



**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: Fraser Valley Inn Ltd. (In Trust)
dba Fraser Valley Inn
33790 Essendene Avenue
Abbotsford, BC V2S 2H2

Case: EH08-110

For the Licensee: Rick Erdman

For the Branch: Olubode Fagbamiye

Enforcement Hearing Adjudicator: Edward Owsianski

Date of Hearing: Written Submissions

Date of Decision: May 14, 2009

**Ministry of Housing
& Social
Development**

Liquor Control and
Licensing Branch

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INTRODUCTION

The licensee, Fraser Valley Inn Ltd. (In Trust), owns the Fraser Valley Inn in Abbotsford, BC. The licensee holds Liquor Primary Licence No. 079133 for the operation of a lounge at the inn with liquor sales from 11 a.m. to 1 a.m. Monday to Saturday, and 11 a.m. to midnight on Sundays. The patron capacity is 77. The licensed lounge is operated by a Third Party Operator approved by the branch, 0800474 B.C. Ltd. The licence is, as are all liquor licenses issued in the province, subject to the terms and conditions contained in the publication "*Guide for Liquor Licensees in British Columbia.*"

ALLEGED CONTRAVENTION AND PROPOSED PENALTY

The branch's allegations and proposed penalty are set out in the Notice of Enforcement Action (the "NOEA") dated November 3, 2008.

The branch alleges that on August 29, 2008, the licensee contravened S. 43(1) of the *Liquor Control & Licensing Act* by selling or giving liquor to an intoxicated person or a person apparently under the influence of liquor.

The proposed penalty is a \$5000 monetary penalty (item 9, Schedule 4 of Schedule 4 of the *Regulation*).

Item 9 of Schedule 4 of *the Regulation* provides a range of penalties for a first contravention of a license suspension for 4 - 7 days and/or a monetary penalty of \$5000 - \$7000.

The licensee does not dispute that the contravention took place, just the penalty proposed. It was agreed that this hearing would take place by way of written submissions.

RELEVANT STATUTORY PROVISIONS

LIQUOR CONTROL AND LICENSING ACT [RSBC 1996] CHAPTER 267

Drunkennes

43 (1) A person must not sell or give liquor to an intoxicated person or a person apparently under the influence of liquor.

ISSUES

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

EXHIBITS

1. Branch Registrar's March 19, 2009 letter setting out the process for proceeding by way of written submissions.
2. Branch's book of documents, tabs 1 – 11.
3. Licensee's submission dated March 30, 2009.
4. Licensee's submission dated March 31, 2009.
5. Branch's March 31, 2009 response to licensee's submission.
6. Licensee's April 15, 2009 final submission.

EVIDENCE

The branch's evidence is summarized as follows:

On August 29, 2008 at approximately 10:20 p.m. a joint inspection team consisting of the area liquor inspector and members of the local police and fire services attended the Fraser Valley Inn to conduct inspections of the liquor-licensed areas. During their inspection of the licensed pub area, two obviously intoxicated patrons, a male and a female were observed and sent on their

way. The inspection team then proceeded into the licensed lounge area (subject of this hearing). The two intoxicated patrons were observed seated at the bar in front of the bartender. Both had been served liquor (beer). Both patrons were exhibiting obvious signs of intoxication: staggering, shaky hands, bloodshot watery eyes, slurred speech. Their condition was brought to the attention of the bartender on duty. She removed the liquor from the patrons and asked them to pay the tab. The intoxicated male had great difficulty in using the debit machine and required assistance from the bartender.

The inspector issued a Contravention Notice for a first contravention of this type and prepared a Notice of Enforcement Action (NOEA). He recommended a \$5000.00 monetary penalty, the minimum monetary penalty for a first contravention.

The NOEA, at Appendix B, indicates that there is no compliance history for this establishment.

The licensee's evidence is summarized as follows:

At the time of the contravention two staff members were scheduled to work in the licensed lounge. One staff member called in sick leaving the bartender to work on her own. The bartender holds a Serving It Right certificate. The manager of the lounge trains each staff member when they are hired. The bartender no longer works for the establishment. As a result of the contravention notice the licensee terminated the lease of the third party operator and has negotiated a new lease and will be submitting an application to the branch for a new third party operator. The licensee and the establishment have a spotless 17 year history without enforcement proceedings or any concerns being expressed by the branch.

SUBMISSIONS

Branch Submissions

The branch's submissions are summarized as follows:

The branch advocate submits that in the circumstances of this case the bartender failed to recognize the signs of intoxication of the two obviously intoxicated patrons and proceeded to sell liquor to them, oblivious that to do so was a contravention. The actions of the bartender, who was the directing mind of the licensee at the time, do not demonstrate due diligence on the part of the licensee. Further, there is no evidence that the licensee provided any training or had any procedures in place to prevent such occurrences. Consequently any argument that the licensee was duly diligent must fail. He submitted that there are public safety considerations in selling liquor to intoxicated persons. That the bartender failed to recognize that the patrons were intoxicated, and was oblivious that the selling liquor to intoxicated persons represented a contravention, gives rise to the need for a penalty. The proposed minimum monetary penalty is necessary to bring about voluntary compliance.

Licensee Submissions

The licensee's submissions are summarized as follows:

The licensee representative submits that due diligence was exercised by the bartender when she immediately removed the liquor and required the patrons to settle their tab. Given the spotless 17 year history of the licensee and the establishment the proposed monetary penalty is prejudicial to the licensee and contradicts the principles of administrative fairness. The penalty is disproportionate to the circumstances. In cases where there has been no compliance history, it has been the practice of the branch to hold compliance meetings or to deal with first contraventions in a manner that does not result in a penalty being imposed. The bartender no longer works at the establishment and the lease with the third party operator has been cancelled. The licensee is committed to complying with the terms and conditions of the liquor licence.

The licensee representative referred to previous enforcement decisions where a suspension was imposed only after a history of contravention notices and compliance meetings. He submitted that, in the circumstances of this case, the branch impose no penalty other than that the contravention notice be placed on the licensee's file.

REASONS AND DECISION

The licensee has admitted the contravention. Having considered all of the evidence, I find that on August 29, 2008, the licensee contravened S. 43 (1) of the *Liquor Control & Licensing Act* by selling or giving liquor to an intoxicated person or a person apparently under the influence of liquor.

DUE DILIGENCE

The licensee is entitled to a defence to the allegations of the contraventions, if it can be shown that it was duly diligent in taking reasonable steps to prevent the contraventions 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 dealt with.

Here, there is little evidence upon which I can find that the licensee was duly diligent. At the time of the contravention, one staff member called in sick leaving the bartender working by herself. She was, in a strict legal sense, the directing mind of the licensee. There is little evidence of what training the bartender received other than that she received some training from the lounge manager at the time of being hired and held a Serving It Right certificate. There is no evidence of what policies and procedures were in place to guide staff in performing their duties. It is not sufficient that the bartender immediately removed the liquor from the patrons and required them to settle their tabs upon their condition being brought to her attention by the inspection team.

In conclusion, I find 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 *Regulations* and/or the terms and conditions of the licence, I have discretion to order one or more of the following enforcement actions:

- impose a suspension of the liquor licence for a period of time
- cancel a liquor licence
- impose terms and conditions to a licence or rescind or amend existing terms and conditions
- impose a monetary penalty
- order a licensee to transfer a licence

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

The branch's primary goal in bringing enforcement action and imposing penalties is achieving voluntary compliance. Among the factors that are considered in determining the appropriate penalty is whether there is a past history of warnings by the branch and/or the police, the seriousness of the contravention, the threat to the public safety and the well being of the community.

There is no record of prior proven contraventions, offences or enforcement actions of the same type for this licensee for this license within the year preceding this incident. I therefore find this to be a first contravention.

While it is interesting to note that there has been no previous compliance history for this licensee or this establishment, that in itself is not a determining factor in considering whether a penalty is necessary in the circumstances. It would be useful to know the role played by the principal(s) of the corporate licensee and the length of their involvement with the operation of the establishment.

In the circumstances of this case I am satisfied that the licensee has not successfully or sufficiently stressed upon the third party operator or its employees the need to fully and conscientiously carry out their duties, and a penalty is necessary to ensure future compliance.

Any penalty imposed must be sufficient to ensure compliance in the future. Each case is judged upon its own unique set of circumstances. Previous decisions are not binding. In the circumstances of this contravention two intoxicated persons were permitted within two separately licensed areas of the inn. Following their removal from the pub licensed area they made their way to the lounge licensed area, the subject of this hearing, where they were served liquor (beer). Public intoxication is a safety concern and can lead to inappropriate behaviour, disturbances, violence and vandalism. A licensee must take all reasonable steps to prevent contributing to public intoxication. In the circumstances I find that a \$5000.00 monetary penalty is appropriate and reasonable.

ORDER

Pursuant to Section 20 (2) of the *Act*, I order the payment of a five thousand dollar (\$5000) monetary penalty by the licensee to the general manager on or before Thursday, June 15, 2009.

Original signed by

Edward W. Owsianski
Enforcement Hearing Adjudicator

Date: May 14, 2009

cc: Abbotsford Police Department

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

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