out for approximately fifteen (15) minutes. What is most disconcerting about this scene is the fact that a server making her rounds stopped as she approaches the passed out patron, looks at her on the floor, but makes no attempt to assist her or remove her from the premises. Furthermore, no other staff offered any assistance. Finally, the intoxicated patron staggered out of the bar, having been in the establishment for approximately fifty (50) minutes. In my view, this confirms the fact that staff had received little or no training regarding this type of contravention at the time of its occurrence.

The fact that the patron did not buy any alcohol in the Licensee's premises is, in my view, irrelevant to the circumstances of this particular contravention. Had the Licensee been accused of permitting a person to become intoxicated contrary to section 43(2)(a) of the Act, it might well have had a defence, but it is not a defence to the contravention pursuant to section 43(2)(b) of the Act. Section 43(2)(a) and (b) require that a Licensee not only be vigilant with respect to the state of intoxication of patrons to whom it has served liquor but also require the same degree of vigilance with respect to patrons who have imbibed elsewhere but subsequently make their way into a licensee's premises. In this case, the Licensee has failed to meet this latter obligation.

There is no proven contravention of the same type for this Licensee within the year preceding this incident. Schedule 4 (item 11) of the *Regulation* sets out penalties for a first contravention of this kind: a licence suspension of four to seven days and/or a monetary penalty of \$5,000 to \$7,000 dollars. The Branch has recommended a

monetary penalty of \$5,000, which is the minimum monetary penalty for this type of contravention.

Accordingly, in all of the circumstances of this contravention, I find that a \$5,000 monetary penalty is appropriate, necessary and reasonable in order to bring the Licensee into compliance.

ORDER

Pursuant to section 20(2) of the *Act*, I order the Licensee to pay a monetary penalty of five thousand dollars (\$5,000) relating to liquor primary licence number 121017, in respect of Notice of Enforcement Action EH10-050. The monetary penalty must be paid to the general manager by no later than the close of business on December 2, 2010.

Original signed

George C.E. Fuller
General Manager's Delegate

Date: November 2, 2010

cc: RCMP, Kelowna Detachment
Liquor Control and Licensing Branch, Victoria Regional Office
Attn: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Vancouver Regional Office
Attn: Peter Mior, Branch Advocate