



**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: Whitewater Ski Resort Ltd.
dba Whitewater Ski Lodge
602 Lake Street
PO Box 60
Nelson, BC V1L 4C8

Case: EH12-023

For the Licensee: Anne Pigeon

For the Branch: Bode Fagbamiye

General Manager's Delegate: Nerys Poole

Place of Hearing: Written Submissions

Date of Decision: September 26, 2012

Liquor Control and
And Licensing Branch

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INTRODUCTION

The Licensee, Whitewater Ski Resort Ltd. dba Whitewater Ski Lodge is located within a ski resort in the rural area of Whitewater Road, 22 kilometres from the City of Nelson, B.C.

The establishment holds both a Liquor Primary Licence No. 056734 and a Food Primary Licence No. 132799. Both these licensed areas are immediately adjacent to each other on the main (upper) level of the building. Each licensed area has distinct and separate red line areas.

The hours of sale for liquor in both areas are from 11:00 a.m. to 1:00 a.m. from Monday to Saturday and from 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 Guide for Liquor Licensees in British Columbia (the "Guide").

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 May 17, 2012. The branch alleges that on Saturday, February 11, 2012, the licensee contravened section 12 of the *Liquor Control and Licensing Act* (the "Act") by contravening a term and condition of the Act, i.e. removing liquor from the red line area.

The proposed penalty is a monetary penalty of \$6000. Item 46 of Schedule 4 of the *Regulation* provides a range of penalties for a first contravention of this type: a licence suspension of one to three days and/or a monetary penalty of \$1000 to \$3000. The branch also recommends the imposition of two additional terms and conditions to the liquor primary licence.

The licensee does not dispute the contravention but disputes the proposed penalty, and the addition of one of the proposed terms and conditions to the liquor primary licence.

At a prehearing conference on July 12, 2012, with the branch advocate, the licensee representative and the finance manager for the licensee in attendance, the branch Registrar decided that the hearing regarding what penalty, if any, would proceed by way of written submissions.

RELEVANT STATUTORY PROVISIONS

The *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 provides:

Licences

- 12** (1) The general manager, having regard for the public interest, may, on application, issue a licence for the sale of liquor.
- (2) The general manager may, in respect of any licence that is being or has been issued, impose, in the public interest, terms and conditions
 - (a) that vary the terms and conditions to which the licence is subject under the regulations, or
 - (b) that are in addition to those referred to in paragraph (a).

(3) Without limiting subsection (2), the terms and conditions referred to in that subsection may

- (a) limit the type of liquor to be offered for sale,
- (b) designate the areas of an establishment, both indoor and outdoor, where liquor may be sold and served,
- (c) limit the days and hours that an establishment is permitted to be open for the sale of liquor,
- (d) designate the areas within an establishment where minors are permitted,
- (e) approve, prohibit or restrict games and entertainment in an establishment,
- (f) exempt a class or category of licensee from requirements with respect to serving food and non-alcoholic beverages in an establishment,
- (g) vary seating requirements in the dining area of an establishment,
- (h) vary requirements with respect to the location of an establishment,
- (i) exempt a class of licensee from requirements with respect to marine facilities where liquor is sold,
- (j) specify the manner in which sponsorship by a liquor manufacturer or an agent under section 52 may be conducted and place restrictions on the types of events, activities or organizations that may be sponsored,
- (k) specify requirements for reporting and record keeping, and
- (l) control signs used in or for an establishment.

(4) Nothing in subsection (2) or (3) authorizes the general manager to impose terms and conditions that are inconsistent with this Act or the regulations.

- (5) A licence expires on the date specified on it as the expiry date.
- (6) The general manager may, on application by a licensee, amend the terms of, renew or transfer a licence.
- (7) If the general manager, following application, refuses to issue, amend the terms of, renew or transfer a licence, the general manager must give to the applicant or licensee written reasons for the decision.

Action against a licensee

- 20** (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.

ISSUES

1. Did the contravention occur?
2. If so, has Licensee established a defence to the contravention?
3. If the contravention is proven, what penalty, if any, is appropriate?

EXHIBITS

The following exhibits were presented:

Exhibit 1: Branch book of documents, tabs 1 to 14.

Exhibit 2: Licensee's submission dated August 15, 2012.

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 the contraventions occurred. The licensee has, however, made submissions with respect to the fairness and appropriateness of the proposed penalty and the recommendation of the additional terms and conditions to its licence.

The branch's book of documents includes the Notice of Enforcement Action dated May 17, 2012, which describes the events of February 11, 2012, as follows:

On the afternoon of February 11, 2012, the liquor inspector inspected the licensed areas of the Whitewater Ski Lodge, without identifying himself to staff or management. The liquor inspector entered the main (upper level) area that has a large cafeteria style Food Primary (FP) area adjacent to a small Liquor Primary (LP) area, with a full service bar overlooking a Food Primary patio (deck). The liquor inspector observed that liquor service in the FP area was in the form of beer bottles in a cooler cabinet adjacent to the cashier positions. Patrons wishing to purchase liquor can do so after obtaining their food order at a service counter and then selecting their liquor prior to it being opened by the cashier. The liquor inspector noted no other form of liquor service in the FP area during his inspection. The liquor inspector noted that the only signage regarding liquor service in this area was a single sign on a door allowing egress to the ski area via a set of steps. This sign was laminated and pinned to the door and read: "No liquor Allowed Beyond This Point." The word "No" had been concealed by the application of a Whitewater resort decal.

The liquor inspector observed a female patron walking from the FP patio area to the bar in the LP area. He saw her purchase a bottle of Okanagan Cider from the female server at the bar and return to the FP patio area with her drink. No staff attempted to prevent her from leaving the LP area and she did so in full view of the server at the bar.

The liquor inspector next observed a male patron purchasing a pint of beer from a male server at the bar and returning to the cafeteria FP area in full view of the male server. The male server made no attempt to prevent the male patron from leaving the LP area.

The liquor inspector followed the male patron into the cafeteria FP area and noted that he joined five other patrons seated at a table in the centre of the cafeteria. These patrons were also drinking beer from pint glasses. The liquor inspector saw no food at their table. Elsewhere in the cafeteria, the liquor inspector noted that three tables had pitchers of beer on them.

The liquor inspector then returned to the same seat in the LP area. He saw a second female patron leave the LP area, after speaking with the server. She was carrying a bottle of Kokanee beer out to the cafeteria FP area.

He then saw a second male patron take a pint glass containing some beer from the table in the LP area and walk out into the cafeteria FP area. He did so in full view of both the female and male servers, who made no attempt to stop him leaving the LP area with his drink. The liquor inspector then left the establishment.

On February 13, 2012, the liquor inspector issued the contravention notice and sent it to the licensee. On February 24, 2012, the liquor inspector met with bar staff and management. A representative of the licensee attended by telephone.

SUBMISSIONS

Branch's Submission

In the NOEA, the branch summarizes four points from the above evidence:

1. Patrons in possession of liquor were permitted to move freely from the Liquor Primary area into the adjacent Food Primary areas.
2. A patron was seen to take liquor from the Liquor Primary area and consume the remainder within the Food Primary cafeteria area.
3. A patron removed liquor from the Liquor Primary area having interacted with staff while doing so.
4. No control measures or signage were in place between the Liquor Primary and other areas to prevent these occurrences.
5. Staff were in complete disregard to the actions of their patrons in removing liquor from the Liquor Primary area, to the point of totally ignoring it.
6. No control of the movement of liquor by staff whatsoever was noted during the duration of the inspection.

At the time of the licence transfer in late 2008, the liquor inspector emphasized at an education session the importance of exercising diligence to ensure patrons were not removing liquor from the red line areas. In April of 2010, an instance of liquor being removed from the premises led to enforcement action and a subsequent compliance meeting during which the liquor inspector again dealt with the specific issues surrounding the movement through, and removal of, liquor from specific areas.

The recommended monetary penalty of \$6000 falls outside the penalty range set out in Schedule 4 of the Regulation for a first contravention of this type. The branch recommended a higher than maximum penalty in the NOEA, as previous actions by the branch have not been sufficient to ensure voluntary compliance.

The NOEA also recommends that the following terms and conditions be added to the liquor primary licence:

- 1) While the current structure of the Liquor Primary area exists adjacent to the Food Primary areas, a member of staff must be positioned at the boundary between the Liquor Primary and Food Primary areas during the hours of liquor service in order to prevent the movement of liquor out of the Liquor Primary area. This staff member should be engaged only in this purpose, and not performing the role of server at the same time.
- 2) Clear and permanent signage must be displayed in prominent locations informing patrons that liquor purchased in the Liquor Primary area must only be consumed within that area. This signage must be placed in the clear, unobstructed view of patrons, and be of sufficient dimensions to ensure that it can be easily read and understood.

Licensee's Submission

As noted above, the licensee does not dispute the facts of the contravention but disputes the fairness and appropriateness of the monetary penalty. The licensee also says the addition to its licence of condition No.1 above is unnecessary, given the actions undertaken since February 11, 2012, to mitigate any further infractions, and the new proposed layout of the facility. The licensee agrees to the addition of condition No.2 above.

The licensee provides a brief history of the ski resort. It is a stand-alone resort with one day lodge, three lifts and no on-mountain accommodations or overnight facilities. From the mid 70s until 2008, the resort was a family owned and operated company. In the fall of 2008, it was sold to Knee Deep Development and, a year later, a new lift was installed that increased skier visits by 28% over the succeeding two seasons. Although the increase was welcome to the owner, the licensee notes it came "with a number of unpredicted operational challenges that we feel have now been identified and are being addressed accordingly."

Subsequent to the meeting with the liquor inspector on February 24, 2012 (to discuss the February 11, 2012 contravention), the licensee states that they immediately took all reasonable steps to prevent the contravention from happening again. The licensee met with its bar staff on a regular basis to review items of concern around reasonable beverage service and has instructed the staff to ask the self-served patrons where they would be sitting. They have hired extra staff to carry patrons' beverages from the LP area to the FP area when required. The licensee has erected a permanent half wall between the LP area and the FP area on the red line. They have positioned an employee to stand there during the peak hours to ensure there is no movement of liquor by patrons between the two licensed areas. They have also posted clear visible signs at all the exit points instructing patrons not to carry alcohol across the red line.

Since the end of the ski season, the licensee has undertaken extensive renovations to the Liquor Primary and the Food Primary areas to better accommodate the increase in guests. The applications for these various amendments to both licenses have been submitted to the branch and are currently under review by the branch. The licensee has worked closely with the liquor inspector and others to come up with a floor plan to alleviate the risk of further infractions of this type. The cost to the licensee for these changes and the licence fees has been over \$35,000. The licensee does not foresee an increase in revenues as a result of this expenditure, which has been done purely to address the issue of extending the red line area and to address the issues that arose from this contravention.

With respect to the observations of the liquor inspector that some patrons were observed drinking beer in the FP area with no evidence of food in place, the licensee points out that Whitewater is renowned for the food it serves. The licensee submits that a review of the food and liquor receipts demonstrates that food is the main focus. The licensee says that liquor represents 2% of the total sales in the Liquor Primary and Food Primary areas combined, and only 17% of the total sales in the Liquor Primary area. The licensee offers to make the sales records available for inspection at the branch's request.

The licensee asks for leniency with respect to the proposed monetary fine of \$6,000. The licensee notes that this falls outside the range in the Regulation and asks for a reassessment to bring the monetary penalty to within the suggested range in Schedule 4 of the Regulation.

In addition, the licensee submits that the first term and condition proposed in the NOEA, i.e. the positioning of a staff member specifically to prevent movement of liquor between the LP area and the FP area, not be added to its licence. The new proposed layout has the entrance to the LP area directly beside the bar with a 7 foot long corridor and a set of salon doors to separate it from the FP area. The only other entrance to the LP area is from the deck that leads into the building which is where the liquor inspector has requested the installation of an alarm when the gate is opened – which the licensee will do. The licensee states that it has budgeted to post a staff member at the boundary of the LP and FP areas during the peak hours on busier days but asks that this not be made as a condition to the licence. The licensee says that during the quieter mid week, inclement weather and shoulder season days, when the LP area is quiet, it would not be necessary or beneficial given the new proposed layout of the facility. The licensee provides a drawing to illustrate the new layout.

The licensee agrees to the recommendation of an added condition on the licence of clear and permanent signage and attaches a sample of what they propose to post. The licensee also indicates that it welcomes any feedback from the branch on the proposed signage.

REASONS AND DECISION ON CONTRAVENTION

I find, based on the uncontroverted facts, as set out in the NOEA and accepted by the licensee, that the contravention of removing liquor from the LP area to the FP area, contrary to section 12 of the Act, occurred on February 11, 2012.

Due Diligence

The licensee is entitled to a defence 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 procedures to identify and deal with problems, it must ensure that those procedures are consistently acted upon and problems are dealt with.

The licensee presented no evidence to demonstrate due diligence to prevent the contravention. The licensee has stated that it accepts the facts as presented by the liquor inspector. There was no evidence presented of processes in place to ensure liquor was not being removed from the LP area to the FP area. In fact, the evidence as presented in the NOEA is that liquor was being removed in full sight of at least one server, and thus presumably with his/her knowledge. There was no evidence that staff had been instructed to prevent movement of liquor between the two areas and no evidence that staff on duty was attempting to prevent the movement of liquor.

I find that the licensee was not duly diligent.

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 may do one or more of the following:

- Take no enforcement action
- Impose terms and conditions on the licence or rescind or amend existing terms and conditions
- Impose a monetary penalty on the licensee
- Suspend all or any part of the licence
- Cancel all or any part of the licence
- Order the licensee to transfer the licence

I am not bound to order the penalty proposed in the Notice of Enforcement Action. However, if I find that either a licence suspension or a monetary penalty is warranted, I am bound to follow 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.

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. The factors that are considered in determining the appropriate penalty include whether there is a proven compliance history, 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.

There is no record of a proven contravention of the same type for this licensee at this establishment within the preceding twelve months of this incident. Therefore, I find this to be a first contravention for the purposes of Schedule 4 and calculating a penalty. Item 46 in Schedule 4 provides a range of penalties for a first contravention of this type: a one to three day licence suspension and/or a \$1000 to \$3000 monetary penalty.

I find that a penalty is warranted on the facts of this case. As noted in the NOEA, there was no evidence of processes in place to prevent this type of contravention. The liquor inspector had brought this issue to the attention of the licensee at the time of the transfer of the licence and again in April 2010 when enforcement action was taken against the licensee for allowing liquor to be removed from the establishment.

As noted above, the branch recommends a monetary penalty of \$6000. I may impose higher than the maximum of \$3000. As a delegate of the general manager, I have the discretion under section 20(2.1) of the Act to impose a higher than maximum penalty if I am satisfied that it is in the public interest to do so. Pursuant to section 20 (2.2), I am required to take into account the licensee's entire compliance history and the particular circumstances of the specific contravention.

I have considered the licensee's compliance history – which includes a contravention on April 11, 2010, of section 42(4), allowing liquor to be removed from the establishment, and a compliance meeting in May 2010 relating to that contravention. The NOEA also mentions a compliance meeting in March 2003, with respect to section 42(4), when the establishment was under the previous ownership. The compliance meeting of February 24, 2012, noted in the Branch's documents at tab 7 relates to this contravention that is before me (Contravention Notice B 009152).

I have considered this history and the circumstances of this contravention. I do not find sufficient evidence of past history and warnings to satisfy me that it is in the public interest to impose a higher than maximum penalty. The actions of the licensee in responding to this contravention and its proposed changes to the establishment's layout lead me to conclude that the maximum monetary penalty of \$3000 will encourage future voluntary compliance.

In ordering the maximum monetary penalty, I have considered the actions of the servers here who apparently paid little or no attention to the movement of liquor from the red line areas. I also note the absence of any evidence of management policies and any training to its employees on the importance of maintaining the distinction between the LP area and the FP area, despite the statement in the licensee's submission that "it soon became apparent that we had out grown the layout of the LP area and it was getting harder to keep track of the guests once they left the service area." I conclude that the apparent disregard by the licensee's employees of the patrons' actions in removing liquor and the absence of policies or specific instructions to staff warrant a maximum monetary penalty under the Schedule.

The licensee in its submission, states that, since the meeting of February 24, 2012, with the liquor inspector, they have immediately taken all reasonable steps to prevent the contravention from happening again. The licensee has also undertaken extensive renovations in both the Liquor Primary and Food Primary areas to address the issues of this contravention. The proposed changes to the licence resulting from these renovations are currently under review by the branch. I commend the efforts of the licensee to ensure this type of contravention does not occur again. However, I note that these are 'after the fact' changes and thus, do not affect my conclusions about the appropriate penalty on the facts of this contravention. Although voluntary compliance is the goal of the branch, the system of regulation and enforcement requires that the circumstances of an alleged contravention be considered at the time of the contravention. The purpose of any penalties is to encourage voluntary compliance in the future.

With respect to the added terms and conditions, I find that the 2nd term and condition – placement of clear and permanent signage – should be added to the LP licence. I note the licensee is in agreement with this added condition and has provided some sample signage for the branch's consideration.

I find that the first term and condition as recommended by the branch - the assignment of a staff member solely engaged in monitoring any movement between the two areas - is unnecessary at this time. Licensees have a responsibility to manage their premises to comply with the Act and the Regulation. The licensee asserts that the new layout and their plans to post a staff member at the boundary of the LP and FP areas during peak hours on the busier days will prevent future contraventions of this type. In the circumstances outlined here, the contravention occurred in full view of two staff members. The posting of an additional staff member will undoubtedly assist in reducing the possibility of infractions, but the key issue for the licensee is to ensure that policies are in place and staff are adequately trained to observe and address any infractions by the patrons.

I am satisfied from the licensee's submission that the branch's goal of voluntary compliance will be met without the imposition of this added condition to the licence. I further note the proviso in the branch's recommendation of this added condition – "while the current structure of the LP area exists adjacent to the FP areas." The licensee has made some changes already in erecting a half wall between the two areas and has proposed other changes that are under review by the branch.

ORDER

Pursuant to section 20(2) of the Act, I order that the Licensee pay a monetary penalty in the sum of Three Thousand Dollars (\$3000) to the general manager of the Liquor Control and Licensing Branch on or before **October 29, 2012**.

Signs satisfactory to the general manager showing that a monetary penalty has been imposed will be placed in a prominent location in the establishment by a Liquor Control and Licensing Branch inspector or a police officer.

I further order that the following term and condition be added to the Liquor Primary Licence No. 056734:

Clear and permanent signage must be displayed in prominent locations informing patrons that liquor purchased in the Liquor Primary area must only be consumed within that area. This signage must be placed in the clear, unobstructed view of patrons, and be of sufficient dimensions to ensure that it can be easily read and understood.

Original signed by

Nerys Poole
Enforcement Hearing Adjudicator

Date: September 26, 2012

cc: Liquor Control and Licensing Branch, Victoria Office
Attn: Gary Barker, Regional Manager
Liquor Control and Licensing Branch, Victoria Office
Attn: Bode Fagbamiye, Branch Advocate