



**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 (Guildford) Ltd. dba Earl's (Surrey) 10160 – 152nd St. Surrey, BC V3R 8W3
Case:	EH10-114
For the Licensee:	Cathy Humphrey
For the Branch:	Olubode Fagbamiye
Enforcement Hearing Adjudicator:	Edward Owsianski
Date of Hearing:	February 16, 2011
Place of Hearing:	Vancouver, BC
Date of Decision:	April 1, 2011

**Ministry of Public
Safety and Solicitor
General**

Liquor Control and
Licensing Branch

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INTRODUCTION

Earl's Restaurant (Guildford) Ltd. operates Earl's (Surrey) located in Surrey, British Columbia. The licensee holds Food Primary Licence 124589 for the operation of a restaurant with a patio. The hours of sale are 9:00 a.m. to 1:30 a.m. Monday through Saturday, and 9:00 a.m. to Midnight on Sunday. The licensed capacity is 120 patrons in area 1, 24 in area 2 and 50 on the patio. The licence is, as are all food primary licences issued in the province, subject to the terms and conditions contained in the publication *Food Primary Terms and Conditions, A Guide for Liquor Licensees in British Columbia* (the Guide). The license is endorsed with several terms and conditions including:

- For the sale and consumption of all types of liquor in establishments with a primary focus on the service of food.
- Patron non-participation entertainment permitted.

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the NOEA) dated September 30, 2010. The branch alleges that on September 5, 2010, the licensee contravened section 20 of the *Liquor Control and Licensing Act* (the Act) and section 11 of the *Liquor Control and Licensing Regulation* (the Regulation) by operating the licensed establishment in a manner that was contrary to the primary purpose of the business as stated on the licence. The proposed penalty is a 10 day suspension of the liquor licence (item 1, Schedule 4 of the *Regulation*).

Item 1 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type: a licence suspension of 10–15 days, and/or a monetary penalty of \$7,500 to \$10,000.

The licensee disputes the contravention and the proposed penalty.

RELEVANT STATUTORY and REGULATORY PROVISIONS

See Appendix

ISSUES

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

EXHIBITS

The following exhibits were presented:

Exhibit No. 1: The Branch's Book of Documents, tabs 1-14

Exhibit No. 2: The Licensee's Book of Documents, tabs 1-22

EVIDENCE - THE LIQUOR CONTROL AND LICENSING BRANCH

Inspector A testified that she has been a liquor inspector for approximately 10 years and was working in that capacity during the evening hours of September 5, 2010 checking licensed establishments in the Surrey area. At approximately 9:30 p.m. she heard loud music emanating from Earl's restaurant. She proceeded to the restaurant and entered through the main entrance. There was no one at the hostess station so she proceeded inside. She observed 15 – 20 patrons seated within the main dining area (area 1). She proceeded onto the patio and determined that this was where the music was emanating from. Inside the patio area she observed 17 patrons seated at tables consuming alcoholic beverages. A temporary bar had been set up from which a bartender was serving shooters and cocktails to patrons. A server was selling bottles of beer from a tub with ice. A disc-jockey was playing music at an extremely loud volume making conversation difficult. It was dim as there was no lighting on the patio. There was a sign reading, "Back to school patio party". She observed the activities on the patio for approximately 50 minutes during which time the number of patrons varied from

15 to 25 with patrons coming and going. She noted only four plates of food being served to patrons all of whom were seated at the same table. There was no evidence of food, menus, cutlery or condiments on any of the remaining tables. At one point there were eight patrons standing and dancing in the area in front of the DJ. This was contrary to the terms and conditions of the liquor licence which permitted only non-patron-participation entertainment. Patrons were walking around on the patio with their drinks and mingling with other patrons. She observed several patrons coming onto the patio, some may have come from inside the restaurant, four or five came from outside of the restaurant. She was approached by a patron who appeared to be intoxicated. She believed that the atmosphere on the patio was similar to that of a lounge or nightclub, not that of a restaurant and that the establishment was operating contrary to its primary purpose.

Prior to leaving the restaurant she spoke with the night manager (witness C) and advised him of her concerns. The manager said that they were celebrating the end of summer and the return to school for their patrons. He disputed that the patrons observed were dancing. She asked to see the sales receipts for the patrons on the patio. The receipts shown to her by the manager were only for the four food orders she had observed being served. There were no receipts for the liquor being consumed by the patrons. She requested that the day's sales receipts be sent to her office, these were subsequently received (exhibit 1, tab 11). She left the restaurant at approximately 10:20 p.m. and wrote up notes of her observations (exhibit 1, tab 10).

She met with the general manager for the restaurant (witness D) on September 10th and reviewed the sales receipts for the patio area the night of September 5th (exhibit 1 tab 11 p2). The general manager advised her that these figures did not include the cash sales made at the temporary bar or the beer tub. She advised the general manager of her concerns with the operation of the patio during the time of her visit. He told her that the event had been planned in advance, but they had "dropped the ball" as it was not to take away from their main focus on food service. She issued him a contravention notice (CN) (exhibit 1, tab 2).

In her testimony the inspector referred to copies of documents from the branch file:

- Exhibit 1, tab 1: NOEA letter of September 30, 2010.
- Exhibit 1, tab 2: Contravention Notice issued to the licensee for “Operate contrary to primary purpose”, and “Permit prohibited entertainment”. The branch did not proceed to enforcement for the contravention “Permit prohibited entertainment”.
- Exhibit 1, tab 3: the food primary licence issued to Earl's (Surrey) and in effect at the time of the alleged contravention.
- Exhibit 1, tab 4: floor plan outlining the licensed areas of the establishment.
- Exhibit 1, tab 5: Inspection and Interview information documents outlining the issuance of the licence. The general manager had signed the documents acknowledging the terms and conditions of the licence and agreeing to abide by them.
- Exhibit 1, tab 6: Compliance meeting documents completed by the inspector on April 3, 2008 and March 29, 2004 after meeting with the general manager and discussing issues following inspections conducted of the establishment. The general manager made commitments to operate in compliance with the requirements. No enforcement action was taken by the branch.
- Exhibit 1, tab 7: A copy of the Food Primary Guide in effect at the time of the alleged contravention. The Guide outlines the statutory and regulatory requirements for the operation of the establishment and sets out the terms and conditions of the liquor licence. The guide deals specifically with the requirements of operating a food primary establishment as a restaurant at pages 10 to 13.
- Exhibit 1, tab 8: Excerpts from the “Serving It Right: Responsible Beverage Service Program” (“SIR”) manual. The manual provides educational and reference materials for a licensee and staff for compliance with liquor licence requirements.

The inspector testified that enforcement action was taken in this instance as the contravention is considered serious in that it allows a food primary licensee to circumvent the more rigorous process for obtaining a liquor primary licence. This licensee is part of a large corporation holding similar food primary licenses at other locations at which there have been non-compliance issues. The recommended penalty of a 10 day licence suspension is the minimum suspension penalty. The food primary licence allows the licensee to operate the establishment during the suspension period properly as a restaurant without the availability of serving liquor and thus to refocus its operation.

In response to questions from the licensee's representative the inspector agreed that some of the patrons observed on the patio may have eaten earlier, either on the patio or in the main dining area. She agreed that her concerns were with the operation of the patio and not of the main dining area. The patio area must however conform to the same rules as the main dining area where there may be the occasional service of liquor without food but the primary focus must remain on the service of food. The patio is not to operate as a lounge where the service of liquor without food is permitted. She agreed that the sales receipts (exhibit 1, tab 11) showed that the food sales at the restaurant for the day exceeded the liquor sales, however, this was not the case for the patio, particularly if the cash sales from the temporary bar and beer tub were included. Her observation of food and liquor service on the patio was that the establishment was not operating within its primary purpose.

EVIDENCE - THE LICENSEE

Licensee Witness B testified that she has been employed at Earl's Restaurant Surrey as a hostess for the past year. Her duties include greeting customers, seating them, offering them menus and advising them of the daily features. She does not serve customers and does not have a "Serving It Right" (SIR) certificate. She is not familiar with the Guide. She regularly attends staff meetings.

She was working as a hostess the night of September 5, 2010. She did not see the liquor inspector enter the restaurant but did see her standing at the entrance to the patio. She believed that the inspector may have entered the restaurant when she left the hostess station to attend to other duties. Some customers originally seated in the main dining area may have moved onto the patio. Some of the customers she greeted at the door that night were regular customers and did not need to see a menu. None of the customers advised her that they did not intend to eat, but were just there for a few drinks. The music was loud on the patio, but not in the remainder of the restaurant.

Licensee witness C testified that he is employed at Earl's Restaurant Surrey as night leader (manager). He holds a SIR certificate as do all servers and bartenders. Training is provided to staff when they are first hired. Regular staff meetings are held throughout the year. Pre-shift meetings are held with staff on a daily basis.

He was working the night of September 5, 2010. They were having an "End of summer, back to school" event which they had pre-planned taking into account the terms and conditions of their liquor licence and the number of staff needed. Entertainment was provided on the patio as outlined in a previous letter to the branch (exhibit 2, tab 12). Decorations on the theme were set up and temporary liquor service was set up on the patio. He was assisting with food orders and recalls serving three food orders to three different tables on the patio during the time the liquor inspector was present. Some patrons may have left the patio and gone outside for a smoke, returning to the patio. He saw several patrons gathered in front of the DJ, but disagreed with the inspector's description that they were dancing. The inspector pointed out a male patron who she believed may have been intoxicated. This person was an off-duty employee. He was sent home in a taxi and warned that his behaviour was inappropriate.

Licensee Witness D testified that he has been employed as the general manager of Earl's Restaurant (Surrey) for the past three years and holds a SIR certificate. They have a training manual and a training program for all new employees. The program provides 22 hours of training over a four to five day period and includes information regarding the service of liquor and related problems such as intoxication and over service. All staff serving food or liquor hold SIR certificates. Liquor service to a patron may be cut-off if necessary and arrangements made for the patron to have a safe ride home. Any employee not following the rules may have their employment suspended for a period of time or terminated.

The "back to school party" of September 5th was held in conjunction with a local nightclub. The restaurant was closing its patio for the season and the intention was that patrons of both the restaurant and the nightclub would be encouraged to go out for the evening, first to the restaurant for something to eat and then to the nightclub. A poster at exhibit 2, tab 14 advertised the event.

The establishment operates as a restaurant with all food served prepared on site. There have never been any noise complaints. Regular police patrols are made and there have been no concerns. Sales over a year are typically 73% food and 27% liquor and non-alcoholic beverages.

He referred to documents presented into evidence on behalf of the licensee at exhibit 2:

- Tab 16 - A listing of all food and non-alcoholic products purchased for the operation of the establishment during 2009.
- Tab 19 – Weekly and daily sales summary for the period of August 30 – September 5, 2010. The food/liquor ratio for the restaurant for September 5th was 67.6% food. For the evening hours after 5 p.m. it was 63% food.

He testified that he has reviewed the excerpts from the Guide concerning the proper operation of a licensed restaurant and believes that they have not contravened the licensing requirements. Their food – liquor ratio met the requirement that liquor sales did not exceed food sales. They were permitted to have non-patron participation entertainment. They were permitted to occasionally serve liquor without food. There is no specific requirement that all patrons must be asked if they will be eating or told that they must order food. When he met with the liquor inspector on September 10th he provided her with the sales figures for the patio during the night of September 5th. Those figures did not include the cash sales of approximately \$300 for liquor sold from the temporary bar and \$120 sold from the beer tub. Some of this liquor and beer may have been sold to patrons sitting in the main dining area. The inspector did not request the figures. He told her that if they dropped the ball it was not intentional nor for lack of trying.

SUBMISSIONS – BRANCH

The branch's submission is summarized as follows:

The service of food is the primary purpose during all hours of operation for this establishment. The licensee cannot allow a shift in focus from food service to liquor service. The patio area is required to operate under the same rules as the main dining area.

The evidence is of liquor service to all patrons on the patio with few of the patrons being served food. The food/liquor ratio on the patio the night of September 5th is 48% food – 52% liquor as shown in the licensee's sales receipts. These figures do not take into account the cash sales made for liquor which would decrease the food percentage. The atmosphere on the patio as described by the inspector was that of a liquor primary establishment. The music was loud, some of the patrons were dancing. Patrons were not being greeted by a hostess and food menus were not being provided to patrons. The licensee cannot be said to be duly diligent as it failed to put a system in place to

ensure that the service of liquor did not become the primary focus of the business. The minimum 10 day suspension penalty is necessary to bring about voluntary compliance.

SUBMISSIONS – LICENSEE

The licensee is duly diligent. There is an extensive training program for employees. The managers reviewed the terms and conditions of the liquor licence during the planning for the “end of summer” event and acted accordingly. The kitchen was in operation. A hostess was on duty greeting customers and providing them with menus. The liquor inspector should have waited at the entrance for the hostess to return. The volume of the music is a factor of the demographics of the customers. Branch policy allows a liquor inspector the discretion whether to proceed to enforcement where patrons are found dancing in circumstances where it is not permitted. Food/liquor sales ratios are consistent with a food primary licence.

If a contravention is found and a penalty deemed necessary the circumstances do not require a licence suspension, a monetary penalty would be appropriate.

REASONS AND DECISION

The evidence here is that the liquor inspector's attention was drawn to this food primary establishment by loud music emanating from the patio area. She proceeded into the establishment, walking through the main dining area she noted approximately 15 - 20 patrons seated at tables. She had no cause for concern about the operation of this area. Proceeding on to the patio she observed the operation there for approximately 50 minutes. There were approximately 17 patrons on the patio when she arrived, this number varied from 15 to 25 with patrons coming and going during the time of her observations. Some of the patrons coming on to the patio appeared to be coming off the street into the restaurant without being greeted by staff and offered a menu. A temporary liquor service bar and an iced beer tub were serving liquor and all patrons

appeared to be drinking. None of the tables were set for dining with menus, cutlery or condiments. There was little evidence of food service with only four food orders served. The music was loud. Some of the patrons were dancing which was contrary to the entertainment endorsement on the liquor licence. One of the patrons appeared to be intoxicated. She believed that the atmosphere was that of a liquor primary establishment. Viewing the sales receipts for the operation of the patio during that night she determined that the food/liquor ratio was 48% food – 52% liquor and those ratios would change to reflect more liquor sales if the cash liquor sales made at the bar and beer tub were factored in. She concluded that the establishment was operating contrary to its primary purpose.

The evidence on behalf of the licensee is that there was a hostess on duty providing menus to patrons. Patrons coming on to the patio as observed by the inspector may have just stepped outside for a smoke. There was more food service to patrons on the patio than what was observed by the inspector. The patrons were not dancing. Food/liquor sales for the whole of the restaurant on a daily average are approximately 70% food. Food/liquor sales ratios for the night of September 5th were 63% food. The establishment was being operated within the terms and conditions of its licence.

Section 11(3) provides that: “The general manager may consider, in determining whether the primary purpose of the business carried on in the establishment is the service of food *during all hours* [my emphasis] 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.”

Giving consideration to all of the evidence I find, on a balance of probabilities:

- (a) kitchen equipment - operative and adequate
- (b) furnishings and lighting - adequate
- (c) menu – adequate
- (d) type and hours of entertainment and games offered by the license - the type of entertainment, dancing is considered to be patron participation and is not allowed by the terms and conditions of the licence issued to this licensee.
- (e) advertising – the poster (exhibit 2, tab 14) refers only to the party, the entertainment and the liquor specials. It makes no mention that Earl's is a restaurant and food service is expected.
- (f) hours of operation – suitable
- (g) financial records – adequate
- (h) the ratio of receipts from food sales to receipts from liquor sales in the establishment - food/liquor ratio for patio night operation was approximately 40% food – 60% liquor factoring in the cash liquor sales.
- (i) any other relevant consideration that may assist in the determination

In my view it is appropriate to consider evidence of how the establishment was being operated at the time of the alleged contravention. There are several points in the evidence that I am satisfied are relevant and probative to the issue. The first is, how are patrons being greeted? This is important as it may set the tone for the expectations between the licensee and its patrons. Here, while there was a hostess on duty she was absent from time to time and persons were permitted to proceed directly to the patio area where liquor could be purchased.

It is also relevant and probative I believe to consider whether food is being served to all or a majority of patrons. The "Guide" (exhibit 1, tab 10 at p. 6) provides "As long as you are running your business properly you may *occasionally* serve liquor to a customer, without food, at any table within the dining area." The evidence here is that a significant minority of patrons on the patio had food service. I find that this is considerably different than *occasionally* serving liquor to a customer, without food, at any table within the dining area.

On the evidence, it would be possible to find that during the evening hours of September 5, 2010, particularly the time during which the inspector was in attendance, the licensee was not operating the licensed patio area with a primary focus on food service.

The real issue to be decided here in my view is whether a determination can be made that a licensed establishment is being operated contrary to the primary purpose of its licence by taking a narrow examination of only one licensed area of the establishment. Section 11 of the *Regulations* upon which this contravention is based consistently reads, "the primary purpose of the business carried on in the establishment". In my view that requires an examination of the operation of the establishment in its totality at the time of the alleged contravention. Here, the inspector testified that during the time that she was in attendance at the establishment she observed there to be 15 - 20 patrons in the main dining area (area 1). She had no cause for concern about the operation of the main dining area. It must be considered then that she was satisfied that the main dining area was operating within the requirements of the liquor licence and that the primary purpose of the food primary licence was being met in the main dining area. The inspector did not provide any evidence concerning the operation of the small dining area at the front of the restaurant (area 2) so it must be considered that it also was operating within the requirements of the licence. Giving consideration to the food and liquor sales for all areas of the restaurant, the evidence is that food/liquor ratios for the entire restaurant during the night of September 5th were 63% food.

I find that the evidence, taken as a whole does not support the alleged contravention that the establishment was operating contrary to its primary purpose.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: April 1, 2011

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

Liquor Control and Licensing Branch, Victoria Office
Attention: Olubode Fagbamiye, Branch Advocate

APPENDIX

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;

(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:

(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;

LIQUOR CONTROL AND LICENSING REGULATION

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.